

U.S. District Court
Western District of Kentucky (Louisville)
CIVIL DOCKET FOR CASE #: 3:19-cv-00528-RGJ-LLK

Yarmey v. Mazza
Assigned to: Judge Rebecca Grady Jennings
Referred to: Magistrate Judge Lanny King
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 07/18/2019
Date Terminated: 05/12/2023
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner

Mark Damian Yarmey

represented by **Armand I. Judah**
Tilford Dobbins & Schmidt PLLC
401 W. Main Street, Suite 1400
Louisville, KY 40202
502-664-9338
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TERMINATED: 02/13/2020
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard Earl Cooper
Richard Cooper PSC
P.O. Box 6313
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502-587-6554
Email: richardcooperesq@gmail.com
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V.

Respondent

Warden Keven Mazza

represented by **Leilani K.M. Martin**
Kentucky Attorney General
1024 Capital Center Drive, Suite 200
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TERMINATED: 07/20/2021
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Date Filed	#	Docket Text
07/18/2019	<u>1</u>	PETITION for Writ of Habeas Corpus filed by Mark Damian Yarmey. (Attachments: # <u>1</u> Exhibit A – Habeas Corpus Filing Fee, # <u>2</u> Exhibit B – Jefferson Circuit Court – Order, # <u>3</u> Exhibit C – Court of Appeals Doc, # <u>4</u> Exhibit D – Jefferson Circuit Court – Notice, # <u>5</u> Motion for Lawyer Help, # <u>6</u> Envelope) (ALS) (Entered: 07/19/2019)
07/18/2019	<u>3</u>	MOTION for Leave to Proceed in forma pauperis by Petitioner Mark Damian Yarmey. (Attachments: # <u>1</u> Envelope) (ALS) (Entered: 07/19/2019)
07/18/2019	<u>4</u>	Prisoner Trust Fund Account Statement re <u>3</u> MOTION for Leave to Proceed in forma pauperis filed by Mark Damian Yarmey. (Attachments: # <u>1</u> Envelope) (ALS) (Entered: 07/19/2019)
07/18/2019	<u>5</u>	MOTION to Appoint Counsel by Petitioner Mark Damian Yarmey (ALS) (Entered: 07/22/2019)
07/19/2019	<u>2</u>	Case Assignment (Random Selection): Case Assigned to Senior Judge Charles R. Simpson III. (ALS) (Entered: 07/19/2019)
07/24/2019		Filing fee: \$ 5, receipt number L33060759 by Mark Damian Yarmey. (JLP) (Entered: 07/24/2019)
07/30/2019	<u>6</u>	MEMORANDUM AND ORDER signed by Senior Judge Charles R. Simpson, III on 7/29/2019. Denying as moot <u>3</u> Motion for Leave to Proceed in forma pauperis; Denying <u>5</u> Plaintiff's Motion to Appoint Counsel. cc: Petitioner (pro se), Respondent, Attorney General, Magistrate Judge King (ALS) (Entered: 07/30/2019)
07/30/2019	<u>7</u>	SERVICE AND REFERRAL ORDER by Senior Judge Charles R. Simpson, III on 7/29/2019; The Clerk of Court shall forward by certified mail, return receipt requested, one copy of the petition DN <u>1</u> and this Order on Respondent and the Attorney General for the Commonwealth of Kentucky. Respondent shall file an answer herein within 40 days from the date of entry of this Order. This matter is REFERRED to Magistrate Judge Lanny King pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter. The Clerk of Court is DIRECTED to mail Petitioner a copy of the Pro Se Prisoner Handbook. cc: Petitioner (pro se), Respondent, Attorney General, Magistrate Judge King (ALS) (Entered: 07/30/2019)
07/31/2019		***Answer Date Set to: 9/9/2018. (Answer due within 40 days from date of entry of <u>7</u> .) (RLK) (Entered: 07/31/2019)
08/05/2019	<u>8</u>	NOTICE OF SERVICE on Defendant re <u>7</u> – Service and Referral Order. (KD) (Entered: 08/05/2019)
08/08/2019	<u>9</u>	

		NOTICE of Appearance by Leilani K.M. Martin on behalf of Keven Mazza (Martin, Leilani) (Entered: 08/08/2019)
08/22/2019	<u>10</u>	MOTION for Extension of Time to File Answer re <u>1</u> Petition for Writ of Habeas Corpus, by Respondent Keven Mazza (Martin, Leilani) (Additional attachment(s) added on 8/22/2019: # <u>1</u> Proposed Order) (ALS). (Entered: 08/22/2019)
08/23/2019	<u>11</u>	ORDER by Magistrate Judge Lanny King on 8/23/2019 – Respondent is granted an extension until 11/8/2019, to file her answer to the petition. (KD) (Entered: 08/23/2019)
10/08/2019	<u>12</u>	NOTICE of Change of Address by Mark Damian Yarmey. (KD) (Entered: 10/09/2019)
10/31/2019	<u>13</u>	RESPONSE to <u>1</u> Petition for Writ of Habeas Corpus, by Keven Mazza. (Attachments: # <u>1</u> Appendix, # <u>2</u> Appendix, # <u>3</u> Appendix, # <u>4</u> Appendix, # <u>5</u> Proposed Order) (Martin, Leilani) (Entered: 10/31/2019)
11/04/2019		Schedules: Answer due 11/8/2019. (RLK) (Entered: 11/04/2019)
11/12/2019	<u>14</u>	MOTION to Appoint Counsel, MOTION for Extension of Time to File by Petitioner Mark Damian Yarmey (ALS) (Entered: 11/13/2019)
11/12/2019	<u>15</u>	MOTION for Leave to Proceed in forma pauperis by Petitioner Mark Damian Yarmey (ALS) (Entered: 11/13/2019)
11/12/2019	<u>16</u>	Prisoner Trust Fund Account Statement re <u>15</u> MOTION for Leave to Proceed in forma pauperis filed by Mark Damian Yarmey by Mark Damian Yarmey. (ALS) (Entered: 11/13/2019)
11/20/2019	<u>17</u>	TEXT ORDER REASSIGNING CASE pursuant to GO 2019–12. Case reassigned to Judge Justin R. Walker for all further proceedings. Senior Judge Charles R. Simpson, III no longer assigned to case. cc:counsel (KJA) (Entered: 11/20/2019)
11/26/2019	<u>18</u>	ORDER signed by Magistrate Judge Lanny King on 11/25/19; denying as moot <u>15</u> Motion for Leave to Proceed in forma pauperis. cc: Petitioner (pro se) (DJT) (Entered: 11/26/2019)
12/10/2019	<u>19</u>	MOTION to Withdraw <u>1</u> Petition for Writ of Habeas Corpus, by Petitioner Mark Damian Yarmey (JM) (Entered: 12/10/2019)
01/06/2020	<u>20</u>	MEMORANDUM OPINION AND ORDER Signed by Magistrate Judge Lanny King on 1/4/2020 granting <u>14</u> Motion to Appoint Counsel. The Clerk has appointed the Honorable Armand Judah, under the Criminal Justice Act, to represent Petitioner beginning on 1/3/2020. On or before 2/1/2020, Respondent shall EXPAND the statecourt record to include relevant materials regarding Petitioner's postconviction CR 60.02 and RCr 11.42 motions. The Court will SCHEDULE a telephonic status conference after Respondent supplements the record. cc: Counsel, MG, Petitioner, Respondent(JM) (Entered: 01/06/2020)
02/03/2020	<u>21</u>	NOTICE of Compliance with Order Expanding the State Court Record by Keven Mazza re <u>20</u> Order on Motion to Appoint Counsel,, Order on Motion for Extension of Time to File,, (Attachments: # <u>1</u> Appendix Appellee Brief, # <u>2</u> Appendix Appellant Brief) (Martin, Leilani) (Entered: 02/03/2020)
02/11/2020	<u>22</u>	ORDER by Magistrate Judge Lanny King on 2/9/2020: The Clerk shall SCHEDULE a telephonic status conference on a date after appointed counsel has had an opportunity

		to meet and confer with Petitioner. cc: counsel (JM) (Entered: 02/11/2020)
02/11/2020	<u>23</u>	TEXT ORDER by Magistrate Judge Lanny King on 02/11/2020. A Telephonic Status Conference is scheduled for 3/4/2020 at 10:30 a.m. Eastern Time before Magistrate Judge Lanny King. Counsel for the parties shall connect to the call by dialing the Toll-Free Meeting Number 1-877-848-7030 and entering the Access Code 7238577# when prompted. This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached. (cc: counsel) (MHB) (Entered: 02/11/2020)
02/12/2020	<u>24</u>	MOTION to Withdraw as Attorney <i>and appoint new counsel</i> . (Continue to receive notice:No) by Petitioner Mark Damian Yarmey (Attachments: # <u>1</u> Proposed Order) (Judah, Armand) (Entered: 02/12/2020)
02/13/2020	<u>25</u>	ORDER signed by Magistrate Judge Lanny King on 2/13/2020. Granting <u>24</u> Motion to Withdraw as Attorney Armand I. Judah. A separate order appointing new counsel will be entered. cc: Counsel, QC, plaintiff(KJA) (Entered: 02/13/2020)
02/14/2020	<u>26</u>	ORDER by Magistrate Judge Lanny King on 2/13/2020: The Honorable Richard E. Cooper is APPOINTED to represent the petitioner on this matter. The representation of counsel shall commence beginning on 2/13/2020; The previously court appointed counsel, Honorable Armand I. Judah, shall forward any documentation that he has on this case, to include any documentation received from the respondent's counsel. Telephonic Status Conference set for 3/4/2020 at 10:30 AM before Magistrate Judge Lanny King. cc: counsel, QC, Petitioner (as directed) (JM) (Entered: 02/14/2020)
02/18/2020	<u>27</u>	NOTICE of Compliance with Court Order by Mark Damian Yarmey re <u>26</u> Order (Attachments: # <u>1</u> Exhibit) (Judah, Armand) (Entered: 02/18/2020)
03/09/2020	<u>28</u>	MOTION to Remove and Replace Counsel by Petitioner Mark Damian Yarmey (ALS) (Entered: 03/11/2020)
03/11/2020	<u>29</u>	ORDER for proceedings held before Magistrate Judge Lanny King: Telephonic Status Conference held on 3/4/2020. Telephonic Status Conference set for 3/31/2020 at 3:30 PM before Magistrate Judge Lanny King. cc: Counsel (DLW) (Entered: 03/11/2020)
03/27/2020	<u>30</u>	ORDER Signed by Magistrate Judge Lanny King on 3/27/2020 denying <u>28</u> Motion to Remove and Replace Counsel. cc: Counsel, Petitioner (at address listed on motion) (JM) (Entered: 03/27/2020)
04/06/2020	<u>31</u>	ORDER for proceedings held before Magistrate Judge Lanny King: Telephonic Status Conference held on 3/31/2020. Telephonic Status Conference set for 6/1/2020 at 10:30 AM before Magistrate Judge Lanny King. Attorney Martin shall CONTACT the Court prior to 6/1/2020 to confirm or deny her availability for the telephonic status conference. cc: counsel (DLW) (Entered: 04/06/2020)
06/04/2020	<u>32</u>	ORDER for proceedings held before Magistrate Judge Lanny King: Telephonic Status Conference held on 6/1/2020. Petitioner's oral motion to strike the motion at DN <u>19</u> is GRANTED. Within 60 days of entry of this Order, Petitioner shall FILE his amended petition, which will supersede and replace the pro-se petition at DN <u>1</u> . Respondent shall RESPOND within 60 days following service of the amended petition, and Petitioner may REPLY within 21 days following service of Respondents response. cc:

		counsel (DLW) (Entered: 06/04/2020)
07/28/2020	<u>33</u>	AMENDED PETITION for Writ of Habeas Corpus re <u>1</u> Petition for Writ of Habeas Corpus by Mark Damian Yarmey. (Attachments: # <u>1</u> Exhibit) (Cooper, Richard) (Entered: 07/28/2020)
09/03/2020	34	TEXT ORDER OF REASSIGNMENT by Chief Judge Greg N. Stivers. IT IS HEREBY ORDERED that, pursuant to the reassignment protocol set forth in GO 20-16, this matter is reassigned to the docket of Judge Rebecca Grady Jennings for all further proceedings. This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached. cc: Counsel (SMJ) (Entered: 09/03/2020)
09/14/2020	<u>35</u>	MOTION for Extension of Time to File Answer by Respondent Keven Mazza (Attachments: # <u>1</u> Proposed Order Granting Extension) (Martin, Leilani) (Entered: 09/14/2020)
09/16/2020	<u>36</u>	ORDER Signed by Magistrate Judge Lanny King on 9/15/2020 granting <u>35</u> Motion for Extension of Time to Answer. Respondent is granted an extension until 11/10/2020 to file an answer to the petition. cc: Counsel (SMJ) (Entered: 09/16/2020)
11/06/2020	<u>37</u>	Second MOTION for Extension of Time to File Answer by Respondent Keven Mazza (Attachments: # <u>1</u> Proposed Order granting) (Martin, Leilani) (Entered: 11/06/2020)
11/10/2020	<u>38</u>	ORDER Signed by Magistrate Judge Lanny King on 11/9/2020. Respondent's <u>37</u> motion for a second extension up to and including 11/24/2020 is granted. cc: Counsel (SMJ) Modified on 11/10/2020, link added (SMJ). (Entered: 11/10/2020)
11/24/2020	<u>39</u>	RESPONSE to re <u>33</u> Amended Document <i>Petition for Writ of Habeas Corpus</i> filed by Keven Mazza. (Martin, Leilani) (Entered: 11/24/2020)
01/12/2021	<u>40</u>	ORDER OF CLARIFICATION signed by Magistrate Judge Lanny King on 1/12/2021. By way of clarification and out of an abundance of caution, it is hereby ORDERED that Petitioner may (but is not required) to file a reply to Respondent's limited response within 30 days of entry of this Order (after which the Court will consider Petitioner's amended petition ripe for determination). cc: Counsel (SMJ) (Entered: 01/12/2021)
02/03/2021	<u>41</u>	REPLY re <u>39</u> Response , REPLY to Response to Motion <i>Amended Petition for Writ of Habeas Corpus</i> filed by Mark Damian Yarmey. (Cooper, Richard) (Entered: 02/03/2021)
02/12/2021	<u>42</u>	MEMORANDUM OPINION AND ORDER signed by Magistrate Judge Lanny King on 2/12/2021. Within 30 days of entry of this Order, Respondent shall FILE an unlimited response to Petitioner's amended petition, (DN <u>33</u>), and request for an evidentiary hearing (DN <u>41</u>). cc: Counsel (SMJ) (Entered: 02/12/2021)
03/08/2021	<u>43</u>	MOTION for Extension of Time to File Answer by Respondent Keven Mazza (Attachments: # <u>1</u> Proposed Order Granting Extension) (Martin, Leilani) (Entered: 03/08/2021)
03/09/2021	<u>44</u>	ORDER Signed by Magistrate Judge Lanny King on 3/9/2021 re <u>43</u> Motion for Extension of Time. Respondent is granted an extension until 4/28/2021 to file her

		answer to the petition. cc: Counsel (SMJ) (Entered: 03/09/2021)
04/26/2021	<u>45</u>	Second MOTION for Extension of Time to File Answer by Respondent Keven Mazza (Attachments: # <u>1</u> Proposed Order granting) (Martin, Leilani) (Entered: 04/26/2021)
04/27/2021	<u>46</u>	ORDER Signed by Magistrate Judge Lanny King on 4/27/2021 granting <u>45</u> Motion for Extension of Time to Answer. Respondent is granted an extension until 5/8/2021 to file his answer to the amended petition. cc: Counsel (SMJ) (Entered: 04/27/2021)
05/10/2021	<u>47</u>	RESPONSE to re <u>33</u> Amended Document, <u>42</u> Order, <i>Amended Petition for Writ of Habeas Corpus</i> filed by Keven Mazza. (Martin, Leilani) (Entered: 05/10/2021)
05/11/2021	<u>48</u>	ORDER by Magistrate Judge Lanny King on 5/11/2021 re <u>33</u> Amended Petition for Writ of Habeas Corpus, filed by Mark Damian Yarmey. Petitioner's reply to Respondent's response, DN <u>47</u> , if any, is DUE within 30 days of entry of this Order. cc: counsel (SRH) (Entered: 05/11/2021)
06/02/2021	<u>49</u>	MOTION for Extension of Time to File Response/Reply by Petitioner Mark Damian Yarmey (Attachments: # <u>1</u> Proposed Order) (Cooper, Richard) (Entered: 06/02/2021)
06/10/2021	<u>50</u>	ORDER Signed by Magistrate Judge Lanny King on 6/3/2021 granting <u>49</u> Motion for Extension of Time to File Reply. The Court grants an extension until 7/21/2021 to file his Reply to the Response to Amended Petition. cc: Counsel (SMJ) (Entered: 06/10/2021)
07/13/2021	<u>51</u>	MOTION to Withdraw as Attorney . (Continue to receive notice:Yes) by Respondent Keven Mazza (Attachments: # <u>1</u> Proposed Order granting) (Martin, Leilani) (Entered: 07/13/2021)
07/19/2021	<u>52</u>	REPLY re <u>47</u> Response to <i>Amended Petition for Writ of Habeas Corpus</i> filed by Mark Damian Yarmey. (Cooper, Richard) (Entered: 07/19/2021)
07/20/2021	<u>53</u>	ORDER Signed by Magistrate Judge Lanny King on 7/20/2021 granting <u>51</u> Motion for Leilani K.M. Martin to Withdraw as Attorney. New counsel shall ENTER an appearance within 14 days of entry of this Order. cc: Counsel (SMJ) (Entered: 07/20/2021)
07/28/2021	<u>54</u>	NOTICE of Change of Address by Richard Earl Cooper (Cooper, Richard) (Entered: 07/28/2021)
07/29/2021	<u>55</u>	NOTICE of Appearance by Todd D. Ferguson on behalf of Keven Mazza (Ferguson, Todd) (Entered: 07/29/2021)
09/02/2021	<u>56</u>	FINDINGS OF FACT AND RECOMMENDATION signed by Magistrate Judge Lanny King on 9/1/2021 re <u>1</u> Petition for Writ of Habeas Corpus, <u>33</u> Amended Petition. The Magistrate Judge RECOMMENDS that the Court: 1) DENY Petitioner's pro-se petition, (DN <u>1</u>), as superseded and replaced by his amended petition; 2) DENY Petitioner's amended petition, (DN <u>33</u>), because Petitioner waived his claims when he pled guilty; and 3) DENY a certificate of appealability. Objections to Findings of Fact due by 9/16/2021. cc: Counsel (SMJ) (Entered: 09/02/2021)
09/15/2021	<u>57</u>	OBJECTION to re <u>56</u> Findings of Fact filed by Mark Damian Yarmey. (Attachments: # <u>1</u> Proposed Order) (Cooper, Richard) (Entered: 09/15/2021)
09/21/2022	<u>58</u>	MOTION for Ruling by Petitioner Mark Damian Yarmey (Attachments: # <u>1</u> Proposed Order) (Cooper, Richard) (Main Document 58 replaced on 9/23/2022) (SMJ). (Entered: 09/21/2022)

09/22/2022	<u>59</u>	NOTICE OF DOCKET CORRECTION Re:PDF Error: Incorrect document attached to docket entry by efiler re: <u>58</u> MOTION for Ruling ; Correct document attached to this entry. (Attachments: # <u>1</u> Proposed Order) (Cooper, Richard) (Entered: 09/22/2022)
02/21/2023	<u>60</u>	Letter from Mark Yarmey regarding case status. (SMJ) (Entered: 02/22/2023)
05/12/2023	<u>61</u>	MEMORANDUM OPINION AND ORDER Signed by Judge Rebecca Grady Jennings on 5/11/2023. The Court ADOPTS the R&R (DE <u>56</u>). The Court DENIES Yarmey's Objections (DE <u>57</u>). A Certificate of Appealability is DENIED. Yarmey's Motion for Ruling (DE <u>58</u>) is GRANTED. The Court will enter separate judgment. cc: Counsel, Petitioner (SMJ) (Entered: 05/12/2023)
05/12/2023	<u>62</u>	JUDGMENT signed by Judge Rebecca Grady Jennings on 5/11/2023. Yarmey's Petitions (DE <u>1</u> ; DE <u>33</u>) are DISMISSED WITH PREJUDICE and judgment is entered in favor of Respondent. The issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is DENIED as to all claims. This is a FINAL judgment, and the matter is STRICKEN from the active docket of the Court. cc: Counsel, Petitioner (SMJ) (Entered: 05/12/2023)

19 JUL 18 PM 12: 32

AO 241
 (Rev. 10/07)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
 HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District: WESTERN DISTRICT OF KENTUCKY
Name (under which you were convicted): Mark Damian Yarmey		Docket or Case No.: 3:19-cv-528-CRS
Place of Confinement : Green River Correctional Complex 1200 River Rd./P.O. Box 9300 Central City, KY. 42330		Prisoner No.: 234693
Petitioner (include the name under which you were convicted) Mark Damian Yarmey		Respondent (authorized person having custody of petitioner) v. Keven Mazza, Warden
The Attorney General of the State of Kentucky		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
 Jefferson Circuit Court
 Hall of Justice
 600 West Jefferson St., 2nd Floor
 Louisville, KY. 40202-2740
 (b) Criminal docket or case number (if you know): 08-CR-001191
2. (a) Date of the judgment of conviction (if you know): 12-11-2009
 (b) Date of sentencing: 03-01-2010
3. Length of sentence: 15 years
4. In this case, were you convicted on more than one count or of more than one crime? Yes No
5. Identify all crimes of which you were convicted and sentenced in this case:
 Use of a Minor U/16 in a Sexual Performance
6. (a) What was your plea? (Check one)

<input checked="" type="checkbox"/> (1) Not guilty	<input type="checkbox"/> (3) Nolo contendere (no contest)
<input type="checkbox"/> (2) Guilty	<input type="checkbox"/> (4) Insanity plea

(2b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

NA

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: Kentucky Court of Appeals

(b) Docket or case number (if you know): No: 2010-CA-604

(c) Result: Affirmed

(d) Date of result (if you know): 12-22-2011

(e) Citation to the case (if you know):

(f) Grounds raised:

Trial Court Abused its Discretion in Admitting the Seven Photographs
Trial Court Erred in Ruling that KRE 412 Barred Testimony Concerning the Florida Rape
Appellant was Entitled to a Limiting Instruction

(g) Did you seek further review by a higher state court? Yes No

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Jefferson Circuit Court

(2) Docket or case number (if you know): 08-CR-001191

(3) Date of filing (if you know): 06-28-12

(4) Nature of the proceeding: Pro-Se RCr 11.42 and Supplemental RCr 11.42

(5) Grounds raised: Trial Counsel was deficient by failing to, 1) conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos, 2) request the Court to instruct and inform the jury about the number and nature of the photos in the camera after photos were discovered 3) request mistrial to allow time for exam of the newly discovered photo evidence to determine their nature and origin, including whether they originated from the same photo pack. Counsel was ineffective in his general presentation due to a prior auto accident and prescribed narcotics. Trial Counsel was ineffective by his failing to investigate previous claim of rape upon the complaining witness, to request psychological exam on the complaining witness and for failing to follow the rules of civil procedure in presenting the prior unreported sexual assault on the prosecuting witness. Counsel failed to explain the negative consequences of allowing, and in fact requested that Mr. Yarmey waive his 5th amend. right against self incrimination and testify on his own behalf then failed to prepare him to testify. Counsel was ineffective in that he failed to explain plea/sentencing form.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: Denied

(8) Date of result (if you know): 02-12-2016

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):
- (4) Nature of the proceeding:
- (5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):
- (4) Nature of the proceeding:
- (5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Petitioner was denied due process of law under the 14th Amend. to the U.S. Const. when the trial court abused its discretion by admitting seven legal photographs into evidence that were unrelated to the indicted charges.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During a pre-trial conference and even during the actual trial (outside the presence of the jury), the Com. Atty. stated to the court that "the seven photographs that we have here are the same photographs that were presented to the Grand Jury and are not illegal." Even though the Com. Atty. admitted that the seven photos were legal photos and were not evidence supporting the indicted charge, the trial court still admitted the photos over the objection from trial counsel, which led to the Com. Atty. presenting these legal photos to the jury on an overhead projection screen and making the following statements to the jury: 1) "that picture is a crime scene, that child is about to get molested, that child is being exploited." 2) "You can go back and look at these pictures and say, you know what, this whole transaction was criminal." 3) "Its not our job here today to decide whether or not those pictures were immoral, our job here today is to determine whether or not Mr. Yamey's conduct crossed the line and these photographs were criminal." Allowing these legal photographs to be admitted into evidence led the Com. Atty. making totally false statements to the jury and was prejudicial to the Petitioner.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to conduct an adequate investigation of the case concerning an important piece of the Com.'s evidence, that being the Polaroid 600 instant camera.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During a search of Petitioner's home, police confiscated some items including a Polaroid Camera. Petitioner admitted during his interrogation that he used the Polaroid to take legal photos of the alleged victim for a modeling portfolio 10 years earlier at the request of her mother. The alleged victim had given the detective in this case these 7 legal photos and she alleged that at least 8 semi-nude and nude photos were taken after the first 7. No proof existed of the additional photos. Petitioner had informed trial counsel early in the case that at the time he took the 7 photos, the camera had not been used since he left his job as building and electrical inspector for Jefferson County in 1994 and then had not been used since the taking of the 7 photos. During trial, while inspecting the camera, trial counsel discovered that the camera still contained 3 undeveloped photos. This is easily discovered by looking at the picture counter that displays how many undeveloped photos remain in the camera, starting with 10, counting down to 1, the camera will only hold 1 film pack containing 10 photos. The Court, Com. Atty. and trial counsel all admitted this to be a fact. If trial counsel had been just the least bit motivated to even a haphazard investigation, he would have inspected the evidence before trial and discovered the undeveloped photos in the camera and have hired an expert who would have determined that those 3 photos came from the same photopack as the 7 legal photos. Testimony at trial by the alleged victim was that the Petitioner never changed film in the camera while taking photos of her. This testimony by the alleged victim herself, in addition to testimony from an expert in photography, if counsel would have hired one, would have proven that other photos were never taken and the outcome of the trial would have been different.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice, 600 West Jefferson St., 2nd floor, Louisville, KY. 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 02-12-2016

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion or petition? Yes No
- (4) Did you appeal from the denial of your motion or petition? Yes No
- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals
Frankfort, Kentucky.

Docket or case number (if you know): 2016-CA-001245

Date of the court's decision: 1-11-2019

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two

GROUND THREE: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to request the court to inform and instruct the jury concerning the number of undeveloped photos that were discovered in the camera.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During trial while inspecting the camera, trial counsel discovered that the camera still contained 3 undeveloped photos. This is easily discovered by looking at the photo counter that displays how many undeveloped photos remain in the camera, starting with 10, counting down to 1. The camera will only hold 1 film pack containing 10 photos. The court, Com., and trial counsel all admitted this to be a fact. The court even did an extensive internet research on the Polaroid 600 instamatic camera to verify this fact. After the discovery of the undeveloped photos the Com. Atty. began tampering with the camera and ejected all 3 photos and then removed the photopack. All parties then agreed to a stipulation (issue of fact) to give to the jury as follows: "Ladies and Gentlemen, the parties have reached an agreement on issues of fact. We call it a stipulation. This camera, a Polaroid 600, generates a photo that looks like the one that will be introduced into evidence, I suppose, and that this camera uses an instant photopack that goes in containing 10 photos that come

out. So, part two stipulation, this is what comes out of the camera, this size photo and that this camera is able to produce, using a full pack, 10 of these." However, the stipulation did not include the critical fact that 3 undeveloped photos had been in the camera until they were ejected by the Com. Atty. because trial counsel failed to request this most critical fact to be included. This was most critical due to the 3 photos having been ejected from the camera while the jury was not in the courtroom so the jury never had knowledge of this fact that 7 photos plus the 3 photos equals 10 photos equals the fact that no other photos were taken which equals a different outcome of the trial.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice, 600 West Jefferson St., 2nd floor, Louisville, KY. 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 02-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, KY.

Docket or case number (if you know): 2016-CA-001245

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to request a mistrial to allow the "newly discovered evidence" to be examined by an expert.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During trial while inspecting the camera, trial counsel discovered that the camera still contained 3 undeveloped photos. This is easily discovered by looking at the photo counter that displays how many undeveloped photos remain in the camera, starting with 10, counting down to 1. The camera will only hold 1 film pack containing 10 photos. The court, Com., and trial counsel all admitted this to be a fact. the Court even did extensive internet research on the Polaroid 600 instamatic camera to verify this fact. After the discovery of the undeveloped photos, the Com. Atty. began tampering with the camera and ejected all 3 photos and then remover the photopack. Trial counsel and the jury was very aware of the 7 legal photos in evidence that the Petitioner had admitted he took of the alleged victim at the request of the mother. The alleged victim testified that at least 8 more seni-nude and nude photos were taken of her that were never found. However, her testimony at trial was that Petitioner never changed film in the camera- a camera that will only produce 10 photos without changing film. If the jury had heard testimony from an expert in photography that the 7 legal photos of the victim and the 3 undeveloped photos that were ejected from the camera by the Com. Atty. came from the same photopack, the outcome of the trial would have been different.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice, 600 West Jefferson St., 2nd floor, Louisville, KY. 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals
Frankfort, KY.

Docket or case number (if you know): 16-CA-001245

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

GROUND Five: Petitioner was denied his right to effective assistance of counsel under the 5th, 6th, and 14th Amend. to the U.S. Const. when counsel proceeded to trial under the influence of prescription narcotics rendering him ineffective.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Prior to Petitioner's trial in the spring of 2009 trial counsel was involved in a tragic car accident in South Carolina when he was moving. Counsel's father died in this accident and counsel suffered serious back injuries and other serious injuries. The situation was so serious trial was continued from 5-26-2009 until 12-08-2009. Due to counsel's serious injuries and the death of his father, counsel was taking pain and antidepressants. These drugs affected counsel to the point that counsel had to get help from the Petitioner's son to open his pill bottle. The additional effect of these pills was counsel's inability to function within the norms of competent counsel. The inability is proven by his lack of coherent questions, articulatable strategy, lack of preparation, and numerous errors. Counsel failed to illicit testimony that no images of the alleged victim were found anywhere even though a full forensic exam was conducted by the Com. Counsel failed to hire experts to testify about the exam or transference relating to other statements by the accuser that she had been abused by others. He failed to object to improper voir dire questions even after the Judge pointed them out to him. Had Counsel articulated that the 7 legal photos presented at trial and the 3 taken from the camera by the Com. accounted for all the photos the camera held the outcome of trial would have been different.

(b) Direct Appeal of Ground Five:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice, 600 West Jefferson St., 2nd floor, Louisville, KY. 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals
Frankfort, KY.

