

No. 24-6039

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

Jul 3, 2025

KELLY L. STEPHENS, Clerk

WAYNE C. MURPHY,

Petitioner-Appellant,

v.

AMY ROBEY, Warden, Luther Luckett  
Correctional Complex.

Respondent-Appellee.

Appendix # A

Before: NALBANDIAN, MURPHY, and RITZ, Circuit J

Wayne C. Murphy, a Kentucky prisoner, petitions for rehearing of our May 21, 2025, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying his motion for a certificate of appealability. *See* Fed. R. App. P. 40(b)(1)(A). We also deny his motion for the appointment of counsel.

The petition for rehearing and the motion to appoint counsel are **DENIED**.

ENTERED BY ORDER OF THE COURT

  
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Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

May 21, 2025

KELLY L. STEPHENS, Clerk

No. 24-6039

WAYNE C. MURPHY,

Petitioner-Appellant,

v.

AMY ROBEY, Warden, Luther Luckett  
Correctional Complex,

Respondent-Appellee.

Before: CLAY, Circuit Judge.

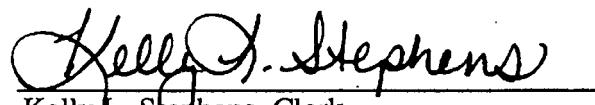
**JUDGMENT**

THIS MATTER came before the court upon the application by Wayne C. Murphy for a certificate of appealability.

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

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

**ENTERED BY ORDER OF THE COURT**

  
Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

May 21, 2025

KELLY L. STEPHENS, Clerk

WAYNE C. MURPHY,

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Petitioner-Appellant,

)

v.

)

AMY ROBEY, Warden, Luther Luckett  
Correctional Complex.

)

Respondent-Appellee.

)

ORDER

Before: CLAY, Circuit Judge.

Wayne C. Murphy, a pro se Kentucky prisoner, appeals the district court's judgment dismissing as time-barred his petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. He applies for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He also moves for the appointment of counsel. Because no reasonable jurist could debate the district court's decision, Murphy's COA application is denied.

In 2008, a jury convicted Murphy of first-degree rape, first-degree assault, and first-degree robbery based on evidence that he and an accomplice, Ryan Dixon, robbed a video store and brutally assaulted and raped the female store clerk. Murphy was identified as a perpetrator by the victim, another witness who entered the store during the assault, and a jailhouse informant. He maintained, however, that he was running errands with his girlfriend and her uncle, John Hurst, at the time of the crime. The Kentucky Supreme Court affirmed Murphy's convictions, but it remanded for resentencing. *See Murphy v. Commonwealth*, No. 2007-SC-000176, 2008 WL 1850626, at \*1 (Ky. Apr. 24, 2008). On September 25, 2008, Murphy was resentenced to concurrent terms of 20 years of imprisonment for the robbery and assault convictions and life imprisonment for the rape conviction.

On July 22, 2011, Murphy began postconviction proceedings in state court. On May 17, 2019, the Kentucky Court of Appeals affirmed the denial of his various motions, which asserted that trial counsel was ineffective. *See Murphy v. Commonwealth*, No. 2017-CA-000596, 2019 WL 2157583, at \*1 (Ky. Ct. App. May 17, 2019), *review denied*, (Ky. Mar. 18, 2020).

On May 18, 2020, Murphy, then represented by counsel, filed his § 2254 petition. As relevant here, he claimed that trial counsel performed ineffectively by failing to adequately investigate and present his alibi defense and failing to adequately impeach the victim's testimony identifying Murphy as her assailant. He argued that his petition should be considered timely based on his discovery of two pieces of evidence that supported his claims. First, he received a letter from the Kentucky Lottery Commission on January 10, 2011, that helped corroborate his alibi because it showed when he had purchased lottery tickets at a Speedway on the day of the assault, consistent with Hurst's trial testimony. Second, he received a letter from the Russell Police Department on January 20, 2011, indicating that they did not have any written record of an identification of Murphy by the victim in the weeks after the assault, which he claimed could have been used to impeach her identification of him at trial.

