

APPENDICES

**Appendix A:** opinion by the United States Sixth Circuit

**Appendix B:** opinion by the United States District Court

**Appendix C:** Opinion by the Kentucky Supreme Court

**Appendix D:** Opinion by the Kentucky Court Of Appeals

NOT RECOMMENDED FOR PUBLICATION  
File Name: 24a0075n.06

No. 22-5879

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

Feb 22, 2024

KELLY L. STEPHENS, Clerk

JOSEPH ROACH,	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
V.	)	COURT FOR THE WESTERN
AMY ROBEY, Warden,	)	DISTRICT OF KENTUCKY
Respondent-Appellee.	)	OPINION
	)	

Before: SILER, MATHIS, and BLOOMEKATZ, Circuit Judges.

BLOOMEKATZ, Circuit Judge. Joseph Roach was convicted of murder in Louisville, Kentucky and sentenced to life imprisonment. The jury instructions allowed him to be convicted on a theory that he was guilty of murder either as the principal or as an accomplice. Roach argues this combination instruction denied him a unanimous verdict under the Kentucky Constitution, and his counsel on direct appeal was therefore ineffective for not challenging his conviction on that ground. The district court denied Roach habeas relief as to this and other claims. We granted him a certificate of appealability on the ineffective assistance of appellate counsel claim. Because Roach has not shown the combination jury instruction was erroneous, his ineffectiveness claim fails, and we affirm the district court's denial of Roach's petition for habeas relief.

**BACKGROUND**

On Friday, January 18, 2002, officers from the Louisville, Kentucky police department responded to a call about a murder in an apartment unit. Inside the apartment, Renee Robinson's dead body lay on her bed; she was bloody and beaten with her pants pulled around her ankles.

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She had been “choked” and “severely beaten about the head with what was believed to be a golf club.” Ky. S. Ct. Order, R. 10-3, PageID 383. The floor, walls, and furniture in her apartment were covered with blood, and her belongings had been ransacked. There was a bloody golf club next to the door and a crack pipe sitting on top of the microwave in the kitchen. The living room TV showed static; the VCR that was attached to it had been ripped out and carried away, along with a handful of VHS tapes.

After a short investigation, police arrested Joseph Roach and his cousin John Drake and charged them with Robinson’s murder, rape, and robbery. Drake had Robinson’s VCR in his house, and Roach had some of her tapes. In exchange for his testimony against Roach, Drake pled guilty to facilitation to murder and facilitation to robbery and agreed to a sentence of fifteen years’ imprisonment.

Roach proceeded to trial. The jury heard testimony from the detective who interviewed Roach after his arrest.<sup>1</sup> Roach told him that on the evening of January 17, 2002, he and Drake were drinking together near Robinson’s apartment. They knew Robinson was looking for “dope” and had money on her to purchase it. Trial Recording, R. 67, Nov. 24, 2004 at 10:02–10:29. Roach told the detective that both he and Drake wanted to “holler at” Robinson. *Id.* Eventually, the three of them went to drink together in Robinson’s apartment. Robinson wanted to exchange sexual favors with Roach for crack. So, said Roach, he and Robinson went into her bedroom and “hugged on each other.” *Id.* After some time had passed, Roach noticed Drake had left Robinson’s apartment. Ten minutes later, after he and Robinson “messed around,” Roach left the apartment.

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<sup>1</sup> Roach chose not to testify in his own defense, and the trial court permitted the interviewing officer to testify about portions of Roach’s Mirandized statement.

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*Id.* Roach did not admit that he was in Robinson's apartment when she was injured or deceased, or that he tried to clean up the apartment.

Drake's testimony at trial contradicted the story Roach told the detective. Drake said that Roach saw Robinson and had the idea to give her drugs in return for sex. The three of them went to the apartment and drank together. Then, Roach and Robinson started to smoke crack together. Robinson agreed to have sex with at least Roach in exchange for more crack. Eventually, Robinson asked Drake to leave the apartment for about forty-five minutes because she "wanted to do the sex thing one at a time." Trial Recording, Nov. 29, 2004 at 10:56–11:16. Drake said he then fell asleep drunk in his car. Some time later, Roach woke him up, threw something in the back of Drake's car, and told him to come back to the apartment. When he walked in, Drake saw the apartment covered in blood, and Robinson on the ground with two wounds on her face. Drake said Robinson was still alive, breathing shallowly, when he saw her. Roach asked Drake to help him clean up the apartment, but Drake left because he was scared. He started his car to leave, but had to wait to drive away because of a problem with the car's transmission. As Drake waited for his car to get into gear, Roach came back to the car. Drake further testified that Roach told him he "fucked up" and not to tell anyone about what he had seen. *Id.* Drake said he did not call the police because he forgot the number. Drake said Roach told him to drive to different locations so he could dispose of evidence, but that Roach had left Robinson's VCR in his car, so Drake brought it into the house where he was staying.

As for physical evidence, there was no DNA from Roach or Drake at the crime scene. An expert testified that samples of blood taken from a rug, a wall, a pair of long underwear, and the base of the toilet in the apartment were "consistent" with genetic markers present in Robinson's

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and Drake's blood, but not Roach's. Trial Recording, Nov. 23, 2004, 14:12-14:15, 14:21 (rug), 14:24-14:27 (base of toilet), 14:30 (long underwear), 14:30-32 (wall).

At the conclusion of the trial, the court gave the jury these instructions on the murder charge:

You will find the defendant, JOSEPH W. ROACH, guilty of Murder, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

A. That in this county on or about January 18, 2002, acting alone or in complicity with another, he killed Renee Robinson by beating her with a blunt object and/or strangling her;

AND

B. That in so doing;

(1) He caused the death of Renee Robinson intentionally.

OR

(2) He was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Renee Robinson under circumstances manifesting extreme indifference to human life.

Jury Instructions, R. 29-2, PageID 854 (emphasis added). The court provided the following definition of "complicity":

A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

Jury Instruction Definitions, R. 29-3, PageID 855.

Roach's trial counsel objected to the complicity instruction. The trial court permitted the instruction, concluding that if a reasonable jury believed Drake's testimony that he saw Roach cleaning up the crime scene after Robinson had been killed, it could believe that either Roach "or

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“someone else” committed the murder. Trial Recording, R. 67, Dec. 1, 2004 at 09:57–10:05. The jury found Roach guilty of murder, and he was sentenced to life imprisonment.

The Kentucky courts affirmed Roach’s conviction on direct appeal and on postconviction review. Roach then petitioned for habeas relief in the United States District Court for the Western District of Kentucky under 28 U.S.C. § 2254, raising a number of constitutional claims. The district court denied Roach’s petition in full and declined to issue a certificate of appealability. We granted his application for a certificate of appealability on one issue: whether Roach’s counsel on direct appeal was ineffective because he failed to argue that the combination principal-complicity jury instruction led to the denial of Roach’s right to a unanimous jury verdict under the Kentucky Constitution.

#### DISCUSSION

We review the district court’s denial of Roach’s habeas petition de novo, accepting the district court’s factual findings unless they are clearly erroneous.<sup>2</sup> *Daniel v. Burton*, 919 F.3d 976, 978 (6th Cir. 2019). To show his appellate counsel was ineffective for failing to raise an issue on direct appeal, Roach must show that it was “objectively unreasonable” for counsel not to raise the issue, and that if counsel had raised the issue, there is a “reasonable probability” Roach would

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<sup>2</sup> Kentucky agrees that the deferential standard of 28 U.S.C. § 2254(d) does not apply in this case because the Kentucky Court of Appeals denied Roach’s appellate ineffectiveness claim as untimely rather than on the merits. *See Maslonka v. Hoffner*, 900 F.3d 269, 277–78 (6th Cir. 2018). Such a denial would normally be a procedural default, and Roach would need to persuade us to excuse it. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). But, as the district court properly concluded, he need not here. Kentucky courts did not recognize appellate ineffectiveness claims during the three years in which Roach could have timely brought one. *Pollini v. Robey*, 981 F.3d 486, 491 (6th Cir. 2020) (citing *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010)). Kentucky’s choice not to recognize these claims means it “voluntarily forwent the opportunity” to hear them on the merits; we may therefore consider the merits now. *Id.* at 499. The warden also forfeited the procedural default argument on appeal by not raising it in her briefing. *See Maslonka*, 900 F.3d at 276.

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have prevailed on appeal. *Manimone v. Jenkins*, 49 F.4th 1026, 1060 (6th Cir. 2022); *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000). These two requirements correspond to the familiar “deficient performance” and “prejudice” prongs of the ineffective assistance of trial counsel test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Robbins*, 528 U.S. at 285–86 (citing *Strickland*, 466 U.S. at 687–91, 694).<sup>3</sup> Roach argues that his counsel on direct appeal should have argued that he was denied his right to a unanimous jury verdict in violation of the Kentucky Constitution because the judge gave the jury the combination principal-accomplice murder instruction. *See Ky. Const. § 7; see also Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978).

Under Kentucky law, a jury instruction may include two mutually exclusive theories of a case so long as “either theory . . . is reasonably supported by the evidence.” *Beaumont v. Commonwealth*, 295 S.W.3d 60, 72 (Ky. 2009) (quotation omitted). The jurors don’t have to agree on one theory—the verdict is still unanimous if sufficient evidence supports a guilty verdict under either the principal interpretation or the accomplice interpretation. *See Wells*, 561 S.W.2d at 87.

Roach does not dispute that sufficient evidence supported the principal interpretation. Indeed, it was the prosecutor’s theory of the case. Accordingly, we must assess if sufficient evidence supported the complicity instruction. For Roach to be guilty under the accomplice theory, the Commonwealth had to prove (1) Roach intended to promote or facilitate the murder; (2) another person committed the murder; and (3) Roach “participated in that offense.” *Harper v. Commonwealth*, 43 S.W.3d 261, 265 (Ky. 2001). Roach’s appeal primarily concerns the evidence

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<sup>3</sup> The warden is incorrect that *Brown v. Davenport* requires us to apply an extra measure of deference to the state-court verdict. 596 U.S. 118, 126, 134 (2022). Because § 2254(d) deference does not apply here, the prejudice prong of Roach’s ineffectiveness claim does the work of the equitable deference discussed in *Davenport*. *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009).

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introduced at trial to support the second prong.<sup>4</sup> Specifically, he maintains that his appellate counsel should have argued that there was no evidence in the record from which a jury could find that Drake murdered Robinson and Roach was guilty as his accomplice. We disagree.

The jury heard enough at trial to support Roach's murder conviction on the theory that Drake was the principal and Roach was the accomplice. In our review of the evidence presented, we draw "all fair and reasonable inferences" in the warden's favor, *Beaumont*, 295 S.W.3d at 68, with the understanding that a jury may "believe and disbelieve particular portions" of witness testimony, *Morton v. Commonwealth*, 817 S.W.2d 218, 223 (Ky. 1991). No evidence directly identified the person who murdered Robinson, so the jury had to infer the murderer's identity from circumstantial evidence. And a jury instruction is proper so long as the inferences required to support liability under that instruction are reasonable. *Luna v. Commonwealth*, 460 S.W.3d 851, 889 (Ky. 2015).

Four pieces of evidence provide the basis on which the court properly gave the combination principal-complicity instruction. *First*, Drake testified that he was present in the apartment before Robinson was murdered and as she was near death. As the warden points out, from this testimony a jury could infer Drake had a motive to kill Robinson—if she had lived, she could identify him

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<sup>4</sup> Roach also suggests there is insufficient evidence on the first prong. But by declining to dispute that sufficient evidence supported the principal instruction, Roach also declines to dispute that there was sufficient circumstantial evidence to show he intended for and caused Robinson to be killed. The same intent and participation aspects that support Roach's principal liability also support his accomplice liability. Roach argues that there is still a gap in the theory of accomplice liability: that there was insufficient evidence that he intended for *Drake* to murder Robinson, citing *Parks v. Commonwealth*, 192 S.W.3d 318, 327 (Ky. 2006). *Parks*, however, forbids a complicity instruction when the evidence shows the person alleged to be principal "could not have committed the underlying crime." *Pate v. Commonwealth*, 243 S.W.3d 327, 334–35 (Ky. 2007) (citing *Parks*, 192 S.W.3d at 327). That means the complicity instruction was proper so long as the jury also heard evidence which "could support a finding" that Drake "actually committed the underlying offense." *Id.* at 335.

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as having been involved in a drug-fueled assault. *Second*, Drake also testified that he helped Roach dispose of items taken from Robinson's apartment after she was killed. It is reasonable to infer Drake did so to dispose of evidence showing he murdered Robinson. *Third*, blood samples from some items in the apartment were consistent with samples from Drake and Robinson, but not Roach. *Fourth*, Roach wrote a note to Drake indicating that he told the police that Drake had committed the murder. Given that no direct evidence at trial identified the person who killed Robinson, a jury could conclude from these facts that Drake murdered her, and Roach was guilty as an accomplice.

The supporting circumstantial evidence here is similar to supporting evidence in other Kentucky complicity cases. In one, the defendants were present at the victim's home when she was killed and personal property was stolen from her home. *Caudill v. Commonwealth*, 120 S.W.3d 635, 648 (Ky. 2003). In another, the defendant drove the victim to the scene of the murder and participated in an armed robbery there. *Harper*, 43 S.W.3d at 265–66. Drake also accompanied Robinson to the scene of her murder and received the proceeds from her robbery. Accordingly, Kentucky law supported a complicity instruction.