Docket or case number (if you know): 16-CA-001245

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence Affirmed

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

ROUND

GROUND SIX: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when counsel failed to comply with the requirements of KRE 412.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel planned to question the accuser concerning several unreported cases of abuse by the accuser including an unreported claim of a rape that occurred in Florida. Counsel failed to make a motion to the court as required by KRE 412 prior to the attempted questioning. The purpose of this questioning was to establish if this alleged and unreported rape had actually occurred, She was transferring the feelings of anger from that incident to the defendant. Had this incident and others actually not occurred this would have been evidence of her lack of credibility. Additionally, Counsel, knowing that he was going to pursue a transference as part of his defense, failed to acquire an expert to explain or convey that there was a transference that occurred. In the same vain, and knowing that the accuser had claimed "she had been in therapy ever since you (Petitioner) did it." Counsel failed to acquire those records from the accuser's therapist or have a psychological evaluation conducted on the accuser. Had Counsel performed any of these duties the jury would have been shown the accuser was transferring her anger onto the defendant and would have also been shown her lack of credibility.

(b) Direct Appeal of Ground Six

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice, 600 West Jefferson St., 2nd floor, Louisville, KY. 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals
Frankfort, KY.

Docket or case number (if you know): 16-CA-001245

Date of the court's decision: 01-1102019

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence Affirmed

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

ROUND

GROUND SEVEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to Class Habit Evidence testimony by Sgt. Joshua Judah.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During questioning by the Com. Atty., Sgt. Joshua Judah, a Sgt. in the Crimes Against Children Unit was asked, "And are delayed disclosure cases rare in the Crimes Against Children Unit?" His response was, "No. What I just told you all about, most of the cases we get are delayed. At least, its very rare we get a case where we have a chance to go out and get physical evidence. And its very, very common that you don't. The case doesn't come across the detective's desk until two or three years, at least, after it happened. The nature of these offenses and the way they occur, it occurs with chilpren who were afraid to go and report it to anyone." This statement, combined with multiple statements listed in Grounds Eight, Nine, and Ten were very prejudicial to Petitioner's Defense.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Raising this issue per Martinez V. Ryan - Ineffective Assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

ROUND

GROUND EIGHT: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to the multiple instances of Class Habit Evidence by Det. Angela Merrick.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Following the testimony of Sgt. Judah, Det. Angela Merrick was the Comm.'s next witness. The Com. Atty. asked Det. Merrick, "When it comes to these sorts of cases, do the majority of them, do they usually get prosecuted, a case that makes it to your desk?" Her response was, "No, sir. Just like Det. Judah said, the majority of them do not." Later, she stated, "However, with our juvenile victims, a lot of times they don't disclose initially. Sometimes it takes a little while before they disclose sexual abuse to them." A few seconds later, the Com. Atty. asked, "And sometimes does it take people 5 years, 10 years, 20 years to come forward?" Det. Merrick answered, "Quite often most of our cases are like that." There are 4 other instances of this Class Habit Evidence testimony from Det. Merrick. All of this testimony was highly prejudicial and should have been objected to by trial counsel.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or

raise this issue: Raising this issue per Martinez V. Ryan, Ineffective Assistance of trial Counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

ROUND

GROUND NINE: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to Class Habit Evidence testimony by former Det. Mike Mulhall.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During questioning by the Com. Atty., Det. Mulhall was asked, "If we can't get a victim, and I'm trying to think of cases you and I have worked on. If we can't get a victim that will come into this courtroom, our case is dead?" He answered, "Correct". Com. Atty: "And the perpetrator goes free?" Det Mulhall: "Correct" Com. Atty.: "And sometimes these victims come back when they're older?" Det. Mulhall: "Oh, yes." Com. Atty.: "And they're ready?" Det. Mulhall: "Oh, yes." Com. Atty.: "We have a delayed disclosure?" Det. Mulhall: "Yeah. People don't understand why the delay, why they do that." This exchange is more class Habit Evidence that was prejudicial to the Petitioner and should have been objected to by trial counsel.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective Assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

ROUND

GROUND TEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to multiple instances when the Com. Atty. compared the Petitioner and the alleged victim to other cases using Class Habit Evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During closing, the Com. Atty. argued Class Habit Evidence multiple times to the jury :1) "And I've touched on this already. It is the nature of these sorts of cases that kids don't come forward. Okay? Weather it is to a trusted friend, whether it is to a parent in a good home environment, which she did not have, its just the nature of these cases." 2) "I hope when you all go back there, say on onehand, we've got a victim who fits the profile of a child abuse victim, okay, a child sex abuse victim. This is it. Okay?" 3) "But I tried to make it a point in this case to show you these sort of offenders come in all shapes and sizes. They are employed, they are unemployed. They are intelligent, they are uneducated. Its all across the spectrum. Okay?" 4)" That child grew to be an adult who started having nightmares, and they are getting better. Notice they are getting better when this process picks up. When we start the process of seeking justice, she's starting to get better. And that's an absolute appropriate response of a victim of child sexual abuse." 5)"We learned a lot about child sex abuse cases in this trial from people we put on who are on the front lines with this stuff and deal with delayed disclosure. That's the phenomin when a victim does not go immediately to a trusted adult or call 911." Allowing the Com Atty. to argue Class Habit Evidence over and over and over without objection was highly prejudicial to the Petitioner.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective Assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND

GROUND ELEVEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to raise the issue of perjured Grand Jury Testimony.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During Petitioner's trial, outside the presence of the jury, the Com. Atty. stated to the court on two different occasions that, "These are the same photographs that were presented to the Grand Jury and these are not illegal photographs." Those 7 legal photos were the only ones presented to the Grand Jury or used in trial proceedings. However, the Com. Atty. presented these 7 photos to the Grand Jury through testimony of Det. Merrick and led them to believe they had numerous other nude photos. This was not true because no other photos existed. After hearing this statement and while looking at the 7 legal photos, a member of the Grand Jury stated "I mean, its child abuse too." The Com. Atty. remained silent, letting the Grand Jury believe that nude photos existed and the 7 legal photos were illegal and also considered "child abuse". Det. Merrick made another false statement to the Grand Jury, telling them, "And then I asked him about the nude pictures, he said if they were taken along with these other pictures that I have, then he must have took those too." This was an absolute false statement as Petitioner never admitted to taking nude photos. This false and misleading testimony from Det. Merrick along with the Com. Atty. allowing the Grand Jury to believe evidence existed that did not was prejudicial to Petitioner. It was the responsibility of trial counsel to move for the dismissal of the indictment without prejudice and allow only truthful testimony and evidence that actually existed to be presented to a new Grand Jury.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective Assistance of Trial Counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND

GROUND TWELVE: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to insure that the jury instructions would require a unanimous verdict.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During the testimony of the alleged victim, the Com. Atty. asked her to identify 7 photos for the jury. These were the same 7 photos that the Com. Atty. referred to twice in court, out of the presence of the jury, as being the "same photographs that were presented to the Grand Jury and these are not illegal photographs." During cross-examination by trial counsel, the alleged victim stated that in addition to the 7 photos that were admitted into evidence, there were 8 more photos taken, some topless, some nude, for a total of 15 photos. The Instruction No. 2, Use Of A Minor In A Sexual Performance, stated as follows: 1) That in Jefferson Co. Ky., between January 1, 1998 and March 6, 2000, the defendant knowingly employed, consented, authorized or induced Erin Brannick to engage in a sexual performance; AND 2) that at the time of such contact, Erin Brannick was less than 16 years of age. It is not evident and clear from these instructions and verdict form that the jury agreed, not only that Petitioner committed one count of Use Of A Minor In A Sexual Performance, but also exactly which photo they all believe constituted this charge! Petitioner was denied a unanimous verdict and thus, due process of law because trial counsel failed to object to this instruction.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective Assistance Of trial Counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND THIRTEEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel allowed the alleged victim to be released and not subject to recall.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The alleged victim, Erin Branick, was the Com.'s first witness at trial. At the end of her testimony, trial counsel did not inform the the court that he wanted her subject to recall (for impeachment purposes) and even agreed to let her remain in the courtroom as an exhibit for the jury. Later in the trial, during a bench confrence, trial counsel stated to the court and the Com. Atty. that, "She (Erin) told Det. Merrick that she had long hair at the time and he (Petitioner) grabbed her long hair and pulled her forward. Now, the photographs show that she had short hair at the time." Com. Atty., replied "Objection, hearsay." Judge responded "that's what Michelle (Erin) told him? that's hearsay. That would have been a question you could have presented to her." This was very relevant because she had told Det. Merrick during her first interview that she had long hair at the time the 7 photos were taken, and this interview was before she searched her mon's house and found the 7 photos. In closing argument, the Com. Atty. stated, "Everything she(Erin) said to the last detail checked out. Find me one inconsistency!" Later on, he stated, "Was she ever impeached? Did you see that moment? No!" And another time, he states, "Her story checks out without one inconsistency. Not one incorrect detail." These statements alone show Petitioner was prejudiced by the ineffectiveness of trial counsel.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND FOURTEEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel demonstrated his obvious incompetence during a failed objection to inadmissible evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.) During the testimony of Sgt. Judah, the Com. Atty. questioned him concerning a scanner that was collected as evidence at Petitioner's home. Trial Counsel objected, stating that there was no evidence to show that Petitioner owned the scanner when the photos were taken in 1998. Com. Atty. stated no evidence existed showing that he didn't and the jury could decide that fact. The judge overruled the objection and admitted the scanner into evidence as an exhibit. If trial counsel had brought it to the attention of the trial court that the manufacturing date of the scanner was stamped 2006, his objection would have been sustained. Petitioner had told Det. Merrick during his interrogation that he did not own a scanner when the 7 photos were taken in 1998. However, during her interview, the alleged victim had told Det. Merrick that the Petitioner had "scanned" the photos on a scanner back in 1998 and testified to this happening. Petitioner's son also testified there was not a scanner in their home until 2006. Petitioner testified that the scanner was a gift he received in 2006. He testified it was used for school related work as he was a school teacher, teaching electricity. Trial counsel was obviously incompetent for not pointing out to the court that this scanner was not manufactured until 2006 which resulted in a failed objection and allowed a fictitious inadmissible and highly prejudicial piece of evidence to be admitted as an exhibit.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr. 11.42 post-conviction proceeding.

GROUND FIFTEEN: Petitioner was denied effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to hearsay statements of Cindy Brannick and Keitha (last name unknown)(non-testifying witnesses) introduced through testimony of Erin Brannick.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During Petitioner's trial, Com. witness Erin Brannick (Sipes) made several statements allegedly made by her non-testifying mother, Cindy Brannick. Erin stated, "She come to me and said that her and Mark had decided that they were going to do a modeling portfolio for me, and she had cut a picture out of a magazine as an example of the kind of pictures that I would be taking." Later on in her testimony, she said, "He and my mom went and talked and my mom came back to me and said, "they were going to take what Mark called shadow pictures, which I was—she asked me to take my bathing suit top off and I would be topless in the pictures but you couldn't see anything." And again, "My mom and Mark went to another room to talk, and my mom came back and said "that she was tired but Mark wasn't done yet so she was going home. And he—when he finished with me he was going to bring me home." Erin additionally made another statement allegedly made by another non-testifying individual named Keitha. Erin stated, "When I told Keitha, she told me I needed to tell my mom what happened." Neither of these individuals testified or were at the trial to testify. Not only are these statements hearsay and inadmissible and should have been objected to, but also denied Petitioner his right to confront these statements because neither person was available for cross-examination.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND SIXTEEN: Petitioner was denied effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to hearsay statements of Cindy Brannick, a non-testifying witness introduced through testimony of Gary Sipes, Tammy Shields, and Det. Angela Merrick.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): At Petitioner's trial, 3 additional Com. witnesses, Gary Sipes, Tammy SShields, and Det. Merrick all made statements allegedly made by the non-testifying witness Cindy Brannick. Gary Sipes testified, "I opened the drawer and there were all those photographs that her mother said had been destroyed." Tammy Shields testified, "I asked Cindy to come home and Cindy just basically, told me O could handle the situation by myself. She was not ready to come home." and later, "She gave her(Cindy) financial—She gave her mom money all the time. It was kind of "you have to give me money." type of thing. Det. Merrick testified, "Cindy Brannick, in the controlled phone call, confirmed that there were pictures taken." and "And then later when I talked to Cindy Brannick, she said that they did the same thing and we were able to locate it then." At no time did trial counsel object to these of any hearsay statements allowing inadmissible evidence to be introduced to the jury and denying the Petitioner the opportunity to confront the individual.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND

GROUND SEVENTEEN: Petitioner was denied effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to object to hearsay statements of Cindy Brannick, a non-testifying witness, introduced by the Com. Atty.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During Petitioner's trial, the Com. Atty. made several hearsay statements to the jury to influence them. The Com. Atty. told the jury in his closing statements, "We know that Cindy Brannick put that makeup on her and showed pictures of what she wanted. Now, I mean by this is—and Mr. Yamey admits this—that actually Cindy brought over something even more explicit, more explicit than this, okay, and said, "This is what I want you to do with my daughter." and, "What should they do the moment a parent says "I want explicit pictures of my daughter", and again later he states, "I don't dispute Mr. Yamey that the photo's were actually more explicit, you know, the ones that she said, "This is what I want of my daughter." These inadmissible hearsay statements were presented, by the Com. Atty., with the sole purpose of influencing the jury against the Petitioner. Trial counsel should have objected to these hearsay statements. This was a denial of Petitioner's right to confront an individual that was not a witness or present in court.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND EIGHTEEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. th the U.S. Const. when counsel failed to object to an unreliable and inadmissable CACU intake log entered into evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): At trial, The Com. introduced a CACU Intake Log allegedly created prior to trial showing that the alleged victim reported the allegations against Petitioner as recently as 5 years before trial. Trial counsel should have objected to the admission of this unreliable evidence. The Com. Atty. states during trial that the CACU Intake Log is faulty. The Prosecutor admits that the alleged victim's listed date of birth is 3-7-2004. This is 7 years after the alleged incident. Additionally, as acknowledged by the Com. Atty., this Intake Log listed the incident date as 6-21-1905, 103 years prior to trial and long before anyone associated with this trial was even born. The Com. Atty. admitted there was no associative supporting file connected to or with this Intake Log. These facts make this Intake Log unreliable and inadmissible and should have been objected to by trial counsel. This unreliable and inadmissable Intak Log was introduced by the Com. Atty. in a blantant attempt to bolster the accuser's credibility.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

GROUND NINETEEN: Petitioner was denied his right to effective assistance of counsel under the 6th Amend. to the U.S. Const. when counsel coerced him into signing, and failing to explain the consequences of an improper sentencing agreement.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): After Petitioner was tried and convicted at trial, defense counsel confiscated Petitioner's personal items including his glasses, stating they were not allowed in jail, and gave them to Petitioner's son. Petitioner was taken to a "no contact" holding cell next to the courtroom. Counsel then brought a document that he stated was a "Sentencing Agreement" telling the Petitioner that it was a sentencing agreement for 15 years in prison and this was the best deal the Petitioner could get. Without his glasses, Petitioner was forced to rely on trial counsel's explanation. The Petitioner was never informed by counsel that this improper agreement would constitute the sentence as a violent offense, 5 year conditional discharge, loss of goodtime while incarcerated, and housing restrictions in violation of ex-post-facto law. The violent offender law pertaining to this charge did not take effect until 2006, 9 years after the alleged commission of this crime. Counsel also failed to inform the Petitioner that he was giving up his right to appeal the decision. The laws pertaining to Petitioner's crime and sentence, changed several times between 1998, the alleged date of occurrence, and 2010, when Petitioner was convicted and sentenced. The Petitioner was prejudiced by not being sentenced under the 1998 law in effect in 1998 when this crime allegedly occurred extending Petitioner's sentence.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 proceeding.

GROUND TWENTY: Petitioner was denied effective assistance of counsel under the 6th Amend. to the U.S. Const. when trial counsel failed to establish a date for the alleged commission of the crime and allowing the application of a sentence that violates ex-post-facto law.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Petitioner was arrested in March of 2008 based on an allegation by the accuser that she had been abused by the Petitioner 10 years prior. This would have designated the alleged crime to have been committed in March of 1998. The incident states a time frame of 3-1999 to 3-2000. Throughout trial the Prosecutor and witnesses testimony referenced the year of 1998 and also that the incident, when reported in 2008, occurred 10 years prior which places the alleged incident occurring in 1998. The establishment of a time of occurrence is extremely important due to the various statute changes that occurred during this time. Additionally, Petitioner was sentenced under the 2010 Statute for an alleged crime that he was found guilty of committing between 1998 and 2000. The statutes pertaining to this crime changed 3 or more times between 1998 and 2010. Petitioner has been prejudiced by counsel failing to establish a specific date or even a year of the alleged crime. The changes in the law definitely extend the Petitioner's length of sentence, good time earned while incarcerated, housing restrictions when released, and amount of conditional discharge which was not enacted until 2006, well after the alleged commission of this crime.

(b) Direct Appeal of Ground

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Raising this issue per Martinez V. Ryan, - Ineffective assistance of trial counsel issue not raised in the initial RCr 11.42 post-conviction proceeding.

13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Ground 1 presented to Court of Appeals on Direct appeal. Grounds 2 through 6 presented to Court of Appeals on appeal of RCr 11.42 Motion. Grounds 7 through 20 were never raised in the initial post conviction motion due to the inexperience and incompetence of retained counsel.

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them: Grounds 7 through 20 were never raised in the initial post conviction motion due to the inexperience and incompetence of retained counsel.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:
- (a) At preliminary hearing: James Falk, Address unknown, Moved to South Carolina during pretrial, shortly after arraignment.
 - (b) At arraignment and plea: James Falk, Address unknown, Moved to South Carolina shortly after Arraignment.
 - (c) At trial: James Falk, Address unknown, Moved to South Carolina shortly after Arraignment.
 - (d) At sentencing: Joe Blandford, The Landward House, 1387 S. Fourth St., Louisville KY. 40208.
 - (e) On appeal: Joe Blandford, The Landward House, 1387 S. Fourth St., Louisville KY. 40202.
 - (f) In any post-conviction proceeding: Joe Blandford, The Landward House, 1387 S. Fourth St., Louisville, KY. 40208.
 - (g) On appeal from any ruling against you in a post-conviction proceeding: Maureen Sullivan, Kentucky Home Life Building, 239 South Fifth St., Suite 1700, Louisville, KY. 40202.
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future:
N/A
- (b) Give the date the other sentence was imposed:
- (c) Give the length of the other sentence:
- (d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes No
18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*
- | | |
|------------|---------------------------|
| 3-1-2010 | Final Judgment/Sentencing |
| 3-26-2010 | Notice of Appeal |
| 12-22-2011 | Direct Appeal Opinion |

(Continued on Next Page)

6-28-2012	Pro-Se RCr 11.42 filed
2-28-2013	Supplemental RCr 11.42 filed (Submitted by retained counsel)
2-12-2016	RCr 11.42 Denied by Circuit Court
2-23-2016	Notice of Appeal filed
1-11-2019	Court of Appeals Denial of RCr 11.42
2-12-2019	Motion for Discretionary Review
4-23-2019	Motion for Discretionary Review withdrawn by Appellant

Tolling Time Calculations

365 days
+90 days (Writ of Certiorari not filed)
+21 days (Direct Appeal becoming final)
476 days
-187 days (Time between Direct Appeal opinion and Pro-Se RCr 11.42 Motion)
- 85 days (Time lapse between withdraw of M.D.R. and filing of this Petition)
204 days (Remaining to file Petition as of July 17, 2019)

This Petition is due by February 6, 2020

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: ~~Grant this Writ of Habeas Corpus or, Order an Evidentiary Hearing and appoint counsel to represent Petitioner at the hearing, or in the alternative, appoint counsel to represent Petitioner in all future filings required in this action including the preparation of his Memorandum of Law which will be necessary to respond to the Commonwealth~~

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 07-17-2019 (month, date, year).

Executed (signed) on 07-16-2019 (date).


Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

From: Mark Yarmey #234693
Green River Correctional Complex
1200 River Rd.
P.O. Box 9300
Central City, KY. 42330

FILED JS
US DISTRICT COURT CLERK
WESTERN DISTRICT OF KY

19 JUL 18 PM 12:32

TO: Vanessa Armstrong, Clerk
United States District Court
106 Gene Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY. 40202-2249

3:19-CV-528-CRS

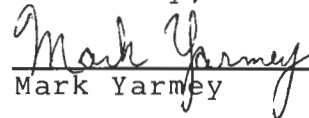
Re: Habeas Corpus Five Dollar Filing Fee:

Ms. Armstrong;

Enclosed is my Habeas Corpus Petition, Jefferson Circuit Case No. 08-CR-001191. The five dollar filing fee is being sent via separate first class mail as this institution reads outgoing legal material prior to enclosing a check. The five dollar filing fee should arrive within a few days of your receipt of this Petition.

If you have not received my filing fee within a week of receiving this Writ, please let me know. Thank you for your understanding in this matter.

Sincerely,


Mark Yarmey

NO. 08CR1191

JEFFERSON CIRCUIT COURT
DIVISION ONE (1)

MARK YARMEY

PETITIONER

v.

ORDER

COMMONWEALTH OF KENTUCKY

RESPONDENT

* * * * *

This case is before the Court on Petitioner Mark Yarmey’s (“Petitioner”) motion to vacate or set aside his criminal conviction pursuant to combined RCr 11.42 and CR 60.02 motions. Petitioner has filed briefs for both motions. The Commonwealth has filed a response brief. An evidentiary hearing was conducted on October 11, 2013, and recorded at 30-01-13-VR-181-A.

Findings of Fact

Judgment of conviction was entered against Petitioner on January 9, 1997. He was found guilty of Use of a Minor in a Sexual Performance. He was sentenced to fifteen (15) years to serve for this criminal conviction.

Issues of Law

The issues for this Court to address are: (1) Whether Petitioner received ineffective assistance of counsel pursuant to RCr 11.42 and the Supreme Court of the United States’ decision in *Strickland v. Washington*, [466 U.S. 668, 669](#) (1984); and (2) whether newly discovered evidence warrants post conviction relief pursuant to CR 60.02.

Analysis

The purpose of an 11.42 post-conviction motion to vacate, set aside, or correct sentence

is not to provide an opportunity to conduct a fishing expedition for grievances, but rather to provide a forum for known grievances. *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007). RCr 11.42(2) explicitly requires a specific complaint, factual support, and prejudice. Movant “must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971).

The motion must be filed within three years after the judgment on appeal becomes final with two exceptions: (1) when the factual basis of the claim was unknown to the movant and could not have been ascertained through due diligence; or (2) when the fundamental constitutional right asserted was created after the three year period and has been held to apply retroactively. The motion must then be filed within three years after the event establishing the exception occurred. RCr 11.42(10).

Pro se movants are not held to the same standards as counsel for purposes of determining sufficiency of a motion as a pleading. Still, the pro se motion must be specific. *Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967); *Brooks v. Commonwealth*, 447 S.W.2d 614, 618 (Ky. 1969); *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971).

Whether at a hearing or simply on the motion itself, the burden of proof is on the movant. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). “The burden is on the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). Movant’s failure to introduce evidence to substantiate a particular claim constitutes waiver of claim. *King v. Commonwealth*, 408 S.W.2d 204, 205 (Ky. 1966). If it appears the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant movant a new trial, or correct the

sentence as may be appropriate pursuant to Civil Rule 52.02.

“It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the trial court and upon an appeal considered by this court.” *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972).

By its terms, CR 60.02 is an extraordinary remedy. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). It is “available only when a substantial miscarriage of justice will result from the effect of the final judgment.” *Id.* CR 60.02 supplements RCr 11.42 and is not a substitute for it. *Perkins v. Commonwealth*, 382 S.W.2d 393, 394 (Ky. 1964). A defendant is prevented from using CR 60.02 to raise issues which could have reasonably been presented via RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856-857 (Ky. 1983).

CR 60.02 is available for relief that is not available by direct appeal or under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

CR 60.02 is available “to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief.” *Gross*, at 856.

In his motion to vacate sentence pursuant to CR 60.02, Petitioner argues that he was erroneously charged with the crime of Use of a Minor in a Sexual Performance. In its response to Petitioner’s 60.02 motion, the Commonwealth contends that the record refutes the basis of Petitioner’s claim in that the photographs admitted were not used to prove the “sexual

performance” element, but rather they were used to establish the context in which the alleged crimes occurred. Further, the Commonwealth points out that the issues argued by Petitioner pursuant to CR 60.02 were pretrial matters not properly raised under CR 60.02.

In both instances, the Commonwealth is correct in its assertions that Petitioner’s CR 60.02 motion for post-conviction relief fails. The photographic evidence was presented not as direct evidence of any sexual performance, but rather as a means of showing the context in which the crime occurred. All additional arguments raised by Petitioner in his CR 60.02 motion were subject to direct appeal and not properly brought under CR 60.02.

In his motion to vacate sentence pursuant to RCr 11.42, Petitioner argues that trial counsel was deficient by failing to: conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos; request the Court to instruct and inform the jury about the number and nature of photos in the camera after photos were discovered; request a mistrial to allow time for examination of the newly discovered photographic evidence to determine their nature and origin, including whether or not they originated from the same package as other photos.

Petitioner also asserts the following as evidence of ineffective assistance of counsel: trial counsel was ineffective in his general presentation due to a prior automobile accident and the prescribed narcotics he was taking during trial; trial counsel failed to investigate previous claims of rape by the victim, request psychological examination of the victim, or follow the rules of civil procedure in presenting the prior unreported sexual assault on the prosecuting witness.

According to Petitioner, trial counsel also failed to explain the negative consequences of allowing Petitioner to testify on his own behalf after failing to adequately prepare him for testimony. Finally, Petitioner argues that trial counsel failed to adequately explain the plea form

at trial.

In this final submitted “closing argument,” Petitioner reiterates the arguments raised in the original RCr 11.42 motion and also summarizes the testimony from the October 11, 2013 evidentiary hearing. Petitioner requests this Court to grant a new trial in this matter due to Petitioner’s trial counsel’s ineffective assistance.

In its response to Petitioner’s request for relief pursuant to RCr 11.42, the Commonwealth asserts that the issues Petitioner raises under his RCr 11.42 motion are subject to normal appeal. The trial court judgment on appeal was affirmed by the Court of Appeals, and now Petitioner is attempting to raise additional issues which he initially waived his right to appeal through this post-conviction relief motion. Further, the Commonwealth adds that the tactics chosen by Petitioner’s trial counsel did not constitute ineffective assistance. Rather they fell within the broad range of discretion accorded to a defense attorney. This accordingly fails the two-pronged ineffective assistance of counsel test required under the *Strickland* decision.

With regard to the argument involving the film in the Kodak Polaroid camera, the Commonwealth argues that nothing Petitioner’s trial counsel decided to do or refrain from doing in regards to the inadvertent discovery that the Polaroid camera still had film inserted in it at the time of trial, or that it was meant to be used with a film pack designed to hold ten photographs, constituted ineffective assistance. Even if it did, the Commonwealth argues that it is telling that never once since Petitioner’s convicted has he or his post-conviction counsel tried to have the seven photographs that were admitted into evidence compared with the two that were produced inadvertently from the camera during the trial.

The Commonwealth further addresses Petitioner’s claim that his trial counsel was under the influence of powerful prescription pain medication due to an automobile accident in which he

was injured: after some dispute as to how close in proximity this accident was to Petitioner's trial, the Commonwealth points to the fact that it occurred some fourteen months prior to trial. Coupled with Petitioner's trial counsel's testimony that he had not been taking prescription pain killers or anything stronger than an over the counter pain reliever such as Advil, the Commonwealth asserts that it is highly unlikely that any strong medication was clouding trial counsel's judgment.

In regards to trial counsel's failure to pursue the claims of an unreported allegation of rape which occurred to the victim in Florida, the Commonwealth asserts that any such motion to admit this type of evidence would likely be blocked by the applicable Rape Shield Statute, KRE 412.

In addressing Petitioner's argument that his trial counsel failed to prepare him for testifying on his own behalf, the Commonwealth asserts that this is an age-old dilemma for defense attorneys, and a matter that truly can only be decided by the defendant himself. Whether or not to testify on one's own behalf can be argued for by trial counsel, but ultimately it is up to the defendant whether or not to risk doing so. The fact that it often backfires on defendants does not, according to the Commonwealth, automatically make trial counsel's insistence on it in any particular case ineffective by default.

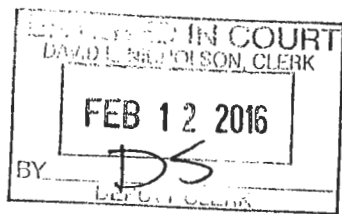
Finally, the Commonwealth addresses Petitioner's claim that trial counsel failed to explain the plea following the jury verdict. The Commonwealth points to the thorough nature of the plea colloquy undertaken by the Judge at trial, as well as the merits of the plea admitted to by both defense counsel and the prosecution at trial.

This Court finds the Commonwealth's arguments concerning Petitioner's motion for post-conviction relief pursuant to RCr 11.42 persuasive on all accounts. Petitioner has failed to

address any matter in the handling of his case at trial in which the decisions made by trial counsel were anything other than strategy allowable under the broad discretion given to trial counsel by the Court. There is simply put not enough evidence to conclude any prescription medication's influence over trial counsel which would have hindered his decision making. The decision not to have the admitted photographs tested against those produced at trial is telling of Petitioner's own confidence in that type of test's outcome. Understanding of the limiting nature of the Rape Shield Law, as well as a basic understanding of the risks posed by a defendant who testifies on his own behalf prevent this Court from finding any ineffective assistance of counsel with regards to the decisions made at trial on those accounts. Finally, it is clear, from the record, that Petitioner understood, despite what he claims to have heard from his trial counsel, the implications of pleading guilty voluntarily.

Conclusion

For the foregoing reasons, Petitioner's motions to vacate his criminal conviction pursuant to CR 60.02 and RCr 11.42 are DENIED.



A handwritten signature in black ink, appearing to be "B. Willett", written over a horizontal line.

BARRY WILLETT
JEFFERSON CIRCUIT COURT JUDGE

Date Signed: 2/12/16

Document: Yarmey v. Commonwealth, 2019 Ky. App. Unpub. LEXIS 24

A Yarmey v. Commonwealth, 2019 Ky. App. Unpub. LEXIS 24

Court of Appeals of Kentucky

January 11, 2019, Rendered

NO. 2016-CA-001245-MR

Reporter**2019 Ky. App. Unpub. LEXIS 24 * | [2019 WL 169133](#)**

MARK YARMEY, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Prior History: [*1] APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE BARRY WILLETT, JUDGE. ACTION NO. 08-CR-001191.

Yarmey v. Commonwealth, 2011 Ky. App. Unpub. LEXIS 912 (Ky. Ct. App., Dec. 22, 2011)

Core Terms

trial counsel, sexual, camera, photographs, rape, ineffective, prosecuting, sentencing, witness's, circuit court, direct appeal, investigate, argues, film

Counsel: For APPELLANT: Maureen A. Sullivan, Louisville, Kentucky.