The district court nonetheless concluded that the § 2254 petition was untimely under 28 U.S.C. § 2244(d)(1). The district court recognized that the petition could be timely if the limitations period began when Murphy received the letters identified above, *see id.* § 2244(d)(1)(D), because Murphy was litigating his state postconviction claims for much of the time between January 2011 and May 2020, and “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” is excluded from the limitations period. *Id.* § 2244(d)(2). But the district court concluded that the letters did not constitute new “factual predicates” for Murphy's claims, and therefore the limitation period was triggered by the date of final judgment in Murphy's case, which occurred on September 25, 2009. The district court concluded that the new evidence—although it would have marginally supported Murphy's alibi defense and aided in impeaching the

victim--- was cumulative of evidence already presented at trial. The district court also denied a COA.

Murphy now seeks a COA from this court, arguing that his new evidence does constitute the factual predicate for his claims for purposes of § 2244(d)(1)(D) because it helps him prove that he received ineffective assistance of counsel concerning his alibi defense and impeaching the victim's identification.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a § 2254 petition on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A one-year statute of limitations applies to § 2254 petitions. 28 U.S.C. § 2244(d)(1). Ordinarily, the limitations period begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Murphy does not dispute that if this subsection applies and the statute of limitations began to run when his judgment became final, then his petition is untimely. Subsection (d)(1)(D), however, provides an alternative starting date for the statute of limitations, "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." To determine whether a petition is timely under this subsection, this Court considers, in the following order, "the factual predicate of [the] habeas claim," when the petitioner could "have discovered the factual predicate of [his] habeas claim through the exercise of due diligence," and whether the petitioner filed his habeas petition "within one year of discovering the factual predicate of [his] claim." *Ayers v. Ohio Dep't of Rehab. & Corr.*, 113 F.4th

665, 670 (6th Cir. 2024), *pet. for cert. filed*, No. 24-584 (Nov. 27, 2024). The statute does not define “factual predicate,” but “courts generally agree that ‘a factual predicate consists only of the ‘vital facts’ underlying the claim.’” *Id.* (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012)). “A fact is ‘vital’ if it is required for the habeas petition to overcome sua sponte dismissal.” *Id.*

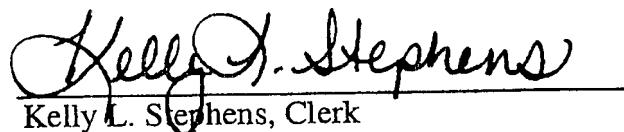
Beginning with the Kentucky Lottery Commission letter and the alibi claim, Murphy asserts that he was running errands with his girlfriend and Hurst at the time of the crime, which included a stop at a Speedway, where he purchased lottery tickets approximately one hour before the crime occurred. Murphy’s alibi timeline was presented at trial through Hurst’s testimony. But the surveillance footage timestamp and Speedway’s electronic timestamp for when the purchase was made were inconsistent with each other, and the electronic record was inconsistent with Hurst’s testimony. Murphy argues the discrepancies were used by the prosecution to undermine Hurst’s credibility generally and his account of where they were later in the day when the crime occurred. Murphy argues that the Kentucky Lottery Commission letter supports Hurst’s account that they stopped at a Speedway around 11:17 a.m., thus bolstering his credibility for the entirety of the claimed alibi timeline. But reasonable jurists could not debate the district court’s conclusion that this evidence is cumulative of the alibi defense presented at trial and therefore is not a vital fact underlying the claim. *See id.* Although this evidence supports Hurst’s account that he and Murphy stopped at a Speedway at 11:17 a.m., and thus might have marginally boosted the credibility of his other testimony, it does not directly speak to Murphy’s whereabouts when the crime occurred between 12:08 p.m. and 1:03 p.m. It is therefore cumulative of the alibi defense already presented, and reasonable jurists would agree that it does not constitute a new factual predicate sufficient to restart the statute of limitations under § 2244(d)(1)(D). *See Jefferson v. United States*, 730 F.3d 537, 547 (6th Cir. 2013) (“[N]ew information discovered ‘that merely supports or strengthens a claim that could have been properly stated without the discovery . . . is not a “factual predicate” for purposes of . . . 2244(d)(1)(D).’” (quoting *Rivas*, 687 F.3d at 535)).