True, the Commonwealth's theory was that Roach acted alone as the principal. The theory rested on Drake's testimony that he was not in the apartment when Robinson died. But the jury could disbelieve certain aspects of Drake's testimony to conclude that he was the one who killed Robinson, with Roach acting as his accomplice. *See Pate v. Commonwealth*, 243 S.W.3d 327, 335 (Ky. 2007) (explaining that “the jury was not required to believe” testimony indicating the defendant acted alone when other evidence implied the defendant acted together with his wife). Only Drake's testimony removed him from the apartment at the time of Robinson's death, and Roach's trial counsel impeached Drake's credibility. Trial counsel emphasized that Drake was

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inconsistent about whether Roach asked him to clean up the bloody apartment. Counsel also suggested Drake lied when he insisted he forgot the phone number for 911 and claimed he couldn't immediately leave Robinson's apartment because he suddenly had car trouble. And trial counsel emphasized that Drake pled guilty to facilitation to murder and facilitation to robbery so that he only had to spend 15 years in prison even though he said he knew nothing about the murder and did not participate in it at all. Based on the totality of the evidence, the jury could have reasonably concluded that Drake and Roach were both guilty of murder, even if it didn't share the Commonwealth's view on who was the principal and who was the accomplice. *See Holbrook v. Commonwealth*, 525 S.W.3d 73, 77, 87 (Ky. 2017) (concluding that a complicity instruction did not deny a unanimous verdict when evidence suggested a defendant involved in a murder "might not have been solely responsible").

Roach must show *no* reasonable juror could conclude that he acted as an accomplice to Robinson's murder. The evidence at trial does not support that conclusion. Since there is no "reasonable probability" the argument would have succeeded on direct appeal, Roach has failed to show that his appellate counsel's decision not to press the issue prejudiced him. *Mammone*, 49 F.4th at 1060. He is therefore not entitled to habeas relief.

#### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

JOSEPH ROACH,

Petitioner,

v.

Civil Action No. 3:16-cv-300-DJH-HBB

RANDY WHITE, Warden, Kentucky State  
Penitentiary,

Respondent.

\* \* \* \* \*

**MEMORANDUM OPINION AND ORDER**

Joseph Roach petitions for a writ of habeas corpus under 28 U.S.C. § 2254. (Docket No.

- 1) The Court referred the matter to Magistrate Judge H. Brent Brennenstuhl for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (D.N. 18) Judge Brennenstuhl held evidentiary hearings on August 12, and October 1, 2019. He issued Findings of Fact, Conclusions of Law, and Recommendation on January 29, 2020, recommending that the Court deny Roach's petition yet issue a certificate of appealability as to Count 4. (See D.N. 38; D.N. 45; D.N. 51) White timely objected, and following an extension of the deadline, Roach also timely objected. (D.N. 52; D.N. 58; *see* D.N. 54) For the reasons explained below, the Court will sustain White's objection and sustain in part and overrule in part Roach's objection, deny the petition, and decline to issue a certificate of appealability.

**I.**

On January 18, 2002, Renee Robinson was found murdered in her Louisville, Kentucky apartment. (D.N. 10-3, PageID.382–83) She had been “choked” and “severely beaten about the head with what was believed to be a golf club.” (*Id.*, PageID.383) Law enforcement officers arrested Roach and his cousin John Drake on January 24, 2002, charging them with murder, rape, and robbery. (See *id.*, PageID.143–46, 383) The same day, Roach gave a statement to the police

EXHIBIT B

after he was read his *Miranda* rights. (See *id.*, PageID.146–66) Roach told the officers that he was with Drake on the evening of January 18, when they saw Robinson outside a liquor store. (See *id.*, PageID.153–57) According to Roach, Robinson indicated that she wanted to purchase “dope” from him, and Roach, Drake, and Robinson walked to Robinson’s apartment, where they drank alcohol. (See *id.*, PageID.157–60) Roach stated that Robinson asked Drake to leave so that she could have sex with Roach in exchange for drugs, although Roach denied having sex with her. (See *id.*, PageID.160–62) Roach told the officers that Drake left Robinson’s apartment, and Roach left about ten minutes later to search for him. (See *id.*, PageID.160–63) Roach said that he went to a liquor store and then returned to Robinson’s apartment, where he found Drake asleep in his vehicle. (See *id.*, PageID.163–64) According to Roach, Drake said that he had returned to Robinson’s apartment after Roach left and gave her a “dove”<sup>1</sup> in exchange for a stereo and videotapes. (*Id.*, PageID.164) Roach explained that he noticed a stereo and videotapes in Drake’s car and later helped Drake “clean[] his car out.” (*Id.*, PageID.164–66) Law enforcement officers ultimately found several of Robinson’s videotapes in Roach’s possession and Robinson’s VCR in Drake’s possession. (See *id.*, PageID.383)

Drake pleaded guilty to facilitation to murder and facilitation to robbery and agreed to testify against Roach at his trial. (See *id.*, PageID.203–07) In exchange for his testimony, Drake received five years each for facilitation to murder and facilitation to robbery, to run consecutively, and a five-year enhancement for his status as a second-degree persistent felony offender, for a total of fifteen years. (*Id.*, PageID.208–10) At Roach’s November 2004 trial, Drake testified that he and Roach were smoking crack cocaine at Robinson’s apartment when Roach asked Drake to leave so that Roach could have sex with Robinson in exchange for more drugs. (See *id.*, PageID.241,

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<sup>1</sup> A “dove” is an illegal substance. (See D.N. 10-3, PageID.164 (referring to a “dove” as “dope”))

382–83) According to Drake, he left the apartment and was sleeping in his car when Roach awakened him. (*See id.*, PageID.383) Drake said that the two men returned to Robinson’s apartment, washed her body, and “cleaned off fingerprints from her apartment.” (*Id.*)

Several pieces of evidence were disclosed to Roach’s counsel during the trial. First, the Commonwealth’s DNA expert testified that, based on the information in her notes, a cigarette butt found in Robinson’s apartment contained male DNA. (*See id.*) This fact—that the DNA was from a male—was not disclosed to Roach’s counsel prior to trial because the Commonwealth turned over only the expert’s report, not her notes.<sup>2</sup> (*See id.*; *see also* D.N. 10-3, PageID.359–67) Upon the expert’s testimony, her notes were provided to Roach’s counsel. (*See id.*, PageID.383) Second, test results showing that Robinson’s brother’s fingerprints were found in the apartment were not provided to either the Commonwealth or Roach’s counsel until “the initial days of the trial.” (*Id.*, PageID.384) Third, the Commonwealth introduced two letters that Roach wrote to Drake while they were awaiting trial. (*See id.*, PageID.385) Drake’s counsel turned over the letters to the Commonwealth during Roach’s trial, and upon receipt, the Commonwealth provided them to Roach’s counsel. (*See id.*) His counsel requested a one-week continuance to have the notes authenticated by a handwriting expert, and the trial judge granted a four-day continuance. (*See id.*)

A jury found Roach guilty of murder, first-degree sex abuse, and theft by unlawful taking. (*Id.*, PageID.218–23) Roach was sentenced to life for murder, five years for first-degree sex abuse, and twelve months for theft by unlawful taking, to run concurrently. (*Id.*, PageID.224–26) Roach

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<sup>2</sup> According to Roach’s habeas petition, the expert’s notes also stated that blood on Robinson’s bed matched the markers in Drake’s blood. (*See* D.N. 1, PageID.12) This fact was not mentioned in either Roach’s direct appeal or the Kentucky Supreme Court opinion denying his direct appeal. (*See* D.N. 10-3, PageID.230–86, 382–88) The expert’s notes are not found in the record provided to the Court.

challenged his convictions on direct appeal, asserting that the trial court erred by (1) failing to exclude evidence or grant a continuance or mistrial after the Commonwealth belatedly turned over Roach's two letters, the DNA expert's notes, the fingerprint report, and a Commonwealth witness's lie-detector test results; (2) admitting the letters, which he argues were not properly authenticated; (3) failing to order a competency evaluation of Roach; (4) admitting Roach's statement to the police, allegedly in violation of *Miranda*; and (5) excluding portions of the same statement. (*Id.*, PageID.243–86) The Kentucky Supreme Court rejected these claims and upheld Roach's convictions in October 2006, (*see id.*, PageID.382–88). *Roach v. Commonwealth*, No. 2005-SC-0211-MR, 2006 WL 2986492 (Ky. Oct. 19, 2006).

#### A. State-Court Collateral Motions

In June 2007, Roach, proceeding pro se, moved the state trial court to vacate his sentence pursuant to Kentucky Rule of Criminal Procedure 11.42. (*Id.*, PageID.390–93) As grounds for his motion, Roach asserted that the trial court erred by denying his discovery request for Drake's mental health records and that his trial counsel was ineffective for failing to interview Drake's brother and to request mitochondrial DNA testing of "evidence collected at the crime scene." (*Id.*, PageID.390–08) Roach was appointed counsel in December 2007.<sup>3</sup> (*Id.*, PageID.409)

Nearly four years later in March 2011, Roach, again proceeding pro se, moved to supplement his Rule 11.42 motion. (*Id.*, PageID.411–35) He sought to add claims that his trial counsel provided ineffective assistance by failing to (1) conduct an adequate pretrial investigation; (2) interview several witnesses in addition to Drake's brother; (3) object to a jury instruction that was not supported by the evidence; (4) request a facilitation instruction; (5) argue that the letters passed to Drake did not implicate Roach in Robinson's murder; (6) request an

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<sup>3</sup> The state court appointed new counsel in January 2009. (*See D.N. 10-3, PageID.410*)

accessory-after-the-fact instruction; (7) request jury instructions “in support of Roach’s theory of defense”; and (8) object to an “erroneous reasonable doubt instruction.” (*Id.*) Roach also asserted that his appellate counsel was ineffective for failing to argue that (1) his trial counsel erred by not requesting a facilitation instruction; (2) he was denied a unanimous jury verdict due to a complicity instruction that was not supported by the evidence; (3) the trial court erred by not allowing requested avowal testimony from the Commonwealth’s DNA expert; and (4) his trial counsel erred by not objecting to an “erroneous reasonable doubt instruction.” (*Id.*) The state trial court summarily denied Roach’s Rule 11.42 motion and supplement on June 30, 2011. (*Id.*, PageID.527)

In March 2011, and while his first post-conviction motion was pending, Roach, with the assistance of counsel, moved for an evidentiary hearing pursuant to Kentucky Rule of Civil Procedure 60.02 in light of “newly discovered evidence.” (*Id.*, PageID.437–48) He asserted that Drake told three inmates—Stephen Blakemore, Joseph Sharer, and Robert Hanley—that he, and not Roach, murdered Robinson. (*See id.*) In support of his motion, he attached affidavits from Blakemore, Sharer, and Hanley testifying as to their conversations with Drake. (*See id.*, PageID.451–63) The state trial court denied his motion in March 2012 as time-barred. (*See id.*, PageID.701)

On March 27, 2015, the Kentucky Court of Appeals affirmed as to both motions. (*Id.*, PageID.700–21) As to his Rule 11.42 motion, the court determined that an evidentiary hearing was unnecessary and that Roach failed to demonstrate that his trial counsel performed deficiently. (*See id.*, PageID.714–17) It found his ineffective-assistance-of-appellate-counsel claims, which were asserted in the supplemental Rule 11.42 motion, untimely. (*See id.*, PageID.700–14) It also concluded that Roach’s Rule 60.02 motion was untimely. (*See id.*, PageID.717–21) On October 21, 2015, the Kentucky Supreme Court declined to review the decision. (*Id.*, PageID.763)

**B. Habeas Corpus Petition**

Roach filed a petition for habeas corpus under 28 U.S.C. § 2254 in this Court on May 19, 2016. (D.N. 1; D.N. 5-1; *see* D.N. 8) Roach asserts ten grounds for relief: (1) the Commonwealth withheld exculpatory evidence; (2) the trial court erred in refusing to continue the trial after the Commonwealth belatedly disclosed exculpatory evidence; (3) trial counsel rendered ineffective assistance by failing to interview Drake's brother; (4) the state court erred in failing to consider newly discovered evidence of Roach's innocence; (5) appellate counsel rendered ineffective assistance; (6) the trial court erred by admitting Roach's letters to Drake; (7) the trial court erred by failing to establish Roach's competency; (8) the trial court erroneously admitted Roach's statement to police; (9) trial counsel rendered ineffective assistance by failing to object to a witness's testimony; and (10) the Commonwealth engaged in prosecutorial misconduct. (D.N. 1)

The Court referred the matter to Magistrate Judge H. Brent Brennenstuhl for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (D.N. 18) Judge Brennenstuhl conducted evidentiary hearings on August 12, and October 1, 2019, as to Count 4. (*See* D.N. 38; D.N. 45) He issued Findings of Fact, Conclusions of Law, and Recommendation on January 29, 2020, recommending that the Court deny Roach's petition yet issue a certificate of appealability as to Count 4. (D.N. 51) White timely objected, and following an extension of the deadline, Roach also timely objected. (D.N. 52; D.N. 58; *see* D.N. 54) On July 1, 2022, this matter was reassigned to the undersigned pursuant to General Order 2022-08. (*See* D.N. 59)

**II.**

When reviewing a report and recommendation, the Court reviews de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The Court may adopt without review any portion of the report to which no

objection is made. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Upon review, the Court “may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). Accordingly, the Court will review de novo the portions of Judge Brennenstuhl’s recommendation to which the parties object. White objects on two grounds, contending that the magistrate judge erroneously applied *Brady v. Maryland*, 373 U.S. 83 (1963), in evaluating Count 1 and that a certificate of appealability should not be issued as to Count 4. (D.N. 52) Roach also objects on two grounds, asserting that Counts 4 and 5 were not procedurally defaulted. (D.N. 58)

A.

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

An application for a writ of habeas corpus . . . shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

- (B)
  - (i) there is an absence of available State corrective process; or
  - (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

§ 2254(b)(1). “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” § 2254(c). “In order to exhaust a claim, the petitioner ‘must “fairly present” his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.’” *Woolbright v. Crews*, 791 F.3d 628, 631 (6th Cir. 2015) (quoting *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)). “When a petitioner has failed to fairly present his claims to the

state courts and no state remedy remains, his claims are considered to be procedurally defaulted.”

*Id.* “If a petitioner’s claims are procedurally defaulted, they may not be reviewed by a habeas court unless he can demonstrate ‘cause’ and ‘prejudice.’” *Id.* (quoting *McMeans v. Brigano*, 228 F.3d 674, 680 (6th Cir. 2000)).