For APPELLEE: Andrew G. Beshear, Attorney General of Kentucky, Leilani K. M. Martin, Frankfort, Kentucky.

Judges: BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND D. LAMBERT, 1 3, JUDGES. ALL CONCUR.

Opinion by: D. LAMBERT

Opinion

AFFIRMING

LAMBERT, D., JUDGE: Mark Yarmey argues for post-conviction relief under RCr 2 3 11.42 and CR 3 3 60.02. Yarmey was convicted of using a minor in a sexual performance. After review, we affirm the Jefferson Circuit Court's order denying the motions.

I. BACKGROUND

Most of the facts relevant to this appeal were set forth in *Yarmey v. Commonwealth*, 2010-CA-000604-MR, 2011 Ky. App. Unpub. LEXIS 912, [2011 WL 6743294](#) (Ky. App. Dec. 22, 2011), Yarmey's direct appeal to this Court. A jury convicted Yarmey of the underlying sexual offense after hearing evidence that he took nude photographs of an 11-year-old girl with a Polaroid camera. Yarmey also faced a first-degree sodomy charge based on other allegations, but was not convicted.

At trial, both Yarmey and the alleged victim testified. A Polaroid camera seized from Yarmey's home was also introduced into evidence, along with seven photographs. Yarmey admitted he had taken the photographs using the seized Polaroid [*2] camera. Also, while handling the camera in the courtroom, Yarmey's trial counsel apparently discovered for the first time that there was still enough film in the camera to take three more photos. His trial counsel subsequently stipulated that the camera had been loaded with a film pack containing ten photos.

After deliberation, the jury found Yarmey guilty of using a minor in a sexual performance. The jury did not reach a verdict, however, as to the first-degree sodomy count. Rather than proceed to the sentencing phase of the trial, Yarmey entered a conditional plea agreement wherein he accepted a 15-year prison sentence.

In his direct appeal, a panel of this Court affirmed several of the circuit court's evidentiary findings relating to the prosecuting witness's sexual history and to the photographs. This Court held that the evidence relating to the witness's sexual history was properly excluded and that the photographs were properly admitted. The panel also affirmed the circuit court's refusal to give a limiting instruction with respect to the photographs. Yarmey did not file a motion for discretionary review.

Instead, Yarmey filed a *pro se* CR 60.02 motion, and later, a motion under RCr 11.42. He also [*3] requested an evidentiary hearing, which was ultimately granted. Not long thereafter, Yarmey retained new counsel and filed a second RCr 11.42 motion, arguing ineffective assistance by his trial counsel.

In his second post-conviction motion, Yarmey mainly complained that his trial counsel failed to adequately investigate whether the camera still contained film and whether the prosecuting witness required psychological testing due to suspected sexual trauma. Yarmey also claimed his trial counsel was rendered ineffective by the prescription medications he was taking during the trial and because Yarmey testified in his own defense. Finally, Yarmey asserted his plea agreement was not knowingly and voluntarily entered because his counsel failed to adequately explain the consequences of the agreement.

Following the aforementioned evidentiary hearing, the circuit court denied Yarmey's motions. The circuit court held that several of his arguments either were, or should have been, raised on direct appeal. The circuit court also held that the remaining issues did not present a valid claim of ineffective assistance simply because Yarmey's trial strategy did not achieve a desired outcome. This appeal followed. [*4]

II. STANDARD OF REVIEW

Whether counsel was unconstitutionally ineffective requires an examination under the two-pronged test outlined in *Strickland v. Washington*, [466 U.S. 668](#), [104 S.Ct. 2052](#), [80 L.Ed.2d 674](#) (1984). The defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced him. *Id.* at 687. In evaluating counsel's performance, reviewing courts must only "look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance to the extent that the errors caused the adversarial testing process not to work." *Harper v. Commonwealth*, [978 S.W.2d 311, 315](#), [45 10 Ky. L. Summary 15](#) (Ky. 1998) (citations and internal quotations omitted). Second-guessing trial strategy with the benefit of hindsight is to be avoided. *Id.* at 317.

As for relief under CR 60.02, this is an extraordinary remedy, reserved to raise issues that cannot be raised in other proceedings. *McQueen v. Commonwealth*, [948 S.W.2d 415](#). It "is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *Id.* (quoting RCr 11.42(3) and citing *Gross v. Commonwealth*, [648 S.W.2d 853, 855-56](#) (Ky. 1983)).

III. DISCUSSION

On appeal, Yarmey reasserts his arguments from the trial level. He begins by generally claiming his trial counsel failed to adequately investigate the case. Yarmey then presents two reasons why [*5] the investigation was insufficient: (1) because counsel did not discover that the Polaroid camera contained additional film until trial; and (2) because his counsel did not thoroughly investigate the prosecuting witness's prior sexual history. Had his counsel thoroughly investigated, Yarmey argues, his counsel might have discovered exculpatory evidence and been able to request that the witness undergo a psychological examination regarding her status as a rape victim. [4] For the following reasons, we disagree.

"[A] constitutionally effective criminal defense requires trial counsel reasonably to investigate the circumstances of the alleged crime." *Herp v. Commonwealth*, [491 S.W.3d 507, 511-12](#) (Ky. 2016). The investigation must have been reasonable under the circumstances of the representation rather than under ideal circumstances. *Commonwealth v. McGorman*, [489 S.W.3d 731, 743](#) (Ky. 2016).

Here, by testifying that the Polaroid camera seized from his residence and introduced into evidence was the one he used to take seven photographs of the prosecuting witness, Yarmey, by admission, allowed the evidence remaining in the camera to be presented to the jury. See *Thomas v. Commonwealth*, [153 S.W.3d 772, 780](#) (Ky. 2004) (testimony from defendant's mother as to residue on a Mountain Dew bottle was sufficient to link the bottle to the crime). Moreover, since the [*6] remaining film was expended without producing any exculpatory evidence, there was no demonstrated prejudice to Yarmey's defense. Yarmey's trial counsel did not act unreasonably regarding the Polaroid camera, nor did any prejudice result from counsel's performance, assuming counsel had acted unreasonably. Accordingly, Yarmey's allegations did not entitle him to relief.

Likewise, Yarmey's trial counsel did not act unreasonably with respect to the witness's sexual history. The events in this case occurred before the witness's twelfth birthday. Although she testified by avowal that she was later raped by another perpetrator in another state, that act apparently occurred several years after Yarmey took the photographs. Declining to ask for a court-ordered psychological evaluation based on unrelated events that occurred several years after those at issue is precisely the kind of strategic decision this Court will not criticize on appellate review.

As a second claim on appeal, Yarmey argues his trial counsel should have attempted to bypass Kentucky's Rape Shield Law by relying on the prosecuting witness's avowal testimony that she was raped years after the photographs were taken. From Yarmey's [*7] perspective, his counsel's failure to make this argument was unconstitutionally deficient because he could have hired an expert to testify that the prosecuting witness was transferring the emotional injury caused by the rape to the incident with Yarmey. We strongly disagree.

KRE **5** 412(a)(1) generally bars evidence of a victim's prior sexual activity from being introduced to prove that the victim of a sex-related crime engaged in other sexual behavior. The purpose of this evidentiary rule is to avoid improper impeachment of character based on sexual activity. *Perry v. Commonwealth*, 390 S.W.3d 122, 129 (Ky. 2012). In criminal cases, though, evidence of the alleged victim's sexual behavior may be admitted if offered to show that someone other than the accused was the source of injury or other physical evidence. KRE 412(b)(1)(A).

Here, Yarmey cannot demonstrate how his trial counsel acted incompetently or prejudiced his defense by not attempting to admit evidence of the subsequent, unrelated rape. First, he assumes, without citing any supporting authority, that a timely filed attempt to introduce the evidence would have resulted in its admission under KRE 412(b)(1)(A). And then from that flawed premise, he claims evidence of the subsequent, unrelated rape would have given trial counsel **[*8]** the opportunity to prove that the victim was conflating which forcibly compelled sexual act traumatized her. As this position is wholly untethered from logic and the policy underlying Kentucky's Rape Shield Law, it is meritless. See *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002) (failure to perform a futile act is not ineffective assistance of counsel).

For his next argument on appeal, Yarmey claims his trial counsel was ineffective because of the medications he was taking during the trial. He does not list which medications his trial counsel was taking, nor which side effects allegedly caused the deficiency. Instead, he merely criticizes his trial counsel for failing to make certain objections during the trial, and other forms of trial tactics, all while blaming an unspecified "medication." Arguments of this kind lack adequate support. Hence, they do not comply with the specificity requirements of RCr 11.42(2) and warrant summary dismissal.

Regarding his final arguments on appeal, Yarmey claims several errors with respect to the plea agreement he entered after he was convicted, but before he was sentenced. He argues his guilty plea was void because it was not knowingly, intelligently, or voluntarily given and because his trial counsel failed **[*9]** to advise him as to his parole eligibility. And then, while assuming the invalidity of his guilty plea, he argues that the circuit court erred in dismissing his petition for CR 60.02 relief, wherein he claimed the evidence before the jury was insufficient to support a conviction. For the following reasons, none of these arguments is persuasive.

Here, the plea deal Yarmey entered was voluntary. The trial court held a *Boykin* **6** colloquy in which Yarmey affirmed he was freely accepting the prosecution's offer. These solemn declarations, stated in open court with counsel, are presumed true. See *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). Furthermore, Yarmey's reliance on an unpublished opinion of this Court, styled *Patton v. Commonwealth*, No. 2014-CA-001115-MR, 2016 Ky. App. LEXIS 134 (Ky. App. July 29, 2016), is misplaced. The Kentucky Supreme Court reversed that decision in *Commonwealth v. Patton*, 539 S.W.3d 651 (Ky. 2018). **7**

Because Yarmey's plea agreement was voluntarily entered, his claim of ineffective assistance of counsel regarding the guilty plea was properly dismissed. Trial counsel is not ineffective merely because he negotiated a plea deal that his client willingly accepted but later regretted. Instead, the petitioner must show that rejecting the plea deal would have been rational under the circumstances. **[*10]** *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012). Here, Yarmey faced sentencing for a Class B felony, stemming from a sex crime against child, and possible additional proceedings relating to the first-degree sodomy charge. Accordingly, advising Yarmey to mitigate a potentially longer sentence than one of 15 years was not irrational, even though he would serve 85% of it before becoming parole eligible. See also *Commonwealth v. Pridham*, 394 S.W.3d 867, 880 (Ky. 2012) (argument as to egregious difference between bargained-for parole eligibility and statutorily-mandated parole eligibility a "red herring" when potential post-conviction sentencing not a factor).

Also, the valid plea agreement renders Yarmey's CR 60.02 motion moot. Any issue relating to the sufficiency of evidence at trial should have been raised on direct appeal. The trial record was available, and not newly discovered. On the contrary, the trial record contained Yarmey's express declaration of guilt. CR 60.02 does not authorize criminal defendants to disregard a valid plea agreement and relitigate known arguments through collateral challenge. Hence, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

Footnotes

1 ¶

Judge Debra Hembree Lambert authored this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

2 ¶

Kentucky Rules of Criminal Procedure.

3 ¶

Kentucky Rules of Civil Procedure.

4 ¶

The prosecuting witness testified by avowal she had been raped by a separate perpetrator while in Florida, years after the encounter with Yarmey.

5 ¶

Kentucky Rules of Evidence

6 ¶

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

7 ¶

The Supreme Court rendered its decision while this appeal was pending.

Content Type:

Terms:

Narrow By: -None-

Date and Time: Jul 15, 2019 10:14:12 a.m. EDT



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15 DISTRICT COURT CLERK
WESTERN DISTRICT OF KY

NO. 08-CR-001191

19 JUL 18 PM 12:33

JEFFERSON CIRCUIT COURT
JUDGE BARRY WILLETT
CIRCUIT COURT (1)

COMMONWEALTH OF KENTUCKY

V. NOTICE-MOTION-ORDER

MARK DAMIAN YARMEY

DEFENDANT

*** **

Take notice that the undersigned shall tender the following motion on the 4 day of March, 2013, at 8:30 a.m. in the courtroom of the above court.

CERTIFICATE

It is hereby certified that a copy of the foregoing was mailed to the following this 27 day of February, 2013:

COMMONWEALTH'S ATTORNEY
30th Judicial District
Hon. Thomas Wine
514 W. Liberty Street
Louisville, Kentucky

and

KENTUCKY ATTORNEY GENERAL
Jack Conway
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

and

JAMES FALK
Bush Law Group, P.C.
3 Broad Street, Suite 450
Charleston, SC 29401

11.42 MOTION

Comes the Defendant, Mark D. Yarmey, by counsel, and moves the Court to vacate, set aside or correct his sentence for the above indictment pursuant to Ky. R.Cr.11.42.

PROCEDURAL HISTORY

On April 10, 2008, Mark Damien Yarmey (hereinafter referred to variously as Defendant or Mr. Yarmey), was indicted by the Jefferson County Grand Jury by direct submission for the offense(s) of Sodomy in the First Degree, pursuant to [KRS §510.070](#) and Use of a Minor in a Sexual Performance, pursuant to [KRS §531.310](#).

Sodomy in the First Degree is defined as follows:

“(1) A person is guilty of sodomy in the first degree when:

- (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
- (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
 - 1. Is physically helpless; or
 - 2. Is less than twelve (12) years old.

(2) Sodomy in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.”

Due to the alleged age of the complaining witness, Mr. Yarmey’s maximum penalty was a Class A felony which carried a term of 20 to 50 years to life imprisonment.

Deviate Sexual Intercourse, pursuant to [KRS §510.010\(1\)](#), is defined as:

“any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign

object manipulated by another person. "Deviate sexual intercourse" does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices.”

Use of a Minor in a Sexual Performance, pursuant to [KRS §531.310](#), is defined as follows:

“(1) A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.

(2) Use of a minor in a sexual performance is:

(a) A Class C felony if the minor so used is less than eighteen (18) years old at the time the minor engages in the prohibited activity;

(b) A Class B felony if the minor so used is less than sixteen (16) years old at the time the minor engages in the prohibited activity; and

(c) A Class A felony if the minor so used incurs physical injury thereby.”

Mr. Yarmey was prosecuted under section (2)(b), which is a Class B felony and carries a penalty of 10 to 20 years imprisonment. Further, a conviction for Use of Minor in a Sexual Performance is not parole eligible until a convicted Defendant has served 85% of his sentence and the Defendant is not entitled to “good time” credits. (See [KRS §439.3401](#)).

On March 25, 2008, the complaining witness, Erin M. Brannick (hereinafter referred to as CW or Brannick, or in the trial tapes as Michelle) presented herself to the Louisville Metro Police Department, Crimes Against Children Unit, and asked to speak to a detective. Ms. Brannick met with Det. Angela Merrick and relayed to her that approximately ten (10) years earlier, in either 1998 or 1999, Mr. Yarmey had taken pictures of her pursuant to the request of Ms. Brannick’s mother, Cindy Brannick. (Trial tape vr #212 4, 12-9-09 at 3:42:59.) (Trial Tape vr#213 7, 12-10-09, at 2:18:01 p.m.). According to Brannick, her mother wanted a modeling portfolio

created and took her to a person she knew had a camera, Mark Yarmey. (Trial Tape vr #212 4, 12-9-09 at 3:13:12 p.m.). The Brannick's knew Mr. Yarmey from church and from his occasional help around their home due to Cindy Brannick's disability. Mr. Yarmey occasionally drove the Brannick's to church, mowed their yard, or did other handyman projects around the home. There was no sexual relationship between Mr. Yarmey and Cindy Brannick, and any services Mr. Yarmey performed for the Brannicks was done out of friendship, obligation from church, or simple kindness. (Trial Tape vr #214 7, 12-11-09 at 2:07:00 p.m.).

Erin Brannick testified that after she and her mother arrived at Mr. Yarmey's house, her mother and Mr. Yarmey discussed what pictures would be necessary and there were at least two wardrobe changes by Ms. Brannick, once into a leopard pattern bikini and then into one of Mr. Yarmey's blue dress shirts. Ms. Brannick further testified that when these photos were taken, perfume bottles were placed under her breasts in order to give her more cleavage. (Trial Tape vr #212 4, 12-9-09 at 3:12:41 p.m. through 3:18:25 p.m.).

On the night in question, which cannot be conclusively determined, it is undisputed that Mr. Yarmey took pictures of Erin Brannick. Those pictures were introduced into evidence over the Defendant's motion in limine to suppress and renewed motion at trial. (Defendant's Motion in Limine, renewed at trial, see Trial Tape vr #212 4, 12-2-09 at 3:22:54 p.m.). Mr. Yarmey admitted to taking the photos which were introduced into evidence; but denied, on all occasions, of taking any nude pictures of Erin Brannick. (Trial Tape vr #214 7, 12-11-09 at 3:01:00 p.m.)

Cindy Brannick did not testify at trial. Erin Brannick testified that her mother Cindy was present for the first 7 pictures, introduced as Commonwealth's Exhibit 1 – 7 at trial, that after these pictures were taken, Mr. Yarmey and her mother stepped into another room, had a short conversation and then Cindy Brannick left.

Erin Brannick testified that after her mother left her with Mr. Yarmey, he proceeded to ask her, "have you ever sucked a dick?" and then proceeded to force her to her knees and forced her to perform oral sex on him until he ejaculated in her mouth. According to Erin Brannick's testimony, Mr. Yarmey then continued to take pictures for a total of up to 25 pictures. Erin Brannick further testified that all pictures taken after her mother left were of her in various phases of undress, up to and including complete nudity. According to Ms. Brannick, Mr. Yarmey then took those Polaroid pictures into the next room, where a computer and scanner were located.

Ms. Brannick testified that Mr. Yarmey scanned at least one of the naked pictures of her into his computer and proceeded to show her that the image could be manipulated, and used a program to cover her breasts. After seeing that this upset her, Mr. Yarmey allegedly threw the pictures into a trashcan and took her home. (Trial Tape vr#212 4, 12-9-09 at 3:28:30 p.m. through 3:36:00 p.m.).

Ms. Brannick testified that she never returned to Mr. Yarmey's home or was alone with him again. All of these events which resulted in Mr. Yarmey's indictment are limited to this single occasion.

Despite Erin Brannick's testimony of at least one of the pictures being scanned into the computer and manipulated, a search of the computer hard drives found in Mr. Yarmey's home and a review by the National Center for Missing and Exploited Children turned up no additional photos and only the 7 photos that were in Cindy Brannick's possession were introduced as evidence at trial or were ever found.

Sometime in 2004, Cindy and Erin Brannick went to the Louisville Metro Police Department Crimes Against Children Unit and spoke to a detective, allegedly about Mr. Yarmey. Erin Brannick testified that at this meeting, the Detective informed them that a controlled

telephone call and/or a forensic interview would need to be conducted. Erin Brannick testified that her mother never took her for the interview or contacted the police again. For whatever reason, the forensic interview never occurred and the file was closed and marked as unsubstantiated. Other than Erin Brannick's testimony, there is no proof, one way or the other, as to the reason why no additional actions were taken by the Louisville Metro Police Department in 2004. (Trial Tape vr #212 4, 12-9-09 at 3:38:00 through 3:40:00).

At the time that Erin Brannick spoke to Det. Merrick in 2008, she allegedly did not have the 7 pictures in her possession and stated that she did not know where they were. After speaking with Det. Merrick, she and her husband went to the home they shared with her mother and searched her mother's nightstand drawer and miraculously found the pictures, ten years after they were taken and in the home she shared with her mother. (Trial Tape vr #212 4, 12-9-09 at 3:45:50 through 3:46:12).

Erin Brannick took these pictures to Det. Merrick and thereafter a controlled call was made to Mr. Yarmey by Erin Brannick under the direction of Det. Merrick, a conversation in which he had difficulty remembering her, or the events of ten (10) years before. (Trial Tape vr #213 3, 12-10-09 at 10:43:09 through 10:54:55).

Based on the telephone call, the statement of Ms. Brannick and the pictures, Det. Merrick obtained an arrest warrant and search warrant for Mr. Yarmey's home. Mr. Yarmey was taken into custody by the Louisville Metro Police Department where he was interrogated by Det. Merrick about the events from ten (10) years before.

At the same time, officers executed the search warrant at Mr. Yarmey's home and confiscated a plethora of video, camera, and computer equipment. Despite this extensive and exhaustive physical search, and a subsequent computer forensic search, no evidence of child

pornography was found, nor were any pictures of Erin Brannick found.

Mr. Yarmey, after his arrest, signed a Miranda waiver form and agreed to speak with the detectives investigating Erin Brannick's allegations. At no time during any phone call, interview, interrogation or during his testimony did Mr. Yarmey ever admit to any inappropriate touching of Erin Brannick nor did he admit to taking any nude or naked pictures of Erin Brannick and in fact, he adamantly denied ever doing either. Despite the tactics of the investigating officer to lure or trick Mr. Yarmey into an admission, Mr. Yarmey stayed with the truth and denied the allegations.

After the interrogation of Mr. Yarmey the above listed indictment was filed.

On May 18, 2009, trial counsel for Mr. Yarmey filed a motion in limine seeking to exclude the introduction of the 7 pictures. This motion was overruled and the evidence was admitted at trial as Commonwealth's Exhibits 1 – 7.

Trial of this matter began on December 8, 2009, in Jefferson Circuit Court, Division One, Honorable Barry Willett presiding. At trial, Mr. Yarmey testified that he did take the pictures identified as Exhibits 1 – 7, that Cindy Brannick was there when those pictures were taken, that she directed what type of pose she wanted, that she left after the pictures were taken and left Erin with him because she had some errand to take care of or didn't feel good, that he took Erin home and finally, he adamantly denied take any pictures beyond the 7 in Cindy Brannick's possession and adamantly denied inappropriately touching Erin Brannick.

After several days of trial the case was submitted to the jury for consideration. The jury ultimately returned a verdict of guilt on the charge of Use of a Minor in a Sexual Performance but was unable to reach a unanimous verdict on the Sodomy in the First Degree charge. The Court declared a mistrial on count one of the indictment, Sodomy in the First Degree, based upon manifest necessity. (Order declaring mistrial, entered December 18, 2009, Page 88 of the

Jefferson Circuit Court file).

The parties reached an agreement and Mr. Yarmey entered a conditional plea on December 15, 2009 to the charge of Use of a Minor in a Sexual Performance for a total sentence of 15 years. This conditional plea waived all issues for appeal with the exception of the following:

1. “However, the defendant may appeal the Court’s pretrial evidentiary ruling concerning the admissibility of CW exhibit 1 – 7.”
2. “The defendant may also appeal the court’s ruling concerning the defendant’s proposed limiting instruction.” And,
3. “Defendant may also appeal the Court’s ruling prohibiting the admissibility of victim’s prior rape. No other issue may be appealed.” See Commonwealth’s Offer on a Plea of Guilty, attached hereto.

Mr. Yarmey was sentenced under this agreement on March 1, 2010. See Judgment of Conviction, Sex Offender, Violent Offender, Conditional Plea Pursuant to RCr 8.09.

LAW

To prevail on a claim of ineffective assistance of counsel, Mr. Yarmey must fulfill two requirements.

First, he must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, [466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 \(1984\)](#).

“[T]he proper standard for attorney performance is that of reasonably effective

assistance.” Id. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted). Id. at 691-692. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. Additionally, “a hearing is required only if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, [854 S.W.2d 742, 743-744](#) (Ky. 1993).

ARGUMENT

- 1. Trial counsel was deficient by failing to, (1) conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos, (2) request the Court to instruct and inform the jury about the number and nature of photos in the camera after photos were discovered and (3) request a mistrial to allow time for examination of the newly discovered photographic evidence to determine their nature and origin, including whether or not they originated from the same package as other photos.**

At trial, outside the presence of the jury, while handling the evidence, the Assistant

Commonwealth Attorney, Jon Heck, took a photo with Mr. Yarmey's camera. Only at that point was it discovered that the camera still contained film. Ultimately, all of the remaining photos were ejected from the camera, a total of three. Then the photo pack was ejected from the camera. The parties and Court agreed to inform the jury of this fact, and stipulated that the photo pack in the camera held ten photos prior to any usage. However, the stipulation did not include the information that three photos had been in the camera until they were ejected by the commonwealth attorney.

The Court instructed the jury as follows:

"Ladies and gentlemen, the parties have reached an agreement on issues of fact. We call it a stipulation. This camera, a Polaroid model 600, generates a photo that looks like the one that will be introduced into evidence, I suppose, and that this camera uses an instant photo pack that goes in containing 10 photos that come out.

So, two part stipulation: This is what comes out of the camera, this size photo, and that this camera is able to produce, using a full pack, 10 of these."

The idea that the Commonwealth or the Louisville Metro Police Department failed to determine if the camera had film remaining in it is mind boggling.

When it became known to trial counsel that the camera contained film, a motion for a mistrial should have been requested so the film pack could be compared and submitted to an expert to determine if the camera film pack and the pictures in evidence originated from the same film pack.

Ms. Brannick testified that numerous other photos were taken the same evening after the pictures introduced into evidence. However, Mr. Yarmey specifically denied this allegation and those alleged photos were never found.

If trial counsel had requested a mistrial based upon this "new" evidence and the negligent testing and examination of the camera and its contents by the Louisville Metro Police Department and the Commonwealth, it is likely the Court would have granted Mr. Yarmey the opportunity to review this evidence and submit it to expert examination. Such an examination would have shown that the pictures in evidence and the pictures remaining in the photo pack were siblings originating from the same photo package at creation. This comparison of the pictures in the photo pack would show that Ms. Brannick was not truthful about subsequent pictures, leaving her entire testimony subject to serious attack based upon its falsity.

Likewise, once trial counsel learned the number of photos remaining in the camera, he should have made this argument known to the jury and demanded that the number of photos in the camera be made known to the jury. A stipulation would be the only way to make this fact known since Mr. Heck could not be called as a witness to establish this fact.

It was, and is, Mr. Yarmey's contention that the only photos he took were the 7 in evidence and that the photo pack in the camera was the same one used to take the original pictures of Ms. Brannick. The Commonwealth submitted the camera into evidence as the one used to take the pictures of Ms. Brannick. The failure to do anything with, or about, this critical piece of evidence, either by the Commonwealth or Trial Counsel is wrong on its face, wrong after thoughtful analysis and wrong to even a casual observer.

An underlying fact in the trial was the existence of additional photos Ms. Brannick claimed were taken and which showed her in various stages of undress. The only evidence of these other photos was Ms. Brannick's testimony, yet their existence haunted the proceedings. The only charge the jury could agree on was Use of a Minor in a Sexual Performance, which by its very nature indicates that the jury believed the other photos existed. Failure to explore this issue denied

Mr. Yarmey a fair trial.

If the pictures had all been taken at the request of the Defendant, the fact that 3 remained out of a pack of 10 and 7 photos were in evidence would have been a factor that the jury would have found compelling and which would have changed the outcome.

This failure is not mere conjecture nor is it speculative; it is concrete, articulable and clearly prejudiced the proceedings.

The failures of the Prosecution and of trial counsel regarding this critical piece of evidence are mind boggling. If trial counsel had done any of the foregoing it would have changed the trial result. The failure to do any of these precluded Mr. Yarmey from having a fair trial and robbed him of the guarantee of a fair trial.

If trial counsel's purpose was to preserve and protect Mr. Yarmey's rights to a fair trial, he failed miserably in this regard and this fact alone is sufficient to justify a new trial in this matter.

2. Counsel was ineffective in his general presentation due to a prior automobile accident and the prescribed narcotics he was under during trial.

Prior to trial of this matter, Mr. Falk was involved in a tragic automobile accident which resulted in the death of his father and serious injuries to himself. The original trial date had to be continued due to Mr. Falk's injuries.

Apparently while in Charleston, South Carolina, for the purpose of moving his family and practice to South Carolina, Mr. Falk was involved in the aforementioned automobile accident.

By the time trial actually occurred in December, 2009, Mr. Falk had finalized the relocation of his home and practice to South Carolina and he actually drove back and forth to Kentucky for the trial. Additionally, Mr. Falk was still suffering from injuries from the wreck,

including a serious back injury sustained in the accident, and was taking prescription pain killers. During the course of the trial, Mr. Falk would leave the courtroom and go to the hallway outside the courtroom. Since he was unable to open the pill bottle, Mr. Yarmey's son, John, would open the bottle for him. The bottle was clearly labeled with instructions not to operate heavy equipment or motor vehicles, that it could cause dizziness or drowsiness and not to take alcohol with it. (See Affidavit of John Yarmey, attached hereto).

During the course of the trial, as one watches it, it is clear that trial counsel is operating under a disability. The lack of coherent questions, articulable strategy or any effort besides simply sitting in court are patently obvious.

The lack of preparation and inability to communicate with the jury goes beyond mere trial strategy. Trial counsel made a number of errors during the course of the trial that viewed singularly and alone do not constitute ineffectiveness, but when viewed in total, clearly demonstrate that Mr. Falk was operating under a disability and was ineffective as counsel as defined by *Strickland*.

Examples of these inexplicable acts by trial counsel are as follows:

a. Failed to illicit testimony that no images of Brannick were found on Mr. Yarmey's computer, either by direct testimony or by expert witness. No images of Ms. Brannick were found on Mr. Yarmey's computer or in his possession. Although a forensic exam was performed on the computer, Trial Counsel failed to question Detective Merrick about this fact or to secure an expert witness, despite the explicit instructions of Mr. Yarmey, to testify regarding this fact.

b. Failed to raise objections during voir dire on improper questions of the prosecution. Including asking if anyone had ever taken painted or taken pictures of naked children, which elicited the statement from the Court that it had no idea what that had to do with the issues at trial.

c. Failure to object to, or clarify to the jury, that the scanner in evidence could not have been used as it was manufactured years after the alleged events. During the trial, a scanner was presented as evidence and left out as evidence taken from Mr. Yarmey's home. However, as could easily be ascertained, the scanner in question was manufactured too late to have been present in Mr. Yarmey's home at the time in question. No objection to their admissibility was made, nor was any testimony elicited to show that the scanner was manufactured many years after the event claimed. This failure unfairly placed in the jury's mind that the scanner in court was the scanner Mr. Yarmey allegedly used.

d. Failed to point out to the jury the sarcastic nature of Mr. Yarmey's statement in recorded telephone call. During the controlled phone call by Ms. Brannick to Mr. Yarmey, she asked if he were afraid to say anything because he might incriminate himself. Mr. Yarmey replied, "Yes, that's it." This comment was clearly a sarcastic reply from Mr. Yarmey which the prosecution used to claim that Mr. Yarmey made an admission. Trial counsel failed to explore this or make the jury aware of the sarcastic nature of this comment.

e. Failed to reserve Ms. Brannick as a witness for recall. At the end of Ms. Brannick's testimony, the Court specifically asked Mr. Falk if he wished to reserve Ms. Brannick as a witness, which he declined to do. This allowed Ms. Brannick to remain in the Courtroom and be observed by the jury during the entire trial, thereby potentially eliciting sympathy when she could have been required to remain outside the courtroom.

f. Advised Mr. Yarmey's son to file an 11.42 motion. After the jury returned its verdict, Mr. Falk turned and advised John Yarmey, Mr. Yarmey's son, that they needed to file an 11.42 motion. This comment speaks for itself.

