APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 23-5535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS SALFI,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
AMY ROBEY, Warden,	)	KENTUCKY
	)	
Respondent-Appellee.	)	

ORDER

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

Nicholas Salfi, a pro se Kentucky prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Salfi also moves the court to strike his unscheduled appellate brief. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). We deny Salfi's motion to strike as moot and affirm the district court's judgment for the following reasons.

Salfi bludgeoned, stabbed, and strangled to death his ex-girlfriend Kelly Doyle and seriously wounded Payton Thomas in the same attack. Charged with murder and first-degree assault, Salfi turned down a plea agreement for a 40-year sentence and proceeded to a jury trial. The jury rejected Salfi's extreme-emotional-disturbance defense and convicted him of both counts. The trial court sentenced Salfi to 55 years in prison, and the Kentucky Supreme Court affirmed. *See Salfi v. Commonwealth*, No. 2011–SC–000562–MR, 2012 WL 4327660, at *1 (Ky. Sept. 20, 2012). The trial court denied Salfi's post-conviction motion to vacate his sentence under Kentucky Rule of Criminal Procedure 11.42, and the Kentucky Court of Appeals affirmed. *See Salfi v.*

Appendix A

Commonwealth, No. 2016-CA-000292-MR, 2017 WL 652109, at *1 (Ky. Ct. App. Feb. 17, 2017), *perm. app. denied*, (Ky. June 8, 2017).

Salfi then filed a § 2254 petition in the district court, claiming in pertinent part that his trial attorney performed ineffectively during plea negotiations by not presenting counteroffers to the prosecution. The district court decided that Salfi procedurally defaulted this claim by not raising it in his post-conviction Rule 11.42 motion. And the court concluded that the ineffective assistance of Salfi's post-conviction counsel did not excuse the default because the trial-counsel claim was not "substantial" under *Martinez v. Ryan*, 566 U.S. 1 (2012). In support of that conclusion, the court found that Salfi failed to present evidence of a specific counteroffer that both the prosecution and the trial court would have been willing to accept. The court therefore concluded that trial counsel's failure to make a counteroffer to the prosecution did not prejudice Salfi. Accordingly, the court denied that claim as procedurally defaulted, but it granted Salfi a certificate of appealability.

On appeal, Salfi concedes that he procedurally defaulted his ineffective-assistance claim, but he argues that the district court erred in concluding that it was not substantial. Salfi contends that the record shows that although the parties were at an impasse, plea negotiations were ongoing, and the prosecution was waiting for a counteroffer from his attorney. Further, Salfi asserts that he and his attorney discussed a variety of potential plea agreements for a sentence between 25 and 40 years of imprisonment.

We review a district court's denial of a § 2254 habeas petition de novo. *Gaona v. Brown*, 68 F.4th 1043, 1046 (6th Cir. 2023). We also review a district court's conclusion that the petitioner procedurally defaulted a claim de novo. *Jones v. Bradshaw*, 46 F.4th 459, 484 (6th Cir. 2022). As a general rule, we cannot review a federal claim that the petitioner procedurally defaulted in state court. *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020). "We have the option, however, to excuse a procedural default and review a defaulted claim on the merits if a petitioner demonstrates '(1) cause for the default and actual prejudice, or (2) that the failure to consider the claim will

result in a fundamental miscarriage of justice.'" *Id.* (quoting *Williams v. Bagley*, 380 F.3d 932, 966 (6th Cir. 2004)).

In Kentucky, a prisoner's first opportunity to raise an ineffective-assistance-of-trial-counsel claim is in a post-conviction Rule 11.42 motion, *see* Ky. R. Crim. P. 11.42. *See also Haight v. Jordon*, 59 F.4th 817, 846-47 (6th Cir. 2023) (per curiam), *cert. denied*, 144 S.Ct. 578 (2024). A Kentucky habeas petitioner thus procedurally defaults an ineffective-assistance claim by not raising it at that time. *Id.* at 846. The petitioner may rely on his post-conviction attorney's failure to raise the claim as cause to excuse the default. *Martinez*, 566 U.S. at 9; *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015). In addition to demonstrating that post-conviction counsel was ineffective, the petitioner must show that the defaulted ineffective-assistance claim is "a substantial one," meaning that it has "some merit." *Martinez*, 566 U.S. at 14.

To establish ineffective assistance of counsel, the petitioner must prove both (1) that his trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). A criminal defendant is entitled to effective assistance of counsel during the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To show prejudice where counsel allegedly provided deficient representation during plea negotiations, the petitioner must establish a reasonable probability that (1) he would have accepted a plea agreement with the effective assistance of counsel; (2) the prosecution would not have withdrawn the plea offer, if it had such discretion; (3) the trial court would have accepted the plea agreement, if it had discretion to reject it; and (4) the proceeding would have resulted in a plea to a lesser charge or a more favorable sentence. *See Missouri v. Frye*, 566 U.S. 134, 147 (2012). Salfi failed to carry this "formidable" burden. *Byrd v. Skipper*, 940 F.3d 248, 257 (6th Cir. 2019).

First, in denying Salfi's claim that he rejected the prosecution's original plea offer because his trial attorney misadvised him about his maximum potential sentence, the Kentucky Court of Appeals found that Salfi was unwilling to accept a 40-year sentence and wanted to "take his

chances" at trial. *See Salfi*, 2017 WL 652109, at *4. Salfi has not shown that this finding was clearly erroneous. *See* 28 U.S.C. § 2254(e)(1). So his subsequent claim that he was prejudiced by his attorney's failure to make a counteroffer because he might have received a plea agreement for a 40-year sentence is not substantial. *Cf. Frye*, 566 U.S. at 146 (warning that prisoners may raise "late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences").

Second, although Salfi asserts that he and his attorney discussed various plea scenarios, he does not argue that he instructed his attorney to convey a particular option to the prosecution as a counteroffer. Nor does Salfi point to a plea option that he thinks that the prosecution and the trial court might have accepted. Consequently, Salfi's defaulted ineffective-assistance claim is wholly without factual support. *See Rogers v. Mays*, 69 F.4th 381, 398 (6th Cir. 2023) (en banc), *cert. denied*, 2024 WL 674902 (Feb. 20, 2024).

And third, Salfi failed to establish a reasonable likelihood that both the prosecution and the trial court would have accepted a plea agreement for a sentence of less than 40 years. All of Salfi's plea scenarios for a lesser sentence were premised on the prosecution agreeing that he was affected by an extreme emotional disturbance when he killed Doyle and assaulted Thomas. There is little or no chance that the prosecution would have accepted this stipulation, however, because it had substantial, if not overwhelming, evidence that Salfi acted intentionally rather than under the influence of an extreme emotional disturbance. *See Salfi*, 2012 WL 4327660, at *2. Notably, Salfi had several hours to "cool[] off" between the time he suspected that Doyle was likely with someone else and the time that he entered her home and killed her. *See Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (Ky. 2008). And despite Salfi's claim that he "lost it" when he saw Doyle and Thomas in bed together, his surreptitious entry into Doyle's house and his decision to arm himself with a knife beforehand indicated premeditation. *See Salfi*, 2012 WL 4327660, at *1; *cf. Cecil v. Commonwealth*, 888 S.W.2d 669, 673 (Ky. 1994).

For these reasons, we conclude that Salfi's procedurally defaulted ineffective-assistance claim was not substantial under *Martinez*. Accordingly, we **AFFIRM** the district court's judgment. We **DENY** Salfi's motion to strike his unscheduled appellate brief as **MOOT**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5535

NICHOLAS SALFI,

Petitioner-Appellant,

v.

AMY ROBEY, Warden,

Respondent-Appellee.

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

NICHOLAS SALFI PETITIONER V. SCOTT JORDAN, WARDEN RESPONDENT	Civil Action No. 3:17CV-774-JHM-CHL SENIOR JUDGE JOSEPH H. MCKINLEY JR.

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, and the Court having considered same as well as the objections filed by the Resondent [DN 45] and the Petitioner [DN 50] and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the parties objections are **overruled** The Court adopts the Magistrate Judge's Findings of Fact and Conclusions of Law as set forth in the Report.

IT IS FURTHER ORDERED that the Petitioner's motion to stay habeas petition [DN 21] is **denied**.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus is **denied**.

IT IS FINALLY ORDERED that a Certificate of Appealability is **denied** as to all claims except Claim 9 on which a Certificate of Appealability be **granted** and issued for the reasons recommended by the Report.

Copies to: Petitioner, *pro se*
Counsel of record

Joseph H. McKinley, Jr.
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

NICHOLAS SALFI PETITIONER V. SCOTT JORDAN, WARDEN RESPONDENT	Civil Action No. 3:17CV-774-JHM-CHL SENIOR JUDGE JOSEPH H. MCKINLEY JR.

JUDGMENT

In accordance with the Order of the Court **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The petition for writ of habeas corpus is **dismissed with prejudice** and judgment is entered in favor of Respondent.

2. A Certificate of Appealability is **denied** as to all claims except a Certificate of Appealability is granted as to Claim 9.

3. This is a **final** judgment and the matter is **stricken** from the active docket of the Court.

Copies to: Petitioner, *pro se*
Counsel of record

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

May 24, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:17-CV-774-RGJ-CHL

NICHOLAS SALFI, **Petitioner,**

v.

SCOTT JORDAN, *Warden of Luther Luckett Correctional Complex* **Respondent.**

REPORT AND RECOMMENDATION

Nicholas Salfi ("Salfi") is a Kentucky prisoner presently serving a fifty-five year sentence following convictions for murder and first-degree assault. Salfi filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DN 1.) Respondent Scott Jordan (the "Warden") responded, and Salfi filed a reply. (DNs 16, 23.) The Court granted Salfi leave to file an amended petition to add an additional ground for relief. (DN 31.) Salfi has filed his amended petition, the Warden has filed a response, and Salfi has filed a reply. (DNs 32, 33, 37.)

The District Judge referred this matter to the undersigned Magistrate Judge "pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary, and for findings of fact, conclusions of law, and recommendations on any dispositive matter." (DN 6.) These matters are now ripe for review.

I. FINDINGS OF FACT

Salfi's convictions arise from the murder of his former girlfriend Kelly Doyle ("Doyle") and assault of Payton Thomas ("Thomas"), Doyle's male friend, on January 2, 2010. According to the Kentucky Court of Appeals, the events surrounding Doyle's death and Thomas's assault unfolded as follows:

> In the early morning hours of January 2, 2010, Salfi, after watching a football game with his father, decided to drive by the house that he had previously

> shared with Kelly Doyle and their infant son. Doyle had recently broken off a three-year relationship with Salfi, but Salfi continued to foster hopes of reconciliation. Upon arriving at the home, Salfi noticed a strange vehicle parked in the driveway. He used the house key that he had refused to give back to Doyle to furtively enter the home. Upon entry, Salfi discovered Doyle and her male friend, Payton Thomas, sleeping in the same bed. Salfi and Doyle's son was asleep in his crib in the same room. Angered, Salfi began striking Thomas, who woke up and immediately ran out of the house. Salfi pursued Thomas into the front yard with a knife and stabbed him several times. Salfi then went back into the house and proceeded to attack Doyle. Salfi beat Doyle with a blunt force object, strangled her with a ligature, and stabbed her over one-hundred times in her face, neck, and back. When the police arrived, they discovered Doyle dead in the entranceway to the house. Her infant son was found safe, but alone crying in his crib.