The Antiterrorism and Effective Death Penalty Act (AEDPA), which amended § 2254(d), provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

§ 2254(d). “A state court adjudication is ‘contrary to’ Supreme Court precedent under § 2254(d)(1) ‘if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases’ or ‘if the state court confronts a set of facts that are materially indistinguishable from a decision [of the Supreme Court] and nevertheless arrives at a [different result].’” *Hill v. Curtin*, 792 F.3d 670, 676 (6th Cir. 2015) (en banc) (alterations in original) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)).

“Under the ‘unreasonable application’ clause of § 2254(d)(1), habeas relief is available if ‘the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.’” *Id.* (alteration in original) (quoting *Harris v. Haeberlin*, 526 F.3d 903, 909 (6th Cir. 2008)). A petitioner must therefore “show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). “In short, the standard for obtaining federal habeas relief is ‘difficult to meet . . . because it was meant to be.’” *Hill*, 792 F.3d at 677 (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013)).

**B.**

**1. Count 1**

In Count 1, Roach asserts that the Commonwealth withheld the following evidence in violation of *Brady*: (1) the notes prepared by the Commonwealth’s expert, which indicated that a cigarette butt in Robinson’s apartment contained an unidentified male’s DNA and that blood on Robinson’s bed potentially matched markers in Drake’s blood; (2) a report showing that fingerprints found in the apartment belonged to Robinson’s brother; (3) Roach’s letters to Drake; and (4) polygraph examination results for a witness who testified for the Commonwealth. (D.N. 1, PageID.10–19) Judge Brennenstuhl noted that this claim was presented to the state court and determined that a *Brady* violation occurs when previously withheld evidence is disclosed at trial and the defendant is prejudiced by the delayed disclosure. (D.N. 51, PageID.982 (citing *United States v. Garner*, 507 F.3d 399, 405 (6th Cir. 2007))) He concluded that the Commonwealth did not violate *Brady*, however, because Roach could not show prejudice, as required under *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). (D.N. 51, PageID.982–88) Although White agrees with Judge Brennenstuhl’s recommendation to deny Roach’s habeas petition on Count 1, he objects to the application of *Brady* to situations in which previously withheld evidence is disclosed during trial. (D.N. 52, PageID.1013–14)

Judge Brennenstuhl applied de novo review to Count 1, rather than the more deferential standard set out in § 2254(d), determining that the state court did not address Roach’s *Brady* claim

on the merits because it “decided the issue solely on state law grounds.” (D.N. 51, PageID.983) But “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits,” although “that presumption can in some limited circumstances be rebutted.” *Johnson v. Williams*, 568 U.S. 289, 298–301 (2013) (citing *Harrington*, 562 U.S. at 99–100); *see Stermer v. Warren*, 959 F.3d 704, 722 (6th Cir. 2020) (“[U]nless there is good reason for a federal court to think a state court’s decision was *not* on the merits, the federal court must assume that it was on the merits and apply § 2254(d).”). This rule applies where, as here, the state court “confined its analysis to state-law authorities.” *Jackson v. Smith*, 745 F.3d 206, 210 (6th Cir. 2014) (quoting *Brown v. Bobby*, 656 F.3d 325, 329 (6th Cir. 2011)); *cf. Gumm v. Mitchell*, 775 F.3d 345, 362 (6th Cir. 2014) (applying de novo review where the state court decided the petitioner’s *Brady* claim on state procedural grounds by concluding that it did not have jurisdiction to entertain the claim). Roach has not attempted to rebut this presumption, and he therefore must satisfy the more stringent AEDPA standard of review by showing that “the state court’s decision ‘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.’” *Jackson*, 745 F.3d at 210 (quoting § 2254(d)(1)).

Roach cites Sixth Circuit precedent to support his argument that *Brady* applies to delayed disclosures of exculpatory evidence. (See D.N. 14, PageID.776–80 (citing *United States v. Garner*, 507 F.3d 399 (6th Cir. 2007); *Sawyer v. Hofbauer*, 299 F.3d 605 (6th Cir. 2002))) But “circuit [court] precedent does not constitute ‘clearly established Federal law’” under § 2254(d)(1), *Parker v. Matthews*, 567 U.S. 37, 48 (2012), and Roach has not pointed to, nor is this Court aware of, any case in which the Supreme Court found a *Brady* violation where evidence was disclosed

during trial. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (noting that *Brady* applies to “the discovery, after trial, of information which had been known to the prosecution but unknown to the defense”). Roach has therefore failed to show that the state-court decision was contrary to, or an unreasonable application of “clearly established federal law,” and the Court will sustain White’s objection and deny Roach’s petition as to Count 1. *Hill*, 792 F.3d at 676 (citing *Parker*, 567 U.S. at 48).

## 2. Count 4

Roach asserts in Count 4 that the state court contravened or unreasonably applied clearly established federal law in failing to consider three affidavits from inmates Stephen Blakemore, Joseph Sharer, and Robert Hanley, who testified that that Drake told them on separate occasions that he alone murdered Robinson.<sup>4</sup> (D.N. 1, PageID.22–25; *see* D.N. 10-3, PageID.451–63) In March 2011, more than four years after his conviction became final,<sup>5</sup> Roach moved the state court for an evidentiary hearing pursuant to Kentucky Rule of Civil Procedure 60.02(e) and (f) in light of “newly discovered evidence”—that is, the three affidavits.<sup>6</sup> (D.N. 10-3, PageID.382, 437–48)

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<sup>4</sup> The state-court record shows that Hugh Drake, John Drake’s brother, testified in an affidavit that he was with John the night of the murder until John left to “get some more money” so the two men could buy more drugs. (D.N. 10-3, PageID.637) According to Hugh, Roach arrived five minutes after John left, and Hugh and Roach waited for John “for about an hour” until Roach left to search for John. (*Id.*) The affidavit also contains several incriminating statements that John made to Hugh while John was incarcerated. (*Id.*) This affidavit was purportedly included with Roach’s initial and supplemental Rule 11.42 motions. (*See id.*, PageID.402, 632 n.5) Roach briefly mentions Hugh’s affidavit in his discussion of Count 4, seemingly to bolster the credibility of the inmate affidavits. (*See* D.N. 1, PageID.24) Roach does not, however, assert that Hugh’s affidavit constitutes newly discovered evidence. (*See id.*, PageID.20–22)

<sup>5</sup> Under Kentucky law, “a judgment becomes final with ‘the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken.’” *Bush v. Commonwealth*, 236 S.W.3d 621, 622 (Ky. Ct. App. 2007) (quoting *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky. App. 1999)). Roach’s conviction became final when the Kentucky Supreme Court denied his direct appeal in October 2006. (*See* D.N. 10-3, PageID.382)

<sup>6</sup> Rule 60.02 grants relief from a final judgment “on the following grounds:”

The state trial court denied Roach's motion in March 2012, and the Kentucky Court of Appeals affirmed. (*See id.*, PageID.701) Applying Rule 60.02(b), which covers "newly discovered evidence" and has a one-year statute of limitations, the Kentucky Court of Appeals found Roach's motion untimely and therefore refused to address the merits of his claim or to conduct an evidentiary hearing (*see id.*, PageID.717–21). *See* Ky. R. Civ. P. 60.02. The Kentucky Supreme Court declined to review the decision. (*Id.*, PageID.763)

Roach asserts in Count 4 that the state court's refusal to consider the affidavits of Sharer, Blakemore, and Hanley contradicted or was an unreasonable application of Supreme Court authority. (D.N. 1, PageID.24–25) Judge Brennenstuhl conducted two evidentiary hearings, at which Sharer and Blakemore<sup>7</sup> testified that John Drake told them that he implicated Roach because he "felt he had no [other] choice" and that he, not Roach, murdered Robinson. (D.N. 41, PageID.887; *see* D.N. 43) Although Judge Brennenstuhl found the testimonies of Sharer and Blakemore "generally credible," he concluded that Roach's claim was procedurally defaulted. (D.N. 51, PageID.992–99) Nevertheless, he recommended issuing a certificate of appealability on Count 4. (*Id.*, PageID.998–99) Roach objects to Judge Brennenstuhl's recommendation as to procedural default, and White objects as to the certificate of appealability. (*See* D.N. 52, PageID.1014–16; D.N. 58, PageID.1033–38)

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(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Ky. R. Civ. P. 60.02; *see* Ky. R. Crim. P. 13.04.

<sup>7</sup> Hanley did not testify at either hearing.

**a. Roach's Objection**

A habeas petitioner “must first exhaust his state remedies and ‘meet the State’s procedural requirements for presenting his federal claims.’” *Smith v. Warden*, 780 F. App’x 208, 218 (6th Cir. 2019) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729–32 (1991)). A petitioner’s claim is procedurally defaulted where “there is a state procedural rule that is applicable to the petitioner’s claim”; “the petitioner failed to comply with the rule”; “the state courts actually enforced the state procedural sanction”; and “the state procedural forfeiture is an ‘adequate and independent’ state ground on which the state can rely to foreclose review of a federal constitutional claim.” *McNeill v. Bagley*, 10 F.4th 588, 595 (6th Cir. 2021) (quoting *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)) (internal quotation marks omitted).

White contends that the one-year statute of limitations set out in Rule 60.02(b) constitutes an independent and adequate state-law ground that precludes relief on Roach’s newly-discovered-evidence claim. (See D.N. 10, PageID.102; see also D.N. 10-3, PageID.717–21) Roach asserts that Kentucky courts do not regularly apply Rule 60.02(b) to claims of newly discovered evidence when such claims would be untimely, and that his claim thus is not procedurally defaulted. (See D.N. 50, PageID.963) He alternatively argues that the miscarriage-of-justice exception outlined in *Schlup v. Delo*, 513 U.S. 298 (1995), excuses his procedural default. (See D.N. 50, PageID.966–67) Nevertheless, because “resolution of the procedural issues is not necessary” to the disposition of Count 4, the Court will proceed to the merits. *Smith v. Nagy*, 962 F.3d 192, 207 (6th Cir. 2020).

As discussed above, Roach asserts in Count 4 that the state court contravened or unreasonably applied clearly established Supreme Court precedent by failing to adequately consider the affidavits of Sharer, Blakemore, and Hanley. (D.N. 1, PageID.24–25) Notably, he

does not argue in Count 4 that his conviction rested on insufficient evidence, nor could he, as “a reviewing court evaluating a sufficiency-of-the-evidence claim cannot consider newly discovered evidence.” *Smith*, 962 F.3d at 206 (construing the petitioner’s claim as one of “actual innocence” where he argued that the state court erred in failing to consider an affidavit that cast doubt on two witnesses’ testimonies at his trial). The Court therefore understands Roach to be arguing that he “is entitled to habeas relief because newly discovered evidence shows that [his] conviction is factually incorrect.” *Id.* (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

While a habeas petitioner may assert his actual innocence as a “gateway” to have an otherwise procedurally barred claim considered on the merits, *see House v. Bell*, 547 U.S. 518, 53637 (2006) (citing *Schlup*, 513 U.S. at 327), the Sixth Circuit has “repeatedly indicated” that freestanding actual-innocence claims “are not cognizable on habeas.” *Smith*, 192 F.3d at 207 (quoting *Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007)) (internal quotation marks omitted). Moreover, even if such claims were cognizable, “the petitioner’s burden ‘would necessarily be extraordinarily high,’” and Roach has not met that burden here. *Id.* (quoting *Herrera*, 506 U.S. at 417). In *Smith*, the Sixth Circuit rejected an actual-innocence claim, determining that an affidavit that “seriously undermine[d]” two witnesses’ testimonies nonetheless fell short of “affirmatively proving” the petitioner’s innocence. *Id.* Likewise, while the affidavits of Sharer, Blakemore, and Hanley and the testimonies of Sharer and Blakemore give the Court “reason to doubt” John Drake’s testimony at Roach’s trial, they do not “preclude any possibility” of Roach’s guilt. *Id.* (quoting *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997) (en banc)) (internal quotation marks omitted). Thus, the Court cannot grant Roach habeas relief on Count 4. *See id.* at 207–08.

**b. White's objection**

White objects to the magistrate judge's recommendation that the Court issue a certificate of appealability as to the denial of Count 4. (See D.N. 52) A certificate of appealability "may be issued 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Kissner v. Palmer*, 826 F.3d 898, 901 (6th Cir. 2016) (quoting 28 U.S.C. § 2253(c)(2)). A petitioner must therefore show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338 (quoting *Slack*, 529 U.S. at 484) (internal quotation marks omitted). Roach has failed to make this showing for the reasons explained above, *see Smith*, 192 F.3d at 206–07, and the Court will therefore deny a certificate of appealability on Count 4. *See Miller-El*, 537 U.S. at 338.

**3. Count 5**

Roach asserts in Count 5 that his appellate counsel rendered ineffective assistance by failing to argue that (1) Roach's murder and sexual-abuse charges were supported by insufficient evidence; (2) the complicity jury instruction was supported by insufficient evidence; and (3) the trial court erred by refusing to allow avowal testimony by the Commonwealth's DNA expert. (D.N. 1, PageID.25–30) Judge Brennenstuhl recommended denying Roach's petition on these grounds, determining that the claims of ineffective assistance of appellate counsel (IAAC) were procedurally barred. (D.N. 51, PageID.999–1001) Roach objects to this conclusion. (D.N. 58, PageID.1038–39)

Roach's convictions became final in October 2006 when the Kentucky Supreme Court denied his direct appeal (*see* D.N. 10-3, PageID.382). *See Bush*, 236 S.W.3d at 622 (quoting *Palmer*, 3 S.W.3d at 765). In June 2007, Roach, proceeding pro se, asked the trial court to vacate his sentence pursuant to Kentucky Rule of Criminal Procedure 11.42. (D.N. 10-3, PageID.390–93) On November 18, 2010, and while Roach's Rule 11.42 motion was pending in state trial court, the Kentucky Supreme Court decided *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010). *Hollon* overruled *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992), and for the first time permitted petitioners to bring all IAAC claims in Rule 11.42 motions. *See Hollon*, 334 S.W.3d at 434. The court, however, gave its holding in *Hollon* "prospective effect only." *Id.* at 439.