3. Trial Counsel was Ineffective by his failure to investigate previous claim of rape upon

the complaining witness, to request psychological exam on the complaining witness and for failing to follow the rules of civil procedure in presenting the prior unreported sexual assault on the prosecuting witness.

In discovery, the Commonwealth presented an interview with Ms. Brannick's husband, Gary Sipes. During this interview, he shared with the detectives that Ms. Brannick had been raped when she lived in Florida but failed to report this to any legal authority. (Ms. Brannick lived in Florida after the events which form her allegations against Mr. Yarmey but before the trial on those allegations).

Based on this information, trial counsel had an obligation to determine the facts surrounding that event. Upon learning this fact, trial counsel would have had several options available to him. First, he could have requested that Ms. Brannick submit to a psychological exam pursuant to *Mack v. Commonwealth, Ky.*, [860 S.W.2d 275](#) (1993). Second, an expert witness could have been retained who could have offered the theory that Ms. Brannick was transferring anger towards these unknown assailants, men who were beyond her reach, to Mr. Yarmey, someone who was definitely within her grasp.

Trial counsel did seek to impeach Ms. Brannick with this unreported rape in Florida. The Commonwealth objected on the basis of [KRE 412](#), which provides in pertinent part, as follows:

“Rule 412. Rape and similar cases - Admissibility of victim's character and behavior

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subsections (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

After hearing the argument of counsel, the Court sustained the Commonwealth's objection and did not allow any testimony from Ms. Brannick regarding this topic.

Since trial counsel failed to follow the Rules of Criminal Procedure, the evidence was not

presented to the jury. However, trial counsel did attempt to preserve this issue by having Ms. Brannick testify by avowal.

That testimony is as follows:

“Mr. Falk Q: Something happened to you one day when you were walking home from school?
Ms. Brannick A: (No verbal response).
Q: Let me – I’m sorry. I shouldn’t have given it to you that way. But let’s sort of give you the background; Mr. Sipes told Ms. Merrick that one day when you were coming home from school, you were jumped and attacked and raped?
A. I wasn’t coming home from school, but, yes. Okay.
Q. That is true?
A. Yes.
Q. And so this happened when you were in Florida; is that correct?
A. Yes. I-
Q. Did you go to the police?
A. No.
Q. Did you ask your mother to go to the police?
A. No.
Q. Your mother didn’t go and you didn’t ask her to go; is that correct?
A. No.
Q. Obvious question: This was obviously a traumatic experience; is that correct?
A. Yes.” (Trial Tape vr#212 5, 12-9-2009, at 04:37:00 to 04:38:00).

Therefore, it is not mere speculation as to whether Ms. Brannick would testify she was raped in Florida and failed to report it; we know it to be true.

The failure to present this evidence, or to follow the rules regarding its admissibility severely hampered Mr. Yarmey's ability to defend himself, to present a defense or even to explore Ms. Brannick's motivation.

These failures by trial counsel constitute ineffectiveness of trial counsel which unfairly prejudiced Mr. Yarmey in the eyes of the jury and violated the guarantees of *Strickland*.

4. **Counsel failed to explain the negative consequences of allowing, and in fact requested, that Mr. Yarmey waive his 5th Amendment right against self-incrimination and testify on his own behalf and then failed to prepare him to testify.**

At trial of this matter, Mr. Yarmey testified in his own behalf and waived his right against self-incrimination pursuant to the 5th Amendment. Prior to indictment, but while in custody, Mr. Yarmey waived his 5th Amendment rights after being given a *Miranda* warning and without benefit of counsel was questioned by the investigating detective. In that interview, which was played at trial, Mr. Yarmey consistently denied the allegations raised by the prosecuting witness.

Trial counsel told Mr. Yarmey he wanted him to testify at trial. At no time did he explain the reasons for asserting his 5th Amendment rights nor did he explain the possible repercussions of testifying in his own behalf.

Most importantly, prior to his testimony, trial counsel failed to prepare Mr. Yarmey in any way. Mr. Yarmey did not even have the opportunity to review his previous statement with counsel before testifying.

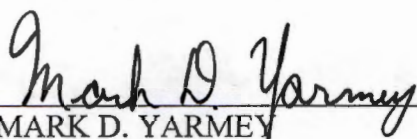
This failure to explain these negative ramifications and then failing to adequately prepare Mr. Yarmey or even having him read his prior statement led Mr. Yarmey tripping over his own testimony.

This ineffectiveness of trial counsel unfairly prejudiced Mr. Yarmey in the eyes of the jury and violated the guarantees of *Strickland*.

5. **Trial Counsel was ineffective in that he failed to explain plea form.**

After the jury returned hung on one of the charges, the Commonwealth and trial counsel negotiated a plea agreement. At no time did Trial Counsel explain this document to Mr. Yarmey, either to explain the limitation on the right of appeal, or the fact that it was a "violent" crime per

I have reviewed this 11.42 motion and it is true and correct.



MARK D. YARMEY

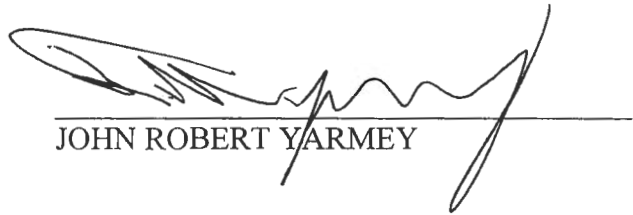
DATE: 2-22-2013

AFFIDAVIT

Comes the Affiant, John Robert Yarmey, and being duly sworn, states as follows:

1. I am the son of Mark Yarmey. I am 30 years old and live in Jefferson County, Kentucky.
2. I was present for the entire trial of my father.
3. During the trial, Mr. Falk, my father's attorney, was taking pain medication for injuries he suffered in an automobile accident. Because Mr. Falk couldn't open the bottle containing his medication, so he asked me to.
4. I reviewed this bottle and although I don't remember the name of the medication, I believe it was a narcotic. I believe this because it had warning labels stating not to operate motor vehicles or heavy equipment, that it may cause dizziness or drowsiness and not to take with alcohol.
5. I opened this bottle for him on at least two occasions. Both of these occasion were at the courthouse during the course of the trial.
6. Mr. Falk was actively trying my father's case while he was taking these narcotics.
7. After taking the medication, Mr. Falk would noticeably lose his train of thought and have difficulty focusing on, and remaining on, whatever topic we were talking about.
8. After the jury returned its verdict, Mr. Falk turned around and told Carol Mooney, a friend of Dad's, and myself, that Dad needed to file an 11.42 motion.

Further, Affiant sayeth not.



 JOHN ROBERT YARMEY

STATE OF KENTUCKY)
) SS
 COUNTY OF JEFFERSON)

SUBSCRIBED AND SWORN to before me by John Robert Yarmey, this 27th day of February, 2013.

MY COMMISSION expires: September 7, 2014



 NOTARY PUBLIC, STATE AT LARGE, KY.

Kentucky statutes.

This ineffectiveness of trial counsel unfairly prejudiced Mr. Yarmey in the eyes of the jury and violated the guarantees of *Strickland*.

CONCLUSION

Therefore, Defendant, Mark Yarmey, moves the Court to sign and enter the Order attached hereto setting an evidentiary hearing on his motion for relief pursuant to Ky RcrP. 11.42.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Joseph E. Blandford, Jr.", is written over a horizontal line. The signature is stylized and cursive.

JOSEPH E. BLANDFORD, JR.

Attorney at Law

1387 S. Fourth Street

Louisville, Kentucky 40208

502-636-4615

Counsel for Mark Yarmey

UNITED STATES DISTRICT COURT

Western District of Kentucky

Case No: 3:19-CV-528-CRS

FILED (JS)
US DISTRICT COURT CLERK
WESTERN DISTRICT OF KY

19 JUL 18 PM 12:32

Mark Yarmey

PLAINTIFF

V.

MOTION FOR LAWYER HELP

Keven Mazza, Warden

DEFENDANT

** ** ** ** ** **

Unable to help myself with this. I am begging to be given help from anyone who knows more than the lawyers that have "helped" so far.

- 1) Mark Damian Yarmey is the Petitioner in this Federal Habeas Petition filed in the Western District Court of Kentucky.
- 2) Petitioner had been represented by retained counsel throughout the entire state court proceedings. However, Petitioner nor any member of his immediate family had been charged with a crime, so they had absolutely no experience with the criminal justice system and no knowledge of how to evaluate and hire a criminal defense attorney, and had no idea that all attorneys are not competent, experienced and qualified in every area of the law. Therefore, Petitioner was misled by a number of attorneys who misrepresented their little experience and knowledge of criminal law and the criminal appellate system just so they could take Petitioner's money, even though they were not capable of properly representing Petitioner's needs. Therefore, Petitioner had incompetent representation throughout his entire state court proceedings as outlined below:
 - a) Petitioner retained James Falk to represent him at trial. Mr. Falk represented himself to be highly qualified and very experienced in representing clients charged with sexual related crimes. Long after trial, Petitioner discovered that Mr. Falk had no trial experience with these type of cases and his inexperience is very evident from the trial videos. Additionally, Mr. Falk moved to South Carolina when he was suppose to be investigating and developing Petitioner's case.
 - b) Since Petitioner was found guilty and incarcerated, Petitioner's son had to select an appellate attorney to represent the Petitioner. Petitioner's son was lied to by Joseph Blandford Jr. when he proclaimed to be an experienced post-conviction attorney. Mr. Blandford knew very little about post-conviction work

and Petitioner is enclosing the RCr 11.42 Motion with this request for appointment of counsel in order to show this Honorable Court how incompetent Mr. Blandford was. First Mr. Blandford did not even number the pages of this motion. However, starting with page nine of this motion, there are five arguments discussed in the next eleven pages and Mr. Blandford cited only ONE CASE LAW in the entire eleven pages of arguments.

Four arguments contained absolutely NO CASE LAW to support the issue. The RCr 11.42 Motion filed by Mr. Blandford on behalf of Petitioner was not even equivalent to a \$50.00 (fifty dollar) motion filed by an incompetent prison legal aide who only has to complete a three week training course. Once again, the system failed the Petitioner.

c) Petitioner was then directed toward Maureen Sullivan. Ms. Sullivan misrepresented her abilities and Petitioner retained her to prepare the appeal of his RCr 11.42 Motion to the Kentucky Court of Appeals. Her prepared brief was weak and even criticized in the Court's opinion denying Petitioner relief.

3) Petitioner has no money left to seek representation on his Petition and is humbly asking this Honorable Court to allow Petitioner to be represented by competent counsel. Petitioner has no knowledge of Federal Law and how it pertains to his issues contained in this Petition.

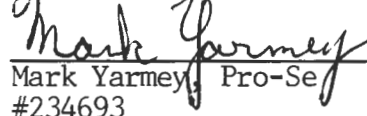
4) Petitioner could not even prepare this Petition. **It was prepared for him by an experienced Inmate Legal Advisor.** The Legal Advisor watched the Petitioner's trial videos and believes Petitioner has multiple valid Constitutional violations under Martinez V. Ryan, 566 U.S. 1,132 S.Ct. 1309,182 L.Ed. 272(2012). These issues were never raised in Petitioner's initial post-conviction motion and are explained in grounds Seven through Twenty in this Petition.

5) This Legal Advisor will no longer be available to assist Petitioner in the future with his Petition. Petitioner has been told by the six assigned Legal Aides at this institution that they have no knowledge of federal Habeas research and won't get involved.

Therefore, Petitioner respectfully requests this Honorable Court show compassion and understanding and appoint competent counsel to develop and present these

legitimate and Constitutional issues, omitted by incompetent counsel, to the Court, thereby giving this Petitioner a fair and reasonable chance to acquire the justice and opportunity he deserves.

Respectfully submitted,


Mark Yarmey, Pro-Se

#234693

Green River Correctional Complex
1200 River Rd.
P.O. Box 9300
Central City, KY. 42330

Mark Yarmey #234693
Green River Corr. Comp.
02-AL-03
1200 River Rd.
P.O. Box 9300
Central City, KY. 42330

P

US POSTAGE & FEES PAID
1 LB PRIORITY MAIL RATE
ZONE 2 NO SURCHARGE
ComBasPrice

062S0006144858
FROM 42330



stamps
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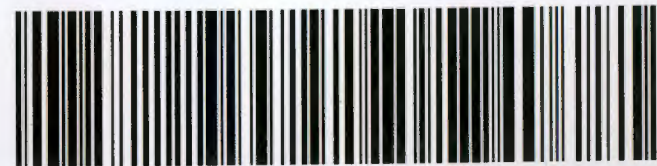
PRIORITY MAIL 2-DAY™

Mark Yarmey 234693
Green River Correctional Complex
1200 RIVER RD
CENTRAL CITY KY 42330

C075

SHIP TO: Vanessa Armstong, Clerk
106 Gene Snyder U.S. Courthouse
United States District Court
601 W. Broadway
Louisville KY 40202-2249

USPS TRACKING #



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

)
)
)
MARK DAMIAN YARMEY)
 Plaintiff) No. 3:19-CV-00528-JRW-LLK
)
)
)
vs.)
)
)
WARDEN KEVIN MAZZA)
 Defendant)

ORDER

Motion for CJA Counsel to Withdraw (DN #24) having been made and the Court being sufficiently advised;

IT IS HEREBY ORDERED that CJA appointed counsel for the Plaintiff, Armand I. Judah and the law firm of Lynch, Cox, Gilman & Goodman PSC, are withdrawn and relieved of any further responsibility in this action.

IT IS FURTHER ORDERED that new CJA appointed counsel shall be appointed to represent the Plaintiff in this case. A separate order will be entered appointing new counsel.

February 13, 2020

CC: Quality Analyst
Plaintiff-Mark Yarmey - Prisoner #234693
Luther Luckett Correctional Complex
1612 Dawkins Road
P.O. Box 6
LaGrange, KY 40031


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION # 3:19-CV-00528-JRW

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, Warden

RESPONDENT

ORDER

The Court entered an Order (Docket Number # 25) on February 13, 2020, granting appointed counsel's motion to withdraw and to appoint new counsel.

IT IS HEREBY ORDERED:

- 1.) The **Honorable Richard E. Cooper** is **APPOINTED** to represent the petitioner on this matter. The **representation of counsel** shall commence **beginning on February 13, 2020**. Counsel shall meet and confer with his client prior to the March 4, 2020 telephonic status conference.
- 2.) The previously court appointed counsel, Honorable Armand I. Judah, shall forward any documentation that he has on this case, to include any documentation received from the respondent's counsel. **The documentation shall be forwarded and received by Mr. Cooper no later than Wednesday, February 19, 2020**, in order, for him to discuss this case with his client prior to the telephonic conference.
- 3.) A **telephonic status conference** was previously scheduled in the order entered at DN #23. This matter will remain on the docket, as previously scheduled, for **March 4, 2020 at 10:30 a.m. Eastern Time**. Counsel for the parties shall connect to the teleconference by dialing the toll-free number 1-877-848-7030 and entering the access code 7238577#.

February 13, 2020

cc: Quality Control
Mark Damian Yarmey – Prisoner #234693
Luther Luckett Correctional Complex
1612 Dawkins Road
P.O. Box 6
LaGrange, KY 40031

LLK-mhb


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

)	
)	
)	
MARK DAMIAN YARMEY)	
Petitioner)	No. 3:19-CV-00528-JRW-LLK
)	
)	
)	
vs.)	
)	
)	
WARDEN KEVIN MAZZA)	
Respondent)	

NOTICE OF COMPLIANCE WITH COURT ORDER OF 2/13/20

Comes Armand I. Judah, former CJA-appointed counsel for the Petitioner, and states that he has complied with this Court's Order of February 13, 2020 by emailing to Petitioner's new counsel the state court briefs filed by Respondent's counsel (D.N. 21). Although said documents have been filed in this action, those are the only documents received from Respondent's counsel, so the undersigned, to be fully in compliance with this Court's Order, forwarded the documents to Petitioner's new counsel. Attached hereto as Exhibit A is the email, showing attachments, sent to Petitioner's new counsel.

Respectfully submitted,

/s/ Armand I. Judah

Armand I. Judah
Lynch, Cox, Gilman & Goodman PSC
500 W. Jefferson Street, Suite 2100
Louisville, KY 40202
(502) 589-4215

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing was filed electronically on the 18th day of February, 2020.

/s/ Armand I. Judah
Armand I. Judah

Armand Judah

To: richardcooperesq@gmail.com
Subject: yarmey vs. mazza
Attachments: corrected brief for appellat.pdf; state court brief for commonwealth.pdf

Per the court's order of 2/13/20, I have attached the state court briefs which were recently filed in the USDC record (#21). This is the only documentation I received from the Respondent's counsel in this action. All other documents are on PACER.

If you need any additional information, please feel free to contact me.

Armand I. Judah
Attorney-at-Law
Lynch, Cox, Gilman & Goodman PSC
500 W. Jefferson Street, Suite 2100
Louisville, KY 40202
(502) 589-4215

NOTICE: This electronic mail message and any attachment is an Electronic Communication within the meaning of the Electronic Communications Privacy Act (18 U.S.C. 2510) and may contain attorney-client and/or work product privileged material. This electronic mail message is intended only for the addressee(s) to whom specifically directed. If you receive this in error, no waiver of any privilege or permission or authority to use any portion of this electronic mail message or any attachment is intended or may be inferred. Please contact (502) 403-6700 to receive instructions on how to deal with the unintended electronic mail message. No attorney-client relationship is formed by receipt of this electronic mail message. No federal or other tax advice is rendered or intended to be rendered in this electronic mail message. In addition, the IRS requires that the following notice be applied to this electronic mail message: ANY FEDERAL TAX ADVICE CONTAINED IN THIS MESSAGE IS NOT INTENDED OR WRITTEN BY THE PREPARER OF SUCH ADVICE TO BE USED, AND IT CANNOT BE USED BY THE RECIPIENT, FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON THE RECIPIENT. THIS DISCLOSURE IS INTENDED TO SATISFY U.S. TREASURY DEPARTMENT REGULATIONS.

Exhibit A

United States District Court
Western District of Kentucky
At Louisville

FILED U.S.
DISTRICT COURT CLERK
WESTERN DISTRICT OF KY

20 MAR -9 PM 3:07

Case NO: 3:19-CV-00528-CRS-LL

Mark Yarmey

Petitioner

Request to Remove and Replace
Assigned Attorney with Experienced
and Knowledgeable Federal Habeas Corpus
Attorney

Kevin Mazza, Warden

Respondent

Comes now the Petitioner, Mark Yarmey, Pro-Se, and respectfully requests this Honorable Court to withdraw the representation of Petitioner's currently assigned Attorney, Honorable Richard Cooper, P.S.C. and replace him with an Attorney experienced with Habeas Corpus Petitions and procedures and experienced in Ineffective Assistance of Counsel Claims.

As grounds for this request, Petitioner states as follows:

On or about the 25th day of February, 2020, the Petitioner met with the Honorable Richard Cooper, assigned to represent the Petitioner in his Federal Habeas Corpus

Petition proceedings.

During this meeting, Mr. Cooper was extremely forthright and honest. Mr. Cooper expressed to the Petitioner that he had little or zero experience or knowledge with Habeas Corpus Petitions or Procedures.

Additionally, Mr. Cooper further related that he had never filed an Ineffective Assistance of Counsel Claim and was therefore neither knowledgeable or experienced in what constitutes these claims.

Petitioner states that due to the Honorable Richard Cooper's lack of knowledge and experience in both Ineffective Assistance of Counsel Claims and Federal Habeas Corpus Procedures, it would be impossible for him to effectively represent the Petitioner to any reasonable degree of competence. To allow Mr. Cooper to continue his representation of the Petitioner would be unfair to both Mr. Cooper and the Petitioner.

Furthermore, the Honorable Mr. Cooper's practice is in the same office as another attorney, Maureen Sullivan, who represented the Petitioner in the appeal of the denial of his RCr 11.42 Motion. This situation also creates a "whiff of impropriety" as it did with the Honorable Armand I. Judah.

Therefore, the Petitioner requests this Honorable Court, due to the inability of Mr. Cooper to effectively

represent the Petitioner to any effective level because of his lack of Knowledge and Experience in these matters, allow for the removal of Mr Cooper from this case and assign a different Federal Attorney with the Knowledge and experience that would allow him to Competently advise or represent the Petitioner in this complicated and life altering process. I have received no advise as to the Merits of my case or whether to withdraw The Petition or not.

Respectfully submitted,

Mark Yarmey

Mark Yarmey # 234693

Luther Lockett Corr. Camp.

P.O. Box 6

LaGrange, KY. 40031

Notice

Please take notice that the foregoing was filed by mailing the same via first class, postage pre-paid to: Office of the Clerk, United States District Court, 106 Gene Snyder U.S. Courthouse, 601 W. Broadway, Louisville, KY. 40202-2249, on this the 4th day of March 2020 to be filed upon receipt and heard at the Court's earliest convenience.

Mark Yarmey

A true and correct copy of the foregoing was mailed via first class, postage pre-paid to: Office of the Attorney General, State Capitol, 700 Capitol Ave Ste 118, Frankfort, Ky. 40601, on this 4th day of March, 2020.

③

Mark Yarmey

Verification

I hereby swear, under the penalty of perjury, That
all statements contained herein are true and correct
to the best of my knowledge and belief

Mark Yurney

RICHARD COOPER, P.S.C.
ATTORNEY & COUNSELOR AT LAW
THE SEVENTEENTH FLOOR
KENTUCKY HOME LIFE BUILDING
239 SOUTH FIFTH STREET
LOUISVILLE, KENTUCKY 40202-3268

OFFICE (502) 587-6554
(502) 585-3084
FAX (502) 585-3548

richardcooperesq@gmail.com

28 February 2020

Mark Yarmey

Inmate
Luther Luckett Correctional Complex
Dawkins Road
LaGrange, Kentucky 40031

CONFIDENTIAL

ATTORNEY/CLIENT MATERIAL

Re: Yarmey v. Mazza
Civil Action No. 3:19-CV-00528-JRW-LLK
United States District Court
Western District of Kentucky
March 4, 2020 Telephonic Conference with Magistrate Judge King

Representation of Counsel

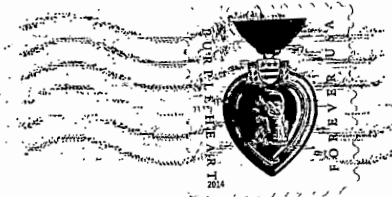
Dear Mr. Yarmey:

This morning I spoke with the ethics attorney with the KBA relating to the question of potential conflict of interest under the Rules of Professional Conduct. It was the ethics attorney opinion that based on the shared-office arrangement with Attorney Maureen Sullivan and I would not technically create a conflict. Therefore, I cannot request to withdraw as your counsel.

As we discussed yesterday, my legal background in habeas corpus is limited. You expressed concern about my ability to provide you competent representation. I asked you to give this matter further thought and to let me know your decision. If you decide I am not a competent lawyer for your case, I believe, it is your responsibility to prepare and file a motion to the court to have me removed and request the appointment of another CJA lawyer.

Mark Yarney # 234693
LCC
P.O. Box 6
La Grange, KY 40031

LOUISVILLE KY 400
05 MAR 2020 PM 3:07

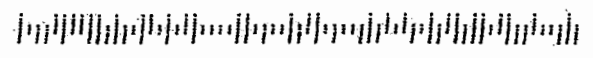


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United States District Court
106 Gene Snyder U.S. Court house
601 W. Broadway
Louisville, Ky 40202-2249

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Legal mail

40202-224999



**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, Warden

RESPONDENT

ORDER

The Court conducted a telephonic status conference on Wednesday, March 4, 2020. Appointed counsel, Richard Earl Cooper, represented Petitioner, and Leilani K.M. Martin represented Respondent. The primary purpose of the conference (as explained in the prior Orders at Dockets # 20 and 22) was to determine whether Petitioner intends to pursue his pro-se motion to withdraw his petition (Docket # 19) (and instead pursue his recently-filed pro-se post-conviction relief motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, filed in the Jefferson Circuit Court).

Counsel stated that he conferred with Petitioner briefly at Luther Lockett Correctional Complex in LaGrange, Kentucky, but was unable to obtain a definitive answer to the Court's question. Counsel advised that he is in the process of locating Petitioner's Jefferson Circuit Court file. Counsel further advised that he informed Petitioner he shares an office space with the attorney, Maureen Sullivan, whom Petitioner retained to represent him in the prior unsuccessful appeal of the denial of his pro-se post-conviction relief motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.¹

This Order shall schedule another telephonic status conference. At that conference, the Court will require a definitive answer from Petitioner (via his appointed counsel) regarding his motion at Docket # 19. In the event Petitioner declines to give a definitive answer, the undersigned shall submit a report

¹ The appellate brief prepared by Ms. Sullivan is at Docket # 21-2, and the Kentucky Court of Appeals affirmed the trial court's denial of Petitioner's 11.42 motion. *Yarmey v. Commonwealth*, No. 2016-CA-001245-MR, [2019 WL 169133](#) (Ky. Ct. App. Jan. 11, 2019).

recommending that the Court grant Petitioner's unopposed motion at Docket # 19 and that Petitioner's petition be dismissed.²

Therefore, it is hereby ORDERED that a telephonic status conference is SCHEDULED for Tuesday, March 31, 2020, at 3:30 p.m. Eastern Time before Magistrate Judge Lanny King. Counsel for the parties shall connect to the call by dialing the Toll-Free Meeting Number 1-877-848-7030 and entering the Access Code 7238577# when prompted.


Lanny King, Magistrate Judge
United States District Court

p: 00/22

March 10, 2020

² The Court will further recommend that the Court grant Petitioner's request that he be allowed to re-file his petition after exhaustion of his 60.02 motion. (Docket # 19.) That will not, however, prevent a motion by Respondent to dismiss the re-filed petition in light of the 1-year period of limitation established by [28 U.S.C. § 2244\(d\)](#).

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, Warden

RESPONDENT

ORDER

This matter is before the Court on Petitioner’s motion to remove and replace his appointed counsel, Richard Earl Cooper. (Docket # 28.) Petitioner requests new counsel because Mr. Cooper told Petitioner he lacks experience in federal habeas law and he shares an office space with the attorney who represented Petitioner in a prior unsuccessful appeal of the denial of his motion for post-conviction relief.

No particular experience in federal habeas law is required in this case. Primarily, the Court appointed counsel to advise Petitioner regarding the wisdom of his pro-se motion to withdraw his petition in light of the 1-year period of limitation set forth at [28 U.S.C. § 2244\(d\)](#). (Docket # 19.) To properly advise Petitioner, counsel need only understand the general legal principle applicable in any civil action that a plaintiff/petitioner cannot file a civil action as a sort of place-holder, voluntarily withdraw his complaint/petition, refile past the statute of limitations, and then expect that the defendant/respondent will not to file a motion to dismiss on statute-of-limitations grounds. Ultimately, however, it is Petitioner’s right to withdraw his petition if he so desires (for example, if he is confident he will succeed in his pending post-conviction relief motion in state court). Additionally (as noted in the prior Order, Docket # 29), at the prior telephonic status conference, counsel indicated Petitioner may not have perfected the filing of the pro-se post-conviction relief motion Petitioner mentioned in his motion at Docket # 19. No particular experience in federal habeas law is required to verify the status of that motion.

Counsel spoke with the ethics attorney with the Kentucky Bar Association, who informed counsel that the shared-office arrangement would not technically create a conflict. (Docket # 28 at 5.) Therefore, Petitioner’s motion (Docket # 28) lacks a legitimate basis.

While Petitioner is entitled to effective assistance of counsel, “the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” *Daniels v. Kawalski*, No. 19-1891, [2020 WL 628476](#), at *3 (6th Cir. Jan. 7, 2020) (quoting *United States v. Gonzalez-Lopez*, [548 U.S. 140, 151](#) (2006)).

Therefore, Petitioner’s motion to remove and replace counsel (Docket # 28) is hereby DENIED.

March 27, 2020


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, Warden

RESPONDENT

ORDER

The Court held a telephonic status conference on March 31, 2020. Petitioner's appointed counsel, Richard Earl Cooper, was present but Respondent's counsel, Leilani K. M. Martin, was not present. Mr. Cooper reported that he has been unable to determine whether Petitioner perfected his CR 60.02 motion in state court and, if so, what claim(s) the motion raises. Mr. Cooper also has been unable to obtain a definitive answer from Petitioner regarding whether Petitioner elects to: 1) persist in his motion to withdraw his petition, which will result in a recommendation that the Court dismiss his petition, 2) withdraw his motion to withdraw his petition, which will result in the Court's proceeding with his petition, or 3) file a motion to hold his petition in abeyance pending exhaustion of his 60.02 claim(s) in state court.

The Court being sufficiently advised, it is hereby ORDERED that a telephonic status conference is SCHEDULED for Monday, June 1, 2020, at 10:30 Central Time (11:30 Eastern Time).¹ Ms. Martin shall CONTACT this office prior to June 1, 2020 to confirm or deny her availability for the June 1, 2020 status conference.

April 3, 2020


Lanny King, Magistrate Judge
United States District Court

¹ Plaintiff's counsel is invited to file a document with the Court before June 1, 2020, stating Petitioner's election.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, Warden

RESPONDENT

ORDER

The Court held a telephonic status conference on June 1, 2020. Petitioner's appointed counsel, Richard Earl Cooper, and Respondent's counsel, Leilani K. M. Martin, were present. Mr. Cooper reported that the claims presented in Petitioner's pending collateral-attack motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 appear to be unrelated to the claims presented in the pro-se petition at Docket Number ("DN") 1. Mr. Cooper further reported that Petitioner has decided to strike his motion to withdraw his pro-se petition at DN 19.

The Court being sufficiently advised, it is hereby ORDERED that Petitioner's oral motion to strike the motion at DN 19 is GRANTED. Within 60 days of entry of this Order, Petitioner shall FILE his amended petition, which will supersede and replace the pro-se petition at DN 1. Respondent shall RESPOND within 60 days following service of the amended petition, and Petitioner may REPLY within 21 days following service of Respondent's response.