Salfi v. Commonwealth, No. 2016-CA-000292-MR, 2017 WL 652109, at *1 (Ky. Ct. App. Feb. 17, 2017). As the Kentucky Supreme Court explained regarding what happened next:

> After the attacks, [Salfi] called his father and said he intended to kill himself. He then drove to his mother's house, where he told his stepfather that he had killed Doyle. His clothing was soaked in blood which was later determined to be Doyle's blood, Thomas's blood, and [Salfi]'s own blood. His hands had numerous cuts. [Salfi]'s step-father called police, and when they arrived, [Salfi] was calmly taken into custody.

Salfi v. Commonwealth, No. 2011-SC-000562-MR, 2012 WL 4327660, at *1 (Ky. Sept. 20, 2012).

On January 13, 2010, a grand jury in Jefferson County, Kentucky indicted Salfi on charges of (1) murder, (2) attempted murder, (3) first-degree assault, and (4) tampering with physical evidence. (DN 16-2, at PageID # 111-13.) On June 14, 2011, after a seven-day trial, a Jefferson County, Kentucky, jury found Salfi guilty of murder and first-degree assault and recommended a sentence of fifty-five years, forty years for murder and fifteen years for first-degree assault to run consecutively. (*Id.* at 114-16, 134; DN 17 (trial recordings).)

Salfi appealed his convictions to the Kentucky Supreme Court, alleging five claims of error: (1) the trial court failed to grant a mistrial as a result of improperly admitted character evidence and inadmissible prior bad acts, (2) the trial court erred in excluding a recording of Salfi's interview with law enforcement that contained evidence of Salfi's emotional reaction to Doyle's

death, (3) the trial court erred in failing to instruct the jury that the absence of extreme emotional disturbance ("EED") was an element of first-degree assault, (4) the trial court improperly permitted victim impact testimony from the mother of a living assault victim, and (5) the trial court improperly permitted Salfi to be cross-examined during the penalty phase about inadmissible details of his prior offenses. (DN 16-2, at PageID # 117-73.) The Kentucky Supreme Court affirmed the Jefferson Circuit Court's judgment in its entirety on September 20, 2012. *Salfi*, 2012 WL 4327660, at *5. Salfi did not file a writ of certiorari with the United States Supreme Court.

On June 7, 2013, Salfi filed a *pro se* motion to vacate his sentence and conviction pursuant to Ky. R. Crim. P. 11.42 ("RCr 11.42"). (DN 16-4, at PageID # 223-49.) The Jefferson Circuit Court appointed counsel to represent Salfi, and on November 7, 2014, Salfi's appointed counsel supplemented Salfi's RCr 11.42 motion. (*Id.* at 250-58.) In the motion, Salfi alleged several claims of ineffective assistance of counsel including that (1) his trial counsel failed to conduct an adequate pre-trial investigation, (2) his trial counsel failed to prepare a defense for trial, (3) his trial counsel failed to obtain an expert witness, and (4) his trial counsel informed him of the wrong maximum potential penalty. (*Id.* at 223-58.) He also alleged cumulative error. (*Id.*) The Jefferson Circuit Court denied Salfi's RCr 11.42 motion without holding an evidentiary hearing "as the issues could be decided based on the face of the record." (*Id.* at 280, 276-80.)

Salfi appealed the denial of his RCr 11.42 motion to the Kentucky Court of Appeals with the assistance of appointed counsel. (DN 16-5, at PageID # 281-303.) Salfi's appeal encompassed his claims that his trial counsel failed to develop an EED defense by failing to have Salfi evaluated or investigate Salfi's mental health history, that his trial counsel failed to retain an expert to testify in support of his EED defense, that his trial counsel erroneously informed Salfi of the potential maximum penalty at trial, and of cumulative error. (*Id.* at 281-303.) Salfi also claimed on appeal

that the trial court erred in not holding an evidentiary hearing on his RCr 11.42 motion. (*Id.*) The Kentucky Court of Appeals ultimately affirmed the Jefferson Circuit Court's order denying Salfi's RCr 11.42 motion. *Salfi*, 2017 WL 652109, at *5.

Again with the assistance of appointed counsel, Salfi filed a motion for discretionary review of the Court of Appeals' decision with the Kentucky Supreme Court. (DN 16-6, at PageID # 333-56.) On June 8, 2017, the Kentucky Supreme Court denied his motion. (*Id.* at 361.)

Salfi filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 21, 2017, raising five claims of error from his direct appeal, three claims of ineffective of assistance of counsel from his RCr 11.42 motion, and a claim of cumulative error. (DNs 1, 1-2.) On September 27, 2019, the Court granted Salfi leave to amend his petition to add an additional claim of ineffective assistance of counsel. (DN 31.) His combined claims for relief from his initial and amended petitions are:

(1)	The trial court erred by refusing to grant a mistrial after Megan Disselkamp testified about improper character evidence and inadmissible prior bad acts;
(2)	The trial court committed reversible error by precluding Salfi from admitting his taped interview with law enforcement;
(3)	The trial court committed reversible error by failing to give a correct instruction concerning first degree assault;
(4)(a)[1]	The trial court erred by permitting the Commonwealth to present testimony from Patricia Satterly during the penalty phase;
(4)(b)	The trial court erred by permitting the Commonwealth to cross-examine Salfi about inadmissible information regarding a prior conviction through use of an affidavit during the penalty phase;
(5)	Trial counsel was ineffective in failing to fully develop an EED defense by having Salfi evaluated, reviewing his medical history, and retaining an expert to testify regarding his mental state at the time of the incident;

[1] Though Salfi presented what the Court has characterized as Claims 4(a) and 4(b) together jointly as Claim 4, given the Warden's argument, discussed below, that Ground 4(b) is procedurally defaulted, the Court will analyze them as separate and distinct claims.

(6) Trial counsel was ineffective in misinforming Salfi of the maximum possible penalty in the case thereby causing Salfi to reject a possible plea of forty years;

(7) Trial counsel was ineffective in failing to properly object and preserve for appeal the use of an affidavit, in lieu of witness testimony, during the sentencing portion of the trial;

(8) Cumulative error; and

(9) Trial counsel was ineffective in failing to present counteroffers to the prosecution.

(DNs 1, 1-2, 32.) The Warden argued in response that all of Salfi's claims were meritless. (DNs 16, 33.) The Warden also argued that Salfi's arguments in Claims 4(b) and 7 related to the affidavit used by the Commonwealth during the penalty phase of his trial were procedurally defaulted in addition to being meritless. (DNs 16, 33.)

II. CONCLUSIONS OF LAW

A. Standard of Review

Where a petitioner's claims were adjudicated by a state court on the merits, 28 U.S.C. § 2254, as amended in the Antiterrorism and Effective Death Penalty Act of 1996, provides relief from a state conviction if the petition satisfies one of the following conditions:

> the [state court's] adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the "contrary to" clause of Section 2254(d)(1), the phrase "contrary to" means " 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (citing Webster's Third New International Dictionary 495

(1976)). Under this clause, a court may grant a habeas petition if the state court (a) "arrives at a conclusion opposite to that reached by t[he Supreme] Court on a question of law"; or (b) "decides a case differently than t[he Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 405-06, 412-13. Under the "unreasonable application" clause of Section 2254(d)(1), a court may grant a habeas petition "if the state court identifies the correct governing legal principle from t[he Supreme] Court's decisions but unreasonably applies that principle to the facts of the p[etitioner]'s case." *Id.* at 407-13. However, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly"; instead, a court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409, 411. *See also Tolliver v. Sheets*, 594 F.3d 900, 916 (6th Cir. 2010) (summarizing standard of review pursuant to 28 U.S.C. § 2254(d)(1)).

Section 2254(d)(2) applies when a petitioner challenges factual determinations made by the state court. *See Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001) (challenging the state court's determination that the evidence did not support an aiding and abetting suicide instruction); *Clark v. O'Dea*, 257 F.3d 498, 506 (6th Cir. 2001) (challenging the state court's factual determination that sheriff had not seen letter prior to defendant's trial). A federal habeas court may not substitute its evaluation of the state evidentiary record for that of the state trial court unless the state determination is unreasonable. *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).

Regardless of whether the court reviews a petitioner's claims pursuant to Section 2254(d)(1) or (2), the court is generally confined in its review to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181-182

(2011); *Keeling v. Warden*, 673 F.3d 452, 464 (6th Cir. 2012); *Sanders v. Curtin*, 529 F. App'x 506, 517 n.5 (6th Cir. 2013).

B. Salfi's Claims

1. Claim 1: Inadmissible Character/Prior Bad Acts Evidence & Claim 2: Salfi's Taped Interview

In Claims 1 and 2, Salfi raised two errors regarding the trial court's evidentiary rulings that he claimed entitled him to relief. As to Claim 1, Salfi argued that the trial court erred by refusing to grant a mistrial after a witness named Megan Disselkamp ("Disselkamp") testified about improper character evidence and inadmissible prior bad acts. (DN 1, at PageID # 5-7; DN 1-2, at PageID # 21-22.) Salfi raised this claim on direct appeal, but the Kentucky Supreme Court concluded that the trial court did not abuse its discretion in refusing to declare a mistrial. *Salfi*, 2012 WL 4327660, at *2. The Kentucky Supreme Court summarized the factual background of this issue as follows:

> One of Doyle's friends, Megan Disselkamp, testified at trial that [Salfi] was controlling and manipulative, and that [Salfi] "put [Doyle] down" and made her feel insecure. [Salfi] objected and requested a mistrial, claiming that Disselkamp's description of [Salfi] as controlling and manipulative was inadmissible character evidence under KRE 404(a), and that Disselkamp's statements about [Salfi] putting Doyle down and making her feel insecure were inadmissible as prior bad acts under KRE 404(b). The trial court sustained [Salfi]'s objections and offered to admonish the jury not to consider the improper evidence. [Salfi] declined the admonition, and instead moved for a mistrial, which the trial court declined.