In March 2011, Roach, again proceeding pro se, moved to supplement his Rule 11.42 motion by adding IAAC claims. (*See* D.N. 10-3, PageID.411–35) The Kentucky Court of Appeals found his supplemental Rule 11.42 motion untimely, noting that a petitioner has three years after a conviction becomes final to move under Rule 11.42 to vacate the conviction. (D.N. 10-3, PageID.705–14) The court rejected Roach's argument that the supplemental motion, which was filed more than four years after his conviction became final, related back to his original Rule 11.42 motion. (*Id.*) Further, the court refused to apply *Hollon* to the supplemental motion, determining that *Hollon* applies only to IAAC claims "raised in the trial court before *Hollon* was rendered" or to claims "raised post-*Hollon*" in a timely Rule 11.42 motion. (D.N. 10-3, PageID.712)

White argues that this reasoning constitutes a procedural bar to this Court's consideration of Roach's IAAC claims. (*See* D.N. 10, PageID.108–09; D.N. 47, PageID.949–50) Roach seeks to overcome his procedural default by arguing that the statute of limitations imposed by the Kentucky Court of Appeals is not regularly followed. (D.N. 50, PageID.963–66) He also contends

that the *Schlup* actual-innocence exception excuses his procedural default. (D.N. 50, PageID.966–70)

**a. Procedural Default**

As previously explained, a petitioner’s claim is procedurally barred where “there is a state procedural rule that is applicable to the petitioner’s claim”; “the petitioner failed to comply with the rule”; “the state courts actually enforced the state procedural sanction”; and “the state procedural forfeiture is an ‘adequate and independent’ state ground on which the state can rely to foreclose review of a federal constitutional claim.” *McNeill*, 10 F.4th at 595. “So long as the state procedural rule is one that is an independent and adequate ground for refusing to fully consider the petitioner’s argument, the federal courts likewise will not hear the petitioner’s claim.” *Pollini v. Robey*, 981 F.3d 486, 498 (6th Cir. 2020) (citing *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)).

Here, however, Roach “did not fail to comply with state procedural rules.” *Id.* At the time Roach sought state collateral review, the Kentucky Supreme Court “refused to recognize” Rule 11.42 as a vehicle for IAAC claims and provided no other avenue for such claims. *Id.* at 499. It therefore “voluntarily forwent the opportunity to have a first pass at remedying violations of a state prisoner’s federal rights.” *Id.* (citing *Coleman*, 501 U.S. at 730). Simply put, “a Kentucky prisoner does not default his ineffective assistance of appellate counsel claims when binding state precedent barred him from” bringing such claims in any collateral proceeding. *Id.* (citing *Halvorsen v. White*, 746 F. App’x 489 (6th Cir. 2018); *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011), *rev’d on other grounds*, 567 U.S. 37 (2012)). Accordingly, Roach’s IAAC claims are not procedurally defaulted, and his objection to the magistrate judge’s conclusion will be sustained. *See id.* As explained below, however, Count 5 ultimately fails on the merits.

**b. Merits**

The Court will review Roach's IAAC claims *de novo* because the state court did not adjudicate them on the merits. *See Stermer*, 969 F.3d at 721 (citing *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003)): “To establish ineffective assistance of appellate counsel, a petitioner must show that his appellate counsel’s failure to raise a claim was objectively unreasonable and that he was prejudiced as a result.” *Hand v. Houk*, 871 F.3d 390, 416 (6th Cir. 2017) (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). “A petitioner can demonstrate that his appellate counsel’s performance was objectively unreasonable where the unraised claim[s] w[ere] ‘clearly stronger’ than those presented.” *Id.* (quoting *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002)). The petitioner must also establish prejudice, meaning that there is “a reasonable probability that, but for his counsel’s unreasonable failure to” raise the claims on appeal, “he would have prevailed.” *Thompson v. Warden*, 598 F.3d 281, 285 (6th Cir. 2010) (quoting *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009)) (internal quotation marks omitted).

Roach asserts that his appellate counsel was ineffective for failing to argue that (1) his murder and sexual-abuse charges were supported by insufficient evidence; (2) the complicity jury instruction was supported by insufficient evidence, which resulted in a non-unanimous verdict; and (3) the trial court erred by refusing to allow avowal testimony by the Commonwealth’s DNA expert. (*See* D.N. 1, PageID.25–30) Roach contends that these claims were clearly stronger than the five claims his counsel pursued on direct appeal: that the trial court erred by (1) failing to exclude evidence or grant a continuance or mistrial after the Commonwealth belatedly turned over several pieces of evidence; (2) admitting Roach’s letters to Drake; (3) failing to order a competency evaluation of Roach; (4) admitting Roach’s statement to the police, in violation of *Miranda*; and (5) excluding portions of the same statement. (*See* D.N. 10-3, PageID.243–86; D.N. 14,

PageID.788-89) Roach does not explain, however, how the claims presented here are “clearly stronger” than the five claims his appellate counsel did raise. *Kissner*, 826 F.3d at 904. Moreover, as discussed below, Roach’s IAAC claims cannot succeed because he has not shown that prejudice resulted from his counsel’s failure to raise the three underlying claims on direct appeal. *See Thompson*, 598 F.3d at 285.

### **1. Insufficient Evidence**

Roach argues that his appellate counsel rendered ineffective assistance by failing to assert that the Commonwealth presented insufficient evidence to support his convictions for murder and sexual abuse. (D.N. 14, PageID.788; *see* D.N. 1, PageID.25) At trial, John Drake testified that he and Roach were smoking crack cocaine at the victim’s apartment when Roach asked Drake to leave. (*See* D.N. 10-3, PageID.382-83) According to Drake, he left and was sleeping in his car when Roach awakened him. (*See id.*, PageID.383) Drake stated that the two men then returned to Robinson’s apartment, washed her body, and “cleaned off fingerprints from her apartment.” (*Id.*; *see id.*, PageID.186-94) Additionally, inmate Larry Lapiano testified that Roach made inculpatory statements to him about the crimes while they were incarcerated, including that Roach admitted to murdering Robinson. (*See* D.N. 1, PageID.25)

Even assuming that the insufficiency-of-the-evidence claim was preserved for review on direct appeal, *see Jackson v. Commonwealth*, 487 S.W.3d 921, 926 (Ky. 2016), and drawing “all fair and reasonable inferences from the evidence in favor of the Commonwealth,” the evidence presented at Roach’s trial was “sufficient to induce a reasonable juror to believe beyond a reasonable doubt” that he was guilty of murder and sexual abuse. *Ray v. Commonwealth*, 611 S.W.3d 250, 265 (Ky. 2020) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)) (internal quotation marks omitted). Despite Roach’s characterization of Drake and Lapiano

as “inherently unreliable witnesses” (D.N. 1, PageID.25), witness credibility is an issue for the jury. *See Goncalves v. Commonwealth*, 404 S.W.3d 180, 205–06 (Ky. 2013) (rejecting appellant’s argument that the inherent unreliability of the witnesses’ testimonies justified a directed verdict in his favor); *see also Gray v. Commonwealth*, 203 S.W.3d 679, 692 (Ky. 2006) (determining that inconsistencies in the testimonies of the Commonwealth’s witnesses did not entitle the defendant to a directed verdict when testimonies were properly introduced).

Because Roach cannot show that he would have prevailed on his insufficiency-of-the-evidence claim, he cannot show prejudice. *See Goncalves*, 404 S.W.3d at 205–06; *Crumes v. Commonwealth*, No. 2012-SC-000774-MR, 2013 WL 6730044, at \*2–3 (Ky. Dec. 19, 2013) (rejecting appellant’s claim that the evidence was insufficient to support his convictions where the Commonwealth presented only testimony from a co-defendant); *Hodge v. Commonwealth*, 17 S.W.3d 824, 841 (Ky. 2000) (“A conviction can be sufficiently supported even by the uncorroborated testimony of an accomplice.”); *Calloway v. Commonwealth*, No. 2014-CA-002019-MR, 2017 WL 65610, at \*4 (Ky. Ct. App. Jan. 6, 2017) (“The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence.” (quoting *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002)) (internal quotation marks omitted)). His first IAAC claim therefore fails. *See Hand*, 871 F.3d at 416.

## **2. Jury Instruction**

Roach also asserts that his appellate counsel performed ineffectively by failing to argue that the complicity jury instruction given at Roach’s trial was unsupported by the evidence. (See D.N. 1, PageID.26–28) Roach contends that Drake admitted only to helping Roach clean up the scene after the crimes but did not admit direct involvement in Robinson’s murder. (See *id.*,

PageID.28) Because Drake never testified that he was complicit in the murder and the Commonwealth presented no other evidence supporting complicity, Roach argues, a complicity instruction was insufficiently supported. (*See id.*) Therefore, Roach maintains that he was denied a unanimous verdict due to the “combination principal-complicity murder instruction” given at his trial.<sup>8</sup> (D.N. 50, PageID.972)

As an initial matter, the Court notes that the Kentucky Constitution’s unanimous-verdict requirement does not mean that a jury must “concur in a *single* view of the transaction disclosed by the evidence.” *See Beaumont v. Commonwealth*, 295 S.W.3d 60, 72 (Ky. 2009). Rather, the Commonwealth’s different theories of an offense—here, murder—must be sufficiently supported by the trial evidence. *See id.* Thus, the issue is whether the Commonwealth presented sufficient evidence for the jury to find that Roach murdered Robinson as an accomplice and a principal. *See id.*

As previously explained, given the testimonies of Drake and Lapiano (*see* D.N. 1, PageID.25; D.N. 10-3, PageID.243, 383), the Commonwealth presented sufficient evidence that Roach acted as the principal in Robinson’s murder. *See Beaumont*, 295 S.W.3d at 72–73 (affirming murder conviction under the theory that appellant acted as the principal where his co-defendant testified that appellant shot the victim); *Hodge*, 17 S.W.3d at 841. As to accomplice

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<sup>8</sup> The murder instruction at Roach’s trial stated:

You will find the defendant, JOSEPH W. ROACH, guilty of Murder, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

A. That in this county on or about January 18, 2002, acting alone or in complicity with another, he killed Renee Robinson by beating her with a blunt object and/or strangling her; AND  
B. That in so doing; (1) He caused the death of Renee Robinson intentionally. OR (2) He was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Renee Robinson under circumstances manifesting extreme indifference to human life.

(D.N. 29-2, PageID.854)

liability, the Commonwealth must show that the defendant either (1) “specifically intended to promote or facilitate the commission of th[e] offense” or (2) “without the intent that the principal’s act cause the criminal result,” nonetheless had “a state of mind which equates with ‘the kind of culpability with respect to the result that is sufficient for the commission of the offense.’”

*Beaumont*, 295 S.W.3d at 68–70 (quoting *Tharp v. Commonwealth*, 40 S.W.3d 356, 360 (Ky. 2000)); see Ky. Rev. Stat. § 502.020.

~~ROACH WAS NOT INDICTED NOR WAS THE JURY INSTRUCTED UNDER SUBSECTION (2) OF KRS 502-020. IT DOES NOT APPLY~~

The Commonwealth presented sufficient evidence at Roach’s trial to support a complicity jury instruction. First, the Commonwealth demonstrated that Roach admitted to police that both he and Drake were in Robinson’s apartment before the murder. (See D.N. 10-3, PageID.146–66) Second, the Commonwealth showed that Roach and Drake possessed some of Robinson’s personal items after the murder. (See *id.*, PageID.164, 383) Third, the Commonwealth submitted two notes that Roach wrote to Drake while they were each incarcerated awaiting trial. (See D.N. 1, PageID.14–15) In these notes, Roach admitted to stealing an item from Robinson’s apartment after her death. (*Id.*, PageID.15) The notes also contained a timeline of the night of the murder.<sup>9</sup> (See D.N. 10-3, PageID.241)

“Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth,” this evidence sufficiently supported a complicity jury instruction, and Roach was therefore not denied a unanimous verdict. *Beaumont*, 295 S.W.3d at 69–71; *Pate v. Commonwealth*, 243 S.W.3d 327, 335 (Ky. 2007) (finding complicity instruction proper where some evidence pointed to complicity and noting that the jury was not required to believe co-defendant’s testimony that the appellant acted on his own); *cf. Bowling v. Commonwealth*, No.

<sup>9</sup> The notes are not in the record. The Court presumes that the content of the notes is accurately reflected in the habeas petition and Roach’s direct appeal. (See D.N. 1, PageID.14–15; D.N. 10-3, PageID.241)

2006-SC-000167-MR, 2007 WL 1159621, at \*3–6 (Ky. Apr. 19, 2007) (finding complicity instruction erroneous where the Commonwealth presented evidence only that the defendant helped dispose of the victim’s body after the murder and no evidence that the defendant was with the victim before or at the time of his death). Accordingly, Roach cannot demonstrate prejudice, and his second IAAC claim fails. *See Hand*, 871 F.3d at 416.

### 3. Avowal Testimony

Finally, Roach asserts that his appellate counsel was ineffective for failing to argue that the trial court erred in refusing to allow avowal testimony from the Commonwealth’s DNA expert. (D.N. 1, PageID.28–30) At Roach’s trial, one of the Commonwealth’s experts, Dawn Katz, testified that the crime-scene samples she tested were an “inconclusive” match for Roach’s DNA. (*Id.*, PageID.28–29) Roach’s trial counsel sought to present on cross-examination the defense’s own expert’s test results, which found no match for Roach’s DNA, and to ask Katz whether these results “would have changed her opinion.” (*Id.*, PageID.29; *see* D.N. 10-3, PageID.430) The trial court permitted counsel to place the question, but not Katz’s answer, in the record by avowal. (*See* D.N. 1, PageID.29–30; D.N. 10-3, PageID.430–31) Trial counsel declined to do so. (*See* D.N. 10-3, PageID.430) Roach argues that trial counsel’s inability to place Katz’s answer in the record by avowal precluded the Kentucky Supreme Court from reviewing whether the exclusion of the requested cross-examination violated the Confrontation Clause. (D.N. 1, PageID.29–30)

A Confrontation Clause violation occurs where “[a] reasonable jury might have received a significantly different impression of [the witness]’s credibility had [the defendant]’s counsel been permitted to pursue his proposed line of cross-examination.” *Richardson v. Commonwealth*, No. 2019-SC-000438-MR, 2020 WL 2831929, at \*8 (Ky. May 28, 2020) (alterations in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)) (internal quotation marks omitted).