Murphy's claim that counsel performed ineffectively by failing to find and use the information contained in the Russell Police Department letter to impeach the victim suffers from a similar problem. The fact that the Russell Police Department does not have a written record of the victim's identification of Murphy in the weeks after the crime might have been marginally helpful to counsel's impeachment efforts, but it is not a vital fact that would establish ineffective assistance and thus serve as a new factual predicate to restart the statute of limitations. *See Ayers*, 113 F.4th at 670. Reasonable jurists would agree with the district court's conclusion that this evidence was cumulative of counsel's other efforts to undermine the victim's identification, including by arguing that the victim's memory was impaired by the injuries that she suffered during the attack. And reasonable jurists would also agree that it did not rise to the level of a vital fact given that the victim did later identify Murphy, an identification that was corroborated by a second, independent witness who walked into the video store during the assault and by testimony from a jailhouse informant.

The statute of limitations may also be equitably tolled in certain circumstances, *see McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *Holland v. Florida*, 560 U.S. 631, 649 (2010), but Murphy makes no such argument in his COA application. He also did not object along these lines to the magistrate judge's report and recommendation. The argument is therefore forfeited on appeal. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

For these reasons, the application for a COA is **DENIED**. The motion for the appointment of counsel is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

  
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Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION ASHLAND

Appendix # C.

WAYNE C. MURPHY,

**Plaintiff/Petitioner,**

v.

AMY ROBEY,

*Warden, Roederer Correctional Complex,*

**Defendant/Respondent.**

NO. 0:20-CV

**OPINION**

\*\*\* \* \*\*\* \*\*\*

This matter is before the Court on the plaintiff/petitioner Wayne C. Murphy's Petition for a Writ of Habeas Corpus under 28 U.S.C § 2254 (DE 1) and the magistrate judge's Report and Recommendation. (DE 98.) The magistrate judge recommended Murphy's petition be denied and that no certificate of appealability should issue. (DE 98 at 28.) Subsequently, Murphy filed objections to the magistrate judge's recommendation. (DE 101.) The Court, having conducted a *de novo* review of the portions of Report and Recommendation to which Murphy objected, agrees with the magistrate judge's analysis and conclusions for the following reasons.

**I. Background**

The background leading to Murphy's petition being before this Court is extensive. The Report and Recommendation summarizes this background in full. (DE 98 at 1-15.) Relevant to the Court's disposition of Murphy's petition here, *six parts* of the story are worth repeating.

(1) *Murphy's Underlying Criminal Conviction.* As the story goes, on July 14, 2004, Murphy and an accomplice, Ryan Dixon, entered a video store in Russell, Kentucky and proceeded to assault and rape the female attendant and rob the store. These events occurred between 12:08 p.m. and 1:03 p.m. on the day of the crime. Murphy and Dixon's victim, Jane

Doe, would later go on to identify both individuals as the assailants during the subsequent investigation. At trial, the Commonwealth based its case against Murphy on an eyewitness who claimed to have seen Murphy at the scene of the crime, Doe's identification of Murphy, and testimony by a cellmate claiming Murphy had made a jailhouse confession that he assaulted Doe. Meanwhile, Murphy's counsel unsuccessfully attempted to convince the jury that Murphy had an alibi. Further, Murphy's counsel unsuccessfully attempted to challenge Doe's identification of Murphy as one of the perpetrators. Murphy was convicted by a Greenup Circuit Court jury on counts of first-degree rape, first-degree assault, and first-degree robbery in 2006.

(2) *Alibi Evidence at Trial.* The details of Murphy's alleged alibi are well documented in the Report and Recommendation. (DE 98 at 3-4.) At trial, as Murphy admits, his trial counsel's "primary trial strategy was to present Murphy's alibi." (DE 1 at 14.) The alibi defense was presented through the testimony of James Hurst. Hurst testified that he had been with Murphy in the hours leading up to the time when the crime was committed. On cross-examination, the Commonwealth suggested to the jury that Hurst's testimony was not to be believed because of a discrepancy between the alibi timeline, the timestamp on surveillance footage of Hurst and Murphy together at a Speedway on the day of the crime, and the "electronic journal" timestamp from Speedway which showed when Murphy had made a purchase.