Id. The Kentucky Supreme Court found that Disselkamp's remarks were "not so scandalous, offensive, or inherently prejudicial that the jury might have attached undue significance to them" and that when those remarks were "considered alongside the overwhelming evidence of [Salfi]'s guilt," there was no "harmful effect" or "manifest injustice." *Id.*

While Salfi's petition merely described the factual background of Claim 1 without any accompanying argument or legal citations, the Warden construed Salfi's claim as one that

Disselkamp's testimony regarding Salfi's character "violated [Salfi's] due process rights to a fair trial."[2] (DN 16, at PageID # 79.) The Warden argued that the comments did not deprive Salfi of his right to a fundamentally fair trial, emphasized that this Court should presume the correctness of the state court's factual determinations unless rebutted by clear and convincing evidence, and noted that Salfi had not demonstrated prejudice from the comments. (*Id.* at 78-82.) Thus, the Warden argued, Salfi had not demonstrated he was entitled to habeas relief on Claim 1. (*Id.*)

As to Claim 2, Salfi argued that the trial court erred in precluding him from playing portions of his taped interview at trial. (DN 1, at PageID # 7-8; DN 1-2, at PageID # 23-25.) Salfi raised this claim on direct appeal, but the Kentucky Supreme Court concluded that the trial court did not abuse its discretion in refusing to permit Salfi to play the video. *Salfi*, 2012 WL 4327660, at *2-3. Salfi wanted to offer the videotape of his interrogation by a Louisville Metro Police Detective to demonstrate his emotional state at the time he was informed that Doyle was dead and to impeach the detective's testimony regarding his "physical responses that minimized his apparent reaction to being told that Doyle was dead." *Id.* at *3. The trial court denied Salfi's request to introduce the tape on grounds that it was hearsay, irrelevant, and constituted improper bolstering. *Id.* at *2. The Kentucky Supreme Court concluded that the tape and Salfi's emotional reaction was at best of marginal relevance to Salfi's EED defense because given that his interview occurred several hours after the crime and in a different place, it did not "relate [to] his emotional state at the time he killed Doyle and assaulted [Thomas]." *Id.* at *3. The Kentucky Supreme Court also found that given its irrelevance, his emotional state during the interview was a collateral issue such that the trial court was within its discretion to not permit Salfi to impeach the detective's testimony with extrinsic, collateral evidence. *Id.* at *3-4.

[2] The undersigned finds this to be a gratuitous construction as Salfi's petition does not contain the words "due process" or citations to either state or federal authority.

As with Claim 1, Salfi's description of Claim 2 merely recounted the factual background of the claim and did not cite any specific constitutional provision or Supreme Court precedent that the actions of the trial court or the decision of the Kentucky Supreme Court violated. (DN 1, at PageID # 7-8; DN 1-2, at PageID # 23-25.) The Warden argued that Salfi had not demonstrated that the trial court's ruling regarding the evidence impugned fundamental fairness or prevented Salfi from presenting a defense. (DN 16, at PageID # 82-85.) Thus, the Warden argued, Salfi did not demonstrate he was entitled to relief on Claim 2. (*Id.*)

To the extent Salfi intended Claims 1 and 2 to request relief under 28 U.S.C. § 2254(d)(1), Salfi did not cite any specific constitutional provision or Supreme Court precedent that the actions of the trial court or the decision of the Kentucky Supreme Court violated. (DN 1, at PageID # 5-8; DN 1-2, at PageID # 21-25.) Federal habeas corpus is a limited remedy and is only available for violations of "the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 480 (1991). *See also* 28 U.S.C. § 2254(a); *Sinkfield v. Brigano*, 487 F.3d 1013, 1016 (6th Cir. 2007). A court may only grant relief where a petitioner demonstrates the state court's adjudication of his or her claim was "contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States.*" 28 U.S.C. § 2254(d)(1) (emphasis added). "Identifying clearly established federal law is thus the 'threshold question under AEDPA.' " *Dewald v. Wriggelsworth*, 748 F.3d 295, 299 (6th Cir. 2014) (quoting *Williams*, 529 U.S. at 390). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of t[he][Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. Salfi has identified no such law in his filings.

This failure is particularly significant because generally "[t]rial court errors in state procedure and/or evidentiary law do not rise to the level of federal constitutional claims warranting

relief in a habeas action." *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004). To be cognizable, the error must constitute a due process violation; in other words, the state court's ruling must "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). *See also Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) ("When an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief."). However, the categories of infractions that satisfy this standard are very narrow. *Sanborn v. Parker*, 629 F.3d 554, 576 (6th Cir. 2010). As the Supreme Court has explained:

> Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As we observed in *Lovasco*,
>
> > "Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' . . . [They] are to determine only whether the action complained of ... 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.' "

Dowling v. United States, 493 U.S. 342, 352-53 (1990) (citations omitted) (quoting in part *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). "Ultimately, states have wide latitude with regard to evidentiary matters under the Due Process Clause." *Wilson v. Sheldon*, 874 F.3d 470, 476 (6th Cir. 2017). Salfi provided no Supreme Court authority to support that the trial court's refusal to grant a mistrial based on the admission of improper character and bad acts evidence or its refusal to admit his tape confession constituted violations of due process. This is fatal to his claims. *See Stewart v. Winn*, 967 F.3d 534, 540 (6th Cir. 2020) (quoting in part *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012)) (recognizing "that a federal court may 'grant relief in cases where

"the state's evidentiary ruling is so fundamentally unfair that it rises to the level of a due-process violation" ' " so long as a petitioner "identif[ies] a Supreme Court case that addresses the 'specific kind of evidence' challenged"). Accordingly, the undersigned finds that Salfi has failed to demonstrate that he is entitled to habeas relief pursuant to 28 U.S.C. § 2254(d)(1) as to Claims 1 and 2.

To the extent Salfi intended to assert a violation of 28 U.S.C. § 2254(d)(2) in Claims 1 and 2, Salfi has not demonstrated that the Kentucky Supreme Court made an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. While his petition recites the facts pertinent to his Claims 1 and 2, it does not challenge any particular explicit or implicit findings of fact made by the trial court or the Kentucky Supreme Court regarding the challenged evidence. Nor does he attempt to provide clear and convincing evidence to rebut the presumption of correctness afforded to state court factual findings. 28 U.S.C. § 2254(e)(1); *see Roe v. Baker*, 316 F.3d 557, 562 (6th Cir. 2002) (citing *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996)); *Kendrick v. Parris*, 989 F.3d 459, 475 (6th Cir.), *cert. denied*, 142 S. Ct. 483, 211 L. Ed. 2d 293 (2021).

The undersigned recommends that Salfi's petition be denied as to Claims 1 and 2.

2. Claim 3: First Degree Assault Instruction

In Claim 3, Salfi argued that the trial court's jury instruction regarding assault in the first degree was erroneous and that it should have included as an element that Salfi was not acting under the influence of EED. (DN 1, at PageID # 8-10; DN 1-2, at PageID # 26-28.) The Kentucky Supreme Court concluded that the trial court had appropriately refrained from including the absence of EED as an element of first degree assault. *Salfi*, 2012 WL 4327660, at *4. After considering the assault statute, KRS § 508.040, the Kentucky Supreme Court explained, "[T]o

impose the absence of EED as an element of first-degree assault would be clearly contrary to the definition of the crime as established by the legislature." *Id.* The Warden argued that Salfi had failed to demonstrate that any error had occurred with respect to the jury instructions because the Kentucky Supreme Court's ruling rested on state law and was neither contrary to federal law nor an unreasonable determination of the facts. (DN 16, at PageID # 85-86.)

The Supreme Court has held that a jury instruction violates due process if it fails to give effect to the requirement that the prosecution prove every element of the offense beyond a reasonable doubt. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation," *Middleton*, 541 U.S. at 437, and instead the operative question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Here, Salfi cannot satisfy this requirement as the Kentucky Supreme Court held that the language he wanted included was not a proper element of the offense charged. Salfi's petition wholly fails to identify any clearly established federal law challenging this determination, and, as set forth above, habeas relief is not cognizable for an error of state law unless that error offends federal law. Accordingly, the undersigned finds that Salfi has not demonstrated he is entitled to relief pursuant to 28 U.S.C. § 2254(d)(1).

To the extent Salfi intended to assert a violation of 28 U.S.C. § 2254(d)(2) in Claim 3, Salfi has not demonstrated that the Kentucky Supreme Court made an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. As with Claims 1 and 2 above, Salfi challenged no particular factual findings in his petition and offered no clear and

convincing evidence to rebut the presumption of correctness afforded to state factual findings. 28 U.S.C. § 2254(e)(1); *Roe*, 316 F.3d at 562; *Kendrick*, 989 F.3d at 475.

The undersigned recommends that Salfi's petition be denied as to Claim 3.

3. Claim 4(a): Satterly's Testimony

As to Claim 4(a), Salfi argued that the trial court should not have permitted Thomas's mother, Patricia Satterly ("Satterly"), to testify during the penalty phase of his trial because she was not a victim within the meaning of applicable sentencing statutes. (DN 1, at PageID # 10-11; DN 1-2, at PageID # 29.) The Kentucky Supreme Court concluded that while permitting Satterly to testify was erroneous, any error was harmless. *Salfi*, 2012 WL 4327660, at *5. The Kentucky Supreme Court did "not believe [Satterly's] testimony 'substantially swayed' the verdict in the penalty phase" citing *Winstead v. Commonwealth*, for the proposition that "[a] non-constitutional evidentiary error may be deemed harmless [ ] if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Id.* (quoting *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)). The Supreme Court explained, "Satterly's testimony was brief, it gave a factual account of Thomas's injury and his medical treatment, and it did not tend to over-dramatize the impact of the crime, nor did it present an appeal for the sympathy of the jury." *Id.* The Warden argued that the Kentucky Supreme Court's determination that the admission of the testimony constituted harmless error was not objectively unreasonable. (DN 16, at PageID # 87-88.)

As with Claims 1 and 2 above, to the extent Salfi intended to request relief related to the admission of Satterly's testimony under 28 U.S.C. § 2254(d)(1), Salfi did not cite any specific constitutional provision or Supreme Court precedent that the actions of the trial court or the decision of the Kentucky Supreme Court violated. This absence is significant because, as

explained in greater detail above, state errors in evidentiary rulings are generally not cognizable sources of habeas relief unless the error rises to the level of a due process violation. *McAdoo*, 365 F.3d at 494; *Seymour*, 224 F.3d at 552 (quoting *Montana,* 518 U.S. at 43); *Bugh*, 329 F.3d at 512. Salfi has wholly failed to demonstrate that the error rose to that level. Accordingly, the undersigned finds that Salfi has not demonstrated he is entitled to relief on Claim 4(a) pursuant to 28 U.S.C. § 2254(d)(1).

To the extent Salfi intended to assert a violation of 28 U.S.C. § 2254(d)(2), Salfi has not demonstrated that the Kentucky Supreme Court made an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. While he summarized that Satterly was "permitted to testify about the physical and psychological effects her son had suffered," (DN 1-2, at PageID # 29), he pointed to no evidence—let alone clear and convincing evidence—to rebut the Kentucky Supreme Court's characterization of Satterly's testimony as brief, factually-based, not overdramatic, and without appeal to the jury's sympathy or to suggest that conclusion involved an unreasonable determination of facts.[3] *Salfi*, 2012 WL 4327660, at *5.

The undersigned recommends that Salfi's petition be denied as to Claim 4(a).

4. Claim 4(b): Affidavit & Claim 7: Counsel's Failure to Object to Use of Affidavit

As to Claim 4(b), Salfi argued that the trial court should not have permitted the Commonwealth to introduce evidence of his prior convictions for misdemeanor assault during the penalty phase of his trial by questioning him based on an affidavit. (DN 1, at PageID # 10-11; DN

[3] In so finding, the undersigned does not conflate the standards under 28 U.S.C. §§ 2254(d)(2) and (e)(1). As the Supreme Court has not resolved the relationship between these two provisions, the undersigned's above finding merely reflects that under either standard, Salfi's claim fails. *See Wood v. Allen*, 558 U.S. 290, 299-301 (2010); *Carter v. Bogan*, 900 F.3d 754, 768 n.5 (6th Cir. 2018).