June 4, 2020


Lanny King, Magistrate Judge
United States District Court

p: 00/15

**AMENDED PETITION UNDER 28 U.S.C. § 2254 FOR
WRIT OF HABEAS CORPUS BY A PERSON IN STATE
CUSTODY**

United States District Court	District: Western
Name (under which you were convicted): Mark Damian Yarmey	
Docket or Case No.: 3:19-CV-528-CRS	
Place of Confinement: Luther Luckett Correctional Complex 7A DL 04, P.O. Box 6, Lagrange, KY 40031	Prisoner No.: 234693
Petitioner (include the name under which you were convicted) Respondent (authorized person having custody of petitioner) Mark Damian Yarmey v. Keven Mazza, Warden	
The Attorney General of the State of Kentucky	

AMENDED PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
 **Jefferson Circuit Court
 Hall of Justice
 600 West Jefferson Street, 2nd Floor
 Louisville, Kentucky 40202-2740**

(b) Criminal docket or case number (if you know): **08-CR-001191**
2. (a) Date of the judgment of conviction (if you know): **12-11-2009**

(b) Date of sentencing: **03-01-2010**
3. Length of sentence: **15 years**
4. In this case, were you convicted on more than one count or of more than one crime? () Yes (X) No
5. Identify all crimes of which you were convicted and sentenced in this case:
 Use of a minor under 16 in a sexual performance

6. (a) What was your plea? (Check one)

<input checked="" type="checkbox"/> (1) Not guilty	<input type="checkbox"/> (3) Nolo contendere (no contest)
<input type="checkbox"/> (2) Guilty	<input type="checkbox"/> (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: Kentucky Court of Appeals

(b) Docket or case number (if you know): 2010-CA-604MR

(c) Result: Affirmed

(d) Date of result (if you know): 12-22-2011

(e) Citation to the case (if you know): Unpublished

(f) Grounds raised:

Trial court abused its discretion in admitting seven photographs.

Trial court erred in ruling that KRE 412 barred testimony concerning the Florida rape.

Trial court refusal to issue to a limiting instruction.

(g) Did you seek further review by a higher state court? Yes No

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? () Yes (X) No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? (X) Yes () No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Jefferson Circuit Court

(2) Docket or case number (if you know): 08-CR-001191

(3) Date of filing (if you know): 06-28-2012

(4) Nature of the proceeding: Pro Se RCr 11.42 and Supplemental RCr 11.42

(5) Grounds raised:

Trial court was deficient by failing to: (1) conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos; (2) request the court to instruct and inform the jury about the number and nature of the undeveloped film in the camera; and (3) request mistrial to allow time for exam of the newly discovered film evidence. Counsel was ineffective in his general presentation due to use of prescribed narcotics; trial counsel was ineffective by his failing to investigate previous claim of rape upon the complaining witness, to request psychological exam on the complaining witness and for failing to follow the notice procedure within KRE 412 for presenting evidence of the prior unreported sexual assault on the prosecuting witness. Counsel failed to explain the negative consequences to Petitioner for waiving his Fifth Amendment right against self incrimination by testifying on his own behalf. Trial counsel failed to prepare him to testify. Trial counsel was ineffective in that he failed to explain plea/sentencing form.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? (X) Yes () No

(7) Result: Denied

(8) Date of result (if you know): 02-12-2016

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: Jefferson Circuit Court
- (2) Docket or case number (if you know): 08-CR-001191
- (3) Date of filing (if you know): 01-02-2020
- (4) Nature of the proceeding: Motion CR 60.02
- (5) Grounds raised:
Imposition of sentence to post-incarceration supervision violate ex poste facto clause and due process clause. Error made for period of time requiring registration under [KRS 17.520\(6\)](#).

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

() Yes (X) No

(7) Result: Order entered vacate portion of judgment imposing 5 years post-incarceration supervision and reduced period of registration under [KRS 17.520\(6\)](#)

(8) Date of result (if you know): 06-09-2020

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):
- (4) Nature of the proceeding:
- (5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

(1) Petitioner appealed to Kentucky Court of Appeal, but did not request discretionary review from Kentucky Supreme Court.

(2) Petitioner satisfied with decision.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution by the admission of seven photographs not depicting sexual conduct by a minor as defined by KRS 531.300(4). The trial court admitted these photographs over the objection of trial counsel. Trial counsel failed to object to the improper remarks of the Commonwealth Attorney, that were false, prejudicing the jury against Petitioner and influenced the jury's determination to find Petitioner guilty. Thereby denying Petitioner his Sixth Amendment right to effective assistance of counsel and denied his right to a fundamentally fair trial guaranteed by the due process clause under the Fourteenth Amendment of the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During his closing argument the Commonwealth Attorney using these photographs in his presentation to the jury stated: (1) "That picture is a crime scene, that child is about to get molested, that child is being exploited."; and (2) "You can go back and look at these pictures and say, you know what, this whole transaction was criminal."

(b) If you did not exhaust your state remedies on Ground One, explain why:

Petitioner entered a conditional plea limiting the issues on direct appeal. The issue of improper remarks made by the Commonwealth Attorney was not reserved for appeal.

Further, Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include this issue of trial counsel's failure to object to the improper remarks in Petitioner's Kentucky RCr 11.42 Motion based on ineffective assistance of counsel.

(Rev. 10/07)

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

Petitioner entered a conditional plea limiting the issues on direct appeal. The issue of IATC is not permitted by direct appeal.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, Kentucky

Docket or case number (if you know): 2016-CA-001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when his post-conviction counsel failed to include the issue of trial counsel's failure to object to the improper remarks of the Commonwealth Attorney in Petitioner's Kentucky RCr 11.42 Motion.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

GROUND TWO: Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to conduct an adequate investigation of the Polaroid camera used to take the seven photographs admitted into evidence, but the three undeveloped films within the camera were not introduced into evidence nor argued by trial counsel. Thereby denying Petitioner his right to a fundamentally fair trial guaranteed by the due process clause under the Fourteenth Amendment of the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The camera had three undeveloped films within the ten count film pack still in the camera. The alleged victim claimed, besides the seven photographs, there were additional semi-nude or nude photographs taken and stated Petitioner never changed film in the camera while taking photographs. No other photographs were admitted into evidence. No other photographs were discovered by police searching Petitioner's home, where they confiscated the Polaroid camera and computers. It was discovered at trial the camera had a ten count film pack with three undeveloped films remaining. Trial counsel failed to request a mistrial for newly discovered evidence or request a continuance to have the undeveloped film examined to determine if this was the same film pack from which the seven developed photographs were taken. Had trial counsel investigated the camera before trial, he could have retained an expert to inspect the undeveloped film. The evidence of the three undeveloped films would have provided the defense the ability to impeach the credibility of the alleged victim's testimony of additional photographs taken. The remaining three films undeveloped within the camera would have proven that other photographs were not taken. This would influence the jury's determination of the alleged victim's credibility, but for trial counsel's failure.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal.

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include the issue trial counsel's failure to present the undeveloped film, use it to impeach the credibility of the alleged victim, and make this argument to the jury in Petitioner's Kentucky RCr 11.42 Motion.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

Petitioner entered a conditional plea limiting the issues on direct appeal. This issue is IATC that is not permitted by direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ky. RCr 11.42 Motion based on Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, 600 West Jefferson Street, Louisville, Kentucky 40202

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 02-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? (X) Yes () No

(4) Did you appeal from the denial of your motion or petition? (X) Yes () No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? (X) Yes () No

(6) If your answer to Question (d)(4) is "Yes," state: Name and location of the court

where the appeal was filed: Kentucky Court of Appeals

Docket or case number (if you know): 2016 CA 001245 MK

Date of the court's decision: 01/11/2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two**

GROUND THREE: Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to request within the stipulation there remained three undeveloped films within the camera. Thereby denying Petitioner's right to a fundamentally fair trial guaranteed by the due process clause under the Fourteenth Amendment of the United States Constitution.

(a) **Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):** The Commonwealth Attorney ejected the remaining three undeveloped films within the ten count film pack, outside the presence of the jury. Trial counsel and the Commonwealth Attorney entered into a stipulation relating to the undeveloped film. The judge addressed the jury stating, "Ladies and gentlemen the parties have reached an agreement on issues of fact. We call it a stipulation. This camera, a Polaroid 600, generates a photo that looks like the one that will be introduced into evidence, I suppose, and this camera uses an instant photo pack that goes in counting ten photos that come out. So, part two stipulation, this is what comes out of the camera, this size photo and this camera is able to produce, using a full pack, ten of these." The stipulation did not include the critical fact of the three undeveloped films remaining in the camera, because trial counsel failed to request this most critical fact to be included nor did he present or argue to the jury that three undeveloped films remained in the camera. This goes to the credibility of the alleged victim stating there were more than just the seven photographs entered into evidence. No other photographs were discovered in the possession of Petitioner during the search by the police officers when the Polaroid camera was confiscated. Trial counsel deprived the defense of exculpatory evidence.

(b) If you did not exhaust your state remedies on Ground Three, explain why?

Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal.

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include the issue trial counsel's failure to present the undeveloped film, use it to impeach the credibility of the alleged victim, and make this argument to the jury in Petitioner's Kentucky RCr 11.42 Motion based on ineffective assistance of trial counsel.

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue is IATC that is not permitted by direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? (X) Yes () No

(4) Did you appeal from the denial of your motion or petition? (X) Yes () No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? () Yes (X) No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort,

KentuckyDocket or case number (if you know): 2016-CA-001245

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available):

Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when his post-conviction counsel failed to include this issue of trial counsel's failure to object in Petitioner's Kentucky RCr 11.42 Motion.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: N/A

GROUND FOUR:

Petitioner was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution when trial counsel proceeded to trial under the influence of prescription narcotics rendering him ineffective. Thereby denying Petitioner's right to a fundamentally fair trial guaranteed by the due process clause under the Fourteenth Amendment of the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Prior to Petitioner's trial in the spring of 2009 trial counsel was involved in a tragic car accident. Counsel's father died in this accident and counsel suffered serious injuries. Due to counsel's serious injuries and the death of his father, counsel was taking pain medication and anti-depressants. These drugs affected counsel to the point that counsel had to get help from the Petitioner's son to open his pill bottle. The additional effect of these pills was counsel's inability to function within the norms of competent counsel. The inability is proven by his lack of coherent questions, articulable strategy, lack of preparation, and numerous errors. Counsel failed to hire experts to testify about the exam or transference relating to other statements by the accuser that she had been abused by others. He failed to object to improper voir dire questions even after the judge pointed them out to him. Had counsel articulated that the seven legal photos presented at trial and the three taken from the camera by the Commonwealth Attorney accounted for all the photos the camera held the outcome of trial would have been different.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

(X) Yes () No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ky. RCr 11.42 Motion

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice,
600 West Jefferson Street, 2nd Floor, Louisville, Kentucky 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, Kentucky

Docket or case number (if you know): 2016-CA-001245-MR

Date of the court's decision: 01/11/2019

Result (attach a copy of the court's opinion or order, if available): Affirmed. Copy of Order attached.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

GROUND FIVE:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when counsel failed to comply with the requirements of KRE 412. Thereby denying Petitioner's right to a fundamentally fair trial guaranteed by the due process clause under the Fourteenth Amendment of the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel planned to question the accuser concerning several unreported cases of abuse by the accuser including an unreported claim of a rape that occurred in Florida. Counsel failed to make a motion to the court as required by KRE 412 prior to the attempted questioning. The purpose of this questioning was to establish if this alleged and unreported rape had actually occurred, and whether she was transferring the feelings of anger from that incident to Petitioner. Had this incident and others actually not occurred this would have been evidence of her lack of credibility. Additionally, counsel, knowing that he was going to pursue a transference as part of his defense, failed to acquire an expert to explain or convey that there was a transference that occurred. The accuser had claimed, "she had been in therapy ever since you (Petitioner) did it." Counsel failed to acquire those records from the accuser's therapist or have a psychological evaluation conducted on the accuser. Had counsel performed any of these duties the jury would have been shown the accuser was transferring her anger onto Petitioner and would have also been shown her lack of credibility.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) **Direct Appeal of Ground Five:**

(3) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(4) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice,
600 West Jefferson Street, 2nd Floor, Louisville, Kentucky 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, 360 Democrat Drive,
Frankfort, Kentucky 40601

Docket or case number (if you know): 2006-CA-001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed. Copy of Order attached.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five: N/A

GROUND SIX:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution resulting in a denial of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution, when trial counsel failed to object to inadmissible evidence of “child sex abuse syndrome” - of habit of others to prove the conduct of the alleged victim acted the same way or to bolster her credibility .

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

LMPD Officers’ testimony through leading examination by the Commonwealth Attorney [CA] to Detective Joseph Judah:

Q. And are delayed disclosure cases rare in the crimes against children unit?

A. No. What I just told you all about, most of the cases we get are delayed. At least, it is very rare we get a case where we have a chance to go out and get physical evidence. And it is very, very common that you don’t. The case doesn’t come across the detective’s desk until two or three years, at least, after it happened. The nature of these offenses and the way they occur, it occurs with children who were afraid to go and report it to anyone.

* * * * *

CA leading questions Detective Angela Merrick:

Q. When it comes to these sort of cases, do the majority of them, do they usually get prosecuted, a case that makes it to your desk?

A. No sir. Just like Detective Judah said the majority of them do not. . . .

Q. On that last issues, you said sometimes with juveniles it takes a while for disclosure. Detective are you aware of a case, have you ever worked a case where we know a child molestation occurred but the child said it didn’t?

A. Yes, I’ve had several.

Q. And sometimes does it take people five years, ten years, twenty years to come forward?

A. Quite often most of our cases are like that.

* * * * *

CA leading questions Detective Michael Mulhall:

Q. If we can’t get a victim, and I’m trying to think of cases you and I have worked on. If we can’t get a victim that will come into this courtroom, our case is dead?

A. Correct.

Q. And the perpetrator goes free?

A. Correct.

Q. And sometimes these victims come back when they are older?

A. Oh, yes.

Q. And they are ready?

A. Oh, yes.

Q. Does that create special evidentiary problems for us in law enforcement when we have a delayed disclosure?

A. Yeah. People don’t understand why the delay, why they do that.

Q. And the physical evidence is a problem in things like that?

A. Correct.

(b) If you did not exhaust your state remedies on Ground Six, explain why:

(c) **Direct Appeal of Ground Six:**

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues under direct appeal. This issue is an IATC claim that is not permitted by direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The issue of IATC for failure of trial counsel to object to inadmissible evidence of child sex abuse syndrome to bolster the credibility of the alleged victim was not raised in Petitioner's Ky. RCr 11.42 Motion. Ineffective assistance of post-conviction counsel for failure to include this issue of trial counsel's failure to object in Petitioner's RCr 11.42 Motion. Ineffective assistance of post-conviction counsel is a cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012) and Woolbright v. Crews, 791 Fed.3d 628 (6th Cir. 2015).

- (e) **Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six: N/A**

GROUND SEVEN:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution resulting in a denial of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution, when counsel failed to object to the Commonwealth Attorney's closing arguments making references to the improper and inadmissible testimony related to "child sex abuse syndrome" - habits of others to prove as a class the alleged victim acted the same way as other members of a class of persons who were alleged to be sexually abused children and since the alleged victim acted the same way it was to bolster her credibility and to explain her "delayed disclosure".

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

During the closing argument, the Commonwealth Attorney argued the habit evidence as follows: (1) "And I've touched on this already. It is the nature of these sorts of cases that kids don't come forward. Okay? Whether it is a trusted friend, whether it is to a parent in a good home environment, which she did not have, it's just the nature of these cases." (2) "I hope when you all go back there, say on one hand, we've got a victim who fits the profile of a child abuse victim, okay, a child sex abuse victim. This is it. Okay?" (3) "That child grew up to be an adult who started having nightmares and they are getting better. Notice they are getting better when this process picks up. When we start the process of seeking justice, she is starting to get better. And that's an absolute appropriate response of a victim of child sexual abuse." (4) "We learned a lot about child sex abuse cases in this trial from people we put on who are on the front lines of this stuff and deal with delayed disclosure. That's the phenomena when a victim does not go immediately to a trusted adult or call 911." (5) "This is one of the dynamics of child sex abuse: they internalize it; they are frightened; they are embarrassed - - those are her words, not mine - - embarrassed and they won't tell anyone, included trusted family, friends, until they are ready." (6) Another - - another phenomena is called tentative disclosure. It's where they tell a little bit first." (7) "One of the dynamics of child sexual abuse is this shear power that any adult has over an eleven year old, any adult, because we are bigger, and we tell kids to listen to adults, do what adults say, . . ."

(b) If you did not exhaust your state remedies on Ground Seven, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include the issue of trial counsel's failure to object to the Commonwealth Attorney's closing argument in Petitioner's Ky. RCr 11.42 Motion. Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012) and Woolbright v. Crews, 791 Fed 3d 628 (6th Cir. 2015).

(c) **Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue is an IATC claim that is not permitted by direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Ineffective Assistance of Counsel

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, Hall of Justice,
600 West Jefferson Street, 2nd Floor, Louisville, Kentucky 40202-2740

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, 360 Democrat Drive,
Frankfort, Kentucky 40601

Docket or case number (if you know): 2006-CA-001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed. Copy of Order attached .

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The issue of IATC for failure of trial counsel to object to the Commonwealth Attorney's argument to the jury referencing improper theory of child sexual abuse syndrome to bolster the credibility of the alleged victim was not raised by post-conviction counsel in Petitioner's Ky. RCr 11.42 Motion.

Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. [Martinez v. Ryan, 566 U.S. 1 \(2012\)](#).
[Woolbright v. Crews, 791 F.3d 628 \(6th Cir. 2015\)](#).

- (e) **Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:** N/A

GROUND EIGHT: Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution resulting in a denial of his rights under due process of the Fourteenth Amendment of the United States Constitution, when counsel failed to object to inadmissible opinion testimony and evidence of habit of others to prove that the conduct of Petitioner was acting in the same way as a class of alleged perpetrators who were suspected to be a sexual offender. The conclusion was Petitioner acted the same way was to impeach his credibility invading the province of the jury who has the ultimate conclusion of credibility of witnesses.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During the LMPD investigation, Detective Josh Judah and Detective Angela Merrick conducted a controlled telephone call with the alleged victim calling Petitioner. At trial Detective Judah was asked by the Commonwealth Attorney about this controlled telephone call to which Detective Judah replied, "Typically in my experience when somebody has been – when you drop that on somebody the reaction of a person – of the people who we've cleared has been instead of saying "okay, okay" they say "what are you talking about?" And generally they won't continue with the conversation." Detective Judah continues testifying, "In the schools and interviews that I attended, the training I had when someone is trying to change the subject about something so serious that they are avoiding the issue, they are trying to change the question, it's a sign of deception." He continues his direct testimony stating, "The basis of my opinion, if someone - when you accuse somebody of taking pictures of a – taking sexually explicit pictures of a young girl, the first thing they are going to do is tell you you're a liar." This inadmissible and improper opinion testimony from Detective Judah was stressed by the Commonwealth Attorney in closing argument to the jury, "I don't think an innocent man says what he says there [referring to the controlled telephone call]. And Detective Judah – or Sergeant Judah now, kind of spelled it out for us, right? The long pauses, the inappropriate answers. That's what guilty people do."

Under questioning by the Commonwealth Attorney to Detective Mulhull:

Q Did you ever work cases where you had pictures and the person didn't know you had those pictures and he denied taking them? This personal opinion presented by Detective Judah had a direct influence on the jury's decision to find defendant guilty.

A. Oh, I'm sure there probably was "It's not me. It looks like me." That's one of my favorites.

Q. What's that?

A. "It's not me. It looks like me" that's what a lot of times we would get.

Q. Was it common for people to deny knowing the child that was in the picture?

A. Correct.

(b) If you did not exhaust your state remedies on Ground Eight, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal. .

(c) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why:

Petitioner entered a conditional plea limiting the issues on direct appeal. This issue of IATC claim that is not permitted by direct appeal.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d(1)) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion or petition? Yes No
- (4) Did you appeal from the denial of your motion or petition? Yes No
- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, Kentucky

Docket or case number (if you know): 2016-CA-001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

- (7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when his post-conviction counsel failed to include the issue of trial counsel's failure to object to the opinion testimony in Petitioner's Kentucky RCr 11.42 Motion. Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012). Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight: N/A

GROUND NINE:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to object to the jury instructions to insure a unanimous verdict. Thereby denying Petitioner's right to a fundamentally fair trial guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution..

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): There were seven photographs, not depicting sexual conduct by a minor, admitted in evidence. The alleged victim stated in addition to the seven photographs, there were eight more photographs taken, some topless, and some nude. Instruction No. 2 , Use of a Minor in a Sexual Performance stated: (1) that in Jefferson County, Kentucky between January 1, 1998 and March 6, 2000, the defendant knowingly employed, consented, authorized or induced Erin Branick to engage in a sexual performance; and (2) that at the time of such contact Erin Branich was less than sixteen years of age. It is not evident nor clear from the instruction in verdict form that the jury agreed on exactly which photograph they unanimously believed constituted this charge. Petitioner was denied a unanimous verdict.

(b) If you did not exhaust your state remedies on Ground Nine, explain why:

(c) **Direct Appeal of Ground Nine:**

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues under direct appeal. This issue is an IATC claim that is not permitted by direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The issue of IATC for failure of trial counsel to object to the Instructions to the jury referencing was not raised by post-conviction counsel in Petitioner's Ky. RCr 11.42 Motion.

Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. [Martinez v. Ryan, 566 U.S. 1 \(2012\)](#).
[Woolbright v. Crews, 791 F.3d 628 \(6th Cir. 2015\)](#).

- (e) **Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine: N/A**

GROUND TEN:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to object to the trial court's instructions to the jury relating to Use of a Minor in a Sexual Performance that violated Petitioner's right to a unanimous verdict, and failed to provide complete definitions Instructions to be used for the jury's determination of finding of guilt. Thereby denying Petitioner's right to a fundamentally fair trial guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The trial court presented jury instructions for the jury to make its finding of not guilty or guilty on the offenses in Instruction 1, Sodomy in the First Degree and Instruction 2, Use of a Minor in a Sexual Performance. The jury was unable to reach a verdict on Instruction 1, and the court declared a mistrial as to that count. Instruction 3 provided definitions to be used by the jury to determine the meaning of "Knowingly", "Sexual Performance", "Performance", "Audience" and "Sexual Conduct by a Minor". Under the definition of "Sexual Conduct by a Minor" were four definitions providing the elements of alternate theories of guilt. Two of those alternate theories were unsupported by the evidence. The remaining two theories it was possible to make a finding from the evidence, but the verdict does not reflect which theory of guilt the jury decided. Thereby denied Petitioner's right to a unanimous verdict.

Further, the Instruction definitions failed to define "Obscene", a word used in one of the theories "the exposure, in an obscene manner, of the unclothed or apparently unclothed . . . female genitals, pubic area or buttocks, or the female breast . . ." presented in the definition of Sexual Conduct by a Minor for the jury to determine from the evidence, The definition of "Obscene" as provided in Cooper's Instructions to the Jury, Section 4.13 was not provided to the jury. Likewise, within the definition of Obscene is "Prurient Interest", which has a definition Instruction provided in Cooper's Instructions, Section 4.13(a) was not part of the instructions to the jury. Also left out of the Instruction definition relating to "Sexual Conduct by a Minor" was the definition of "physical contact with, or willfully or intentional exhibition of the genitals" which did not include the words "in a lewd manner" as recommended by Cooper's Instructions, Section 4.18 Sexual Conduct by a Minor. The definition of "lewd manner" is outlined in Cooper's Instructions, Section 418(a) was likewise omitted from the Instructions definitions. The cumulative effect of all these missing definitions from the Instructions, left the jury with an uninformed means of determining a theory of guilt of the Petitioner.

(b) If you did not exhaust your state remedies on Ground Ten, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal.

(c) Direct Appeal of Ground Ten:

(1) If you appealed from the judgment of conviction, did you raise this issue? () Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion or petition? Yes No
- (4) Did you appeal from the denial of your motion or petition? Yes No
- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, Kentucky

Docket or case number (if you know): 2006 CA 001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The issue of IATC for failure of trial counsel to object to the Instructions was not raised by post-conviction counsel in Petitioner's Ky. RCr 11.42 Motion.

Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012).
Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

GROUND ELEVEN:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to object to inadmissible evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The Commonwealth Attorney entered into evidence a scanner that was collected at Petitioner's home. Trial counsel objected, stating there was no evidence to show that Petitioner owned the scanner when the photos were taken in 1998. The judge overruled the objection and admitted the scanner into evidence as an exhibit. If trial counsel had brought it to the attention of the trial court the manufacturing date of the scanner was stamped 2006, his objection would have been sustained. Petitioner told Detective Merrick during his interrogation he did not own a scanner when the seven photos were taken in 1998. However, during her interview, the alleged victim told Detective Merrick the Petitioner had "scanned" the photos on a scanner back in 1998 and testified to this happening. Petitioner's son also testified there was not a scanner in their home until 2006. Petitioner testified the scanner was a gift he received in 2006. Trial counsel's failure to investigate allowed inadmissible and highly prejudicial evidence to be admitted.

(b) If you did not exhaust your state remedies on Ground Eleven, explain why:

(c) Direct Appeal of Ground Eleven:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues under direct appeal. This issue is an IATC claim that is not permitted by direct appeal.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d(1)) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: Jefferson Circuit Court, 600 West Jefferson Street, Louisville, Kentucky

Docket or case number (if you know): 08-CR-001191

Date of the court's decision: 01-12-2016

Result (attach a copy of the court's opinion or order, if available): Denied. Copy attached to original Petition filed July 19, 2018.

(3) Did you receive a hearing on your motion or petition?

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
 Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kentucky Court of Appeals, Frankfort, Kentucky

Docket or case number (if you know): 2006-CA-001245MR

Date of the court's decision: 01-11-2019

Result (attach a copy of the court's opinion or order, if available): Affirmed. Copy attached to original Petition filed July 19, 2018.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

IATC issue was not made an issue on appeal of Motion 11.42.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eleven:

GROUND TWELVE:

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to object to hearsay statements of Cindy Brannick, a non-testifying witness introduced through testimony of Gary Sipes, Tammy Shields and Detective Angela Merrick. Further, trial counsel's ineffective assistance of counsel denied Petitioner his Sixth Amendment right under the confrontation clause his opportunity to cross examine.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): At Petitioner's trial, three additional Commonwealth witnesses, Gary Sipes, Tammy Shields and detective Merrick all made statements allegedly made by the non-testifying witness, Cindy Brannick. Gary Sipes testified, "I opened the drawer and there were all those photographs that her mother said had been destroyed." Tammy Shields testified, "I asked Cindy to come home and Cindy just basically told me I could handle the situation by myself. She was not ready to come home." And later, "She gave her (Cindy) financial, she gave her mom money all the time. It was kind of "you have to give me money" type of thing." Detective Merrick testified, "Cindy Brannick, in the controlled phone call, confirmed that there were pictures taken." and "And then later when I talked to Cindy Brannick, she said that they did the same thing and we were able to locate it then." Denying the Petitioner the opportunity to confront and cross examine a non-testifying witness.

(b) If you did not exhaust your state remedies on Ground Twelve, explain why:

(c) **Direct Appeal of Ground Twelve:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

() Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues on direct appeal. This issue was not reserved for appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

() Yes (X) No

(2) If your answer to Question (d(1)) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion or petition?
- (4) Did you appeal from the denial of your motion or petition? Yes No
- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
 Yes No
- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

- (7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include this issue of trial counsel's failure to object in Petitioner's Kentucky RCr 11.42 Motion.. Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012). Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Twelve:

GROUND THIRTEEN:

Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when trial counsel failed to object to hearsay statements of Cindy Brannick, a non-testifying witness, repeated by the Commonwealth Attorney.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During Petitioner's trial, the Commonwealth Attorney told the jury in his closing statements, "We know that Cindy Brannick put that makeup on her and showed pictures of what she wanted. Now, I mean by this is – and Mr. Yarmey admits this – that actually Cindy brought over something even more explicit, more explicit than this, okay, and said, "This is what I want you to do with my daughter." and "What should they do the moment a parent says "I want explicit pictures of my daughter", and again later he states, "I don't dispute Mr. Yarmey that the photos were actually more explicit, you know, the ones that she said, "This is what I want of my daughter." The Commonwealth Attorney repeated these hearsay statements with the sole purpose of influencing the jury against the Petitioner.

(b) If you did not exhaust your state remedies on Ground Thirteen, explain why:

(c) Direct Appeal of Ground Thirteen:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Petitioner entered a conditional plea limiting the issues under direct appeal. This issue is an IATC claim that is not permitted by direct appeal.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition

was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the Yes No appeal?

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include this issue of trial counsel's failure to object in Petitioner's Kentucky RCr 11.42 Motion. Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012). Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Thirteen:

GROUND FOURTEEN:

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution when counsel failed to object to an unreliable and inadmissible CACU log entered into evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): At trial the Commonwealth introduced a CACU log allegedly created prior to trial showing the alleged victim reported the allegations against Petitioner as recently as five years before trial. Trial counsel should have objected to the admission of this unreliable evidence. The Commonwealth Attorney states during trial the CACU log is faulty. The prosecutor admits the alleged victim's listed date of birth is 3-7-2004. This is seven years after the alleged incident. Additionally, as acknowledged by the Commonwealth Attorney, this intake log listed the incident date as 6-21-1905. The Commonwealth Attorney admitted there was no associative supporting file connected to or with this intake log. This unreliable and inadmissible intake log was introduced by the Commonwealth Attorney to bolster the accuser's credibility.

(b) If you did not exhaust your state remedies on Ground Fourteen, explain why:

(c) **Direct Appeal of Ground Fourteen:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

() Yes (X) No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition

was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No
 Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Petitioner was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution when post-conviction counsel failed to include this issue of trial counsel's failure to object in Petitioner's Kentucky RCr 11.42 Motion. Ineffective assistance of post-conviction counsel is cause to excuse a procedural default. Martinez v. Ryan, 566 U.S. 1 (2012). Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Fourteen: N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Grounds One through Three and Grounds Six through Fourteen were never raised in the initial post-conviction motion due to ineffective assistance of post-conviction counsel.

(b) **Is there any ground in this petition that has not been presented in some state or federal court? If so,**

ground or grounds have not been presented, and state your reasons for not presenting them:

Grounds One through Three and Grounds Six through Fourteen were never raised in the initial post-conviction motion due to ineffective assistance of post-conviction counsel. Ineffective assistance of post-conviction counsel is a cause to excuse procedural default. Martinez v. Ryan, 566 U.S. 1 (2012). Woolbright v. Crews, 791 F.3d 628 (6th Cir. 2015).

14. **Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? () Yes (X) No**

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. **Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for**

the judgment you are challenging? () Yes (X) No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: James Falk, Address unknown, moved to South Carolina during pretrial, shortly after arraignment.

(b) At arraignment and plea: James Falk, Address unknown, moved to South Carolina shortly after arraignment.

(c) At trial: James Falk, Address unknown, moved to South Carolina shortly after arraignment.