Roach has not attempted to make this showing, nor could he: two expert witnesses testified immediately after Katz that Roach was not a contributor to the DNA found in Robinson's apartment. (See D.N. 10, PageID.113; D.N. 10-3, PageID.430, 618) There is thus "no 'reasonable possibility that exclusion of the evidence complained of might have contributed to the conviction.'" *Commonwealth v. Armstrong*, 556 S.W.3d 595, 604 (Ky. 2018) (quoting *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998)); *see Goncalves*, 404 S.W.3d at 203 ("[T]here is no constitutional guarantee to engage in cross-examination in whatever manner and extent that the defense so desires. . . . [S]o long as a reasonably complete picture of the witness's veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.") (quoting *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005))). Therefore, even assuming the trial court had properly preserved the requested avowal testimony, the exclusion of the cross-examination testimony would have constituted harmless error. *See Armstrong*, 556 S.W.3d at 604. Accordingly, Roach cannot show prejudice, and his third IAAC claim fails. *See Hand*, 871 F.3d at 416.

### III.

Roach has not demonstrated that he is entitled to habeas relief. As to Count 1, he has failed to show that the state court unreasonably applied *Brady* to the delayed disclosure of exculpatory evidence. *See* § 2254(d). Further, even assuming Roach's claim in Count 4 was not procedurally defaulted, he has not established that he is entitled to relief on the merits or that a certificate of appealability is warranted. *See Miller-El*, 537 U.S. at 338; *Smith*, 192 F.3d at 207–08. And as to Count 5, although Roach's claim is not procedurally defaulted, he has not demonstrated that his appellate counsel provided ineffective assistance. *See Hand*, 871 F.3d at 416. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

**ORDERED** as follows:

- (1) The Findings of Fact, Conclusions of Law, and Recommendation of Magistrate Judge H. Brent Brennenstuhl (D.N. 51) are **ADOPTED** and **INCORPORATED** herein as to Counts 2, 3, 6, 7, 8, 9, and 10.
- (2) White's objection to the magistrate judge's recommendation (D.N. 52) is **SUSTAINED**. No certificate of appealability will issue with respect to any claim raised in this proceeding.
- (3) Roach's objection to the magistrate judge's recommendation (D.N. 58) is **SUSTAINED** in part and **OVERRULED** in part. His objection is **SUSTAINED** as to Count 5 and **OVERRULED** as to Count 4. While the Court sustains Roach's objection regarding procedural default as to Count 5, as discussed in Section II.B.3.a., the claim fails on the merits.
- (4) A separate judgment will be entered this date.

August 29, 2022



David J. Hale, Judge  
United States District Court

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CIVIL ACTION NO. 3:16-CV-00300-JRW-HBB

JOSEPH ROACH

MOVANT/DEFENDANT

VS.

RANDY WHITE

RESPONDENT/PLAINTIFF

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDATION**

**BACKGROUND**

The movant/defendant, Joseph Roach, through counsel has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (“petition”) (DN 1). Respondent, Randy White, has filed a response (DN 10). Roach filed a reply memorandum (DN 14). The District Judge referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B) (DN 18). After receiving the parties initial briefing, this Court ordered an evidentiary hearing to receive new evidence from Roach. The hearing occurred in two parts on August 12, 2019 and October 1, 2019 (DN 41, 43). The record is now adequately developed, and the matter is ripe for determination.

For the reasons set forth below, the undersigned recommends that the Court deny Roach’s petition, but issue a Certificate of Appealability as to Roach’s claim of newly discovered evidence and actual innocence.

**FINDINGS OF FACT**

Following a trial in Jefferson County Circuit Court, Roach was convicted of murder, misdemeanor theft by unlawful taking, and misdemeanor sexual abuse. He was sentenced to life

in prison. Roach v. Commonwealth, 2005-DC-0211-MR, 2006 WL 2986492, at \*1 (Ky. Oct. 19, 2006). As a matter of right, Roach appealed his conviction and sentence to the Supreme Court of Kentucky. Roach, 2006 WL 2986492. The Supreme Court provided the following summary of the relevant facts:

Roach and another male went to the apartment of the victim. Both went to the victim's apartment where Roach and the woman smoked crack cocaine. Roach asked his friend to leave because he intended to have sex with the victim in exchange for giving her more crack cocaine. Roach later woke his friend who was sleeping in the car and they both returned to the apartment. The victim had been severely beaten about the head with what was believed to be a golf club and she had been choked. She was found dead by a neighbor the next day. Roach and his friend had tried to wash the victim's body and cleaned off fingerprints from her apartment. They also took several video tapes and a VCR from the apartment. The VCR was located at the friend's apartment while Roach retained possession of several video tapes. This appeal followed the conviction and sentence.

Roach, 2006 WL 2986492 at \*1.

Roach presented five issues on direct appeal: 1) The trial court erred by declining to exclude evidence and grant a continuance or a mistrial after the belated disclosure of critical exculpatory and inculpatory evidence, 2) The trial court erred by failing to exclude letters written by him that were not properly authenticated, 3) The trial court erred by failing to order a competency evaluation, 4) The trial court erred by admitting into evidence statements taken in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), 5) The trial court erred by refusing to allow Roach to introduce a portion of his statement given to police because it did not fall within a hearsay exception. The Supreme Court of Kentucky denied all of Roach's claims.

Roach, 2006 WL 2986492.

Roach then filed a motion for relief from his sentence pursuant to Ky. R. Crim. P. 11.42 on June 19, 2007 (DN 10-3 PageID # 390). Almost four years later, Roach supplemented the

motion *pro se* (*Id.* at 411). In total, Roach raised 10 claims, all of which were denied by the Jefferson Circuit Court (*Id.* at 525). Two days after filing his 11.42 motion Roach filed, through counsel, a RCr. 60.02 motion to modify his sentence based upon newly discovered evidence (*Id.* at 437). The Jefferson Circuit Court denied the motion, ruling it was untimely filed. Roach v. Commonwealth, 2011-CA-001319-MR, 2015 WL 1450831 at \*2.

Roach appealed both collateral motions to the Kentucky Court of Appeals. Roach, 2015 WL 1450831. The Court consolidated the petitions and summarily denied them. *Id.* at 9. Roach filed a motion for discretionary review with the Supreme Court of Kentucky, which was also denied (DN 10-3 PageID # 78). He then filed this petition for federal habeas relief (DN 1).

## **CONCLUSIONS OF LAW**

### **Standard of Review**

Because Roach filed his petition for writ of habeas corpus on May 19, 2016, review of the State court decisions is governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996) (“AEDPA”) (DN 1). Lindh v. Murphy, 521 U.S. 320, 336 (1997). Under AEDPA the Court must first determine whether a federal Constitutional right has been violated. Williams v. Taylor, 529 U.S. 362, 367 (2000). If it has and the State court adjudicated the federal Constitutional claim on its merits, then this Court must employ the standard of review set forth in 28 U.S.C. § 2254(d) to determine whether to grant the petition. Williams, 529 U.S. at 367, 402-403, 412-413. As amended, by Chapter 153 of AEDPA, § 2254(d) provides as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding."

The phrase "contrary to" means "diametrically different," 'opposite in character or nature,' or 'mutually opposed.'" Williams, 529 U.S. at 405 (citing Webster's Third New International Dictionary 495 (1976)). Thus, under the "contrary to" clause of § 2254(d)(1), the Court may grant the writ if (a) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; **or** (b) the state court decides a case differently than the Supreme Court "has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-413.

Under the "unreasonable application" clause of § 2254(d)(1), the Court may grant the writ if the state court identifies the correct governing legal rule from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Id. at 407-408, 413. When the Court makes the "unreasonable application" inquiry it "should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. Thus, the state court's application of clearly established federal law must be more than simply erroneous or incorrect, it must be objectively unreasonable. Id. at 409-411; Macias v. Makowski, 291 F.3d 447, 451 (6th Cir. 2002).

Under § 2254(d)(2), the petitioner may obtain relief only by showing the State court's conclusion is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus, § 2254(d)(2) applies when a petitioner challenges factual determinations by the State court. *See e.g. Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001) (challenge to 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) (challenge to state court's factual determination that Sheriff Greer had not seen the letter prior to Clark's trial); Stallings v. Bagley, 561 F.Supp.2d 821, 880-881 (N.D. Ohio 2008) (challenge to state court's factual finding regarding issue of mental retardation).

When the Court addresses a § 2254(d)(2) claim it must presume that the state court's factual findings are sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)). Although this standard is demanding, it is not insatiable, and this "[d]eference does not by definition preclude relief." Miller-El, 545 U.S. at 240 (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). In sum, with respect to § 2254(d)(2), "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding . ." Miller-El, 537 U.S. at 340.

#### Discussion

##### 1. The Commonwealth Withheld Exculpatory Information

Roach's first argument is that he was denied due process of law when the Commonwealth withheld exculpatory evidence until after trial began (DN 1 PageID # 10). Before trial, Roach was not informed: 1) that DNA found on a cigarette in the victim's apartment belonged to a male, 2) that the only fingerprints found in the victim's apartment belonged to the victim's brother, 3) that the Commonwealth had jailhouse notes allegedly written by Roach to his co-defendant, Drake, and 4) that the witness who found the victim's body after entering the victim's apartment had taken and failed a polygraph test during the investigation (DN 1 PageID # 10). Roach argues that the

Commonwealth's failure to provide this information before trial violated Brady v. Maryland, 73 U.S. 83 (1963).

White argues that Brady only concerns post trial discovery of exculpatory material (DN 10 PageID # 85). Therefore, because all the contested evidence was presented during trial, there is no risk of a Brady violation. In his reply brief, Roach contests White's analysis and posits that a Brady violation can occur when the late timing of disclosure prejudices a defendant (DN 14 PageID # 777-778).

White is incorrect. A Brady violation can occur if the previously withheld evidence is disclosed at trial if, "the defendant has been prejudiced by the delay in disclosure." United States v. Garner, 507 F.3d 399, 405 (6th Cir. 2007) (quoting United States v. Word, 806 F.2d 658, 665 (6th Cir. 1986)).

Under Brady v. Maryland, the prosecution is required to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. 373 U.S. 83, 87 (1963). "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. This duty to disclose extends to information in the possession of the investigating law enforcement agency. Kyles v. Whitley, 514 U.S. 419, 437-438 (1995).

The Court applies a three-part test to determine whether a Brady violation has occurred. Strickler v. Greene, 527 U.S. 263, 281-282 (1999). The petitioner must demonstrate (1) the

evidence was favorable to the defense; (2) the evidence was suppressed (intentionally or not) by the government; and (3) prejudice to the defense occurred. Strickler, 527 U.S. at 281-282. To satisfy the “prejudice” requirement, petitioner must show “a reasonable probability that the jury would have returned a different verdict.” Id. at 296.

On appeal to the Kentucky Supreme Court, Roach presented both state and federal law arguments concerning the late disclosure of the contested evidence (DN 10-3 PageID # 255-262). However, the Kentucky Supreme Court decided the issue solely on state law grounds. Roach, 2006 WL 2986492 at 1-3. Therefore, this Court will review the claim *de novo*. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

#### A. DNA Evidence

Roach enumerates four pieces of evidence that he believes were withheld in violation of Brady. The first is approximately 200 pages of notes from the file of the Commonwealth’s DNA expert—Danielle Honig (DN 1 PageID # 12). The Commonwealth disclosed a copy of Honig’s four-page final report before trial. The trial court ruled that Kentucky discovery rules entitled Roach to receive the expert’s notes only after Honig mentioned them while testifying (DN 1 PageID # 12) *see RCr 7.24 (8)*.

The Kentucky Supreme Court affirmed the trial court’s ruling. Roach, 2006 WL 2986492 at \*4. The Court reasoned that no discovery violation occurred because notes used to prepare a DNA report are excluded from discovery by RCr 7.24(2) (amended 2017) *see Cavender v. Miller*, 984 S.W.2d 848 (Ky. 1998). The notes were disclosed only after being referenced by the witness as required by RCr 7.24(8) (amended 2017). Roach, WL 2986492. The Court did not consider whether withholding this information was contrary to the Commonwealth’s obligations under Brady.

Roach must first demonstrate that the subject evidence was favorable to his defense. Strickler, 527 U.S. at 281-282. Roach identifies two bits of information in the Commonwealth's expert's notes that he argues should have been disclosed before trial. The first is a cigarette butt found at the scene of the crime containing DNA of an unidentified male. The second a blood stain mixture found on a bed sheet underneath the victim's body that matched Drake's blood.

At trial, Roach presented four possible alternative perpetrators – one of which was Drake (DN 1 PageID 13). It is unclear how the cigarette butt would have benefitted Roach's defense. Without more information it is impossible to know how long the cigarette was present in the victim's home or who it belonged to. Roach can only speculate as to its relevance. It is possible the indeterminable male DNA weakens the much stronger exculpatory evidence also revealed in the expert's notes—Drake's blood. Drake's blood was intermingled with the victim's blood on the bed underneath her body. That is certainly exculpatory evidence and would have undoubtedly benefitted Roach's defense. The blood evidence therefore satisfies the first prong of Brady.