1-2, at PageID #29-31.) The Kentucky Supreme Court summarized the facts underlying this claim as follows:

> In its penalty phase evidence, the Commonwealth introduced proof that [Salfi] had two prior convictions for fourth-degree assault that stemmed from a single incident in 2007. Testifying on his own behalf during the penalty phase, [Salfi] minimized the seriousness of his prior misdemeanor convictions by saying, "It was stupid. It was the night of the UK/U of L game in Lexington, football game, and afterwards I got into it with a couple UK fans outside a bar. I had to do two weekends of jail. That's pretty much it."
>
> The Commonwealth viewed that testimony as having opened the door on more troublesome allegations about the 2007 incident. So, upon cross-examination of [Salfi], the prosecutor, citing an affidavit from one of the victims of that assault, asked [Salfi], "If that affidavit characterizes it as you starting the fight, you would disagree with that?" Citing further information gleaned from the affidavit, the prosecutor asked [Salfi] if he ran away from the scene of that assault and had to be chased down and held for police. The affidavit itself was never introduced into evidence.

Salfi, 2012 WL 4327660, at *5-6 (footnote omitted). The Kentucky Supreme Court ruled that while the information offered by the Commonwealth was greater than that permitted by KRS § 532.055 and *Mullikan v. Commonwealth*, Salfi had opened the door for the Commonwealth to offer contrary proof disputing his testimony. *Id.* at *6 (citing *Mullikan v. Commonwealth*, 341 S.W.3d 99, 108 (Ky. 2011)). On Salfi's claim that introduction of the information from the affidavit violated his Sixth Amendment right to confront witnesses against him, the Kentucky Supreme Court ruled that Salfi had not properly preserved the issue for appellate review. *Id.* at *6-7. It explained that Salfi had objected at trial about the questioning only on grounds that he had not "opened the door" and the questions were outside the scope permitted by KRS § 532.055. *Id.* at *7. "He did not inform the trial court of his Sixth Amendment concerns articulated under *Crawford*." *Id.* Because Salfi alleged a constitutional error, the Kentucky Supreme Court applied palpable error review and found that the introduction of information from and misuse of the

affidavit did not "rise to the level of manifest injustice." *Id.* It emphasized that Salfi had already been found guilty and stated,

> It is inconceivable that the jury that found [Salfi] guilty would, in its assessment of the sentence, be unduly moved by the hearsay evidence suggesting that [Salfi] had once instigated a post-ball game bar fight. There is no reasonable likelihood that this error, despite its constitutional significance, had any impact on the jury's verdict.

Id. Salfi then argued in Claim 7 that his counsel was ineffective for failing to object to and preserve for appeal his argument that Commonwealth's use of the affidavit violated Salfi's rights under the Confrontation Clause. (DN 1-2, at PageID # 39-41; DN 23, at PageID # 387-88.)

The Warden argued that both Salfi's merit-based Claim 4(b) and ineffective assistance of counsel Claim 7 were procedurally defaulted. (DN 16, at PageID # 88-90, 102-04.) A habeas petitioner's claim may become procedurally defaulted in two different ways. First, a habeas "petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court." *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) and *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)). If the state court declines to reach the merits of the issue due to the petitioner's failure to comply with the procedural rule, "the state procedural rule is an independent and adequate grounds for precluding relief, [and] the claim is procedurally defaulted". *Id.* Second, a habeas petitioner can procedurally default his or her claim by failing to raise it in state court or failing to "pursue that claim through the state's 'ordinary appellate review procedures.' " *Id.* (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999)). Such a claim will be procedurally defaulted "[i]f, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim." *Id.* (citing *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982) and *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991)). This type of procedural default can be

confused with the doctrine of exhaustion; however, the two are distinct concepts. Exhaustion relates only "to remedies still available at the time of the federal petition." *Engle*, 456 U.S. at 125 n.28. "Where state court remedies are no longer available to a petitioner because he or she failed to use them within the required time period, procedural default and not exhaustion bars federal court review." *Williams*, 460 F.3d at 806 (citing *Engle*, 456 U.S. at 125 n.28).

Where a petitioner has procedurally defaulted his or her claim(s), the default can only be excused if the petitioner can establish cause for and prejudice as a result of the default or "that failure to consider the claims will result in a fundamental miscarriage of justice."[4] *Coleman*, 501 U.S. at 750; *see also Lundgren*, 440 F.3d at 763. Cause requires something more than an excuse and must be based on a showing of "something external to the petitioner . . . that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753; *Lundgren*, 440 F.3d at 763. Prejudice requires a showing that errors at his or her trial worked to the petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 172 (1982). The Sixth Circuit has explained that "[h]abeas petitioners cannot rely on conclusory assertions of cause and prejudice to overcome procedural default; they must present affirmative evidence or argument as to the precise cause and prejudice produced." *Lundgren*, 440 F.3d at 764.

The Warden argued that the first type of procedural default bars the Court's review of Salfi's Claim 4(b) given Salfi's counsel's failure to object on Confrontation Clause grounds at trial and the Kentucky Supreme Court's subsequent application of palpable error review due to

[4] "A fundamental miscarriage of justice results from the conviction of one who is 'actually innocent.' " *Lundgren*, 440 F.3d at 764 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Assertions of "actual innocence" must be substantiated 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). Salfi did not argue he was actually innocent of the charges against him. Thus, the undersigned need not address the applicability of this mechanism of excusing procedural default.

counsel's failure to preserve the issue for appeal.[5] (DN 16, at PageID # 88-90.) The undersigned agrees. Kentucky's contemporaneous-objection rule and the Kentucky Supreme Court's application of the palpable error standard of review constitute an independent and adequate state ground to foreclose habeas review of Salfi's Confrontation Clause claim unless he can show cause for and prejudice as a result of his default. *Hockenbury v. Sowders*, 620 F.2d 111, 112-13 (6th Cir. 1980); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) ("[W]e view a state appellate court's review for plain error as the enforcement of a procedural default."); *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1076 (6th Cir. 2015) (noting that state court's application of plain error review did not save the petitioner from procedural default).[6]

Salfi's arguments regarding Claim 4(b) in both his petition and his reply do not explicitly attempt to make any showing of cause. However, separately in Claim 7 Salfi argued that his counsel's failure to object to the use of the affidavit as a violation of Salfi's Confrontation Clause rights constituted ineffective assistance of counsel, which the undersigned construes as his attempt to show cause for the procedural default of Claim 4(b). (DN 1-2, at PageID # 39-41; DN 23, at PageID # 387-88.) Ineffective assistance of counsel can constitute cause to excuse a procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). But "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be

[5] Salfi argued that the Warden's position that his claim was procedurally defaulted despite its constitutional significance was inconsistent with the Warden's position on other claims that "only constitutionally significant issues may be brought in a federal habeas petition." (DN 23, at PageID # 379.) Salfi's argument rests on a misapprehension of the doctrine of procedural default, which is broad in its application and scope. To the extent that Salfi is attempting to offer the constitutional significance of his claim as cause for his procedural default, he cites no case law to support that constitutional import alone validly serves as cause to excuse a default.

[6] Though both *Hinkle* and *Wade* dealt with the application of the plain error standard of review by Ohio courts, the plain error standard is the equivalent of the palpable error standard of review applied by the Kentucky Supreme Court to Salfi's claim. *Compare Lundgren*, 440 F.3d at 765 ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits."), *with Salfi*, 2012 WL 4327660, at*7 (quoting in part *Ladriere v. Commonwealth*, 329 S.W.3d 278, 281 (Ky. 2010)) (explaining that "[u]nder the palpable error standard[,] . . . 'reversal is warranted "if a manifest injustice has resulted from the error" ' ").

procedurally defaulted." *Id.* at 452. The Warden argued that Salfi's Claim 7 was itself subject to the second kind of procedural default described above because it was not addressed in Salfi's appeal of the Jefferson Circuit Court's denial of his RCr 11.42 motion. (DN 16, at PageID # 102-04.) The undersigned agrees.

Salfi's ineffective assistance of counsel claim regarding his counsel's failure to object was not raised in his initial *pro se* RCr 11.42 motion. (DN 16-4, at PageID # 223-49.) Salfi argued only the following claims in that motion: (1) counsel failed to conduct an adequate pretrial investigation, (2) counsel failed to prepare a defense including to request an evaluation of Salfi, (3) counsel failed to obtain an expert witness, (4) counsel misinformed Salfi of the maximum potential penalty, and (5) counsel's cumulative errors amounted to ineffective assistance of counsel. (*Id.*) Salfi's *pro se* RCr 11.42 motion does not mention either the Commonwealth's use of the affidavit in question during the penalty phase of his trial or his counsel's failure to object on grounds that use of the affidavit violated his rights under the Confrontation Clause. (*Id.*) In the supplement to Salfi's *pro se* RCr 11.42 motion filed by appointed counsel, counsel included no argument related to the merits of Salfi's Claim 7. Instead, in its recitation of the claims raised by Salfi, the supplement stated, "Mr. Salfi's third *pro se* claim is that trial counsel was ineffective for failing to properly object and preserve for appeal the use of an affidavit, in lieu of witness testimony, during the sentencing portion of the trial." (*Id.* at 251.) This is an incorrect summation of the third claim in Salfi's *pro se* motion, which related to Salfi's trial counsel's failure to obtain an expert witness. (*Id.* at 242-44.) The remainder of the supplement did not address or provide any citations in support of the mis-stated third claim; it focused on "supplement[ing] the law concerned Mr. Salfi's first claim." (*Id.* at 253.) The Jefferson Circuit Court did not address Claim 7 in its opinion on Salfi's RCr 11.42 motion. (*Id.* at 276-80.)

It is unclear that this procedural history supports that Salfi properly exhausted his state remedies with respect to Claim 7. "Exhaustion requires more than notice—a petitioner must present enough information to allow the state courts to apply controlling legal principles to the facts bearing upon his constitutional claim." *Woods v. Booker*, 450 F. App'x 480, 488 (6th Cir. 2011) (citing *Picard v. Connor*, 404 U.S. 270, 276-77 (1971)). While the combination of Salfi's *pro se* motion and his appointed counsel's supplement did sufficiently identify *Strickland* as the applicable standard for ineffective assistance of counsel claims, the two documents contained no showing of facts or argument as to why counsel's failure to object was a deviation from reasonable strategy or resulted in prejudice to Salfi. *See McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) ("A claim may only be considered 'fairly presented' if the petitioner asserted both the factual and legal basis for his claim to the state courts."). This potential error in presentation is compounded by the fact that Salfi then failed to continue to raise Claim 7 or to address the Jefferson Circuit Court's failure to discuss it on his appeal to Kentucky Court of Appeals. A petitioner must exhaust all available state remedies as to each of his or her claims by fairly presenting the same to the state courts prior to bringing the same in a § 2254 petition. 28 U.S.C. § 2254(b)(1) (2017); *O'Sullivan*, 526 U.S. at 845 ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); *Wagner v. Smith*, 581 F.3d 410, 414-15 (6th Cir. 2009). Salfi invoked no state appellate procedures regarding Claim 7. Salfi's time to appeal the Jefferson Circuit Court's denial of his 11.42 Motion has long-since expired, and he would not be permitted to file a new 11.42 Motion because Kentucky law prohibits prisoners from bringing successive RCr 11.42 Motions. Ky. R. Crim. P. 12.04(2) (stating that appeal must be filed thirty days after entry of the judgment or order from which it is taken); Ky. R. Crim. P. 11.42(3) ("Final disposition of the

motion shall conclude all issues that could reasonably have been presented in the same proceeding."); *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970). Thus, his failure to sufficiently raise Claim 7 through "one complete round of the State's established appellate review process" results in a procedural default unless Salfi can show cause and prejudice for the failure. *Williams v. Bagley*, 380 F.3d 932, 967 (6th Cir. 2004) (quoting *O'Sullivan*, 526 U.S. at 848).