(3) *The Kentucky Lottery Letter.* As described above, Murphy's alibi witness' testimony was undermined by a discrepancy between the alibi timeline and timestamp data from Speedway on the day of the crime. On January 10, 2011, after making an open records request, Murphy received a letter from the Kentucky Lottery which he argues corroborates his alibi timeline and discredits the timestamp data from Speedway. Murphy alleges this letter forms the basis for his first claim that he received ineffective assistance of counsel at trial. (DE 101 at 3.)

(4) *The Victim's Identification Testimony at Trial.* At trial, Murphy's counsel also challenged Doe's identification of Murphy as her assailter. According to Murphy, his trial counsel presented evidence to the jury that Doe's memory, and thus her ability to identify her assailter, was impaired by the injuries she sustained. (DE 1 at 14.) Additionally, Murphy's counsel attempted to impeach Doe by noting that Doe "had identified Dixon but failed to identify Murphy in a photo array at the hospital three days after the crime." (DE 101 at 12.)

(5) *The Police Letter.* On January 20, 2011, after more open records requests, Murphy received a letter from the Russell Police Department which explained it had no written record of Doe identifying Murphy as her assailter. (DE 45 at 9.) Murphy claims this letter forms the basis for his second claim that he received ineffective assistance of counsel at trial. (DE 101 at 3.)

(6) *Murphy's § 2254 Petition.* Murphy moved for post-conviction relief in state court a few months after discovering both letters. After those proceedings concluded in 2020, Murphy filed his § 2254 petition in federal court. Murphy's petition makes two claims. First, based on the Kentucky Lottery letter, Murphy claims he received ineffective assistance of counsel at trial because his attorney failed to investigate and present sufficient evidence supporting his alibi defense. (DE 1 at 24.) Second, based on the Russell Police Department letter, Murphy claims he received ineffective assistance of counsel at trial because his attorney failed to impeach Doe with evidence regarding her prior failures to identify Murphy. (*Id.*)

## II. Analysis

The magistrate judge's Report and Recommendation concludes that Murphy's petition is untimely under 28 U.S.C. § 2244(d). (DE 98 at 21.) § 2244(d)(1) provides that petitions for writs of habeas corpus must be filed within one year of the latest of four possible dates:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Murphy contends that subpart (D) provides the applicable triggering date for the statute of limitations period for his § 2254 petition. According to Murphy, the Kentucky Lottery letter and the Russell Police Department letter serve as the “factual predicates” on which his claims to ineffective assistance of counsel are based. (DE 101 at 3.) If Murphy is correct, then his petition could be timely. This is because Murphy filed state relief proceedings on July 22, 2011, mere months after the discovery of both letters. And as § 2244(d)(2) provides “[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward” the limitations period of § 2244(d)(1). Thus, Murphy’s state proceedings could have tolled the limitations period until March 18, 2020, when the state proceedings reached a conclusion. Under this reasoning, only 254 days of the one-year limitations period accrued by the time Murphy’s § 2254 petition was filed on May 18, 2020.

The magistrate judge disagreed with Murphy’s assertion that § 2244(d)(1)(D) provides the applicable triggering date for limitations period. As the magistrate judge explained, § 2244(d)(1)(D) is inapplicable to Murphy’s claims because neither the Kentucky Lottery letter nor the Russell Police Department letter qualify as the “factual predicates” of his claims. (DE 98 at 19-21.) As such, the magistrate judge held that § 2244(d)(1)(A) provides the applicable

triggering date for the one-year limitations period imposed on Murphy's petition. Applying that provision, the magistrate judge held the statute of limitations for Murphy's petition expired on October 25, 2009.<sup>1</sup> (*Id.* at 21.) After entertaining the application of equitable tolling principles, the magistrate judge held that Murphy's petition was untimely filed. (*Id.* at 27.)

**A. The magistrate judge correctly held that neither the Kentucky Lottery letter nor the Russell Police Department letter qualify as "factual predicates."**

Murphy objects to the magistrate judge's refusal to apply § 2244(d)(1)(D) as the provision providing the triggering date for the limitations period on multiple grounds. (DE 101 at 3-15.) First, Murphy argues the magistrate judge focused on the wrong question in deciding whether § 2244(d)(1)(D) applies. (*Id.* at 4.) In Murphy's eyes, the question should have been "what is 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence?'" (*Id.*) This question, however, puts the cart before the horse. As the magistrate judge correctly determined and the Sixth Circuit has recently held, a court must first determine whether the evidence the petitioner presents constitutes a "factual predicate" for their claims. *Ayers v. Ohio Dep't of Rehab. & Correction*, 113 F.4th 665, 670 (6th Cir. 2024). Only after making that determination will a court ask when a petitioner could have discovered the factual predicate through the exercise of due diligence. *Id.*