(d) At sentencing: Joe Blandford, The Landward House, 1387 S. Fourth Street, Louisville, Kentucky 40208

(e) On appeal: Joe Blandford, The Landward House, 1387 S. Fourth Street, Louisville, Kentucky 40208

(f) In any post-conviction proceeding: Joe Blandford, The Landward House, 1387 S. Fourth Street, Louisville, Kentucky 40208

(g) On appeal from any ruling against you in a post-conviction proceeding: Maureen Sullivan, Kentucky Home Life Building, 239 South Fifth Street, Suite 1700, Louisville, Kentucky 40202

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? () Yes (X) No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? () Yes () No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition*

03-01-2010	Final Judgment/Sentencing
03-26-2010	Notice of Appeal
12-22-2011	Direct Appeal Opinion

(Continued on Next Page)

06-28-2012	Pro-Se RCr 11.42 filed
02-28-2013	Supplemental RCr 11.42 filed (Submitted by retained counsel)
02-12-2016	RCr 11.42 Denied by Circuit Court
02-23-2016	Notice of Appeal filed
01-11-2019	Court of Appeals Denial of RCr 11.42
02-12-2019	Motion for Discretionary Review
04-23-2019	Motion for Discretionary Review withdrawn by Appellant

Tolling Time Calculations

365 days
+ 90 days (Write of Certiorari not filed)
+ 21 days (Direct Appeal becoming final)
476 days
- 187 days (Time between Direct Appeal opinion and Pro-Se RCr 11.42 Motion)
- 85 days (Time lapse between withdraw of M.D.R. and filing of this Petition)
204 days (Remaining to file Petition as of July 17, 2019)

Original Petition was due by February 6, 2020
Original Petition was filed on July 18, 2019

* The Penalty Antiterrorism and Effective Death Act of 1996 ("AEDPA") as contained in [28 U.S.C. § 2244\(d\)](#) provides in part that:


- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(Rev. 10/07)

Therefore, petitioner asks that the Court grant the following relief: or any other relief to which petitioner may be entitled.

Grant this Amended Writ of Habeas Corpus or, Order an Evidentiary Hearing and appoint counsel to represent Petitioner at the hearing, or in the alternative, appoint counsel to represent Petitioner in all future filings required in this action including the preparation of his Memorandum of Law which will be necessary to respond to die Commonwealth of Kentucky.



 Signature of Attorney (if any) CJA

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this

Amended

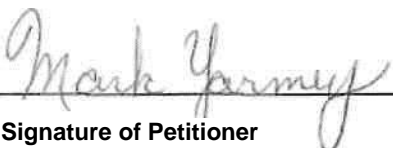
Petition for

Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Execute

22 July 2020

(date).



 Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

NO. 08CR1191

JEFFERSON CIRCUIT COURT
DIVISION ONE (1)

MARK YARMEY

PETITIONER

v.

ORDER

COMMONWEALTH OF KENTUCKY

RESPONDENT

This case is before the Court on Petitioner Mark Yarmey's ("Petitioner") motion to vacate or set aside his criminal conviction pursuant to combined RCr 11.42 and CR 60.02 motions. Petitioner has filed briefs for both motions. The Commonwealth has filed a response brief. An evidentiary hearing was conducted on October 11, 2013, and recorded at 30-01-13-VR-181-A.

Findings of Fact

Judgment of conviction was entered against Petitioner on January 9, 1997. He was found guilty of Use of a Minor in a Sexual Performance. He was sentenced to fifteen (15) years to serve for this criminal conviction.

Issues of Law

The issues for this Court to address are: (1) Whether Petitioner received ineffective assistance of counsel pursuant to RCr 11.42 and the Supreme Court of the United States' decision in *Strickland v. Washington*, 466 U.S. 668, 669 (1984); and (2) whether newly discovered evidence warrants post conviction relief pursuant to CR 60.02.

Analysis

The purpose of an 11.42 post-conviction motion to vacate, set aside, or correct sentence

is not to provide an opportunity to conduct a fishing expedition for grievances, but rather to provide a forum for known grievances. *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007). RCr 11.42(2) explicitly requires a specific complaint, factual support, and prejudice. Movant “must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971).

The motion must be filed within three years after the judgment on appeal becomes final with two exceptions: (1) when the factual basis of the claim was unknown to the movant and could not have been ascertained through due diligence; or (2) when the fundamental constitutional right asserted was created after the three year period and has been held to apply retroactively. The motion must then be filed within three years after the event establishing the exception occurred. RCr 11.42(10).

Pro se movants are not held to the same standards as counsel for purposes of determining sufficiency of a motion as a pleading. Still, the pro se motion must be specific. *Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967); *Brooks v. Commonwealth*, 447 S.W.2d 614, 618 (Ky. 1969); *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971).

Whether at a hearing or simply on the motion itself, the burden of proof is on the movant. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). “The burden is on the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). Movant’s failure to introduce evidence to substantiate a particular claim constitutes waiver of claim. *King v. Commonwealth*, 408 S.W.2d 204, 205 (Ky. 1966). If it appears the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant movant a new trial, or correct the

sentence as may be appropriate pursuant to Civil Rule 52.02.

“It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the trial court and upon an appeal considered by this court.”

Thacker v. Commonwealth, 476 S.W.2d 838 (Ky. 1972).

By its terms, CR 60.02 is an extraordinary remedy. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). It is “available only when a substantial miscarriage of justice will result from the effect of the final judgment.” *Id.* CR 60.02 supplements RCr 11.42 and is not a substitute for it. *Perkins v. Commonwealth*, 382 S.W.2d 393, 394 (Ky. 1964). A defendant is prevented from using CR 60.02 to raise issues which could have reasonably been presented via RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856-857 (Ky. 1983).

CR 60.02 is available for relief that is not available by direct appeal or under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

CR 60.02 is available “to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief.” *Gross*, at 856.

In his motion to vacate sentence pursuant to CR 60.02, Petitioner argues that he was erroneously charged with the crime of Use of a Minor in a Sexual Performance. In its response to Petitioner’s 60.02 motion, the Commonwealth contends that the record refutes the basis of Petitioner’s claim in that the photographs admitted were not used to prove the “sexual

performance” element, but rather they were used to establish the context in which the alleged crimes occurred. Further, the Commonwealth points out that the issues argued by Petitioner pursuant to CR 60.02 were pretrial matters not properly raised under CR 60.02.

In both instances, the Commonwealth is correct in its assertions that Petitioner’s CR 60.02 motion for post-conviction relief fails. The photographic evidence was presented not as direct evidence of any sexual performance, but rather as a means of showing the context in which the crime occurred. All additional arguments raised by Petitioner in his CR 60.02 motion were subject to direct appeal and not properly brought under CR 60.02.

In his motion to vacate sentence pursuant to RCr 11.42, Petitioner argues that trial counsel was deficient by failing to: conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos; request the Court to instruct and inform the jury about the number and nature of photos in the camera after photos were discovered; request a mistrial to allow time for examination of the newly discovered photographic evidence to determine their nature and origin, including whether or not they originated from the same package as other photos.

Petitioner also asserts the following as evidence of ineffective assistance of counsel: trial counsel was ineffective in his general presentation due to a prior automobile accident and the prescribed narcotics he was taking during trial; trial counsel failed to investigate previous claims of rape by the victim, request psychological examination of the victim, or follow the rules of civil procedure in presenting the prior unreported sexual assault on the prosecuting witness.

According to Petitioner, trial counsel also failed to explain the negative consequences of allowing Petitioner to testify on his own behalf after failing to adequately prepare him for testimony. Finally, Petitioner argues that trial counsel failed to adequately explain the plea form

at trial.

In this final submitted "closing argument," Petitioner reiterates the arguments raised in the original RCr 11.42 motion and also summarizes the testimony from the October 11, 2013 evidentiary hearing. Petitioner requests this Court to grant a new trial in this matter due to Petitioner's trial counsel's ineffective assistance.

In its response to Petitioner's request for relief pursuant to RCr 11.42, the Commonwealth asserts that the issues Petitioner raises under his RCr 11.42 motion are subject to normal appeal. The trial court judgment on appeal was affirmed by the Court of Appeals, and now Petitioner is attempting to raise additional issues which he initially waived his right to appeal through this post-conviction relief motion. Further, the Commonwealth adds that the tactics chosen by Petitioner's trial counsel did not constitute ineffective assistance. Rather they fell within the broad range of discretion accorded to a defense attorney. This accordingly fails the two-pronged ineffective assistance of counsel test required under the *Strickland* decision.

With regard to the argument involving the film in the Kodak Polaroid camera, the Commonwealth argues that nothing Petitioner's trial counsel decided to do or refrain from doing in regards to the inadvertent discovery that the Polaroid camera still had film inserted in it at the time of trial, or that it was meant to be used with a film pack designed to hold ten photographs, constituted ineffective assistance. Even if it did, the Commonwealth argues that it is telling that never once since Petitioner's convicted has he or his post-conviction counsel tried to have the seven photographs that were admitted into evidence compared with the two that were produced inadvertently from the camera during the trial.

The Commonwealth further addresses Petitioner's claim that his trial counsel was under the influence of powerful prescription pain medication due to an automobile accident in which he

was injured: after some dispute as to how close in proximity this accident was to Petitioner's trial, the Commonwealth points to the fact that it occurred some fourteen months prior to trial. Coupled with Petitioner's trial counsel's testimony that he had not been taking prescription pain killers or anything stronger than an over the counter pain reliever such as Advil, the Commonwealth asserts that it is highly unlikely that any strong medication was clouding trial counsel's judgment.

In regards to trial counsel's failure to pursue the claims of an unreported allegation of rape which occurred to the victim in Florida, the Commonwealth asserts that any such motion to admit this type of evidence would likely be blocked by the applicable Rape Shield Statute, KRE 412.

In addressing Petitioner's argument that his trial counsel failed to prepare him for testifying on his own behalf, the Commonwealth asserts that this is an age-old dilemma for defense attorneys, and a matter that truly can only be decided by the defendant himself. Whether or not to testify on one's own behalf can be argued for by trial counsel, but ultimately it is up to the defendant whether or not to risk doing so. The fact that it often backfires on defendants does not, according to the Commonwealth, automatically make trial counsel's insistence on it in any particular case ineffective by default.

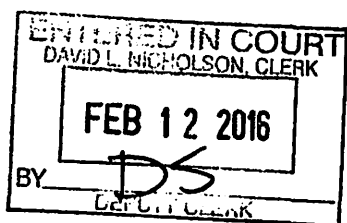
Finally, the Commonwealth addresses Petitioner's claim that trial counsel failed to explain the plea following the jury verdict. The Commonwealth points to the thorough nature of the plea colloquy undertaken by the Judge at trial, as well as the merits of the plea admitted to by both defense counsel and the prosecution at trial.

This Court finds the Commonwealth's arguments concerning Petitioner's motion for post-conviction relief pursuant to RCr 11.42 persuasive on all accounts. Petitioner has failed to

address any matter in the handling of his case at trial in which the decisions made by trial counsel were anything other than strategy allowable under the broad discretion given to trial counsel by the Court. There is simply not enough evidence to conclude any prescription medication's influence over trial counsel which would have hindered his decision making. The decision not to have the admitted photographs tested against those produced at trial is telling of Petitioner's own confidence in that type of test's outcome. Understanding of the limiting nature of the Rape Shield Law, as well as a basic understanding of the risks posed by a defendant who testifies on his own behalf prevent this Court from finding any ineffective assistance of counsel with regards to the decisions made at trial on those accounts. Finally, it is clear, from the record, that Petitioner understood, despite what he claims to have heard from his trial counsel, the implications of pleading guilty voluntarily.

Conclusion

For the foregoing reasons, Petitioner's motions to vacate his criminal conviction pursuant to CR 60.02 and RCr 11.42 are DENIED.



BARRY WILLET
JEFFERSON CIRCUIT COURT JUDGE

Date Signed: _____

2/12/16

MIME-Version:1.0

From:kywd-ecf-notice@kywd.uscourts.gov

To:kywd-ecf-notice@kywd.uscourts.gov

Bcc:

--Case Participants: Richard Earl Cooper (richardcooperesq@gmail.com), Armand I. Judah (ajudah@lynchcox.com), Leilani K.M. Martin (criminal.appealsecf@ky.gov, leilani.martin@ky.gov), Judge Justin R. Walker (leah_spears@kywd.uscourts.gov, megan_jackson@kywd.uscourts.gov), Judge Rebecca Grady Jennings (andrea_morgan@kywd.uscourts.gov, elizabeth_powell@kywd.uscourts.gov, heidi_schumann@kywd.uscourts.gov, matt_veyand@kywd.uscourts.gov, rebecca_jennings@kywd.uscourts.gov), Magistrate Judge Lanny King (chad_e_edwards@kywd.uscourts.gov, lanny_king@kywd.uscourts.gov, mary_butler@kywd.uscourts.gov, michael_lacourse@kywd.uscourts.gov)

--Non Case Participants:

--No Notice Sent:

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Subject:Activity in Case 3:19-cv-00528-RGJ-LLK Yarmey v. Mazza Order

Content-Type: text/html

U.S. District Court

Western District of Kentucky

Notice of Electronic Filing

The following transaction was entered on 9/3/2020 at 11:59 AM EDT and filed on 9/3/2020

Case Name: Yarmey v. Mazza

Case Number: 3:19-cv-00528-RGJ-LLK

Filer:

Document Number: 34(No document attached)

Docket Text:

TEXT ORDER OF REASSIGNMENT by Chief Judge Greg N. Stivers. IT IS HEREBY ORDERED that, pursuant to the reassignment protocol set forth in GO 20-16, this matter is reassigned to the docket of Judge Rebecca Grady Jennings for all further proceedings.

This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached.

cc: Counsel (SMJ)

3:19-cv-00528-RGJ-LLK Notice has been electronically mailed to:

Richard Earl Cooper richardcooperesq@gmail.com

Armand I. Judah (Terminated) ajudah@lynchcox.com

Leilani K.M. Martin leilani.martin@ky.gov, criminal.appealsECF@ky.gov

3:19-cv-00528-RGJ-LLK Notice will not be electronically mailed to.:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-CRS
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

MOTION FOR AN EXTENSION TO ANSWER

Comes now the Respondent, by counsel, and respectfully requests an extension of time up to and including 10 November 2020. Respondent states that the answer is currently due 26 September 2020. The extension is necessary to collect, compile and examine the state court records and file a meaningful answer.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

s/Leilani K.M. Martin
LEILANI K.M. MARTIN
Assistant Attorney General
Office of the Solicitor General
Criminal Appeals Unit
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leilani.martin@ky.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on 14 September 2020, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system. I further certify that the above Motion for Extension of Time to Answer has been served, via ECF, to Richard Earl Cooper, Counsel for the Petitioner

s/ Leilani K.M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-CRS
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 10
November 2020 to file her answer to the petition.

Dated: _____

United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 10
November 2020 to file her answer to the petition.

September 15, 2020


**Lanny King, Magistrate Judge
United States District Court**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-JRW-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

MOTION FOR AN EXTENSION TO ANSWER

Comes now the Respondent, by counsel, and respectfully requests an extension of time up to and including 24 November 2020. Respondent states that the answer is currently due 10 November 2020. This second extension is necessary for the revision and editing process.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

s/Leilani K.M. Martin
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leilani.martin@ky.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on 6 November 2020, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system. I further certify that the above Motion for Extension of Time to Answer has been served, via ECF, to Richard Earl Cooper, Counsel for the Petitioner

s/ Leilani K.M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-JRW-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

Respondent's motion for a second extension up to and including 24
November 2020 is granted.

Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

Respondent's motion for a second extension up to and including 24
November 2020 is granted.

November 9, 2020

A handwritten signature in black ink, reading "Lanny King". The signature is written in a cursive style. A circular seal of the United States District Court for the Western District of Kentucky is partially visible behind the signature.

**Lanny King, Magistrate Judge
United States District Court**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-00528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

LIMITED RESPONSE TO AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

Comes the Respondent, Keven Mazza, Warden, and for his Limited Response to the Amended Petition, respectfully requests that this Court dismiss the petition and states as follows:

1. Petitioner has presented a petition of exhausted and unexhausted claims. The majority of his claims are unexhausted and Petitioner admits that the majority of his claims are unexhausted. Additionally, Petitioner's unexhausted claims are procedurally defaulted as they cannot now be presented in the Kentucky state court system as they would be untimely and also constitute impermissible successive claims of ineffective assistance of counsel. Pursuant to Kentucky RCr 11.42(10), any motion under this rule shall be filed within three years after the judgment becomes final, unless the movant proves one of two exceptions: that the facts upon

which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or that the fundamental constitutional right asserted was not established within the period provided for within RCr 11.42 and has been held to apply retroactively. Moreover, a successive RCr 11.42 motion is impermissible pursuant to RCr 11.42(3), which has been held to bar successive RCr 11.42 motions. *Sanders v. Commonwealth*, [339 S.W.3d](#), 427, 438 (Ky. 2011.)

The independent and adequate state ground doctrine ensures that the state's interest in correcting their own mistakes is respected in all federal habeas cases. *Coleman v. Thompson*, [501 U.S. 722, 731-32](#) (1991). A habeas petitioner who fails to meet the state's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims, as this doctrine supports and endorses. The Supreme Court in *Lambrix v. Singletary*, [520 U.S. 518, 525](#) (1997), stated that a state's procedural rules "are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." Petitioner is barred from raising the unexhausted, and procedurally defaulted, claims as grounds for habeas corpus relief.

2. Respondent denies all allegations contained in the Amended Petition.

3. Respondent asserts that no constitutional right owing to Petitioner was abridged or denied, Petitioner is not being held unlawfully, and Petitioner has alleged no claim for which relief may be granted.

4. A jury found Petitioner guilty of one count of Use of a Minor in a Sexual Performance and hung on the Sodomy in the First Degree charge – prior to the sentencing phase, Petitioner entered a guilty plea to Use of a Minor in a Sexual Performance in exchange for a 15 year sentence and the dismissal of his Sodomy charge. (Appendix I, State Trial Record, Volume I, page 75-78.)

5. Petitioner's guilty plea was conditional and limited his appellate rights to three issues captured in the state trial record. (*Id.*) These three issues were: 1) the trial court's ruling on the admissibility of the photos; 2) the trial court's ruling on Petitioner's proposed jury instructions and; 3) the trial court's ruling to exclude evidence about the victim's rape by another perpetrator. (*Id.*) The Kentucky Court of Appeals affirmed the trial court's denials of relief in an unpublished opinion. *Yarmey v. Commonwealth*, 2010-CA-604-MR, [2011 WL 6743294](#), (Ky. App. Dec., 22, 2011), (Appendix III.)

6. Petitioner then alleged six instances of ineffective assistance of counsel. The Kentucky Court of Appeals affirmed the trial court's denials of relief in an unpublished opinion. *Yarmey v. Commonwealth*, 2016-CA-1245-MR, [2019 WL 169133](#) (Ky. App. Jan. 11, 2019).

7. Respondent has already submitted appendices in his previously filed Rule 5 answer containing relevant portions of the state record, including briefs filed in the state appellate courts, copies of the Kentucky Court of Appeals' opinions affirming Petitioner's conviction under the conditional plea agreement and affirming the denial of post-conviction relief. (Document Number 13.)

8. Respondent incorporates herein his previously filed Rule 5 answer to Petitioner's original Petition as to the exhausted claims. (Document Number 13.)

DETAILED DISCUSSION

Petitioner raises 14 grounds for relief. By his own admission, the bulk of his claims are unexhausted.

CLAIMED GROUNDS FOR RELIEF

Appendix VI is the principal brief that Petitioner filed in his appeal of the order denying his request for post-conviction relief. Page iv of his "Statement of Points and Authorities" sets forth the arguments that Petitioner presented for review to the Kentucky Court of Appeals. (Appendix VI at iv.)

It is clear from a reading of Petitioner's arguments that he presented four claims of ineffective assistance of counsel, one claim of error by the trial court, and a claim that he did not enter his plea knowingly, intelligently, or voluntarily. The trial court's denial of all six claims was affirmed by the Kentucky Court of Appeals. (Appendix IV.). However, the claims that Petitioner now brings before

this Court far exceed the original six claims that were brought before the Kentucky Court of Appeals, and therefore he presents claims that are unexhausted.

The unexhausted claims are:

1. Ground One, a claim that the trial court erred by admitting the Polaroid photos of the victim. Petitioner admits that he did not exhaust this claim.
2. Ground Three, a claim that counsel was ineffective when he did not request a different admonition about the unspent film in the Polaroid camera. Petitioner admits that he did not exhaust this claim.
3. Ground Six, a claim that counsel was ineffective when he did not object to inadmissible evidence about delayed reporting by a victim. Petitioner admits that he did not exhaust this claim.
4. Ground Seven, a claim that counsel was ineffective when he did not object to the prosecutor's closing argument remarks about delayed reporting by victims. Petitioner admits that he did not exhaust this claim.
5. Ground Eight, a claim that counsel was ineffective when he failed to object to Detective Judah's testimony about the controlled phone call between the victim and Petitioner. Petitioner admits that he did not exhaust this claim.

6. Grounds Nine and Ten, claims that counsel was ineffective when he failed to object to the jury instructions. Petitioner admits that he did not exhaust these claims.
7. Ground 11, a claim that counsel was ineffective when he failed to object to evidence about Petitioner's possession of computer scanners. Petitioner erroneously claims that he exhausted this claim, but it was not one of the claims that was presented to the Kentucky Court of Appeals. (Appendix VI, page iv.)
8. Grounds 12 and 13, claims that counsel was ineffective when he failed to object to purported hearsay evidence. Petitioner admits that he did not exhaust these claims.
9. Ground 14, a claim that counsel was ineffective when he failed to object to law enforcement dispatch log evidence. Petitioner admits that he did not exhaust this claim.

To exhaust a federal habeas claim, a petitioner must properly raise each constitutional claim in each appropriate state court, including the state intermediate court of appeal in addition to the state's highest court. *Baldwin v. Reese*, 541, U.S. 27, 29 (2004).

The exhaustion of state remedies requires that petitioners "fairly present" federal claims to the state courts in order to give the state the "opportunity to pass

upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 270 (1971). As explained in *Duncan v. Henry*, 513 U.S. 364, 365 (1995), "[i]f state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."

The "mere similarity of [state and federal] claims" is insufficient to exhaust. *Id.*, 513 U.S. at 366. A petitioner does not satisfy the exhaustion requirement "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1995). General appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *Id.* at 162. A petitioner does not satisfy the "fair presentment" requirement if the claim raised in the federal petition is not the "substantial equivalent of the claim presented in the state courts." *Picard v. Connor*, 404 U.S. 270, 278 (1971). A claim is not the "substantial equivalent" of another if the claim arises under different federal constitutional provisions, *Id.* at 278; or arises under the same federal constitutional provision, but is conceptually distinct, *see Gray v. Netherland*, 518 U.S. at 164-65.

Here, Petitioner has presented 14 claims, and 11 of them were not presented to any state court. His new claims, except for Ground One, are all collateral claims that deal with ineffectiveness of counsel. There was no impediment to his ability

to present them to the courts below under the collateral appeal process for ineffective assistance of counsel claims provided for in Kentucky. This is clearly evidenced by the fact that he did successfully present and exhaust his other claims of ineffective assistance of counsel. Neither has Petitioner demonstrated why he could not have presented these claims to the state courts. Because Petitioner has presented an admittedly mixed petition of exhausted and unexhausted claims, this Court should dismiss the petition.

CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky, as counsel for Respondent, requests that this Court deny the petition for writ of habeas corpus and dismiss with prejudice.

Respectfully Submitted,

DANIEL CAMERON
Attorney General of Kentucky

/s/Leilani K. M. Martin
LEILANI K. M. MARTIN
Assistant Attorney General
Office of Solicitor General
Criminal Appeals Unit
1024 Capital Center Drive, Suite 200
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(502) 696-5342 Phone
(502) 696-5533 Fax

ATTORNEY FOR RESPONDENT

NOTICE AND CERTIFICATE OF SERVICE

On November 24, 2020, I electronically filed the foregoing Response through the ECF system, of which Movant is a participant.

s/Leilani K. M. Martin
LEILANI K. M. MARTIN
ASSISTANT ATTORNEY GENERAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-cv-00528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, Warden

RESPONDENT

ORDER OF CLARIFICATION

Petitioner, through appointed counsel, filed his amended petition under [28 U.S.C. § 2254](#) for a writ of habeas corpus by a person in state custody, and Respondent filed his limited response. [DN 33, 39].

Previously, the Court entered an Order that stated, in pertinent part, that “Respondent shall RESPOND within 60 days following service of the amended petition, and Petitioner may REPLY within 21 days following service of Respondent’s response.” [DN 32]. Respondent filed his limited response on November 24, 2020; therefore, Petitioner’s reply, if any, was due on or about December 15, 2020.

However, by way of clarification and out of an abundance of caution, it is hereby ORDERED that Petitioner may (but is not required) to file a reply to Respondent’s limited response within 30 days of entry of this Order (after which the Court will consider Petitioner’s amended petition ripe for determination).

January 12, 2021


**Lanny King, Magistrate Judge
United States District Court**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**PETITIONER’S REPLY TO RESPONDENT’S
LIMITED RESPONSE TO AMENDED PETITION
FOR WRIT OF HABEAS CORPUS**
(Electronically Filed)

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Respondent’s Limited Response to Petitioner’s Amended Petition for Writ of Habeas Corpus states, “Petitioner has presented a Petition of exhausted and unexhausted claims.” Respondent identifies the exhausted claims as Grounds 2, 4, and 5.

Within his Amended Petition, Petitioner agreed Grounds 4 and 5 have been exhausted. However, Petitioner believes the claim presented in Ground 2 has not been exhausted. Petitioner’s claim was ineffective assistance of post-conviction counsel for his failure to include this issue of trial counsel’s failure to present the issue of the undeveloped film, failure to use it to impeach the credibility of the alleged victim, and failure to make this argument in his closing to the jury in Petitioner’s Kentucky RCR 11.42 Motion.

Petitioner’s claims not presented in a state court post-conviction relief by RCr 11.42 Motion are procedurally defaulted and normally cannot be reviewed unless Petitioner can demonstrate cause and prejudice.

Petitioner agrees with Respondent that Grounds 1, 3, 6 through 14 are unexhausted claims. However, Petitioner disagrees with Respondent's reliance on Coleman v. Thompson, [501 U.S. 722](#) (1991) as dispositive of the unexhausted claims in this case are procedurally defaulted.

Respondent's argument fails to address the merit of Petitioner's claims for ineffective assistance of trial counsel and ineffective assistance of post-conviction counsel under the precedent of Martinez v. Ryan, [566 U.S. 1](#) (2012).

In Martinez, the Supreme Court created an exception to the holding in Coleman v. Thompson. The Supreme Court held, "To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse procedural default. This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim for ineffective assistance at trial." *Id.* at 9.

The Martinez opinion was recognized and followed in Woolbright v. Crews, 791 Fed.3d 628 (6th Cir. 2015). The Sixth Circuit in Woolbright stated, "prisoner can, under certain circumstances, establish cause for a procedural default of their IATC claims that they lacked effective assistance of counsel at their initial-review collateral proceedings." *Id.* at 636.

Further, Woolbright stated, "The holdings in Martinez and Trevino [do] not concern attorney errors and other kinds of proceedings, including appeals

from initial-review collateral proceedings . . .” Citing Martinez, 132 S.Ct. at 1320. Woolbright presented a claim against this post-conviction appellate counsel to “preserve any future argument that “Martinez and Trevino should be extended to ineffective assistance of post-conviction appellate counsel”. Woolbright at 636. Likewise, Petitioner in this case wants to preserve this argument for his claim in Ground 11. The issue was presented in the RCr 11.42 Motion, but was not made an issue on appeal of denial of the RCr 11.42 Motion.

CONCLUSION

Petitioner agrees Grounds 4 and 5 have been exhausted, and the review of these claims would come under the holding in Coleman v. Thompson. Petitioner believes the claims presented in his remaining Grounds are unexhausted IATC claim to be considered under the precedent of Martinez v. Ryan.

Petitioner requests an evidentiary hearing to address his claims, in particular to establish cause for procedural default of his ineffective assistance of trial counsel and ineffective assistance of his initial-review collateral proceeding counsel under the standard of Martinez v. Ryan, 566 U.S. 1 (2012) and followed by Woolbright v. Crews, 791 Fed.3d 628 (6th Cir. 2015).

Respectfully submitted,

/s/
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(502) 585-3084
(502) 585-3548 fax
Attorney for Petitioner
richardcooperesq@gmail.com

CERTIFICATE OF SERVICE

I certify that on February 3, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Petitioner’s Reply to Respondent’s Limited Response to Amended Petition For Writ of Habeas Corpus has been served, via ECF, to Leilani K. M. Martin, Assistant Attorney General.

/s/
RICHARD COOPER, P.S.C.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-cv-00528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, Warden

RESPONDENT

MEMORANDUM OPINION AND ORDER

Petitioner, through appointed counsel, filed an amended petition under [28 U.S.C. § 2254](#) for writ of habeas corpus by a person in state custody, [Docket Number (“DN”) 33], which superseded and replaced his original pro-se petition, [DN 1]. This matter is before the Court on Respondent’s limited response to the amended petition, [DN 39], and to which Petitioner replied and requested an evidentiary hearing, [DN 41]. The Court referred this matter to the undersigned Magistrate Judge “pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\) & \(B\)](#) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter.” [DN 7].

For the reasons below, this Order will REQUIRE Respondent to FILE an unlimited response to Petitioner’s amended petition, [DN 33], and request for an evidentiary hearing, [DN 41].

Petitioner’s claims are exhausted.

The amended petition raises fourteen (14) claims of ineffective assistance of trial counsel (“IATC”). [DN 33]. In his limited response, Respondent argues that the amended petition is subject to dismissal as a “mixed” petition contained both exhausted claims (2, 4, and 5) and unexhausted claims (1, 3, 6 through 14). [DN 39].¹ In his reply, Petitioner “agrees with Respondent that Grounds 1, 3, 6 through 14 are

¹ A federal court cannot grant habeas relief if the petitioner still has state remedies available. See [28 U.S.C. § 2254\(b\)\(1\)\(B\)](#). That rule applies to petitions that contain a mix of exhausted and unexhausted claims. In that situation, a district court has discretion to:

(1) dismiss the mixed petition in its entirety; (2) stay the petition and hold it in abeyance while the petitioner returns to state court to raise his unexhausted claims, (3) permit the petitioner to dismiss the unexhausted

unexhausted claims” but would place Claim 2 in the unexhausted category as well. [DN 41]. For the reasons below, the undersigned has determined (tentatively, pending report and recommendation to the district judge) that all fourteen claims are exhausted.

A “petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.” *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). “A claim may become procedurally defaulted in two ways.” *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). First, “a claim is procedurally defaulted where state-court remedies have been exhausted within the meaning of § 2254, but where the last reasoned state-court judgment declines to reach the merits because of a petitioner's failure to comply with a state procedural rule.” *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir.2013). “Second, a petitioner may procedurally default a claim by failing to raise a claim in state court, and pursue that claim through the state's ‘ordinary appellate review procedures.’” *Williams*, 460 F.3d at 806. “If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted.” *Id.*

In the present case, Petitioner’s Claims 1, 3, 6 through 14 are procedurally defaulted under the second *Williams v. Anderson* category. This is because, as Respondent explains:

Under Kentucky law, the procedural vehicle for bring an IATC claim is in a motion to vacate pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42. Pursuant to RCr 11.42(10), any motion under this rule shall be filed within three years after the judgment becomes final, unless the movant proves one of two exceptions: that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or that the fundamental constitutional right asserted was not established within the period provided for within RCr 11.42 and has been held to apply retroactively. Moreover, a successive RCr 11.42 motion is impermissible pursuant to RCr 11.42(3), which has been held to bar successive RCr 11.42 motions. *Sanders v. Commonwealth*, 339 S.W.3d, 427, 438 (Ky. 2011.)