Salfi's petition and reply do not attempt to show cause for his default of Claim 7 other than to argue that Claim 7 was raised in his appointed counsel's supplement to Salfi's *pro se* RCr 11.42 motion. (DN 23, at PageID # 387.) Salfi provides no citation to case law demonstrating that this constitutes cause on the facts set forth above. Despite his attempts to argue prejudice in his reply, Salfi's failure to show cause for his default alone is fatal to his claim.

As Salfi's ineffective assistance Claim 7 is itself procedurally defaulted, it cannot serve as cause for his procedural default of Claim 4(b). Salfi offers no other argument or legal authority to demonstrate either cause for or prejudice as a result of his procedural default of Claim 4(b).

Accordingly, the undersigned concludes that Claims 4(b) and 7 are procedurally defaulted and that Salfi has failed to show cause and prejudice to excuse the default. The undersigned recommends that Salfi's petition be denied as to Claims 4(b) and 7.[7]

[7] Because the undersigned concluded that Salfi's claims are procedurally defaulted, the undersigned does not reach the merits of Salfi's Claim 4(b) and 7. However, the undersigned notes that to the extent Salfi intended to make a separate argument regarding the Kentucky Supreme Court's ruling with respect to how use of the affidavit and introduction of evidence of his prior crimes violated state law, his petition is deficient under the standards cited as to Claims 1, 2, and 4(a) above. Again, state errors in evidentiary rulings are generally not cognizable sources of habeas relief unless the error rises to the level of a due process violation, and Salfi's petition insufficiently explains how due process was violated by the Kentucky Supreme Court's ruling that Salfi opened the door to cross-examination on his prior offenses. *McAdoo*, 365 F.3d at 494; *Seymour*, 224 F.3d at 552 (quoting *Montana*, 518 U.S. at 43); *Bugh*, 329 F.3d at 512.

5. Claim 5: Counsel's Failure to Develop EED Defense, Investigate, and Retain Expert

As to Claim 5, Salfi argued that his trial counsel provided ineffective assistance because counsel failed to develop an EED defense, review Salfi's medical history, or retain an expert to testify regarding Salfi's mental state at the time of the incident. (DN 1-2, at PageID # 32-35.) The Kentucky Court of Appeals rejected Salfi's claim. *Salfi*, 2017 WL 652109, at *2-3. It found that Salfi's counsel fully investigated and developed Salfi's EED defense and that Salfi had not established his counsel performed deficiently. *Id.* at *4

Claims of ineffective assistance of counsel are evaluated pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, a defendant must show that (1) counsel's performance was deficient and (2) that the deficiency prejudiced him. *Id.* Conclusory allegations or bare bones statements regarding counsel's effectiveness fall short of meeting that burden. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000) (finding that "conclusory statement" by petitioner was "wholly insufficient to raise the issue of ineffective assistance of counsel"). To demonstrate deficient performance, the defendant must "show[ ] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Counsel's performance is deficient if it fell below an "objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 688. Notably, "[t]he 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." *Harrington v. Richter*, 562 U.S. 86, 88 (2011). To demonstrate prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 689. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Pivotally, in reviewing

Salfi's ineffective assistance claims, the question before the Court is not whether it would have applied *Strickland* differently than the state court; this Court is instead limited to considering whether the Kentucky Court of Appeals' decision was contrary to or an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101.

To the extent Salfi intended to request relief under the "contrary to" clause of § 2254(d)(1), he has failed to establish that the Kentucky Court of Appeals reached a conclusion opposite to one reached by the Supreme Court on a question or law or that the Kentucky Court of Appeals decided his case differently than the Supreme Court "has on a set of materially indistinguishable facts." *Williams*, 529 U.S.at 412-13. His initial petition contained no citations to case law and his reply did not proffer any applicable Supreme Court case law besides *Strickland*, which is not factually similar to Salfi's case.[8] Without a more clear assertion or argument as to how the Kentucky Court of Appeal's analysis is contrary to *Strickland*, opposite to the Supreme Court's conclusion on a question of law, or differently decided than a Supreme Court case on materially indistinguishable facts, Salfi has failed to demonstrate he is entitled to relief under the "contrary to" clause. Instead, Salfi's arguments all seem to be based generally on the assumption that the Kentucky Court of Appeals unreasonably applied *Strickland* to his Claim 7.

Salfi argued that his counsel should have further investigated his medical history and, in particular, should obtained records from Dr. Tom Moore, who treated him after his breakup with

[8] In his reply, Salfi cited in passing to "Tibbits and Strickland" but did not provide a full case name or reporter citation to any Tibbits case. (DN 23, at PageID # 385.) The undersigned was unable to locate any seemingly relevant Supreme Court case of that name. It is well-established that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997)). To the extent that Salfi intended to argue that "Tibbits" was the Supreme Court precedent that entitled him to relief under § 2254(d)(1), the undersigned concludes he has waived that argument by failing to provide a full case name, reporter citation, or any description of the case sufficient to permit the undersigned to locate the same. To the extent that Salfi intended to reference *Tibbetts v. Bradshaw*, 633 F.3d 436 (6th Cir. 2011), a Sixth Circuit case cited by the Warden in his response, as that case is a decision from the Sixth Circuit, not the United State Supreme Court, it is does not trigger relief under the "contrary to" clause.

Doyle and prescribed both anxiety medication and counseling. (DN 23, at PageID # 382.) Salfi argued that his counsel's failure to obtain Dr. Moore's records cannot be deemed strategic and that "[h]aving all information about [ ] [his] medical and psychological history would have allowed the jury to better understand [ ] [his] viewpoint and accept his defense." (*Id.* at 382-83.) He emphasized that even if EED isn't a mental disease or defect, evidence of those conditions would have still been relevant to his defense. (*Id.* at 384.) He also argued that even if expert testimony wasn't necessary to establish EED, it still would have been helpful. (*Id.* at 384-85.)

These arguments do not undermine the Kentucky Court of Appeals' application of *Strickland*. After correctly reciting the standard applicable to ineffective assistance claims from *Strickland*, the Kentucky Court of Appeals considered each of Salfi's arguments. *Salfi*, 2017 WL 652109, at *2-3. On Salfi's claim that his counsel failed to investigate, it found that when Salfi referred to counsel's alleged failure to investigate "past psychiatric treatment," Salfi was referring to certain counseling sessions he attended after he and Doyle broke up. *Id.* at *2. It summarized,

> The evidence in the record indicates that defense counsel knew of Salfi's counseling sessions and presented evidence of the treatment and of Salfi's mental status throughout the trial. Trial counsel called witnesses who testified as to Salfi's state of mind at the time of the murder and he also cross-examined many of the Commonwealth's witnesses on the issue. Salfi also testified in his own defense and recounted to the jury his state of mind when he entered the house and saw Thomas in Doyle's bed. He also testified as to how he felt depressed and lost significant weight after breaking up with Doyle, and testified that he received psychiatric treatment after the breakup.
>
> Additionally, Ken Haysley, the psychotherapist who treated Salfi, and who authored the "progress notes" Salfi contends trial counsel should have used, testified on Salfi's behalf. Specifically, Haysley testified that shortly before the murder, he treated Salfi for anxiety and adjustment disorder dealing with the breakup. Salfi's claim that trial counsel did not present evidence of his treatment and state of mind is easily contradicted by the record and clearly without merit.

Id. at *3.

Salfi's mere citation to other psychiatric treatment that his counsel could have investigated or an additional witness he believes his counsel should have presented at trial does not alter the reasonableness of the Kentucky Court of Appeals' application of *Strickland.* Under *Strickland,* "[a court] must presume that decisions of what evidence to present and whether to call or question witnesses are matters of trial strategy." *Cathron v. Jones*, 77 F. App'x 835, 841 (6th Cir. 2003) (citing *Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002)). Nonetheless, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 691. *See also Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Bigelow v. Williams*, 367 F.3d 562, 566 (6th Cir. 2004); *Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011). This is not a case where counsel made no investigation; as detailed above by the Kentucky Court of Appeals, Salfi's counsel did investigate Salfi's medical history and present evidence at trial related to the same. Salfi faults the Kentucky Court of Appeals for misunderstanding his argument and believing he was referring to records from psychotherapist Hasley, who did testify at trial, instead of Dr. Moore. (DN 23, at PageID # 381-82.) However, Dr. Moore is never mentioned by name in Salfi's RCr11.42 motion, appellant's brief, or reply brief. (DN 16-4, at PageID # 223-58; DN 16-5, at PageID # 281-303, 319-22.) Those briefs refer generally to "psychiatric records," "counseling," "movant's therapist," and Salfi's "past psychiatric treatment." (DN 16-4, at PageID # 227, 233, 234, 239, 240; DN 16-5, at PageID # 291.) While Salfi's RCr 11.42 motion alleged that "psychiatric progress notes" were attached as exhibits (DN 16-4, at PageID # 234), those exhibits are not contained within the record as filed by the Warden. To the extent those records overlap with the records tendered by Salfi in his reply (DN 23-1), the records do not specifically identify Dr. Moore. Salfi's petition fails to explain what additional information or testimony Dr. Moore would have provided that

would not have been duplicative of the testimony from his therapist, who did testify. Salfi also fails to specifically identify how Dr. Moore's testimony would have impacted his EED defense. He merely asserted that allowing the jury to have the full picture of his history would have bettered the jury's understanding of his defense. (DN 23, at PageID # 383.) This hypothetical is insufficient to demonstrate either deficient performance or prejudice. Salfi also failed to present any evidence that his counsel was or should have been aware of Dr. Moore or any treatment Dr. Moore provided to Salfi. Instead, as cited by Salfi, the record establishes that his counsel told the Court that the records of psychotherapist Haysley, who testified, were the only psychiatric records of which counsel was aware or planned to use at trial. (DN 17, "Salfi, Nicholas (13) 6-06-11 vr# 95b2 1.asf," at 11:25:00-11:27:05.)[9] Under these circumstances, the Kentucky Court of Appeals did not unreasonably apply *Strickland* in concluding that his counsel's performance with regard to investigating Salfi's mental health and presenting evidence related to the same at trial was not deficient.