Second, Murphy argues that both the Kentucky Lottery letter and Russell Police Department letter qualify as the "factual predicates" to his claims. (DE 101 at 8-18.) Generally, "a factual predicate consists only of the 'vital facts' underlying the claim." *Ayers*, 113 F.4th at 670 (citations omitted). However, evidence presented by a habeas petitioner does not form a

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<sup>1</sup> This date reflects one year from when the Kentucky trial court's Amended Judgment became final.

“vital fact” where it is “merely *cumulative* to the evidence *already presented by the defense at trial.*” *Souter v. Jones*, 395 F.3d 577, 587 (6th Cir. 2005) (emphasis added).

Here, both the Kentucky Lottery letter and the Russell Police Department letter are cumulative of evidence Murphy already presented at trial. As for the Kentucky Lottery letter, Murphy argues the letter corroborates his alibi timeline. (DE 1 at 14-15.) Murphy, however, already presented evidence at trial that served to corroborate his alibi timeline. This evidence came in the form of Hurst’s testimony. Again, as Murphy himself put it in his petition, his trial counsel’s “primary trial strategy was to present Murphy’s alibi.” (DE 1 at 14.) Thus, although the Kentucky Lottery letter lends additional support to Murphy’s alibi defense, it is cumulative of Hurst’s alibi testimony which was presented at trial. *Hubbard v. Rewerts*, No. 21-2968, 2022 U.S. App. LEXIS 14886, at \*7 (6th Cir. May 31, 2022) (“evidence that is merely cumulative cannot form the newly discovered factual predicate for a habeas claim, even if the evidence lends additional support to the claim.”).

As for the Russell Police Department letter, Murphy argues the letter undermines Doe’s trial testimony which identified him as her assaulter. (DE 45 at 9.) Once again, however, Murphy’s own pleadings show that he presented evidence at trial that attempted to impeach Doe’s identification testimony. For example, Murphy admits that “[trial counsel] made some effort to impeach the victim’s testimony,” (DE 45 at 35) and that his counsel questioned Doe’s memory. (DE 1 at 14.) Murphy is likely correct that the Russell Police Department letter would have bolstered his attempt to impeach Doe. But Murphy cannot escape the fact that the letter is merely cumulative of the impeachment evidence Murphy’s counsel presented at trial. Thus, the Russell Police Department letter cannot be the “factual predicate” underlying his current claim.

In sum, neither the Kentucky Lottery letter nor the Russell Police Department letter qualify as the “factual predicates” to Murphy’s claims. Each letter is cumulative of evidence already presented at Murphy’s trial. As such, the limitations period for Murphy’s petition is governed by § 2244(d)(1)(A) and that provision renders Murphy’s petition untimely filed.

**B. The magistrate judge correctly held that no certificate of appealability should issue.**

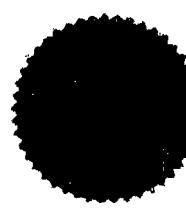
Murphy argues in the alternative that the magistrate judge erroneously failed to issue a certificate of appealability (“COA”). (DE 101 at 15.) A certificate of appealability may issue where a habeas petitioner has made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “When a district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). Here, the evidence presented by Murphy is cumulative of trial evidence, and reasonable jurists would not debate this point. Thus, reasonable jurists would not debate the denial of Murphy’s § 2254 petition as untimely.

**III. Conclusion**

For the foregoing reasons, the Court hereby ORDERS as follows:

1. the Report and Recommendation (DE 98) is ADOPTED as the Court’s opinion;
2. the plaintiff’s petition under 28 U.S.C. § 2254 (DE 1) is DENIED;
3. a certificate of appealability will not be issued; and
4. a judgment consistent with this order and the Report and Recommendation will be ENTERED.

This 16<sup>th</sup> day of October, 2024.



*Karen K. Caldwell*

KAREN K. CALDWELL  
UNITED STATES DISTRICT JUDGE  
EASTERN DISTRICT OF KENTUCKY