[DN 39 at 1-2]. The Kentucky Court of Appeals affirmed the trial court’s denial of Petitioner’s 11.42 motion and found Petitioner’s Claims 4 and 5 (and maybe Claim 2 as well) to be without merit. *Yarmey v.*

claims and proceed with the exhausted claims, or (4) ignore the exhaustion requirement altogether and deny the petition on the merits if none of the petitioner's claims has any merit. *Harris v. Lafler*, 553 F.3d 1028, 1031-32 (6th Cir. 2009).

Commonwealth, No. 2016-CA-001245-MR, [2019 WL 169133](#) (Ky. Ct. App. Jan. 11, 2019). Claims 1, 3, 6 through 14 are new claims first articulated by Petitioner in his amended petition. It is too late (procedurally) for Petitioner to present these claims to the state courts.

Respondent must respond to Petitioner's claims in light of *Martinez v. Ryan*.

Historically, because a post-conviction petitioner had no right to counsel, the ineffectiveness of post-conviction counsel could not serve as cause to excuse a procedural default. See *Coleman v. Thompson*, [501 U.S. 722, 757](#) (1991) (“Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas.”). Thus, under prior rules, Petitioner's Claims 1, 3, 6 through 14 would have been deemed procedurally defaulted, and the default would have been deemed unexcused.

More recently, however, the Supreme Court has created a narrow exception to the rule of procedural default in *Coleman v. Thompson*. In *Martinez v. Ryan*, the Supreme Court held that “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.” [566 U.S. 1, 17](#) (2012). The Supreme Court explained why this shift away from *Coleman* was necessary:

To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Id. at 9.² In *Woolbright v. Crews*, the Sixth Circuit recognized that a motion under Kentucky’s RCr 11.42 is subject to the *Martinez* exception. [791 F.3d 628, 630](#) (6th Cir. 2015).

The *Martinez* exception applies only if Petitioner shows that “the underlying ineffective-assistance-of-trial-counsel [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, [566 U.S. at 14](#).

The *Martinez* exception does **not** apply to “attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings.” *Id.* at 16. In this case, an attorney represented Petitioner with respect to his 11.42 motion before the trial court, and Petitioner made five numbered claims of IATC. [DN 13-2 at 17, 25, 28, 30-31, 34]. A different attorney represented Petition in his appeal of the denial of his 11.42 motion, and Petitioner made four numbered claims of IATC. [DN 21-2 at 2, 6].

Respondent must respond to Petitioner’s claims in light of *Martinez v. Ryan*. The response should discuss (without limitation): 1) Whether Petitioner’s Claim 2 is exhausted in the sense of being fairly presented to the state courts or in the sense of being too late to present to the state courts; 2) Whether any of Petitioner’s claims was presented in his initial 11.42 motion but not pursued on appeal of the denial of the 11.42 motion; 3) Whether initial 11.42 counsel was ineffective (for the limited purpose of excusing a procedural default) for not raising Petitioner’s Claims 1, 3, 6 through 14; and 4) Whether Claims 1, 3, 6 through 14 are “substantial” in the sense of having “some merit.”

Respondent must respond to Petitioner’s request for an evidentiary hearing.

In his reply, Petitioner requests “an evidentiary hearing to address his claims, in particular to establish cause for procedural default of his ineffective assistance of trial counsel and ineffective assistance of his initial-review collateral proceeding counsel under the standard of *Martinez v. Ryan*, [566 U.S. 1](#) (2012) and followed by *Woolbright v. Crews*, 791 Fed.3d 628 (6th Cir. 2015).” [DN 41 at 3].

² While ineffective assistance of post-conviction counsel may provide cause to excuse procedural default of a substantial IATC claim, the Supreme Court expressly declined to decide whether a freestanding right to post-conviction counsel exists. *Id.* at 16.

Respondent must respond to Petitioner's request for an evidentiary hearing. The response should indicate which, if any, of the above issues are properly the subject of an evidentiary hearing and why.

Order

Therefore, it is hereby ORDERED that, within 30 days of entry of this Order, Respondent shall FILE an unlimited response to Petitioner's amended petition, [DN 33], and request for an evidentiary hearing [DN 41].

February 12, 2021


**Lanny King, Magistrate Judge
United States District Court**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

MOTION FOR AN EXTENSION TO ANSWER

Comes now the Respondent, by counsel, and respectfully requests an extension of time up to and including 28 April 2021. Respondent states that the answer is currently due 14 March 2021. This extension is necessary as the answer to the Court's order is lengthy and involved and Respondent also has multiple assignments. This motion is not made to cause any hindrance or delay but is being sought instead to ensure that the Court's order is fully complied with and Respondent has satisfied the Court with his compliance.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

s/Leilani K.M. Martin
LEILANI K.M. MARTIN
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leilani.martin@ky.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on 8 March 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system. I further certify that the above Motion for Extension of Time to Answer has been served, via ECF, to Richard Earl Cooper, Counsel for the Petitioner

s/ Leilani K.M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 28 April
2021 to file her answer to the petition.

Dated: _____

United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 28 April 2021 to file her answer to the petition.

March 9, 2021


**Lanny King, Magistrate Judge
United States District Court**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

MOTION FOR A SECOND EXTENSION TO ANSWER

Comes now the Respondent, by counsel, and respectfully requests an extension of time of ten days up to and including 8 May 2021. Respondent states that the answer is currently due 28 April 2021. The answer is complex and lengthy, and Respondent is contemporaneously working on additional assignments. This second extension is necessary for the in house review process and to perfect and edit the answer. This motion is not made to cause any hindrance or delay but is being sought instead to ensure that the Court's order is fully complied with and Respondent has satisfied the Court with his compliance.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

s/Leilani K.M. Martin
LEILANI K.M. MARTIN
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Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on 26 April 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system. I further certify that the above Motion for Extension of Time to Answer has been served, via ECF, to Richard Earl Cooper, Counsel for the Petitioner

s/ Leilani K.M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 8 May 2021 to file his answer to the amended petition.

Dated: _____

United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

ORDER

It is hereby ordered that Respondent is granted an extension until 8 May 2021 to file his answer to the amended petition.

April 27, 2021


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-00528-RGJ-LLK
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

RESPONSE TO AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

Comes the Respondent, Keven Mazza, Warden, and for his Response to the Amended Petition, respectfully requests that this Court dismiss the petition and states as follows:

1. Respondent asserts that no constitutional right owing to Petitioner was abridged or denied, Petitioner is not being held unlawfully, and Petitioner has alleged no claim for which relief may be granted.

2. A jury found Petitioner guilty of one count of Use of a Minor in a Sexual Performance and could not reach a verdict on the Sodomy in the First Degree, Victim under 12 charge. Prior to the sentencing

phase, Petitioner entered a guilty plea to Use of a Minor in a Sexual Performance in exchange for a 15 year sentence *and* the dismissal of his Sodomy charge. (DN 13; Appendix I, State Trial Court Record, Volume I, pp. 75-78.)

3. Petitioner's guilty plea was conditional and limited his appellate rights to only three issues which had been raised in pre-trial and trial proceedings. (*Id.*) These three issues were: 1) the trial court's ruling on the admissibility of the photos; 2) the trial court's ruling on Petitioner's proposed jury instructions and; 3) the trial court's ruling to exclude evidence about the victim's rape by another perpetrator. (*Id.*) The Kentucky Court of Appeals affirmed the trial court's rulings in an unpublished opinion. *Yarmey v. Commonwealth*, 2010-CA-604-MR, [2011 WL 6743394](#), (Ky. App. Dec. 22, 2011)(DN 13; Appendix III.)

4. Petitioner then alleged six instances of ineffective assistance of counsel in a post-conviction motion. The Kentucky Court of Appeals affirmed the trial court's denials of relief in an unpublished opinion. *Yarmey v. Commonwealth*, 2016-CA-1245-MR, [2019 WL 169133](#) (Ky. App. Jan. 11, 2019)(DN 13; Appendix IV.)

5. Respondent has already submitted appendices, in his previously filed Rule 5 answer, containing relevant portions of the state record, briefs filed in the state appellate courts, and copies of the direct and collateral appeal opinions from the Kentucky Court of Appeals. (DN 13.)

6. Respondent incorporates herein his previously filed Rule 5 answer to Petitioner's original Petition as to the exhausted claims. (DN13.) These three issues were: 1) the trial court's ruling on the admissibility of the photos; 2) the trial court's ruling on Petitioner's proposed jury instructions and; 3) the trial court's ruling to exclude evidence about the victim's rape by another perpetrator. (DN 13; Appendix I, State Trial Court Record, Volume I, pp. 75-78.)

Factual Background

The Kentucky Court of Appeals recounted the facts in its opinion addressing Petitioner's direct appeal:

On March 25, 2008, Erin Michelle Brannick (Michelle) went to the Louisville Metro Police Department (LMPD) and asked to speak with a detective. Michelle met with Detective Angela Merrick of LMPD's Crimes Against Children Unit. During that meeting, Michelle relayed to Detective Merrick that approximately ten years prior,

Yarmey had taken nude photographs of her and sodomized her.

On one evening between the years of 1998 and 2000, Michelle's mother, Cindy Brannick, contacted Yarmey for the alleged purpose of taking pictures of Michelle for a modeling portfolio. Michelle was, at that time, only eleven years old. Yarmey was not a professional photographer. Indeed, the camera in question was a Polaroid camera.

Nonetheless, Michelle was taken to Yarmey's home for the photographs to be taken. In some of the pictures, Michelle wore a leopard-print bikini, which she testified did not belong to her but was given to her by Yarmey. In others, she was wearing one of Yarmey's own dress shirts, unbuttoned, where the side of her breasts and a substantial part of her legs and midsection were showing. Other pictures were taken of Michelle in an oversized men's tank top that belonged to Yarmey. Michelle testified that when some of the photographs were taken, Yarmey placed cologne bottles beneath her breasts to enhance her cleavage.

Michelle testified that her mother was present for some of the pictures. She testified that Cindy removed her bathing suit top and was present for photographs where Michelle was topless, although both Yarmey and her mother explained to her that you would only be able to see a silhouette or "shadow" of her breasts in these shots. Michelle testified that Yarmey manipulated her breasts for these photographs and posed her to his liking.

Michelle stated that her mother eventually had a conversation with Yarmey in another room of the house, after which point her mother left Yarmey's residence. At the point in time when her mother left, Michelle recounted that she was topless and wearing only a bathing suit bottom. She testified that Yarmey had her completely disrobe and took several completely nude photographs of her, including photographs of her genitalia, while requiring her to pose in certain positions. Michelle further testified that after her mother left, Yarmey asked her if she had ever performed oral sex on a man. She testified that he then forced her to her knees and made her perform oral sex on him. Michelle stated that, even after this occurred, Yarmey continued to take pictures of her.

According to Michelle's testimony, Yarmey then took the Polaroid photographs into another room with a computer scanner and scanned at least one of the photographs of her into his computer. Seeing that Michelle was upset, Yarmey told her that he could use a computer program to draw clothes on her in the nude photographs. He then allowed her to dress and took her home. Michelle testified that before they left his house, he grabbed her by the arm and told her not to tell anyone what happened or she would get into trouble. Michelle testified that she never returned to Yarmey's house again, despite her mother's encouragement to maintain a relationship with him, and she was never alone with him again.

In 2004, when Michelle was fourteen years old, she told her mother about events that occurred at Yarmey's house that night several years prior. Cindy took Michelle to LMPD and the pair met

with a detective from the Crimes Against Children unit. Michelle testified that she informed the detective of the events which occurred in 1999 or 2000 at Yarmey's home. Michelle stated that the detective told them a controlled telephone call ought to be conducted and that she would need to return the following week to participate in such a call. Michelle testified that when she asked her mother about taking her back to the police to do the controlled call, her mother refused to take her. The file was subsequently closed.

Then, in 2008, Michelle told her boyfriend (now husband) Gary Spies about what happened in Yarmey's home that night. Michelle testified that the only reason she told Gary about the events was because she was having nightmares and he questioned her about them. After she conveyed what happened to him, he took her back to the Crimes Against Children Unit at LMPD to report the crimes.

Once at LMPD, it was explained to Michelle that controlled calls would need to be made because of lapse in time and because of the lack of other evidence. Thereafter, Michelle participated in a controlled call to her mother, whom she had a strained relationship with. Cindy was on disability and lived in Michelle's home. Michelle testified that she believed the photographs to still be in existence due to certain things that her mother said during the controlled call. After the call, Michelle and Gary searched her mother's room and found seven of the photographs in her mother's lingerie drawer. Michelle then turned the photographs she discovered over to Detective Merrick.

Michelle then participated in a controlled call to Yarmey, during which conversation he did not admit to any of the above events. However, based upon Michelle's statement, the photographs, and the calls, the Crimes Against Children Unit obtained a warrant of arrest for Yarmey and a search warrant for his home. Police confiscated various cameras and computer equipment from Yarmey's residence during the search. A forensic search was later conducted on the computer, although no photographs of Michelle or other evidence of child pornography were found.

Yarmey spoke with police after his arrest and denied inappropriately touching Michelle or taking nude photographs of her. He, at first, denied even having a specific recollection of her being at his house. He claimed that he often told children in the neighborhood that they could come and swim in his pool. He stated that he believed Michelle had come to his house to swim, but he couldn't recall.

When asked whether he took photographs of Michelle, he denied having any recollection of ever doing so. Then, after being presented with the actual photographs, he eventually conceded that he was left alone with Michelle and took the pictures presented to him by the detectives. Yarmey still denied ever taking completely nude photographs of Michelle or sodomizing her. After the interrogation, Yarmey was indicted for one count of sodomy in the first degree and one count of use of a minor in a sexual performance.

Yarmey's counsel filed a motion *in limine* before the trial to exclude the seven photographs. The motion was denied by the trial court. After a

jury trial, Yarmey was found guilty of the use of a minor in a sexual performance, although the jury did not reach a unanimous verdict on the charge of sodomy in the first degree. Rather than facing retrial, Yarmey entered a conditional guilty plea to the charge of the use of a minor in a sexual performance. Under the terms of the agreement, the sodomy charge was dismissed by the Commonwealth without prejudice. Yarmey was sentenced to fifteen years' imprisonment for the use of a minor in a sexual performance.

Yarmey v. Commonwealth, 2010-CA-604-MR, [2011 WL 6743294](#), (Ky. App. Dec 22, 2011) (DN 13; Appendix IV, pp. 1-3)(footnote removed).

STANDARDS OF REVIEW AND APPLICABLE LAW

Review for Federal Habeas Corpus Purposes

The purpose of the writ of habeas corpus is “to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact.” *Herrera v. Collins*, [506 U.S. 390, 400](#) (1993).

“Federal courts are not forums in which to relitigate state trials.”

Barefoot v. Estelle, [463 U.S. 880, 887](#) (1983).

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, [110 Stat. 1214](#) (April 24, 1996) (“AEDPA”) amended the habeas statute, [28 U.S.C. § 2254](#), and applies to all habeas cases filed after April 25, 1996. The petition in this case was filed after that date,

and therefore, the amendments to § 2254 are applicable. *See Walker v. Smith*, [360 F.3d 561, 563](#) (6th Cir. 2004). “The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, [535 U.S. 685, 693](#) (2002)(citing *Williams v. Taylor*, [529 U.S. 362, 403-04](#) (2000)).

The habeas statute 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 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). Section 2254(d), as amended by the AEDPA, states:

- (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 the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) “bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)” above. *Harrington v. Richter*, [562 U.S. 86, 98](#) (2011).

The Sixth Circuit has explained that a state court decision may only be overturned if:

1. It ‘[applies] a rule that contradicts the governing law set forth in [Supreme Court of the United States] cases,’ or;
2. The state-court decision ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent;’ or
3. ‘the state court identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case;’ or
4. The state court ‘either unreasonably extends a legal principle from [a Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.’

Bailey v. Mitchell, [271 F.3d 652, 655](#) (6th Cir. 2001)(internal citations omitted); *see also Williams v. Taylor*, [529 U.S. 362, 406-09; 412-13](#) (2000).

When performing analysis of a state court decision pursuant to § 2254(d), the first requirement is that the decision be tested only against “clearly established Federal law, as determined by the Supreme Court of the United States.” In order to be clearly established law, the law relied on by the petitioner must be law that was clearly established at the time the state court decision became final, not afterward. *Williams*, [529 U.S. at 380](#).

Second, the Court must determine whether the state court decision was “contrary to, or involved an unreasonable application of” that clearly established law. *Id.* at 384. In order to find a state court’s application of Supreme Court precedent unreasonable under § 2254, the state court’s decision must have been objectively unreasonable. *Wiggins v. Smith*, [539 U.S. 510, 520](#) (2003). Therefore, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied

clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams*, [529 U.S. at 411](#).

The AEDPA standard additionally provides that “a determination of a factual issue made by a State court shall be presumed to be correct.” § 2254(e)(1).

Exhaustion Standards and Procedural Default

“Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, [28 U.S.C. § 2254\(b\)](#), thereby giving the State the ‘opportunity to pass upon and correct’ alleged violations of its prisoners’ federal rights.” *Baldwin v. Reese*, [541 U.S. 27, 29](#) (2004). “To provide the State with the necessary ‘opportunity,’ the prisoner 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.” *Id.*; *Gray v. Netherland*, [518 U.S. 152, 162-63](#) (1996). This rule has been interpreted by the Supreme Court as one of total exhaustion. *Rose v. Lundy*, [455 U.S. 509](#) (1982). Thus, each and every claim set forth in the federal habeas petition must have been presented to the state appellate court. *See Picard v. Connor*, [404 U.S. 270, 275](#) (1971).

Claims which are not exhausted are procedurally defaulted and “ordinarily may not be considered by a federal court on habeas review.”

Alley v. Bell, 307 F.3d 380, 388 (6th Cir. 2002). “In order to gain consideration of a claim that is procedurally defaulted, a petitioner must demonstrate cause and prejudice for the failure, or that a miscarriage of justice will result from the lack of review.” *Id.* at 386. The burden of showing cause and prejudice to excuse defaulted claims is on the habeas petitioner. *Lucas v. O’Dea*, 179 F.3d 412, 418 (6th Cir. 1999).

Until 2012, in *Martinez v. Ryan*, 566 U.S. 1 (2012), an attorney’s ineffective assistance in post-conviction proceedings did not qualify as cause to excuse procedural default of a constitutional claim. *Martinez* held that where, under state law, claims of ineffective assistance of 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.*, 566 U.S. at 9.

Martinez held that cause, under the cause and prejudice test for the excusal of a procedural default, exists when the following requirements are satisfied: (1) state law requires the prisoner to raise his IATC (Ineffective Assistance of Trial Counsel) claim in an initial-review collateral proceeding; (2) the IATC claim “is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit”; and (3) the “cause” for default of the IATC claim arises out of the absence of appointed counsel or the ineffectiveness of appointed counsel in the initial-review collateral proceeding. *Id.* at 14, 17.

Under *Trevino v. Thaler*, [569 U.S. 413, 417](#) (2013), the Supreme Court 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 procedural design and systematic 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. The Sixth Circuit has held the *Martinez/Trevino* exception applies to Kentucky’s initial-review collateral proceedings under Kentucky Rule of Criminal

Procedure 11.42. *Woolbright v. Crews*, [791 F.3d 628, 636](#) (6th Cir. 2015).

Ineffective assistance of counsel in an initial post-conviction proceeding, however, remains restricted to otherwise procedurally defaulted claims of ineffective assistance of trial counsel, not ineffective assistance of appellate counsel. *Davila v. Davis*, --- U.S. -----, [137 S.Ct. 2058](#) (2017); *Abdur' Rahman v. Carpenter*, [805 F.3d 710, 713-15](#) (6th Cir. 2015).

To overcome procedural default, Petitioner must demonstrate “cause” and “prejudice.” *See Woolbright v. Crews*, [791 F.3d 628, 631](#) (6th Cir. 2015). “Habeas petitioners must additionally show ‘actual prejudice’ to excuse their default.” *Jones v. Bell*, [801 F.3d 556, 563](#) (6th Cir. 2015)(quoting *Ambrose v. Booker*, [684 F.3d 638, 649](#) (6th Cir. 2012.)). To determine prejudice, the Court ‘look[s] to the record to determine if the outcome of the trial would have been different’ absent counsel’s errors. *Id.* “The ‘most important aspect to the inquiry is the strength of the case against the defendant’ and whether a trial without errors would still have resulted in conviction.” *Id.*(quoting *Ambrose*, [684 F.3d at 652](#)).

“[C]ause under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him” *Coleman v. Thompson*, [501 U.S. 722, 753](#) (1991). Prejudice under the cause and prejudice test of procedural default is when there is constitutionally deficient performance by counsel. *Id.*, [501 U.S. at 753-54](#).

Ineffective Assistance of Counsel Standards

The two-part standard established in *Strickland v. Washington*, [466 U.S. 668](#) (1984), is used to make that determination. *Id.* Under *Strickland*'s two-prong test, a person challenging his counsel's representation must show (1) deficient performance, *i.e.* that “counsel's representation fell below an objective standard of reasonableness” and (2) prejudice. [466 U.S. 668, 687-88, 691-92](#) (1984). Courts must “apply a ‘strong presumption’ that counsel's representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, [562 U.S. 86, 104](#) (2011)(quoting *Strickland*, [466 U.S. at 689](#)). To establish prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, [466 U.S. at 694](#). “A

‘reasonable probability’ is a probability ‘sufficient to undermine confidence in the outcome,’ but something less than a showing that the outcome more likely than not would have been different.” *Bigelow v. Williams*, [367 F.3d 562, 570](#) (6th Cir. 2004)(quoting *Strickland*, [466 U.S. at 693](#)).

Strickland also said that “a court deciding an actual ineffectiveness claim 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. “A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement.” *Id.* “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Id.* at 691. “[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s

failure to pursue those investigations may not later be challenged as unreasonable.” *Id.*

However, “an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* “[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” *Id.* at 693. The appropriate test for prejudice is a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different[;] [a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Id.* at 695. A lack of prejudice can be a stand-alone ground for not finding that counsel was ineffective. *Id.* at 697. This determination can be made without a consideration of counsel’s performance. *Id.* “Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.” *Id.* at 698.

If Petitioner did exhaust his state-court remedies with respect to a claim about ineffective assistance of trial counsel, then he has to show that the decision of the Kentucky courts was contrary to, or involved an unreasonable application of clearly established federal law according to the Supreme Court. *See* [28 U.S.C. § 2254\(d\)](#). When a petitioner fails to present a claim in state court, but that remedy is no longer available to him, the claim is technically exhausted, yet procedurally defaulted. *See Jones v. Bagley*, [696 F3d 475, 483-84](#) (6th Cir. 2012). Federal habeas courts review claims of ineffective assistance of trial counsel that were presented to the state courts pursuant to a doubly deferential standard. The first level of deference is based upon case-law standards defining ineffectiveness, which existed before § 2254(d), and § 2254(d) adds the second level of deference. Courts apply the two in tandem, and the question is “whether there is any reasonable argument that [petitioner] satisfied *Strickland*’s deferential standard.” *Harrington v. Richter*, [562 U.S. at 105](#).

ARGUMENT

An evidentiary hearing was held by the trial court as to Petitioner’s Kentucky Rule of Criminal Procedure (RCr) 11.42 claims.

The trial court denied relief in a written order. (DN 13; Appendix II, State Trial Record Volume II, pp. 237-43.)

Petitioner has 14 grounds for relief in his amended petition.

Petitioner admits that other than Ground 4 and Ground 5, his grounds for relief were not properly presented to the state courts. (DN 33.)

Alternatively, the Respondent states that only one half of Ground 1, Ground 2, two-thirds of Ground 4, and Ground 5 are exhausted and properly before this Court.

Significantly, other than nominal citations to *Martinez* and *Woolbright*, in an attempt to get review of previously unraised issues, Petitioner fails to do anything other than make conclusory statements and bare-bones claims. (DN 33) There is little of substance provided by Petitioner for each of his grounds. (*Id.*) He does not make any argument, nor does he apply case law to any of his 14 grounds. (*Id.*)

Petitioner's §2254(d) claims/grounds

1. Ground One, (a) The trial court should not have admitted the seven, non-sexual photographs over the objection of trial counsel; (b) Trial counsel was ineffective for not objecting to the closing remarks of the prosecutor of, "that picture is a crime scene, that

child is about to get molested, that child is being exploited,” and “you can go back and look at these pictures and say, you know what, this whole transaction was criminal.” (DN 33)

2. Ground Two, Trial counsel failed to make an adequate investigation of the Polaroid camera. (*Id.*)
3. Ground Three, Trial counsel failed to request within the stipulation to the jury that there were three undeveloped photographs in the Polaroid camera. (*Id.*)
4. Ground Four, (a) Trial counsel proceeded to trial under the influence of prescription narcotics, rendering him ineffective; (b) Trial counsel failed to hire experts to testify about the victim’s subsequent, unrelated rape; (c) Trial counsel failed to object to improper voir dire questions. (*Id.*)
5. Ground Five, Trial counsel failed to file a motion pursuant to KRE 412 to admit the evidence of victim’s subsequent, unrelated rape. (*Id.*)
6. Ground Six, trial counsel failed to object to the testimony about delayed reporting of child sex abuse. (*Id.*)

7. Ground Seven, Trial counsel did not object to the prosecutor's closing argument that referenced the testimony about delayed reporting. (*Id.*)
8. Ground Eight, Trial counsel failed to object to testimony that child sex abuse perpetrators often denied that they committed the acts upon questioning. (*Id.*)
9. Ground Nine, Trial counsel failed to object to the jury instructions in that they did not require a unanimous verdict. (*Id.*)
10. Ground Ten, Trial counsel failed to request definitions for "Obscene," "Prurient Interest," and "Lewd Manner." (*Id.*)
11. Ground 11, Trial counsel failed to object to admission of a document scanner found in his home. (*Id.*)
12. Ground 12, Trial counsel failed to object to hearsay testimony of Cindy Brannick, his co-defendant. (*Id.*)
13. Ground 13, Trial counsel failed to object to prosecutor's closing argument where he repeated hearsay statements made by Cindy Brannick. (*Id.*)
14. Ground 14, Trial counsel failed to object to the CACU log. (*Id.*)

Analysis of Grounds

Petitioner waived all but four issues

Petitioner entered an agreement after the jury found him guilty. (DN 13; Appendix I, State Trial Court Record, Volume I, p. 76.) The terms of the agreement were that Petitioner would have his charge of Sodomy in the First Degree, Victim under 12, dismissed in exchange for Petitioner agreeing to a 15 year sentence and restricting his appeal to three issues. (*Id.*) The three issues were: (1) the admission of seven non-sexual Polaroid photographs, (2) the trial court's denial of Petitioner's proposed jury instruction that the jury could not find him guilty on the basis of the seven, non-sexual photographs alone, and (3) the inadmissibility of victim's subsequent, unrelated rape. (*Id.*) All other pre-trial and trial issues were waived as appellate claims. (DN 13; Appendix I, State Trial Court Record, Volume I, pp. 75-76.) Petitioner unsuccessfully appealed these three issues to the Kentucky Court of Appeals. *Yarmey v. Commonwealth*, (DN 13; Appendix III.)

Petitioner has, therefore, received both his 15 year sentence and dismissal of his Sodomy in the First Degree, Victim under 12 charge, *and* appealed his three preserved and agreed-upon issues. Petitioner

received the complete benefit of his agreement and now, through the guise of *Martinez*, he attempts to penetrate his agreement in order to reach issues which he waived as an important part of his agreement. This he should not be allowed to do; it is a deceptive practice, as the prosecution has performed its side of the agreement, and Petitioner is receiving the benefit of the prosecution's performance, and yet seeks to abrogate the terms of the agreement to his unqualified benefit.

Pursuant to Kentucky Rule of Criminal Procedure 8.09, "with the approval of the court, a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion, and a defendant shall be allowed to withdraw such plea upon prevailing on appeal."

Pursuant to *Centers v. Commonwealth*, 799 S.W. 2d 51, 55 (Ky.App.1990)(internal citations omitted), "the effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense." In *Lovett v. Commonwealth*, 103 S.W. 3d 72, 84 (Ky. 2003) (citing *Centers, supra*), the Supreme Court of Kentucky was faced with a request by a defendant to review his

argument positing unconstitutionality of a statute that was not reserved for appeal at the time of his conditional guilty plea, and stated, “the issue is unpreserved and we decline to address it in this case.”

Under the circumstances of this case, where a plea bargain stands between the trial and the attempt to raise pre-trial and trial issues in a federal habeas corpus, *Martinez* should not be available to go behind the plea bargain to resurrect pre-trial and trial issues. Petitioner treats this case as if there was never any plea agreement and acts as if it should have no effect. No review of the waived claims should be undertaken by this Court. Nevertheless, each claim is addressed individually below.

Ground One

Ground One is comprised of two claims. Part (a) is that the trial court should not have admitted the seven, non-sexual photographs over the objection of trial counsel. Part (b) is that trial counsel was ineffective for not objecting to the closing remarks of the prosecutor of, “that picture is a crime scene, that child is about to get molested, that child is being exploited,” and “you can go back and look at these pictures and say, you know what, this whole transaction was criminal.”

Petitioner claims that these claims were not presented to the state courts below. (DN 33; Amended Petition, p. 5.) However, part (a) was preserved for appeal via the plea agreement. (DN 13; Appendix I, State Trial Court Record, Volume I, p. 76.) It was then appealed to the Kentucky Court of Appeals, which denied relief. (DN 13; Appendix III, p. 3.)

The Kentucky Court of Appeals stated:

The photographs reflected the events which took place in Yarmey's living room immediately before the commission of the crimes he was charged with. Michelle testified that the photographs accurately depicted events that took place in Yarmey's living room, including what the room looked like, what she was wearing, and positions she was posed in. The probative nature of these photographs, in creating a context for the events that took place leading up to the crime, was not outweighed by the danger of unfair prejudice.

Yarmey v. Commonwealth, (DN 13; Appendix III, p. 3.) Petitioner makes no argument as to how the decision was an unreasonable application of federal constitutional law. Under the AEDPA's reasonableness test, this decision by the Kentucky Court of Appeals is wholly competent and passes muster.

Petitioner is procedurally barred from presenting part (b) to the state courts as it is outside of the statute of limitations. Pursuant to

RCr 11.42(10), “any motion under this rule shall be filed within three years after the judgment becomes final, unless the movant proves one of two exceptions: that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or that the fundamental constitutional right asserted was not established within the period provided for within RCr 11.42, and has been held to apply retroactively.” Moreover, a successive RCr 11.42 motion is impermissible pursuant to RCr 11.42(3), which has been held to bar successive RCr 11.42 motions. *Sanders v. Commonwealth*, [339 S.W.3d 427, 438](#) (Ky. 2011).