As to Salfi's argument that his counsel should have hired an expert, the Kentucky Court of Appeals explained that "EED is a legal concept, and not a mental disease," thus such a defense is not dependent upon expert testimony. *Salfi*, 2017 WL 652109, at *3. Given this legal reality, it concluded that Salfi's trial counsel did not act unreasonably in choosing to present evidence related to an EED defense through the testimony of Salfi's psychologist. *Id.* Salfi's argument that even if expert testimony was not necessary it could have been helpful falls far short of contradicting the Kentucky Court of Appeals' conclusion. He offered no specific information or testimony that a hypothetical expert could have contributed to his defense. As the Supreme Court has explained,

[9] The trial footage tendered by the Warden on disc was split into seven folders, one folder for each of the seven days of trial. (DN 17.) The undersigned has provided the exact file name of the video footage to assist in identifying the exact footage cited.

"The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of the law and facts' is 'virtually unchallengeable.' " *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (quoting *Strickland*, 466 U.S. at 690). Here, Salfi's trial counsel investigated Salfi's mental condition at the time of the offense, reviewed his psychotherapist records, and presented testimony from Salfi's psychotherapist and Salfi regarding his mental condition. As set forth above, Salfi's trial counsel acted reasonably in not further investigating Salfi's mental health. Under those circumstances, his counsel's decision about how to present Salfi's EED defense falls squarely within the zone of strategic decisions left to counsel's discretion. Thus, the Kentucky Court of Appeals did not unreasonably apply *Strickland* in concluding Salfi's counsel's performance and decision not to hire an expert was not deficient.

Of Salfi's argument that his counsel should have had him evaluated by a mental health professional, the Kentucky Court of Appeals explained that "[a]n evaluation by a mental health expert is necessary to assist with the defense only when one's mental wellbeing is seriously in question." *Salfi*, 2017 WL 652109, at *3 (citing *Crawford v. Commonwealth*, 824 S.W.2d 847, 850 (Ky. 1992)). It also concluded that Salfi's counsel did not err in not having him evaluated by a mental health professional because "[t]here is nothing in the record to show Salfi did anything to bring any alleged mental defect to the attention of counsel or the trial court." *Id.* Salfi offers nothing to dispute this conclusion and instead makes the same argument that the evaluation could have turned up helpful evidence regarding his EED defense. Again, in view of the evidence Salfi's trial counsel did present on his EED defense and the reasonableness of his investigation, the undersigned cannot say that the Kentucky Court of Appeals' decision was an unreasonable application of *Strickland*.

As with Claims 1-3 and 4(a), to the extent Salfi intended to request relief related to Claim 5 under 28 U.S.C. § 2254(d)(2), Salfi did not demonstrate that the Kentucky Court of Appeals or the trial court made an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301; *see also Rice*, 546 U.S. at 341-42 (noting that even if "[r]easonable minds reviewing the record might disagree" as to a particular factual finding the record, "on habeas review that does not suffice to supersede the trial court's [ ] determination"). To the extent Salfi challenged any factual findings, he did not do more than ask this Court to reach a different conclusion than that reached by the state court.

Accordingly, the undersigned recommends that Salfi's petition be denied as to Claim 7.

6. Claim 6: Counsel Misinformed Salfi of Maximum Penalty

As to Claim 6, Salfi argued that his counsel misinformed him of the maximum possible penalty he could receive, which caused him to reject a plea bargain for a forty-year sentence. (DN 1-2, at PageID # 36-38.) He claimed that his counsel told him the maximum he could receive was seventy years imprisonment when the actual maximum was life imprisonment.

The Kentucky Court of Appeals rejected Salfi's claim. *Salfi*, 2017 WL 652109, at *4. It disbelieved his statement that had he known a life sentence was possible, he would have accepted the forty-year deal. *Id.* In particular, it emphasized that given that Salfi was twenty-eight years old at the time of plea negotiations, a seventy-year sentence was tantamount to a life sentence because he would have been ninety-eight years old when released. *Id.* Thus, it found his argument that he would have reacted differently had he been properly advised "inherently incredible" and found that even if Salfi had been improperly advised, Salfi had failed to show prejudice. *Id.*

Where a defendant has entered a guilty plea, the "prejudice" prong focuses on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Where a defendant claims faulty advice led him to accept a plea offer, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*; *see also Warner v. United States*, 975 F.2d 1207, 1214 (6th Cir. 1992) ("Prejudice is proved if the defendant shows a reasonable probability that, but for counsel's defective advice, he would not have pleaded guilty."). Where a defendant claims faulty advice led him to reject a plea offer,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 566 U.S. 156, 164 (2012). Salfi argued that the key difference between a life sentence and a seventy-year sentence was a question of how likely it would be that he would receive parole. (DN 23, at PageID # 387.) He argued that "[h]ad [ ] [he] been informed that a life sentence with its poor parole potential been possible, [he] would have taken the [forty] year plea." (*Id.*) Salfi cited no case law to support that this is considered sufficient prejudice under *Lafler*. He also cited no authority for his understanding of his prospect of parole to demonstrate that the same was correct. Thus, the undersigned cannot find that the Kentucky Court of Appeals unreasonably applied *Strickland* or *Lafler*.

To the extent Salfi intended to request relief under the "contrary to" clause of § 2254(d)(1), he has failed to establish that the Kentucky Court of Appeals reached a conclusion opposite to one

reached by the Supreme Court on a question or law or that the Kentucky Court of Appeals decided his case differently than the Supreme Court "has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13.

As with Salfi's other claims above, to the extent Salfi intended to request relief related to Claim 6 under 28 U.S.C. § 2254(d)(2), Salfi did not demonstrate that the Kentucky Court of Appeals or the trial court made an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. He did not specifically identify any challenged factual findings in his petition.

Thus, the undersigned recommends that Salfi's petition be denied as to Claim 6.

7. Claim 9: Counsel's Failure to Present Counteroffers

As to Claim 9, Salfi argued that his counsel failed to present counteroffers to the prosecution based on an exchange between his counsel and the prosecution on the morning of trial. (DN 32, at PageID # 449.) In discussing pretrial matters with the Court, Salfi's trial counsel, Mac Adams ("Adams"), asked to approach the bench to discuss and ensure that certain information regarding an unrelated case would not be raised during Salfi's trial:

Adams:	Judge, I did have one other motion, but can we approach on it?
Judge:	Okay.
[at bench]	
Adams:	Um, there is this – uh – this matter of this – uh - rape case.
Kingren:[10]	Mhm.
Adams:	I didn't want any of that brought up. I didn't think you'd want any of that brought up.
Kingren:	No. It's not relevant.
Judge:	A rape case? He's been charged with rape?
Kingren:	Well –

[10] Katherine A. Kingren, Assistant Commonwealth's Attorney, served as the prosecutor in Salfi's case.

Adams:	He popped up on the CODIS on a cold case. Uh – but –
Kingren:	It's not been indicted.
Adams:	It has not been indicted.
Kingren:	Its been part of settlement negotiations –
Judge:	Oh.
Kingren:	– and I've been trying to work something out with both of them.
Adams:	Right.
Kingren:	I did not want to go ahead and pursue an indictment on that for fear of the publicity, you know?
Judge:	Right.
Kingren:	That's something that I would probably pursue with whatever – if I can't settle it with this, pursue after whatever happens in this trial.
Judge:	Are you still having – is the door still open to resolving this matter?
Adams:	On this case?
Judge:	Yeah.
Adams:	I don't – I don't think so.
Judge:	Okay. You've reached pretty much an impasse?
Adams:	I think.
Kingren:	Right. You never came back with me with a counter of what he might take.
Adams:	Oh well, uh –
Judge:	Okay, well you don't have to talk about it in front of me.

(DN 17, "Salfi, Nicholas (13) 6-06-11 vr# 95b2 1.asf," at 11:47:06-11:48:17.) Based on this testimony, Salfi argued that even though he and his counsel had discussed counter offers "ranging from 25 to 40 years as well as [Salfi]'s objectives and how the time would be broken up," it wasn't until he received the DVD of the first day of trial that he realized his counsel had not followed through with conveying those offers. (DN 32, at PageID # 449-50.) He indicated that he did not present this claim in his RCr 11.42 motion because he did not know about it until he received the DVD containing the June 6, 2011, footage with the Warden's response to his instant habeas petition. (*Id.* at 450.) He tendered an affidavit from his state postconviction counsel in which

counsel admitted that he did not thoroughly review the video footage from the first morning of Salfi's trial. (*Id.* at 454.) Postconviction counsel indicated that had he reviewed that footage, he would have raised Salfi's instant claim in the state postconviction proceedings. (*Id.*) Based on this affidavit, Salfi argued that any default should be excused by the ineffective assistance of his postconviction counsel. (*Id.* at 450-51.)

In response, the Warden argued that Salfi's claim was untimely and did not relate back to his initial petition. (DN 33, at PageID # 457.) This Court previously rejected the Warden's timeliness argument and found that Salfi could not have discovered the factual predicate for his additional claim earlier through due diligence. (DN 31.) Thus, the Court granted Salfi leave to amend his habeas petition to add the instant claim. (*Id.*) As the Court has already addressed the Warden's timeliness arguments, the undersigned will not do so further here.

The Warden also argued that Salfi's claim was procedurally defaulted because he did not present it to the appropriate state court, and his time to do so has expired. (DN 33, at PageID # 457.) Salfi admitted that he did not present his claim in his RCr 11.42 motion but argued that his failure to do so was excused by the United States Supreme Court's ruling in *Martinez v. Ryan*, 566 U.S. 1 (2012). (DN 32, at PageID # 450-51.) Generally, ineffective assistance by counsel in state postconviction proceedings does not establish "cause" for a procedural default because there is no constitutional right to an attorney in such proceedings. *Coleman*, 501 U.S. at 752-753. However, in *Martinez*, the Supreme Court recognized a narrow equitable exception to the rule in *Coleman*. *Martinez*, 566 U.S. at 10-16. The Supreme Court explained,

> Where, 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.

Id. at 18. The Supreme Court subsequently extended the exception in *Martinez* to any state whose "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). The Sixth Circuit has subsequently held that Kentucky possesses such a procedural framework; therefore, "[t]he *Martinez/Trevino* exception applies in Kentucky and [ ] Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their [ineffective assistance of trial counsel] claims by showing that they lacked effective assistance of counsel at their initial-review collateral proceedings." *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015). Thus, in order to demonstrate the *Martinez/Trevino* exception applies to his case to excuse his procedural default, Salfi must demonstrate that (1) the ineffective assistance of trial counsel claim he now seeks to assert is "substantial," meaning "that the claim has some merit," *Martinez*, 566 U.S. at 13; (2) his state post-conviction counsel was ineffective; and (3) "the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim.' " *Trevino*, 569 U.S. at 423. The undersigned finds that Salfi fails at the first prong of this analysis; therefore, the undersigned does not reach prongs two or three.