The Commonwealth does not refute that it did not disclose Ms. Honig's notes before trial, thereby satisfying the second prong of the Brady analysis. Roach's argument fails at the third prong. He has not shown that he was prejudiced by not receiving the Commonwealth's experts notes until after they were referenced at trial. Roach asserts that he was unable to fully develop his alternative perpetrator theory of defense (DN 1 PageID # 12-13). In his reply brief, Roach adds that trial counsel was unable to effectively cross examine Drake about his blood discovered on the victim's bed underneath her body (DN 14 PageID # 780). The undersigned is unconvinced. The fact that Drake's DNA was found underneath the victim's body undoubtedly benefitted Roach's case. However, effectively cross-examining Drake to determine how his DNA came to be there does not require any expertise in DNA testing. Trial counsel should have been able to

develop an effective cross-examination relatively quickly after learning this new information. And more importantly Roach does not explain specifically how his counsel's cross examination was deficient. Or in other words, Roach hasn't clarified to this Court what his counsel would have revealed during cross-examination if given more time to prepare. To satisfy the Brady prejudice requirement, petitioner must show "a reasonable probability that the jury would have returned a different verdict." Strickler, 527 U.S. at 296. Roach has not shown that earlier disclosure of the DNA expert's notes would have materially altered his defense strategy, certainly not to the extent that a continuance would have created a reasonable probability that his trial would have resulted in a different verdict.

#### B. Fingerprint Evidence

Next, Roach argues that the Commonwealth's failure to disclose before trial the results of a fingerprint analysis taken from the crime scene violated Brady (DN 1 PageID # 14). The fingerprint analysis was disclosed "during the initial days of trial (Id.). Police investigators provided the results to the prosecution, which in turn, provided them to defense counsel (Id.). The analysis showed that Daniel Robinson's fingerprints were found at the crime scene. Daniel Robinson is the victim's brother (Id.).

Again, Roach does not satisfy the three-pronged Brady test. It is not disputed that the fingerprint analysis was not provided until after trial began, thereby satisfying the second prong. However, it is not clear that the evidence would have been favorable to Roach's defense. Roach concedes that the report is not inculpatory, but maintains it is material because it would have assisted him develop an alternate perpetrator defense against Robinson. (Id. at 13-14).

The basis for Daniel Robinson as an alternative perpetrator was the fact that the victim was set to testify against him in an upcoming revocation hearing and she had a restraining order against

him (*Id.* at n. 3). The fingerprint report places Robinson at the scene of the crime. However, Robinson admitted at trial that he visited and stayed at his sister's apartment in the past (*Id.* at pg. 13). Nothing in the fingerprint report indicates when Robinson was in the apartment or if he was near the location of the victim's body. The fingerprint report provided the jury no new information.

### C. Notes to Co-Defendant

Roach also argues that the late production at voir dire of jailhouse notes passed by Roach to Drake violated Brady (DN PageID #14-15). During voir dire the Commonwealth interviewed John Drake and learned that he possessed notes allegedly written by Roach that he received while he was in jail. Drake gave these notes to his attorney. Roach's trial counsel objected to the notes admission and in the alternative requested a continuance to allow a handwriting expert to examine the notes (*Id.*).

Roach must demonstrate that the subject evidence was suppressed, either intentionally or unintentionally, by the government. Strickler, 527 U.S. at 281-282. The Supreme Court of Kentucky did not address this issue pursuant to Brady, but its observations concerning state discovery rules are informative. The Court noted that prosecutors have a duty to provide "written statements made by a defendant that are in possession, custody, or control of the prosecution or its agents." Roach, 2006 WL 2986492 at \*2 (quoting RCr 7.24(1)). The prosecution and their agents were not in possession of the notes prior to trial. Drake gave the notes to his defense attorney. Brady concerns the suppression of evidence under the control of the prosecution, it does not place a burden on the Commonwealth to discover all possible available evidence and disclose it to the defendant. Notably, the Commonwealth provided defense counsel the notes within hours of receiving them. Roach, at \*2. And whatever prejudice Roach may have suffered was remedied

by the trial court's decision to grant a four-day continuance after learning of the notes' existence.

Id.

#### D. Polygraph

Finally, Roach argues that the Commonwealth's failure to provide defense counsel with the results of a polygraph test prior to trial violated Brady (DN 1 PageID# 15-16). Keisha Richardson discovered the victim's body after breaking into her apartment to retrieve something she left there the night before (Id.). After returning home and smoking marijuana, Richardson returned to the apartment with the victim's boyfriend, BoJack (Id.). During her testimony at trial, Richardson revealed that she underwent a polygraph examination administered by the police as part of their investigation (Id.). Defense counsel immediately moved for a mistrial, noting that the Court's discovery order explicitly required disclosure of all polygraph tests administered prior to trial (Id.). The Court denied the motion for a mistrial but conducted a hearing on the issue. Richardson reaffirmed that she took a polygraph test. It was revealed that the polygraph examiner determined Richardson was "deceptive during her questioning" (Id.). Defense counsel again moved for a mistrial citing a need to investigate Richardson's potential role in the homicide. Despite no objection from the Commonwealth, the Court denied Roach's request for a mistrial.

There is no question that the Commonwealth suppressed this evidence. Despite the trial court's finding that there was "no bad faith or willful violation" by the Commonwealth, Brady does not consider the intent behind the suppression of evidence and the prosecution is responsible for evidence suppressed by its agents. Strickler, 527 U.S.,281-282, Kyles v. Whitley, 514 U.S. 419, 437-438 (1995). It is also likely that this evidence would have benefitted Roach's defense. Although results of polygraph tests are not admissible at trial, the test may have assisted Roach's trial counsel's investigation of Richardson as an alternate perpetrator. Roberts v. Commonwealth,

657 S.W. 2d 943 (Ky. 2983). However, Roach has again failed to demonstrate how he was prejudiced by the failure to disclose the results of the polygraph test. He merely states that “the evidence was material to Petitioner’s alternate perpetrator defense” (DN 1 PageID # 17). Without more than bare assertions that his trial counsel could have further investigated Richardson based on the results of the polygraph test, this Court cannot say that disclosure of the test results created a reasonable probability that disclosure would have altered the jury’s verdict.

## 2. Trial Court Erred by Refusing to Continue the Trial

Roach’s second claim is derivative of the first. He argues that the trial court denied him due process by refusing to continue the trial, despite the Commonwealth’s failure to disclose exculpatory evidence and decision to not object to trial counsel’s motion for a continuance (DN 1 PageID # 20). White responds that because no Brady violation occurred, Roach is foreclosed from presenting this argument to the Court (DN 10 PageID # 90).

The matter of a continuance is within the discretion of the trial judge. A decision to deny a request for more time violates due process only if a “myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.” Ungar v. Sarafite, 376 U.S. 575, 589 (1964). There is no formula for deciding when a denial of a continuance is so arbitrary as to violate due process. Rather the inquiry considers the particular circumstances in each case with an emphasis on the reasons for a continuance presented to the trial judge at the time the request was denied. Ungar, 376 U.S. at 589. Roach must show actual prejudice by demonstrating that a continuance would have made a relevant witness available or added something to the defense. Franklin v. Bradshaw, 695 F.3d 439 (2012). Roach presented both state and federal arguments on direct appeal to the Kentucky Supreme Court (DN 10-3 PageID 255-262). The Kentucky Supreme Court decided the issue solely on state law grounds.

Roach, 2006 WL 2986492 at 1-3. Therefore, this Court will review the claim *de novo*. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

Roach has failed to adequately demonstrate actual prejudice from the trial court's decision not to grant a continuance. Roach claims he was prejudiced because his trial counsel was unable to consult with experts or call them to testify due to the late disclosure of several pieces of evidence (DN 1 PageID # 20). As previously discussed in the Brady analysis, Roach has failed to offer any specific prejudice suffered by his failure to further consult his experts. The DNA evidence in the Commonwealth's expert's notes was exculpatory because it inculpated Drake. However, the nature of the evidence was such that it did not require expert knowledge to effectively utilize it on cross-examination. The fingerprint analysis placed the victim's brother, Robinson, at the scene of the crime. But, Robinson admitted in open court to being in his sister's apartment. Roach does not suggest any additional testimony that an expert could have provided that would present new information to a jury.

Similarly, Roach only offers a vague claim that his counsel could "investigate Keisha Richardson once counsel learned she had failed a polygraph test (DN 14 PageID # 781-82). Contrary to Roach's assertion, this does not add anything to his defense. It is mere speculation that counsel would have investigated Richardson and that investigation would have been fruitful. Finally, the trial court did grant a four-day continuance after the Commonwealth discovered notes allegedly written by Roach to Drake while incarcerated. Roach, 2006 WL 2986492 at \*2. This contradicts Roach's claim that the trial court was arbitrarily insistent upon "expeditiousness in the face of justifiable reason for delay" (DN 1 PageID # 20).

### 3. Counsel Rendered Ineffective Assistance by Failing to Interview Hugh Drake

Roach's third claim is that he received ineffective assistance of counsel when his lawyer failed to interview a potential witness, Hugh Drake. Hugh Drake is Drake's brother. Almost one year after Roach's conviction, Hugh provided an affidavit contradicting Drake's testimony (DN 10-3 PageID # 637). Drake was the only eye-witness called to testify by the Commonwealth at trial and his testimony placed the blame for Ms. Robinson's murder solely on Roach (DN 1 PageID # 21). Roach argues that the Kentucky Court of Appeals unreasonably applied Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) to determine his counsel was constitutionally sufficient. White responds that because Hugh's affidavit was provided almost a year after trial and nothing during trial indicated that Hugh had information relevant to the case, the Kentucky Court of Appeals' application of Strickland was reasonable and therefore should not be disturbed.

When the Court conducts a review under either clause of 28 U.S.C. § 2254(d)(1), it must look only to the clearly established precedent of the United States Supreme Court. Lockyear v. Andrade, 538 U.S. 63, 70-71 (2003). Here, the clearly established precedent is set forth in Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. Knowles v. Mirzayance, 556 U.S. 111, 122 (2009); Strickland, 466 U.S. at 687. The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Importantly, the Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The prejudice inquiry requires the defendant "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome.” Id. In the context of a criminal trial, the prejudice inquiry requires the defendant to show there is a reasonable probability that, absent trial counsel’s errors, the jury would have had a reasonable doubt respecting guilt. Id. at 695. The Court need not conduct the two-prong inquiry in the order identified above or even address both parts of the test if the defendant makes an insufficient showing on one. Id. at 697.

On review of Roach’s RCr 11.42 petition the Kentucky Court of Appeals affirmed the Circuit Court’s ruling that Roach’s counsel was not deficient. Roach, 2015 WL 1450831, at \*7. The Court’s reasoning is straightforward. Neither Roach, nor his counsel, had any indication that Hugh possessed exculpatory evidence until almost a year after trial. Id. The court correctly identified its task, “to reconstruct the circumstances of counsel’s alleged conduct, and to evaluate from counsel’s perspective at the time.” Id. (quoting Strickland, 466 U.S. at 699.). Roach did not allege that trial counsel knew or should have known Hugh had any relevant information pertinent to Roach’s case. Roach argued that mere knowledge of Hugh’s existence and the prominent role Drake played in the Commonwealth’s case required counsel to interview Hugh. The Court of Appeals failed to adopt this exacting standard. Id.

Roach faces a higher hurdle in this Court. He must show that the Court of Appeals’ decision was contrary to or an unreasonable application of Strickland. A fair assessment of counsel’s performance requires the Court to, to the extent possible, eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Strickland, 466 at 689. Roach has not substantially altered his argument before this Court. He maintains that counsel’s awareness of Hugh, and the import of Drake’s testimony required counsel to investigate Drake’s family members for potential impeachment evidence. Roach cites no case law endorsing such an elastic view of Strickland. The

Kentucky Court of Appeals decision was certainly a reasonable application of the established Supreme Court precedent.

#### 4. Newly Discovered Evidence

Next, Roach argues that the Kentucky Court of Appeals unreasonably applied United States Supreme Court precedent when it rejected post-trial affidavits attesting that Roach's co-defendant, John Drake, admitted that Roach did not murder Robinson. (DN 1 PageID # 24-25). White argues this claim is procedurally defaulted (DN 10 PageID # 99).

In supplemental briefing ordered by this Court, Roach argued for the first time that this claim is not procedurally defaulted because it was dismissed by the Kentucky Court of Appeals on inadequate state grounds (DN 50 PageID # 962). Roach presented the aforementioned affidavits under RCr 60.02(e) and 60.02(f) (DN 10-3 PageID # 445-447). RCr 60.02(b) allows state habeas relief based on newly discovered evidence but limits such motions with a one-year statute of limitations. The Kentucky Circuit Court dismissed Roach's claim as untimely. The Kentucky Court of Appeals upheld that decision, holding that Roach inappropriately sought to avoid the one-year statute of limitations by erroneously bringing his claim under RCr 60.02 (e) and (f). Roach, 2015 WL 1450831, at \*8. Roach argues that this rule is not strictly followed and therefore an inadequate basis for dismissing his claims without reaching the merits (DN 50 PageID # 963).

"Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). Only "firmly established and regularly followed state practice" if not heeded by a petitioner may bar review by a federal habeas court. James v. Kentucky, 466 U.S. 341, 348 (1984). "To determine whether the rule is firmly established, the

court should look to whether, at the time of the petitioner's actions giving rise to the default, the petitioner 'could not be deemed to have been apprised of [the rule's] existence.'" Hutchison v. Bell, 303 F.3d 720, 737 (6th Cir. 2002) (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)).