Salfi cannot demonstrate that his ineffective assistance of trial counsel claim is substantial because it is without merit and factual support. *See Martinez*, 566 U.S. at 16 (explaining that an "ineffective-assistance-of-trial-counsel claim is insubstantial" where "it does not have any merit or . . . is wholly without factual support"). While the Parties identified no authority factually on all fours with Salfi's case, the Sixth Circuit has explained, "A defendant who rejects or otherwise misses out on a formal plea offer because of deficient performance or erroneous advice can establish ineffective assistance of counsel only if he satisfies the well-known *Strickland* standard."

Johnson v. Genovese, 924 F.3d 929, 934 (6th Cir. 2019). Because a defendant has no constitutional right to be offered a plea or to have a judge accept a plea, "where a petitioner alleges ineffective assistance of counsel prevented plea negotiations, demonstrating prejudice requires that he establish a reasonable probability that but for counsel's errors, the petitioner would have received a plea offer." *Byrd v. Skipper*, 940 F.3d 248, 257 (6th Cir. 2019) (citing *Lafler*, 566 U.S. at 163-64 and *Missouri v. Frye*, 556 U.S. 134, 148-49 (2012)). Additionally, "a petitioner must also show that he would have accepted the offer, the prosecution would not have rescinded the offer, and that the trial court would not have rejected the plea agreement." *Id.* (citing *Lafler*, 566 U.S. at 168 and *Frye*, 556 U.S. at 148-49). This is "a formidable standard." *Id.*

Here, Salfi falls short of meeting this formidable standard. Other than the prosecutor's comment to the judge on the morning of trial that Salfi's counsel had not provided her with a counter offer, Salfi offers no assurance or evidence that the prosecution would have responded to any counter with additional plea offers. As indicated above, the maximum potential sentence for Salfi's charges was life imprisonment. The previous 40-year offer that Salfi had rejected was already a substantial deviation from that maximum, and Salfi offers no guarantee or even hint that the prosecution would have offered a reduction. Salfi merely emphasizes that the issue of plea negotiations came up several times during pretrial proceedings. (DN 37, at PageID # 483.) But given the prevalence of plea negotiations as a manner of resolving criminal cases, it is unclear that this general reference to negotiations suggests any particular likelihood that such a resolution was probable in this case. This is particularly in doubt given the overwhelming evidence of Salfi's guilt relied upon by the Kentucky Supreme Court. *See Salfi*, 2012 WL 4327660, at *2. The weight of the evidence and corresponding likelihood of conviction at trial would have weighed heavily on the prosecution's willingness to make additional offers. That the prosecution would have offered

and/or would not have withdrawn any potential offer is also called into question by the discussion above that indicated that the prosecution wanted to negotiate a joint resolution of both the charges in Salfi's murder/assault case and the potential rape charges against Salfi. As cited by the Warden, the prosecution had emphasized this desire multiple times on the record. (DN 35, "05 Salfi, Nicholas (13) 11-22-10 vr# 205.asf," at 10:41:49-10:44:40; DN 17, "Salfi, Nicholas (13) 6-06-11 vr# 95b2 1.asf," at 11:47:06-11:48:17.) Salfi does not explain or point to any evidence to support that this additional complication would not have been an impediment to potential plea offers by the prosecution.

As to Salfi's willingness to accept a lesser offer, Salfi stated in his amended petition and reply that he would have accepted offers between twenty-five and forty years. (DN 32, at PageID # 450; DN 37, at PageID # 479.) The undersigned finds Salfi's statements to be less than credible given that Salfi's original amended petition was vague as to what specific counteroffers Salfi discussed with his counsel. (DN 32.) It was only after the Warden highlighted this deficiency in his response (DN 33) that Salfi provided a list of the range of penalties he purportedly discussed with his counsel in his reply (DN 37, at PageID # 479). Additionally, Salfi included on this list that he and his counsel discussed a counteroffer of "30 years for Murder and 5 years for First-degree Assault under EED and 5 years for Tampering with Physical Evidence. All ran consecutive for a total of 40 years." (*Id.*) This assertion is not credible given that the evidence shows that Salfi previously rejected an offer for a total of forty-years imprisonment. Its inclusion in Salfi's list of proposals calls into question the remainder of the list. Salfi also offered no evidence regarding the likelihood that the court would have accepted any potential plea deal such as through reference to particular comparators. *See Byrd*, 940 F.3d at 258; *Rodriguez-Penton v. United States*, 905 F.3d 481, 488 (6th Cir. 2018). While the trial court often inquired regarding the status of plea

negotiations, this alone does not demonstrate that the trial court would have accepted any particular plea.

For all these reasons, the undersigned finds that Salfi has failed to establish any prejudice from his counsel's purported failure to provide counter-offers to the prosecution. As such, Salfi has failed to prove a "substantial claim" of ineffective assistance of trial counsel such that his claim does not qualify for the *Martinez/Trevino* exception and is, therefore, procedurally barred. In the alternative, based on the prejudice analysis above, Salfi's claim is meritless.

Accordingly, the undersigned recommends that Salfi's petition be denied as to Claim 9.

8. Claim 8: Cumulative Error

Salfi argued that even if any of the errors he raised did not alone entitle him to relief, "then the cumulative nature of the errors r[o]se[ ] to the level warranting relief." (DN 1-2, at PageID # 42, 42-44.) The Kentucky Court of Appeals found that Salfi was not entitled to relief under the cumulative error doctrine because it "found all of Salfi's [other] claims to be without merit"; it explained, "[W]here there is no prejudicial error in any of the isolated issues, there can be no cumulative error." *Salfi*, 2017 WL 652109, at *4 (citing *Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006)). As the Warden notes (DN 16, at PageID # 106-07), there is no clearly established Supreme Court precedent requiring application of a cumulative error rule, and the Sixth Circuit has expressly held that cumulative error claims are not cognizable in habeas corpus. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)). Even assuming that the Sixth Circuit recognized a cumulative error claim, this claim fails when there are no errors of which to assess the cumulative effect. *See Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007) (en banc); *see also Wogenstahl v. Mitchell*, No. 1:99-cv-843, 2007 WL 2677423, at *76 (S.D. Ohio Sept. 12, 2007). Because the undersigned has found above

that Salfi failed to show that any of the alleged instances of ineffective assistance of counsel deprived him "of a fair trial, a trial whose result is reliable," *Strickland*, 466 U.S. at 687, he cannot show that the accumulation of these non-errors warrants relief. *See Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004). Accordingly, the Kentucky Court of Appeals' determination should not be disturbed. The undersigned recommends Salfi's petition be denied as to Claim 8.

C. Certificate of Appealability

The final issue for the undersigned's resolution is whether Salfi is entitled to a Certificate of Appealability ("COA") on any or all of the claims raised in his petition. When a court rejects a claim on the merits, the petitioner must demonstrate that reasonable jurists would find the court's assessment of the constitutional claim debatable or wrong in order for a court to issue a COA. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The petitioner need not demonstrate that the claim will prevail on the merits; instead, the petitioner need only demonstrate that the issues he seeks to appeal are deserving of further proceedings or debatable among jurists of reason. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). For claims rejected on procedural grounds, *Slack* directs courts to use a two-pronged test to determine whether a COA should issue. To satisfy the first prong, a petitioner must 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 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.* A court need not conduct the two-prong inquiry in the order identified or even address both parts if a petition makes an insufficient showing on one part.

1. Claims 1, 2, and 4(a)

In his first and second grounds for relief, Salfi alleged that the trial court made errors in certain evidentiary rulings regarding refusing to grant a mistrial after a witness testified about improper character evidence and prior bad acts and in refusing to permit Salfi to introduce the videotape of his interview. As part of his fourth ground for relief, Salfi argued that the court erred in permitting a particular witness to testify during the penalty phase of his trial. The undersigned recommended that this Court deny the claims because Salfi had not identified any applicable clearly established federal law and because even under the proper law, Salfi had not demonstrated that the trial court's evidentiary rulings amounted to a denial of due process. Given the lack of law cited by Salfi and lack of argument regarding any due process violation, the undersigned is persuaded that the issues are not deserving of further proceedings or debatable among jurists of reason. The undersigned, therefore, recommends that a COA be denied as to Salfi's Claims 1, 2, and 4(a).

2. Claim 3

In his third ground for relief, Salfi alleged that a portion of the trial court's jury instructions were erroneous. The undersigned recommended that this Court deny the claim because the Kentucky Supreme Court had found that the language Salfi wanted included was not a proper element of the offense with which he was charged and Salfi failed to demonstrate that this amounted to a due process violation. Given the lack of law cited by Salfi and lack of argument regarding any due process violation, the undersigned is persuaded that the issues are not deserving of further proceedings or debatable among jurists of reason. The undersigned, therefore, recommends that a COA be denied as to Salfi's Claim 3.

3. Claims 4(b) & 7

As part of his fourth ground for relief and as his seventh ground for relief, Salfi argued that the use of an affidavit to introduce evidence about his prior convictions was in error and that his counsel provided ineffective assistance in failing to object to use of the affidavit on Confrontation Clause grounds. The undersigned recommended that this Court deny the claims because both were procedurally defaulted, and Salfi had failed to articulate either cause or prejudice for his default. Given the lack of argument on these issues by Salfi, the undersigned finds that reasonable jurists would not find it debatable that the Court's procedural ruling was correct. Therefore, the undersigned recommends that a COA be denied as to Salfi's Claim 4(b) and 7.

4. Claim 5

In his fifth ground for relief, Salfi argued that his counsel was ineffective in failing to develop an EED defense, review his medical history, or retain an expert to testify regarding his EED defense. The undersigned recommended that the Court deny the claim because the Kentucky Court of Appeals did not unreasonably apply *Strickland* given the deference afforded counsel's strategic decisions and the actions that counsel had taken in Salfi's defense. The undersigned is persuaded that the issues are not deserving of further proceedings or debatable among jurists of reason. The undersigned, therefore, recommends that a COA be denied as to Salfi's Claim 5.

5. Claim 6

In his sixth ground for relief, Salfi argued that his counsel was ineffective in erroneously informing him of the maximum penalty for his charges, which he claimed caused him to reject a possible plea deal for a forty-year sentence. The undersigned recommended that the Court deny the claim because the Kentucky Court of Appeals did not unreasonably apply *Strickland* in finding that the lack of meaningful difference between the seventy-year maximum of which Salfi claimed

his counsel advised him and the actual potential life sentence that truly applied constituted a lack of the prejudice necessary to grant relief. The undersigned is persuaded that the issues are not deserving of further proceedings or debatable among jurists of reason. The undersigned, therefore, recommends that a COA be denied as to Salfi's Claim 6.

6. Claim 8

In his eighth ground for relief, Salfi alleged cumulative error. The undersigned recommended that the Court deny the claim based on Sixth Circuit law that cumulative error claims are not cognizable in habeas corpus and because the undersigned found no other errors of which to assess the cumulative effect. The undersigned is persuaded that the issues are not deserving of further proceedings or debatable among jurists of reason. The undersigned, therefore, recommends that a COA be denied as to Salfi's Claim 8.

7. Claim 9

In his ninth and final ground for relief, Salfi alleged that his counsel was ineffective in failing to present counteroffers to the prosecution. The undersigned recommended that the Court deny the claim because Salfi had not established prejudice under *Strickland* given the formidable burden to do so under applicable law. The undersigned's analysis notwithstanding, given the lack of caselaw on all fours with factual background of Salfi's claim, the undersigned finds that the issues are both deserving of further proceedings and debatable among jurists of reason. Therefore, the undersigned recommends that a COA be issued on Salfi's Claim 9.

III. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that Salfi's Petition for Writ of Habeas Corpus (DN 1) and Amended Petition (DN 32) be **DENIED** as to all claims therein asserted. The undersigned further **RECOMMENDS** that a Certificate of Appealability be **DENIED** as to all claims except Claim 9 on which the undersigned **RECOMMENDS** that a Certificate of Appealability be **GRANTED** and **ISSUED**.

Colin H Lindsay, Magistrate Judge
United States District Court

cc: Counsel of record
May 23, 2022

Notice

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

APPENDIX C

RENDERED: FEBRUARY 17, 2017; 10:00 A.M
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000292-MR

NICHOLAS SALFI — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 10-CR-000076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Nicholas Salfi brings this appeal from a February 8, 2016 order of the Jefferson Circuit Court summarily denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. We affirm.

In the early morning hours of January 2, 2010, Salfi, after watching a football game with his father, decided to drive by the house that he had previously shared with Kelly Doyle and their infant son. Doyle had recently broken off a

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three-year relationship with Salfi, but Salfi continued to foster hopes of reconciliation. Upon arriving at the home, Salfi noticed a strange vehicle parked in the driveway. He used the house key that he had refused to give back to Doyle to furtively enter the home. Upon entry, Salfi discovered Doyle and her male friend, Payton Thomas, sleeping in the same bed. Salfi and Doyle's son was asleep in his crib in the same room. Angered, Salfi began striking Thomas, who woke up and immediately ran out of the house. Salfi pursued Thomas into the front yard with a knife and stabbed him several times. Salfi then went back into the house and proceeded to attack Doyle. Salfi beat Doyle with a blunt force object, strangled her with a ligature, and stabbed her over one-hundred times in her face, neck, and back. When the police arrived, they discovered Doyle dead in the entranceway to the house. Her infant son was found safe, but alone crying in his crib.

On January 13, 2010, Salfi was indicted for murder and first-degree assault. In June of the following year, a jury found Salfi guilty on both charges. Salfi appealed to the Supreme Court of Kentucky, which, in an unpublished opinion rendered on September 20, 2012, affirmed his conviction and sentence. *Salfi v. Commonwealth*, 2011-SC-000562-MR, 2012 WL 4327660 (Ky. Sep. 20, 2012).

Thereafter, on June 7, 2013, Salfi, *pro se*, moved the trial court to vacate his conviction and sentence pursuant to RCr 11.42. In his motion, Salfi argued that his trial counsel was ineffective for 1) failing to conduct an adequate pre-trial investigation; 2) failing to prepare for trial; 3) failing to obtain an expert witness; 4) providing erroneous information as to the maximum penalty; and 5) cumulative

error. Appointed counsel supplemented Salfi's *pro se* motion on November 7, 2014. On February 8, 2016, the trial court rendered an order denying Salfi's motion. The court found that all of Salfi's claims could be refuted using only the record in the case. It is from the order denying Salfi's RCr 11.42 motion that Salfi now appeals. Further facts will be developed as necessary.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court framed the standard by which a defendant may establish ineffective assistance of counsel. Pursuant to *Strickland*, a petitioner must show that his trial "counsel's representation fell below an objective standard of reasonableness," *Id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Strickland* standard is a difficult one to meet because counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Defendants alleging ineffective assistance of counsel bear a "heavy burden of proof." *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005).

The proper test to use when judging counsel's performance is whether counsel provided reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688. A reviewing court "must not indulge in hindsight, but must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors." *McQueen v.*

Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996) (overruled on other grounds by *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004)).

On appeal, we look *de novo* at counsel's performance and any potential deficiency caused by counsel's performance. *Id.* Even though both components of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, we must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

Generally, where an appellant's allegations would entitle him to relief, he is entitled to an opportunity to prove the truth of the matter asserted at an evidentiary hearing. *Barnes v. Commonwealth*, 454 S.W.2d 352, 354 (Ky. 1970). It is only where an appellant's allegations are clearly refuted by the record that an evidentiary hearing can be dispensed with. *Frasier v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Where an evidentiary hearing is denied, appellate review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

On appeal, Salfi claims that the trial court erred when it denied his motion without granting an evidentiary hearing. He renews three of the claims he previously raised in the trial court. First, Salfi contends that his trial counsel rendered ineffective assistance of counsel when he failed to fully develop an extreme emotional distress (EED) defense. Specifically, he claims that counsel failed to investigate his past psychiatric treatment, failed to present an expert

witness, and failed to request a mental evaluation. Salfi believes that had his counsel done these things, he would have been convicted of manslaughter instead of murder. We disagree.

The defense of EED requires proof that some triggering event caused the defendant to suffer "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably[.]" *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986). EED is a disturbance for which there was a "reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Kentucky Revised Statutes (KRS) 507.020(1)(a).

Upon review of the record, we find Salfi's claim lacking. First, as to his assertion that his counsel failed to investigate and present evidence of treatment, Salfi fails to explain exactly what past psychiatric treatment his trial counsel failed to investigate. However, after reviewing Salfi's *pro se* brief to the trial court, we find that the "past psychiatric treatment" Salfi refers to is counseling sessions he attended after Doyle ended their three-year relationship. Salfi believes that had his counsel used the "progress notes" from these sessions it would have helped the jury "better understand what he was going through at that time."

The evidence in the record indicates that defense counsel knew of Salfi's counseling sessions and presented evidence of the treatment and of Salfi's mental status throughout the trial. Trial counsel called witnesses who testified as to Salfi's

state of mind at the time of the murder and he also cross-examined many of the Commonwealth's witnesses on the issue. Salfi also testified in his own defense and recounted to the jury his state of mind when he entered the house and saw Thomas in Doyle's bed. He also testified as to how he felt depressed and lost significant weight after breaking up with Doyle, and testified that he received psychiatric treatment after the breakup.

Additionally, Ken Haysley, the psychotherapist who treated Salfi, and who authored the "progress notes" Salfi contends trial counsel should have used, testified on Salfi's behalf. Specifically, Haysley testified that shortly before the murder, he treated Salfi for anxiety and adjustment disorder dealing with the breakup. Salfi's claim that trial counsel did not present evidence of his treatment and state of mind is easily contradicted by the record and clearly without merit.

Salfi also contends that his counsel was ineffective for failing to hire an expert. However, with regards to trial strategy and tactics, a defense attorney enjoys great discretion in trying a case. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998). The calling of witnesses falls within the realm of trial strategy and "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000)(overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005))(citation and quotation marks omitted).

With an EED case, while mental health professionals may offer evidence regarding defendant's state of mind at the time of the offense, expert testimony is not necessary. This is because EED is a legal concept, and not a mental disease. *See McClellan*, 715 S.W.2d at 468–89. Thus, unlike the defense of insanity or mental illness, EED "does not...depend upon expert witnesses to prove it." *Commonwealth v. Elmore*, 831 S.W.2d 183, 185 (Ky. 1992).

Here, trial counsel did not act unreasonably in how he chose to present evidence of Salfi's state of mind to the jury. As stated above, trial counsel presented several witnesses, including Salfi's psychologist, to show Salfi's mental state at the time of the offense. An expert was unnecessary to prove Salfi's state of mind, and calling an expert witness to testify to information that was already provided to the jury would have been unnecessarily cumulative and would have added nothing new. Accordingly, trial counsel's decision not to call an expert witness did not constitute deficient performance.

Salfi further contends that he was denied effective assistance of counsel when his attorney did not have him evaluated before trial by a mental health professional. An evaluation by a mental health expert is necessary to assist with the defense only when one's mental wellbeing is seriously in question. *Crawford v. Commonwealth*, 824 S.W.2d 847, 850 (Ky. 1992). There is nothing in the record to show Salfi did anything to bring any alleged mental defect to the attention of counsel or the trial court. In his motion for post-conviction relief, Salfi does not contend, nor is there any evidence, that he had any mental treatment or

consultations other than the treatment for anxiety he received from Haysley after his breakup with Doyle. Accordingly, we are not convinced that trial counsel was ineffective for failing to have him evaluated by a mental health expert.

In sum, we find that trial counsel fully investigated and developed the EED. defense. He provided information to the jury as to Salfi's state of mind at the time of the offense and identified and presented to the jury a triggering event, which the defense claimed made Salfi lose control. Salfi has failed to establish that any decision made by his trial counsel was objectively unreasonable under the circumstances; therefore, we cannot say that counsel's performance was deficient regarding this issue.

Salfi next argues that trial counsel failed to advise him of the proper maximum sentence he faced for his offense. Specifically, he claims that his attorney erroneously informed him that the most he could receive for his crime was seventy years in prison; however, the true maximum he faced based on his offense was life in prison. Salfi attempts to convince this Court that because he thought seventy years was the worst he could do at trial, he decided to reject the plea offer and take his chances. He claims that had he known that a life sentence was a possibility, he would have accepted the Commonwealth's offer of forty years in prison. We are not convinced.

The right to effective assistance of counsel extends to plea proceedings. *Lafler v. Cooper*, 132 S.Ct. 1376, 1384, 182 L.Ed. 2d 398 (2012). "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the

[performance/prejudice] test set forth in *Strickland*." *Missouri v. Frye*, 132 S.Ct. 1399, 1405, 182 L.Ed.2d 379 (2012). To show prejudice from ineffective assistance of counsel where a plea offer has been rejected because of counsel's deficient performance, "defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Frye,* 132 S.Ct. at 1409. A defendant must further show that the plea would have been entered, and that the end result would have been more favorable by reason of a plea to a lesser charge or less prison time. *Id.*

In this case, we cannot glean from the record whether or not Salfi's counsel erroneously advised him regarding the maximum sentence he could receive at trial. However, assuming that counsel did not advise Salfi correctly, we do not believe a reasonable probability exists that Salfi would have accepted the plea offer had he been correctly advised.

According to the record, Salfi was twenty-eight years old when plea negotiations took place. Thus, if sentenced to seventy years and required to serve the entire sentence, Salfi would be ninety-eight years old when he was released—well past his natural life expectancy. Given that a seventy-year sentence for Salfi would have been the functional equivalent to a life sentence we find his assertion that he would have accepted the plea had he known that a life sentence was possible inherently incredible. Accordingly, we find that, even if Salfi was given erroneous advice as to the maximum sentence, it did not affect his decision to

reject the plea offer. As such, Salfi has failed to show prejudice due to counsel's alleged deficient performance.

Finally, Salfi claims ineffective assistance as a result of the cumulative effect of the above errors. The cumulative error doctrine holds that isolated errors, which are not reversible in themselves, may combine with other errors, the effect of which makes the trial fundamentally unfair. *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). However, where there is no prejudicial error in any of the isolated issues, there can be no cumulative error. *Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006). In this case, we found all of Salfi's claims to be without merit. Therefore, there can be no cumulative error that would require reversal.

Based on the foregoing, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kieran J. Comer
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky

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