Despite Roach's claims to the contrary, the one-year statute of limitations for 60.02(b) motions is a firmly established and regularly followed state procedural rule. Roach cites Foley v. Commonwealth as evidence that "just one year prior" to the Kentucky Supreme Court dismissing his petition the Court recognized that claims based on newly discovered evidence may be brought under RCr 60.02(f). 425 S.W.3d 880 (Ky. 2014). However, the Court was careful to explain that RCr 60.02(f) may be invoked for newly discovered evidence only under the most unusual circumstances. Foley, 425 S.W. 3d 880 at 886 (citing Howard v. Commonwealth, 364 S.W.2d 809, 810 (1963)). The newly discovered evidence must be of such decisive value that it would probably change the result if a new trial were granted. Id. (citing Jennings v. Commonwealth, 380 S.W.2d 284, 285-86 (Ky. 1964)). Kentucky case law is clear that the one-year statute of limitations under RCr 60.02(b) is a regularly followed state practice that is only deviated from under extraordinary circumstances. Roach should have been apprised of the statute of limitations when filing his appeal. See Hutchison 303 F.3d 720 at 737. The Kentucky Supreme Court found that the Roach's circumstances were not extraordinary enough to deviate from their regularly followed practice. Roach's argument that his claim is not procedurally defaulted because it was dismissed on inadequate state grounds fails.

However, Roach has suggested an alternative means around procedural default. (DN PageID # 966-970). If a habeas petitioner fails to comply with a state procedural rule and that failure provides an adequate and independent grounds for the state's denial of relief, then federal review is barred absent a showing of cause for the default and actual prejudice arising from the

claimed constitutional error or that failure to consider the federal claim will result in a “fundamental miscarriage of justice.” *See Harris v. Reed*, 489 U.S. 255, 262-264 (1989) (cleaned up); *Murray v. Carrier*, 477 U.S. 478, 485, 495-496 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 78-79 (1977).

The one-year statute of limitations placed on RCr 60.02(b) provides an adequate and independent grounds for the State’s denial of Roach’s claim. Roach has not conducted a cause and prejudice analysis. Instead, he argues that failure to consider the claim would amount to a miscarriage of justice because he is actually innocent (DN 14 PageID # 784). *See Schlup v. Delo*, 513 U.S. 298 (1995).

The Supreme Court is “confident that, for the most part, ‘victims of a fundamental miscarriage of justice’ will meet the cause-and-prejudice standard.” *Murray*, 477 U.S. at 495-496 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). However, the Supreme Court does “not pretend that this will always be true.” *Murray*, 477 U.S. at 496. The Court has indicated that in extraordinary cases where a constitutional violation has probably resulted in the conviction of a defendant who is innocent a federal court may grant a writ of habeas corpus in the absence of a show of cause for procedural default. *Schlup*, 513 U.S. 298 at 327-331. A claim of actual innocence must be substantiated with new reliable evidence. *Id.* at 324. Any evidence not presented at trial is sufficient. *Cleveland v. Bradshaw*, 693 F. 3d 626, 633 (6th Cir. 2012). Roach must demonstrate that without this evidence “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496. Roach must demonstrate that it is “more likely than not” that “no reasonable juror” would have convicted him in light of all the evidence. *Schlup*, 513 U.S. at 324, 327-328; *Carrier*, 477 U.S. at 496. This standard is more onerous than *Strickland*, but it is less arduous than the “clear and convincing

evidence” standard established by Sawyer. Schlup, 513 U.S. at 327 (citing Sawyer v. Whitley, 505 U.S. 333, 339-348 (1992)). The “more likely than not” standard was selected to ensure that a “petitioner’s case is truly ‘extraordinary,’ … while still providing petitioner a meaningful avenue by which to avoid a manifest injustice. Schlup, 513 U.S. at 327 (citation omitted). Importantly, this Court is not bound by the rules of admissibility in making this inquiry. The emphasis on “actual innocence” requires evaluation of the probative value of all relevant evidence excluded or unavailable at trial. Schlup, 513 U.S. at 327-328. This Court’s task is not to make an independent factual determination about what likely occurred, but to assess the likely impact of the evidence on reasonable jurors. House v. Bell, 547 U.S. 518, 538 (2006) (citing Schlup, 513 U.S. at 329). Thus, to meet the threshold requirement, Roach must persuade the Court that, “in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” Schlup, 513 U.S. at 329. Importantly, if the evidence calls into question the credibility of the witnesses presented at trial and the Court may make credibility assessments. Schlup, 513 U.S. at 330.

In order for this Court to assess the credibility of the new evidence it ordered an evidentiary hearing. The hearing took place in two parts. On August 12, Joseph Sharer testified about the events detailed in his affidavit. He testified that he and Drake were in the same unit at Luther Luckett Correctional Complex (DN 41 PageID # 885). Sharer regularly helped fellow inmates with their cases, including John Drake. Through that assistance, Drake allegedly told Sharer that Roach had done nothing wrong (DN 41 PageID # 887). Drake lamented now that he was “clearheaded and off drugs” he wished he could go back and do it over (Id.). He claimed that he purchased sex from Robinson and Roach just dropped him off, but Drake did not admit to murdering Robinson (Id. at 892-94). At trial, Drake felt he had no choice but to implicate Roach

because he felt threatened and pressured by police (Id.). Sharer repeatedly characterized Drake as remorseful that Roach was in prison for a crime he didn't commit.

Part Two of the hearing took place on October 1. The Court received the testimony of Stephan Blakemore (DN 43). Blakemore testified that he met John Drake in 2004 while incarcerated at Luther Luckett. Blakemore also worked as an inmate legal aid. He did not directly assist Drake with his case, but the two discussed it frequently (Id. at 916). Drake told Blakemore that he was smoking crack with some girls and when the cocaine ran out they got mad and the altercation ended with him killing a girl and taking some of her stuff (Id. at 917). Blakemore testified that Drake told him Roach "didn't do it" that Drake "is the one that did it" and Drake felt bad and wanted to make things right (Id.). Apparently, Drake was facing pressure from his family who wanted to know why he testified against Roach, his cousin, when Drake had committed the murder (Id. at 922).

Sharer's and Blakemore's testimony expounded upon their affidavits. The Court found their testimony generally credible. The evidence casts doubt on Roach's guilt but does not rise to meet the exacting standard set forth in Schlup. Roach must present new evidence that shows that "more likely than not no reasonable juror" would have found him guilty beyond a reasonable doubt. Schlup v. Delo, 513 U.S. 298 (1995). He must demonstrate factual innocence, not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998).

The sum of the new evidence presented by Roach is affidavits from Sharer, Blakemore, and Hanley and subsequent testimony from Sharer and Blakemore. All suggest that after Roach and Drake were convicted and given incongruent sentences Drake felt guilty, recanted his testimony, and insisted Roach had nothing to do with Ms. Robinson's murder. The affidavits attack the credibility of Drake's testimony at trial, which was crucial to the government's case.

However, impeachment evidence, while valuable, “will seldom, if ever, make a clear and convincing showing that no reasonable juror” would have convicted Roach without the affidavits. Sawyer v. Whitley, 505 U.S. 333, 349 (1992). An unsworn statement by a convicted felon purporting to recant sworn testimony originally given at trial and confirmed under oath...is inherently suspect.” Freeman v. Trombley, 483 Fed. Appx 51, 63 (6th Cir. 2012).

The want of more evidence from Roach is made more apparent when analogized with other cases considering actual innocence. In Schlup the petitioner produced affidavits from eye-witnesses to the murder which stated he was not present at the time of the killing. One of those affidavits was from a lieutenant at the prison who swore he was disciplining the petitioner at the time of the murder. Together with video surveillance of the scene presented at trial, the evidence strongly suggested the petitioner could not have been present at the time of the murder and was therefore factually innocent. Likewise, in House the petitioner produced new DNA evidence that contradicted the only forensic evidence introduced at trial that placed him at the scene of the crime. The remaining trial evidence was merely circumstantial. 547 U.S. 518, 541 (2006).

The contrast with the present case is stark. Roach’s newly presented evidence amounts to second-hand accounts of an unsworn confession made to prison legal aides several years after the conclusion of trial. The Court has no sworn testimony from Drake recanting his trial testimony and exonerating Roach of Ms. Robinson’s murder. Nor does it have new forensic evidence suggesting Roach’s factual innocence. The affidavits effectively ask the Court to determine if Drake was lying then or now. Roach provides little more than questions about Drake’s motivation to lie at trial as evidence that he must have been lying then. The promise of a lesser sentence is a strong motivation to lie at trial, especially when facing a life sentence. The affidavits suggest Drake is now motivated by remorse. But, this Court may only consider an otherwise procedurally

defaulted issue if Roach's claim of actual innocence is substantiated with "new reliable evidence."

Cleveland v. Bradshaw, 693 F. 3d 626, 633 (6th Cir. 2012). These affidavits are not reliable enough to conclude that if heard, no reasonable juror would have convicted Roach.

However, an actual innocence analysis requires evaluation of all relevant evidence both included and excluded at trial. Schlup, 513 U.S. at 327-328. The efficacy of the affidavits is diminished by some evidence presented at trial, particularly the jailhouse notes written by Roach in which he admitted to being in Robinson's apartment and stealing her jewelry (DN 1 PageID # 15). But at the same time, evidence of blood matching Drake's found near Robinson's body, and the absence of physical evidence placing Roach in the apartment suggest Drake's confessions may be truthful. The fact is that Schlup requires defendants to clear a very high hurdle. The nature of the evidence must be extraordinary. Without more than second hand accounts of Drake's alleged confession, Roach falls short of meeting the rigorous Schlup standard. Therefore, his claim remains procedurally defaulted. See DN 1 PageID # 22.

In Slack v. McDaniel, the Supreme Court established a two-pronged test to determine whether a Certificate of Appealability should issue on a habeas claim denied on procedural grounds. 529 U.S. 473, 484-485 (2000). To satisfy the first prong of the Slack test, Roach must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 484. To satisfy the second prong, Roach must show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."<sup>1</sup> Id. The undersigned believes that no jurists of reason would find it debatable whether Roach has presented a valid claim of a denial of a constitutional right. On the contrary, one who

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<sup>1</sup> "Where a plain procedural bar is present, and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

is wrongfully convicted has certainly had his constitutional rights violated. It is also true that jurists of reason may find it debatable whether this Court is correct in its procedural ruling. The question of whether it is more likely than not that no reasonable juror would have convicted him in light of this new evidence is very close and reasonable minds may differ on the answer. Therefore, a Certificate of Appealability should be issued.

##### 5. Ineffective Assistance of Appellate Counsel

Roach's fifth claim is for ineffective assistance of appellate counsel. Roach claims his counsel was constitutionally defective for failing to move for directed verdict, failure to object to faulty jury instructions, and failure to object to the trial court's decision to not allow avowal testimony from a DNA expert (DN 1 PageID # 25-30). White argues that the claim is procedurally defaulted from federal habeas review. (DN 10 PageID # 105-109).

Roach attempts to circumvent a procedural default with the actual innocence exception applied in Schlup v. Delo discussed above. Actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995) Herrera v. Collins, 506 U.S. 390, 403 (1993). As discussed above, Roach failed to open the gate with a colorable claim of factual innocence. Therefore, the actual innocence exception to procedural default is not available to Roach. However, Roach has another go at avoiding procedural default by arguing the state court's decision to dismiss his RCr 11.42 supplement was not based on adequate state grounds.

In Kentucky a defendant has three years from when his judgment becomes final to file a motion to vacate under RCr 11.42. RCr 11.42(10). The time begins to run from the date the appellate court enters its judgment on direct appeal, rather than from the date on which the trial

court entered the judgment of conviction. Palmer v. Commonwealth, 3 S.W. 3d 763, 744-65 (Ky. App. 1999). The Kentucky Supreme Court affirmed Roach's conviction on direct appeal on October 19, 2006. The decision became final 21 days later on November 9, 2006. Cr 76.30(2)(a) ("An opinion of the Supreme Court becomes final on the 21<sup>st</sup> day after the date of its rendition unless a petition under Rule 76.32 has been timely filed." Therefore, Roach had until November 9, 2009 to seek RCr 11.42 relief. Roach filed his original motion on June 19, 2007, well within the three-year statute of limitations. However, he filed a *pro se* supplement on March 15, 2011 a year and a half after the three-year period elapsed. Roach, 2015 EL 1450831, at \*3. Roach first raised the relevant three ineffective assistance of appellate counsel claims in his supplemental motion (DN 10-3 PageID # 418). The Kentucky Circuit, Appellate, and Supreme Courts all affirmed that the supplement was untimely filed, and therefore properly denied before reaching its merits. See Roach v. Commonwealth, 384 S.W.3d 131 (Ky. 2012).

Roach argues that the Kentucky Courts ruled in error and its procedural default finding does not rest on adequate state grounds (DN 50 PageID # 964). In support, Roach cites Hollon v. Commonwealth which for the first time allowed ineffective assistance of appellate counsel claims to be brought to trial courts via RCr 11.42 motions. 334, S.W.3d 431, 439 (Ky. 2010). The ruling was given prospective effect only. It applies to "cases pending on appeal in which the issue has been raised and preserved, and to cases currently in or hereafter brought in the trial court in which the issue is raised." Hollon, 334 S.W.3d at 439. Roach argued to the Kentucky Court of Appeals, and again to this Court, that Hollon permits consideration of his untimely ineffective assistance of appellate counsel claim because it applies to cases *currently in or hereafter brought in the trial court in which the issue is raised*. Id. (emphasis added). The Kentucky Court of Appeals rejected this argument. "We think the Supreme Court sought not to prejudice those with the foresight to

assert an IAAC claim despite the fact that, until Hollon, Kentucky had stubbornly refused to recognize such a claim... We do not think our Supreme Court intended to create an escape hatch by which movants could circumvent the time mandates of RCR 11.42. The undersigned agrees. The claim remains procedurally defaulted.

#### 6. Authentication and Admission of Jail Notes

Roach's sixth claim is that he was denied due process of law by the trial court admitting into evidence jailhouse notes allegedly passed from Roach to Drake while awaiting trial. He argues that the notes were not properly authenticated, and their admission at trial so prejudiced him as to deny him due process of law (DN 1 PageID # 30-32). White argues the Supreme Court of Kentucky has held the notes were properly authenticated, and because the issue is solely one of state law, Roach's claim is non-cognizable in a federal habeas court (DN PageID # 114).

While in jail awaiting trial, Roach passed notes to a fellow inmate who in turn passed them along to Drake. Upon receiving the notes, Drake gave the notes to his attorney. The Commonwealth did not learn of their existence until it interviewed the third-party during trial. The notes were immediately provided to defense counsel. At that time, Roach requested a one-week continuance to have a handwriting expert evaluate the note and letter. The trial judge granted four days. The evidence was offered into evidence by the Commonwealth one week after the disclosure of the notes. Roach v. Commonwealth, 2005-DC-0211-MR, 2006 WL 2986492, at \*1 (Ky. Oct. 19, 2006).

The Kentucky Supreme Court held that the notes were properly authenticated. The Court explained that the burden for authentication is slight and requires only a *prima facie* showing of authenticity. Roach 2006 WL 2986492 at \*3 (citing Johnson v. Commonwealth, 134 S.W. 3d 563(Ky. 2004)). Under Kentucky Law the circumstances surrounding a document may be used to

authenticate it. Characteristics like appearance, contents, substance, and internal patterns taken in conjunction with circumstances may be sufficient to authenticate a document. See KRE 901 (b)(4). The Court held that "the details within the writings were sufficient to cross the threshold requirements of admissibility. There was no error or abuse of discretion." Roach 2006 WL 2986492 at \*3.

The Supreme Court has stated many times that "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990)); *see also* Pulley v. Harris, 465 U.S. 37, 41(1984). It is not the province of a "federal habeas court to reexamine state-court determinations on state-law questions." Estelle, 502 U.S. at 68. In conducting habeas review, the court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. Section 2254(a). "State court evidentiary rulings do not rise to the level of due process violations unless they 'offend . . . some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Coleman v. Mitchell, 268 F.3d 417, 439 (6th Cir. 2001) (quoting Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

The introduction of the jailhouse notes did not violate Roach's due process rights. KRE 901 closely tracks FRE 901. Both allow the admission of written evidence if it can be authenticated by unique circumstances and characteristics. Both Kentucky and Federal Courts have upheld the admission of unsigned writings based on their contents without testimony from a handwriting expert. See Johnson v. Commonwealth, 134 S.W. 3d 563 (Ky. 2004); United States v. Jones, 107 F.3d 1147, 1150 (6th Cir. 1997). The notes in question discussed the timeline of the crime (DN 14 PageID # 790-91). The second admitted Roach and Drake were together at the victim's apartment following her death and that Roach took a necklace from the Robinson's pocket (Id.).

The Kentucky Supreme Court found the details within the writings were “sufficient to cross the threshold requirements of admissibility.” This holding was not contrary to or an unreasonable application of federal law. Therefore, this Court cannot disturb the decision.

#### 7. Roach’s Competency

Roach’s next claim is that the trial court erred by failing to establish his competency through an expert evaluation hearing before trial (DN 1 PageID # 32-34). White responds by urging this Court to uphold the Kentucky Supreme Court’s finding that Roach failed to raise “sufficient doubt about his competency to require a further examination by the trial judge.” (DN 10 PageID # 120)(quoting Roach, 2006 WL 2986492, at \*3).

On the morning of trial, Roach’s counsel moved for the court to conduct a competency evaluation. The stated reasons for the motion were “Roach’s repeated refusals to heed [counsel’s] advice to take a plea offer, despite being faced with a case that could not be won, coupled with some observable cognitive problems” (DN 10-3 PageID # 267). At that point the trial court engaged Roach in a colloquy and phoned the jail’s mental health facility to determine Roach’s competence (Id. at 340). The colloquy confirmed that Roach knew the role of the trial participants, understood the charges against him, and the possible penalties (Id. at 201). The Circuit Court denied Roach’s motion and proceeded to trial. On appeal, Roach argued that his counsel’s concerns about his cognitive functioning gave the trial judge reasonable grounds to order a competency evaluation and hold a hearing. The Kentucky Supreme Court disagreed. They found nothing to indicate that Roach raised sufficient doubt about his competency to require a further examination at trial. Roach, 2006 WL 2986492, at \*3.

The conviction of one who is legally incompetent violates due process and state procedures must adequately protect this right. Pate v. Robinson, 383 U.S. 375, 378 (1966). A competency

hearing must be ordered when only when a defendant's mental state is "seriously in question." Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985). Kentucky law follows the federal example. The trial judge must be presented with sufficient evidence to establish reasonable doubt that a hearing is required before considering a defendant's competency. Hunter v. Commonwealth, 869 S.W. 2d 719 (Ky. 1994); Filiaggi v. Bagley, 445 F. 3d 85, 851, 858 (6th Cir. 2006). To be considered competent to stand trial a defendant must be able to consult with his attorney with a reasonable degree of understanding and a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). The Supreme Court has not delineated a test to determine competency. Instead, the question is whether a reasonable judge should have experienced doubt the defendant was competent to stand trial. Filiaggi, 445 F. 3d at 858.

Here, the trial court and the Kentucky Supreme Court found no evidence of Roach's incompetence. Roach confirmed to the trial court that he understood the role of participants at trial and the penalties he faced. He acted rationally throughout the trial. In the two and a half years awaiting trial, he never availed himself of the jail's mental health services, despite regular checks by the jail. Notably, Roach's counsel did not raise questions of his competency until the morning of trial. His counsel's argument seems to rest solely on the fact that Roach exercised his constitutional right to proceed to trial against his counsel's advice. This is hardly enough to demonstrate incompetence. The Kentucky Supreme Court's opinion is not contrary to any Supreme Court precedent and therefore must stand.

#### 8. Miranda

Roach's eighth claim is that he was improperly interrogated by police without being read his Miranda rights. He argues the Kentucky Supreme Court erred when upholding the trial court's decision to allow Roach's statements to police to be admitted into evidence at trial (DN 1 PageID

# 34-39). White argues in response that Roach in fact waived his Miranda rights, and the Kentucky Supreme Court's decision to uphold the trial court was not contrary to or an unreasonable application of clearly established Supreme Court precedent (DN 10 PageID # 128).

A defendant subjected to custodial interrogation must be informed of his Miranda rights prior to questioning by law enforcement. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). An individual subjected to custodial interrogation must be informed that he has a right to remain silent and that his words may be used against him in court. He must also be advised that he has a right to an attorney who may be present during questioning, and that an attorney will be provided to him if he cannot afford one. Miranda v. Arizona, 384 U.S. 436, 468-473 (1966). The failure to administer Miranda warnings creates a presumption of compulsion. Or. v. Elstad, 470, U.S. 298, 307 (1985). The government may not use these statements in its prosecution of a defendant. Or., U.S. 298 at 307. A suspect must invoke his right to remain silent unambiguously. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010). He may waive his rights if it is done voluntarily, knowingly, and intelligently. Miranda, 384 U.S. 436, 444 (1966). The government does not need to show proof of an explicit waiver, it may be implied through the suspect's silence, his understanding of his rights, and conduct indicating waiver. Thompkins, 560 U.S. at 384.

Here, Roach was taken into custody by police and a portion of his interrogation was recorded (DN 1 PageID # 35). The recorded section shows Roach clearly understood his Miranda rights. Roach told his interrogator that a previous officer had read him his rights, still, they were read to him again while being recorded (Id.). Roach clearly indicated that he understood his rights but refused to sign the waiver form presented to him (Id.). When the police continued with the interview. Roach answered their questions and gave a statement (Id.). The trial court denied Roach's pre-trial motion to suppress his statement, finding that Roach was advised of his Miranda

rights, indicated on at least three occasions that he understood those rights, and agreed to talk with officers explicitly and implicitly by answering their questions. The trial court added Roach “clearly having understood his rights and not [having] asserted those rights it is fair to infer that the waiver was knowing, intelligent, and voluntary” (DN 1 PageID # 37).

The Kentucky Supreme Court agreed with the trial court’s assessment, holding that the trial court’s findings of fact were supported by substantial evidence and that Roach could not show the trial judge’s failure to suppress was clearly erroneous. Roach, 2006 WL 2986492 at \*3. This Court agrees. Roach has provided nothing but the fact that he didn’t sign a waiver form to support his argument. But, a refusal to sign a waiver form does not automatically render subsequent questioning invalid. North Carolina v. Butler, 441 U.S. 369 (1979). The record unambiguously shows that Roach was informed of his Miranda rights, waived them, and gave a statement to police. There is no contention that Roach was coerced into making a statement. In fact, he explicitly denied being pressured or coerced into making his statement (DN 1 PageID # 36). The Kentucky Supreme Court’s is not contrary to or an unreasonable application of Supreme Court precedent. Roach’s argument fails.

#### 9. Richardson’s Polygraph Examination Testimony

Roach’s ninth claim is that he received ineffective assistance of counsel when his trial counsel failed to object to testimony that revealed Keisha Richardson undertook a polygraph examination after being arrested the night she found Ms. Robinson dead in her apartment (DN 1 PageID # 39). White argues that the claim is procedurally defaulted because Roach did not raise either claim in the state appellate system (DN 10 PageID # 131).

A petitioner must exhaust his state court appellate remedies before seeking federal habeas relief. He must fairly present his federal claims to all levels of the state appellate system. 28

U.S.C § 2254(b)(1). Roach did not present this claim in his state habeas proceedings (DN 10-3 Page ID # 390-408;437-448). Therefore, federal review is barred absent a showing of cause for the default and actual prejudice arising from the claimed constitutional error or that failure to consider the federal claim will result in a fundamental miscarriage of justice. *See Harris v. Reed*, 489 U.S. 255, 262-264 (1989) (cleaned up); *Murray v. Carrier*, 477 U.S. 478, 485, 495-496 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 78-79 (1977).

In *Coleman v. Thompson*, the Supreme Court made the unqualified pronouncement that ineffective assistance of counsel during state post-conviction proceedings does not establish “cause” for a procedural default because there is no constitutional right to an attorney in such proceedings. 501 U.S. 722, 752-754 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). However, the Supreme Court has recognized a narrow equitable exception to the rule in *Coleman* that applies where the State’s procedural rules specify that the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial. *Martinez v. Ryan*, 566 U.S. 1, 8-9, 11-16 (2012). Specifically, the Supreme Court explained this narrow equitable exception as follows:

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 17.

Thus, this equitable exception to the rule in *Coleman* applies only if the following requirements are satisfied: (1) state law requires the prisoner to raise his ineffective assistance of trial counsel claim in an initial-review collateral proceeding; (2) the claim of ineffective assistance of trial counsel “is a substantial one, which is to say that the prisoner must demonstrate that the

claim has some merit"; and (3) the "cause" arises out of the absence of appointed counsel or "ineffective" appointed counsel during the initial-review collateral proceeding. Id. at 8-9, 11-18. Importantly, the Supreme Court explicitly indicated this holding "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." Id. at 16.

The Supreme Court subsequently extended the Martinez exception to states where the procedural law does not on its face require that claims of ineffective assistance of trial counsel be raised in an initial-review state collateral proceeding but, by reason of its design and operation, the state's procedural framework 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, 416, 428-29 (2013). The Sixth Circuit has held that "[t]he Martinez/Trevino exception applies in Kentucky and thus 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).

Roach believes his claim satisfies the Martino/Trevino exception, and thus should be reviewed by this Court. However, the Martinez/Trevino equitable exemption is exceptionally narrow. It only serves to overcome a procedural default at the *initial-review* of collateral proceedings—in this case, the Kentucky Circuit Court. Martinez, 566 U.S. 1 at 17 (2012)(emphasis added). Roach failed to raise this issue when appealing his RCr 11.42 motion to the Kentucky Court of Appeals (DN 10-3 PageID # 565-592). Therefore, the claim remains procedurally defaulted and barred from review by this Court.

## 10. Prosecutorial Misconduct

Roach's tenth and final claim is that his trial was so infected by prosecutorial misconduct that he was denied due process of law. The basis for his claim are several statements made by the prosecutor during closing argument (DN 1 PageID # 41). In response, White argues that the claims are procedurally defaulted because he did not raise either claim in state court and should therefore be dismissed (DN 10 PageID # 131).

By Roach's own admission, he did not raise a claim of prosecutorial misconduct in his state habeas petitions (DN 1 PageID # 3-6). Nor did he raise it to the Kentucky Supreme Court on direct appeal. Roach, 2006 WL 2986492. Roach failed to open the Schlup gateway with a colorable claim of actual innocence, therefore his claim does not avoid procedural bar under the fundamental miscarriage of justice exception. Therefore, review of the claim is barred absent a showing of cause and prejudice. Reed v. Farley, 512 U.S. 339, 353-355 (1994); Teague v. Lane, 489 U.S. 288, 297-299 (1989); Murray v. Carrier, 477 U.S. 478, 495-496 (1986). Roach has not undertaken a cause and prejudice analysis on this claim. It is procedurally defaulted and barred from review by this Court.

In Slack v. McDaniel, the Supreme Court established a two-pronged test that is used to determine whether a Certificate of Appealability should issue on a habeas claim denied on procedural grounds. 529 U.S. 473, 484-485 (2000). To satisfy the first prong of the Slack test, Roach must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 484. To satisfy the second prong, Roach must show "jurists of reason would find it debatable whether the district court was correct in its

procedural ruling.”<sup>2</sup> Id. The Court need not conduct the two-pronged inquiry in the order identified or even address both parts if Roach makes an insufficient showing on one part. The undersigned determines that no jurists of reason would find it debatable the petition states a valid claim of the denial of a constitutional right as to any of the procedural claims herein. Therefore, no Certificate of Appealability should be issued except on the issue of newly discovered evidence and actual innocence.

When the Court rejects a claim on the merits, Roach must demonstrate that reasonable jurists would find the Court’s assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Roach has failed to meet this burden as to all the claims herein decided on the merits. Therefore, no Certificate of Appealability should be issued.

#### **RECOMMENDATION**

For the foregoing reasons, it is recommended that Roach’s § 2254 petition (DN 1) be **DENIED** and that a Certificate of Appealability be **DENIED**.

January 29, 2020

  
H. Brent Brennenstuhl  
United States Magistrate Judge

Copies:                   Counsel

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<sup>2</sup> “Where a plain procedural bar is present, and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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