Petitioner has not shown how part (b) is captured by the exceptions in RCr 11.42(10). He has not argued them, nor shown any proof in support of them. So these claims are untimely and cannot now be properly raised in the state courts.

So part (b) require analysis under *Martinez*. However, even if the cause of the procedural default can be shown under *Martinez*, Petitioner is still required to prove prejudice under *Strickland*, showing how his case would have come out differently. The victim testified about the photographs and was able to readily recite details about how her

breasts were displayed. *Yarmey v. Commonwealth*, (DN 13; Appendix III, p. 1.) She was able to testify that the Petitioner showed her an exemplar of the series of photographs on his computer. *Id.* Petitioner himself testified that the camera came from his house and belonged to him. *Id.* The evidence convicting Petitioner was overwhelming. He fails to satisfy the prejudice showing. Moreover, the argument by the prosecutor was a valid argument based on the evidence presented, and so counsel was not deficient for choosing not to object. *See Dickerson v. Commonwealth*, [486 S.W.3d 310, 329](#) (Ky. 2016).

Ground Two

Ground Two is that trial counsel failed to make an adequate investigation of the Polaroid camera. Petitioner brought this claim before the state courts. This claim was adjudicated on the merits by the Kentucky Court of Appeals, which denied relief.

The Kentucky Court of Appeals found that Petitioner testified that the camera was the one seized from his residence, and that because the expended film produced no exculpatory evidence, there was no prejudice under *Strickland*. *Yarmey v. Commonwealth*, (DN 13; Appendix IV, p. 2.) The Kentucky Court of Appeals stated:

Here, by testifying that the Polaroid camera seized from his residence and introduced into evidence was the one he used to take seven photographs of the prosecuting witness, Yarmey, by admission, allowed the evidence remaining in the camera to be presented to the jury. *See Thomas v. Commonwealth*, [153 S.W.3d 772, 780](#) (Ky. 2004)(testimony from defendant's mother as to residue on a Mountain Dew bottle was sufficient to link the bottle to the crime). Moreover, since the remaining film was expended without producing any exculpatory evidence, there was no demonstrated prejudice to Yarmey's defense. Yarmey's trial counsel did not act unreasonably regarding the Polaroid camera, nor did any prejudice result from counsel's performance, assuming counsel had acted unreasonably. Accordingly, Yarmey's allegations do not entitle him to relief.

Id. Under the AEDPA's reasonableness test, this decision by the Kentucky Court of Appeals is wholly competent and passes muster. Petitioner makes no argument as to how the decision of the Kentucky Court of Appeals was an unreasonable application of *Strickland*.

Ground Three

Ground Three is that trial counsel failed to request within the stipulation to the jury that there were three undeveloped photographs in the Polaroid camera. Petitioner admits that this claim was not presented the state courts. (DN 33; Amended Petition, p. 9.)

Respondent agrees that this claim was not presented to the state courts,

but points out that it is quite similar to Ground Two and the same logic applies and the same resolution is called for here.

Petitioner is procedurally barred from presenting this claim to the state courts as it is outside of the statute of limitations pursuant to *Sanders v. Commonwealth, supra*.

This claim of ineffectiveness must be analyzed under *Martinez*. Again, even if the cause of the procedural default can be satisfied under *Martinez*, Petitioner is still required to show prejudice under *Strickland*. Petitioner himself testified that the camera came from his house and belonged to him. The evidence convicting Petitioner was overwhelming. He fails to satisfy the prejudice showing. No further review is called for here.

Ground Four

Ground Four is comprised of three parts: (a) trial counsel proceeded to trial under the influence of prescription narcotics, rendering him ineffective, (b) trial counsel failed to hire experts to testify about the victim's subsequent, unrelated rape, (c) trial counsel failed to object to improper voir dire questions. Petitioner brought parts

(a) and (b) before the state courts. He did not bring part (c) before the state courts.

Part (c) is procedurally defaulted. Petitioner is procedurally barred from presenting this claim to the state courts as it is outside of the statute of limitations pursuant to *Sanders v. Commonwealth, supra*.

The Kentucky Court of Appeals considered parts (a) and (b) and decided them on the merits and denied relief both on the merits and also because of failure of Petitioner to comply with RCr 11.42(2), which requires specificity. The Kentucky Court of Appeals stated that Petitioner failed to identify the medications and side effects and also merely “criticizes” his trial counsel. *Yarmey v. Commonwealth*, (DN 13; Appendix IV, p. 3.) The court stated:

He does not list the medications his trial counsel was taking, nor which side effects allegedly caused the deficiency. Instead, he merely criticizes his trial counsel for failing to make certain objections during the trial, and other forms of trial tactics, all the while blaming an unspecified “medication.” Arguments of this kind lack adequate support. Hence, they do not comply with the specificity requirements of RCr 11.42(2) and warrant summary dismissal.

Id.

The court also stated:

Here, Yarmey cannot demonstrate how his trial counsel acted incompetently or prejudiced his defense by not attempting to admit evidence of the subsequent, unrelated rape. First, he assumes, without citing any supporting authority, that a timely filed attempt to introduce the evidence would have resulted in its admission under KRE 412(b)(1)(A). And then from that flawed premise, he claims evidence of the subsequent, unrelated rape would have given trial counsel the opportunity to prove that the victim was conflating which forcibly compelled act traumatized her. As this position is wholly untethered from logic and the policy underlying Kentucky's Rape Shield Law, it is meritless. See *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002)(failure to perform a futile act is not ineffective assistance of counsel).

Id.

Under the AEDPA's reasonableness test, this decision by the Kentucky Court of Appeals is wholly competent and passes muster. Once again, Petitioner makes no argument as to how *Strickland* was unreasonably applied.

Part (c) of this claim must be analyzed under *Martinez*. Petitioner must be able to show deficient performance and prejudice therefrom under *Strickland* to merit full review under *Martinez*. However, Petitioner fails to identify what voir dire questions were objectionable and why an objection should have been made. He then fails to

demonstrate the prejudice from these unidentified questions. He therefore falls extremely short of satisfying a showing of either prong of the *Strickland* test.

Ground Five

Ground Five is that trial counsel failed to file a motion pursuant to KRE 412 to admit the evidence of victim's subsequent, unrelated rape. Petitioner presented this claim to the state courts. The Kentucky Court of Appeals considered and decided this claim on its merits and denied relief. It stated that the assumption that a motion to admit evidence about the subsequent, unrelated rape under KRE 412(b)(1)(A) was a "flawed premise," and that "this position is wholly untethered from logic and the policy underlying Kentucky's Rape Shield Law," and that it was "meritless." *Yarmey v. Commonwealth*, (DN 13; Appendix IV, p. 3.)

This claim is subject to the "doubly deferential" standard of review under *Strickland* and AEDPA. Under this "doubly deferential" standard of review, the adjudication on the merits by the Kentucky Court of Appeals is sound. Moreover, Petitioner does not make any

argument as to how the decision was an unreasonable application of *Strickland*,

Ground Six

Ground Six is that trial counsel failed to object to the testimony about delayed reporting of child sex abuse. This claim must be examined under *Martinez*. Petitioner mistakenly coins this as failure to object to “child sex abuse syndrome.” However, he fails to present any proof that this testimony is captured by that named syndrome. In fact, this was a trial strategy counsel used to undercut the credibility of the victim due to the lapse in time before the report.

Under *Strickland*'s two-prong test, a person challenging his counsel's representation must show (1) deficient performance, and (2) prejudice. [466 U.S. 668, 687-88, 691-92](#) (1984). Here, trial counsel's tactic was reasonable. It is reasonable to use delayed reporting as a mechanism to argue that the victim's credibility is faulty. Further, there was no prejudice to Petitioner as to this testimony. Petitioner completely fails to show how this testimony affected the result of his trial – the evidence was strongly stacked against him. No further review should be afforded.

Ground Seven

Relatedly, Ground Seven is that trial counsel did not object to the prosecutor's closing argument that referenced the testimony about delayed reporting. This claim also requires analysis under *Martinez*, and the claim consequently fails under *Strickland's* two-prong test. Here, trial counsel was not unreasonable, as objections to permissible closing remarks by the prosecutor would be futile. *See Dickerson v. Commonwealth*, [486 S.W.3d at 329](#) (Reversal only justified if the prosecutor's misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings). The decision of trial counsel to not engage in futile acts is neither unreasonable nor prejudicial. No further review is required.

Ground Eight

Ground Eight is that trial counsel failed to object to testimony that child sex abuse perpetrators often deny they committed the acts upon questioning. This claim must be analyzed under *Martinez*. Petitioner classifies this as habit evidence. Habit evidence is not admissible to prove that the defendant acted in conformity to his habit.

Burchett v. Commonwealth, [98 S.W.3d 492, 504](#) (Ky. 2003). However, this evidence is not captured by the habit evidence test. *Id.* at 504-05.

Clearly, this instance of testimony is not habit evidence, it is rather evidence about the witness's prior experience. Neither is it evidence that served to convict Appellant. The testimony was about Petitioner denying that he committed child sex abuse, not testimony about regular, specific, uniform prior child sex abuse acts.

Petitioner has the burden of meeting *Strickland's* two-prong test; (1) deficient performance, and (2) prejudice. [466 U.S. 668, 687-88, 691-92](#) (1984). Trial counsel was not unreasonable for failure to object to something that was not objectionable. Also there was no prejudice. Further review is not called for under *Martinez*.

Ground Nine

Ground Nine is that trial counsel failed to object to the jury instructions in that they did not require a unanimous verdict. Review under *Martinez* is required. Petitioner notes that the victim's testimony was that there were a series of seven photographs taken that were topless and nude, and then a series of eight photographs taken that were of the same nature. Petitioner claims that the jury instructions

did not require the jury to specify which photograph they relied upon to convict. Petitioner purports that this is a fatal flaw in the jury instruction as it potentially allowed a non-unanimous verdict.

Petitioner misconceives the requirements of the jury instructions to achieve a unanimous verdict. In this case, the jury was not called upon to determine whether any particular photograph was child pornography; the issue was whether Petitioner induced the child to participate in a sexual performance. (DN 13; Appendix I, State Trial Court Record, Volume I, p. 84.) The victim's testimony about being posed nude by Petitioner so that he could photograph her was corroborated by the photographs admitted into evidence. The photographs themselves were simply not an element of the offense for which Petitioner was convicted. See [KRS 531.310](#). No error occurred concerning the jury instructions. Petitioner merely seeks to add additional elements to the crime which the legislature did not require.

Given the state of the case, Petitioner completely fails to meet either prong of the *Strickland* test. Trial counsel is not ineffective for failing to object to an issue that is not an error. It is not ineffective to

refrain from a futile act. Also, there was no prejudice. No further review is called for.

Ground Ten

Ground Ten is that trial counsel failed to request definitions for “Obscene,” “Prurient Interest,” and “Lewd Manner.” This claim also requires analysis under *Martinez*. It is the duty of the trial judge to prepare and give instructions on the whole law of the case pursuant to RCr 9.54(1), and this rule requires instructions applicable to every state of the case deducible from or supported to any extent by the testimony. *Webb v. Commonwealth*, [904 S.W.2d 226, 228](#) (Ky.1995). The definitions that Petitioner claims should have been requested by trial counsel are not elements of the offense of use of a minor in a sexual performance. [KRS 531.310\(1\)](#) states simply that “[a] person is guilty of use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance. “Obscene,” “Prurient interest,” and “Lewd Manner” are not elements of the offense charged. The trial court gave the correct instructions.

Again Petitioner has failed to meet either prong of the *Strickland* case. Trial counsel is not ineffective for failing to object to an issue that

is not an error. Also, there was no prejudice. No further review is called for.

Ground 11

Ground 11 is that trial counsel failed to object to admission of a document scanner found in his home. *Martinez* analysis is required. Petitioner's complaint is that the document scanner was manufactured in 2006, and therefore could not have been the document scanner that he used when he took the pictures of the victim. However, the prosecutor did not allege that the document scanner in evidence was used in the crime.

The scanner was relevant evidence to show that Petitioner had familiarity with computer and document scanning equipment. It was not error to have the document scanner admitted into evidence. Upon inspection of the exhibit, the jury could plainly see that it was manufactured in 2006 and was, therefore, not the document scanner that Petitioner used when he made child pornography of the victim.

Under *Strickland's* two-prong test, a person challenging his counsel's representation must show (1) deficient performance, and (2) prejudice. [466 U.S. 668, 687-88, 691-92](#) (1984). Trial counsel was not

unreasonable or ineffective for failing to object to an issue that was not an error. Also, there was no prejudice. *Martinez* does not call for additional review.

Ground 12

Ground 12 is that trial counsel failed to object to hearsay testimony of Cindy Brannick, his co-defendant. This claim must be analyzed under *Martinez*. Under circumstances where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice. *Paulley v. Commonwealth*, [323 S.W.3d 715, 730](#) (Ky. 2010).

Here, the victim testified that her mother, Cindy Brannick, brought her to Petitioner's house for the sole purpose of producing child pornography using her as its subject. *Yarmey v. Commonwealth*, (DN 13; Appendix III, p. 1.) Hence, Cindy Brannick was Petitioner's co-defendant. Petitioner objects to the statements that Cindy Brannick had destroyed all the photographs, when in fact, seven were found in Cindy Brannick's bedroom drawer by the victim and turned in to the police. *Id.* Petitioner also complains that the victim was put under duress to supply money to Cindy Brannick, and that Cindy Brannick

confirmed that photographs had been taken. These hearsay statements are captured by an exception pursuant to *Paulley*, and are admissible.

Strickland's two-prong test is simply not met here. Petitioner fails to prove deficient performance or prejudice resulting therefrom. The statements attributed to Cindy Brannick did not add anything to the Commonwealth's case against Petitioner; the photographs in question were found and presented in evidence. The evidence was strongly against Petitioner and that is why he was convicted. No further review is necessary under *Martinez*.

Ground 13

Relatedly, Ground 13 is that trial counsel failed to object to the prosecutor's closing argument concerning statements made by Cindy Brannick. This claim must be analyzed under *Martinez*. *Strickland's* two-prong test applies. Here, trial counsel was not unreasonable as objections to permissible closing remarks by the prosecutor would have been futile. The prosecutor is allowed wide latitude in closing argument. *See Dickerson v. Commonwealth*, [486 S.W.3d at 329](#) (Ky. 2016)(reversal only justified if the prosecutor's misconduct was so improper, prejudicial, and egregious as to have undermined the overall

fairness of the proceedings). The decision of trial counsel to not engage in futile acts is neither unreasonable nor prejudicial.

Ground 14

Ground 14 is that trial counsel failed to object to the CACU log. This claim requires analysis under *Martinez*. The CACU log was faulty and was used by trial counsel as part of his strategy to show that the victim's prior attempt to report the offense was faulty and unreliable. He also used it to undermine the victim's overall credibility.

Strickland's two-prong test applies. Here, trial counsel's tactic was reasonable. It is reasonable to use the faults in the CACU log to demonstrate to the jury that the victim's credibility is faulty. Further, there was no prejudice to Petitioner as to admission of this faulty log. It was not powerful evidence that served to convict him. Rather, the photographs recovered from Cindy Brannick's bedroom dresser drawer and the cogent and clear testimony of the victim served as the veritable mountain of evidence that convicted Petitioner. Further review is not necessary under *Martinez*.

NO EVIDENTIARY HEARING IS NECESSARY

“Generally, a habeas petitioner is entitled to an evidentiary hearing in federal court if the petition ‘alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing.’” *Stanford v. Parker*, [266 F.3d 442, 459](#) (6th Cir. 2001). The decision to grant an evidentiary hearing is “generally left to the sound discretion of district courts.” *Schriro v. Landrigan*, [550 U.S. 465, 473](#) (2007).

No evidentiary hearing is necessary in this case because there are no facts that are in dispute, and the trial court gave a full evidentiary hearing to every claim that Petitioner desired to present. He now attempts to use the protections of *Martinez* to litigate additional claims that occurred to him after the fact. They are not substantial claims and they do not meet the prejudice standard articulated in *Martinez*.

CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky, as counsel for Respondent, requests that this Court deny the petition for writ of habeas corpus and deny the request for an evidentiary hearing.

Respectfully Submitted,

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Attorney General of Kentucky

/s/Leilani K. M. Martin
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ATTORNEY FOR RESPONDENT

NOTICE AND CERTIFICATE OF SERVICE

On May 10, 2021, I electronically filed the foregoing Response through the ECF system, of which Movant is a participant.

/s/Leilani K. M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-cv-00528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, Warden

RESPONDENT

ORDER

Petitioner, through appointed counsel, filed an amended petition under [28 U.S.C. § 2254](#) for writ of habeas corpus by a person in state custody, [Docket Number (“DN”) 33], which superseded and replaced his original pro-se petition, [DN 1]. Respondent recently responded in opposition. [DN 47].

The Court being sufficiently advised, it is hereby ORDERED that, Petitioner’s reply, if any, is DUE within 30 days of entry of this Order.

May 11, 2021


Lanny King, Magistrate Judge
United States District Court

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

**v. PETITIONER’S MOTION FOR EXTENSION OF TIME
 TO FILE REPLY
 (Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Petitioner, by counsel, requests an extension of time to and including July 21, 2021. Petitioner’s Reply is currently due June 10, 2021. Petitioner’s counsel request the extension due to Petitioner’s attorney is in the process of moving his residence by the end of June and moving his office by the end of July.

Further, Kentucky Governor Beshear recently announced the Kentucky Department of Corrections will allow in-person visits to its facilities beginning June 20, 2021. Petitioner’s attorney has been without in-person contact with Petitioner since March 12, 2020, when in-person visits were not allowed due to Covid-19. Petitioner’s attorney desires to have an in-person conference with Petitioner to discuss the final draft of his Reply.

This Motion is not made to cause any hindrance or delay, but is being sought to ensure compliance with the Court’s Order.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that on June 2, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Petitioner's Reply to Response to Amended Petition For Writ of Habeas Corpus has been served, via ECF, to Leilani K. M. Martin, Assistant Attorney General.

/s/
RICHARD COOPER, P.S.C.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

ORDER

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Upon Motion by Petitioner for an extension of time to reply to Respondent's Response to Amended Petition for Writ of Habeas Corpus;

The Court grants an extension until July 21, 2021 to file his Reply to the Response to Amended Petition.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

ORDER

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Upon Motion by Petitioner for an extension of time to reply to Respondent's Response to Amended Petition for Writ of Habeas Corpus;

The Court grants an extension until July 21, 2021 to file his Reply to the Response to Amended Petition.

June 3, 2021


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-CRS
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, WARDEN

RESPONDENT

MOTION TO WITHDRAW

Comes Leilani K. M. Martin, counsel for Respondent, Kevin Mazza, Warden, pursuant to LR 83.6(b) and hereby moves to withdraw as counsel of record.

The undersigned is transferring from her position as Assistant Attorney General in the Office of Criminal Appeals to another state agency. The undersigned's last day of employment as an Assistant Attorney General will be Monday, July 19, 2021. Because of this transfer, the undersigned will no longer be representing Respondent in this action.

As required by LR 83.6(b), the undersigned certifies that on this date, she served a copy of this motion on Respondent via postal mail at Respondent's state institution.

In light of the undersigned's transfer, as well as that another Assistant Attorney General from the Kentucky Attorney General's Office will enter his/her appearance in this action as counsel of record for Respondent, the undersigned asks

that she be allowed to withdraw as counsel of record and discharged of all further duties as counsel.

Wherefore, Leilani K. M. Martin asks that she be granted the relief set forth in this motion and accompanying order.

Respectfully Submitted,

DANIEL CAMERON
ATTORNEY GENERAL OF KENTUCKY

s/Leilani K.M. Martin
LEILANI K.M. MARTIN
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COUNSEL FOR RESPONDENT

NOTICE AND CERTIFICATE OF SERVICE

I certify that on July 13, 2021, the instant pleading was filed using the electronic case filing (ECF) procedure required by this Court and I further certify that the above Motion for Extension of Time to Answer has been served, via ECF, to Richard Earl Cooper, Counsel for the Petitioner, and has been sent via postal mail to Mr. Kevin Mazza, Warden, Green River Correctional Complex, 1200 River Road, P.O. Box 9300, Central City, KY 42330.

S/Leilani K. M. Martin
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:19-CV-528-CRS
(Electronically Filed)

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, WARDEN

RESPONDENT

ORDER ALLOWING WITHDRAWAL

Leilani K. M. Martin, having filed a motion to withdraw as counsel of record for Respondent, Amy Robey, Warden, and the Court being fully and sufficiently advised,

IT IS HEREBY ORDERED that the motion to withdraw is granted, and Leilani K. M. Martin is relieved of all further duties as counsel for Respondent.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

**v. PETITIONER’S REPLY TO REPOSE TO AMENDED PETITION
FOR WRIT OF HABEAS CORPUS
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Petitioner, Mark Yarmey, by counsel submits his Reply to the Response to his Amended Petition for Writ of Habeas Corpus.

FACTUAL BACKGROUND

This matter began as an Indictment in the Jefferson Circuit Court charging Petitioner with one count of Sodomy in the first degree ([KRS 510.070](#)) and one count of Use of a Minor in a Sexual Performance ([KRS 531.310](#)).

The Indictment arises from a complaint made by Michelle Brannick (“Michelle”) to the Louisville Metro Police Department (“LMPD”) on March 25, 2008. She stated incidences occurred approximately ten years ago when her mother asked Petitioner to take photographs of her for a modeling portfolio. During this session, she claims there were nude polaroid photographs taken of her, and Petitioner sodomized her.

A jury trial began on December 8, 2009. Petitioner was represented at trial by Attorney James Falk (“Falk”). Michelle testified nude photographs, (approximately 25) were taken by Petitioner with a polaroid camera, and he

sodomized her at this photo session. She was the only witness that provided direct testimony of the alleged incident.

The Commonwealth Attorney introduced seven polaroid photographs taken by Petitioner of Michelle. These photographs were found in the possession of her mother. None of the photographs exposed her breast, exposed her genitals, or constitute a sexual performance by a minor. ([KRS 531.300\(4\)\(d\)](#))

Petitioner testified on his own behalf agreeing he took the seven polaroid photographs as directed by her mother, but stated those were the only photographs taken. He denied taking any more than the seven polaroid photographs and denied any sexual touching of Michelle.

The jury returned a verdict of guilty on the charge of Use of a Minor in a Sexual Performance, but was unable to reach a unanimous verdict on Sodomy in the first degree.

The Commonwealth Attorney, Attorney Falk and Petitioner entered a conditional plea agreement on December 15, 2009 to the charge of Use of a Minor in a Sexual Performance for a sentence of fifteen years. The Commonwealth dismissed the sodomy charge in return for the conditional plea. This conditional plea waived all issues for appeal with the exception of the following:

1. Defendant may appeal the Court's pre-trial evidentiary ruling relating to the admissibility of the seven polaroid photographs.
2. Defendant may appeal the Court's ruling concerning Defendant's proposed limiting instruction.

3. Defendant may appeal the Court's ruling prohibiting the admissibility of the victim's prior rape.

Petitioner was sentenced under this conditional plea agreement on March 1, 2010.

Petitioner retained attorney Joseph E. Blandford, Jr. ("Blandford") to prosecute an appeal from his conditional guilty plea to the Court of Appeals of Kentucky raising the three issues outlined in his conditional plea. On December 22, 2011 in the case of *Yarmey v. Commonwealth*, 2010-CA-604-MR [DN 13] the Court of Appeals of Kentucky denied his appeal and affirmed the judgment of the Jefferson Circuit Court in an unpublished opinion.

On February 27, 2013 Petitioner with the legal assistance from Attorney Blandford filed a motion before the Jefferson Circuit Court pursuant to Ky. RCr 11.42 claiming his trial counsel's [Falk] deficient performance and errors were so serious that his trial counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment to the Constitution of the United States of America and denied due process.

Petitioner's post-conviction counsel Blandford raised five grounds of ineffective assistance of trial counsel:

1. Trial Counsel was deficient by failing to, (1) conduct an adequate investigation of the case and inspection of evidence to determine if the camera still contained photos, (2) request the Court to instruct and inform the jury about the number and nature of photos in the camera after photos were discovered, and (3) request a mistrial to allow time for examination of the newly discovered photographic evidence to determine their nature and origin, including whether or not they originated from the same package as other photos.

2. Counsel was ineffective in his general presentation due to a prior automobile accident and the prescribed narcotics he was under during trial.
3. Trial Counsel was ineffective by his failure to investigate previous claim of rape upon the complaining witness, to request psychological exam on the complaining witness and for failing to follow the rule of civil procedure in presenting the prior unreported sexual assault on the prosecuting witness.
4. Counsel failed to explain the negative consequences of allowing, and in fact requested that Mr. Yarmey waive his 5th Amendment right against self-incrimination and testify on his own behalf and then failed to prepare him to testify.
5. Trial Counsel was ineffective in that he failed to explain plea form.

An evidentiary hearing was conducted before the Jefferson Circuit Court on October 11, 2013. The Jefferson Circuit Court Judge entered written Findings of Fact and Conclusions of Law on February 12, 2016 denying Petitioner's 11.42 motion.

Petitioner discharged Attorney Blandford and retained Attorney Maureen A. Sullivan to prosecute an appeal of the Jefferson Circuit Court's decision denying his post-conviction relief.

The Kentucky Court of Appeals rendered a decision on Petitioner's appeal of his post-conviction relief affirming the judgment of the Jefferson Circuit Court by an unpublished Opinion rendered January 11, 2019, *Yarmey v. Commonwealth*, 2016-CA-001245-MR.

Having exhausted his state court remedies, Petitioner filed his pro-se Petition for Writ of Habeas Corpus pursuant to [28 USC §2254](#) on July 19, 2018 in the United States District Court for the Western District of Kentucky [DN 1].

His pro-se Petition claimed twenty grounds relating to ineffective assistance of trial counsel (IATC) and ineffective assistance of post-conviction counsel in violation of the Constitution.

Petitioner with legal assistance from appointed counsel filed an Amended Petition for Writ of Habeas Corpus on July 28, 2020 [DN 33]. The Amended Petition now list fourteen grounds relating to IATC and ineffective assistance of post-conviction counsel in violation of the Constitution.

By a Memorandum Opinion and Order [DN 42], Magistrate Judge King stated,

The Supreme Court has created a narrow exception to the rule of procedural default in *Coleman v. Thompson*. In *Martinez v. Ryan*, the Supreme Court held ‘a procedural default will not bar a federal Habeas Corpus from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.’ 566 U.S. 1, 17 (2012) . . . In *Woolbright v. Crews*, the Sixth Circuit recognized a motion under Kentucky RCr 11.42 is subject to the *Martinez* exception. 791 F.3d 628, 630 (6th Cir. 2015).

The *Martinez* exception applies if Petitioner shows that “the underlying ineffective assistance of trial counsel [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. [DN 33 @ pp. 3-4]

Petitioner, who is neither educated in criminal law nor familiar with the procedures, placed his entire faith and trust in his trial counsel to present the best defense available to him. When he discharged trial counsel and retained post-conviction counsel Blandford, Petitioner likewise placed his full faith and trust in his counsel to present the best evidence of trial counsel’s ineffective assistance of counsel.

Grounds 4 and 5 were presented to the state appellate courts. Petitioner has given authority to his undersigned counsel to withdraw these grounds from his Amended Petition for Writ of Habeas Corpus.

Further, Ground 11 was presented by his post-conviction counsel in his Motion for 11.42 denied by the trial court. Petitioner's counsel retained to appeal the denial of the 11.42 Motion did not present this issue to the state appellate court. Petitioner has given authorization to his undersigned counsel to withdraw this ground from his Amended Petition for Writ of Habeas Corpus.

Petitioner's grounds 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, and 14 were never raised in his initial post-conviction motion filed by his post-conviction counsel Blandford. Petitioner no longer has a state remedy available to assert the IATC nor the ineffective assistance of his post-conviction counsel.

Petitioner has stated in his Amended Petition he "was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution resulting in a denial of his rights under the due process clause of the 14th Amendment of the United States Constitution" that grounds 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, and 14 were caused by IATC and the ineffective assistance of post-conviction counsel for failing to include these issues within post-conviction 11.42 Motion.

Petitioner seeks to be relieved of the procedurally default IATC by the failure of his post-conviction counsel to present these claims in Petitioner's 11.42 Motion under the equitable exception to the rule of procedural default in *Coleman* by the precedent of *Martinez v. Ryan*, [566 US 1, 17](#) (2012).

The *Martinez* exception applies when “counsel in the initial review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington* [cite omitted]. To overcome the default a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez* at 14.

Petitioner asserts each of the IATC claim individually is substantial and has some merit and in particular the cumulative effect of each claim denied his right to a fundamental fair trial. Petitioner states the failure on the part of post-conviction counsel to include these IATC claims within Petitioner’s 11.42 Motion deprived him of his right to effective assistance of counsel and a finding of cause to excuse the procedural default by the exception in *Martinez*.

ARGUMENT

In Petitioner’s trial there was only one direct evidence witness, the alleged victim, who testified the sexual offenses were perpetrated by Petitioner. This trial was a “she-said, he-said” material fact dispute. Thereby, the alleged victim’s testimony must withstand the test of credibility about an event (she states occurred ten years ago) sufficient for a jury to accept her unverified statement over Petitioner’s denial of both offenses. Therefore, credibility was the only defense available in this trial.

Testimony from LMPD officers and other lay witnesses was presented for the sole purpose of bolstering the credibility of the alleged victim. (Grounds 6, 8, 12, 13 and 14) The cumulative effect of the testimony to bolster the alleged

victim's credibility meets the standard that Petitioner's claims are "substantial" in the sense of having some merit, especially in light of the lack of any other direct, credible evidence presented.

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution resulting in denial of his rights under the due process clause of the Fifth and Fourteenth Amendments, when trial counsel failed to object to inadmissible opinion evidence of habit of others to prove the conduct of alleged victim acted the same way as victims of child sexual abuse including a characteristic of "delayed disclosure" to bolster her credibility by testimony of LMPD officers Judah, Merrick and Mulhull. (Ground 6)

Petitioner's post-conviction counsel failure to include this IATC claim in Petitioner's post-conviction motion under RCr 11.42.

Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution resulting in denial of his rights under the due process clause of the Fourteenth Amendment, when trial counsel failed to object to the prosecutor's closing argument reference to the inadmissible opinions of characteristics of others to prove the alleged victim acted the same way as other sexually abused children, and the alleged victim acted the same way as members of that class including a characteristic of "delayed disclosure" of the sexual assault. (Ground 7)

The direct examination by the prosecutor presented this opinion and characteristics relating to child sex abuse victims. This questioning was either

designed to prove alleged victim had been abused, because like other abused children she delayed reporting or to disprove an inference of fabrication arising from the delay in reporting.

“[A] party cannot introduce evidence of a habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances, or to prove that person was a member of that class because she acted the same way under similar circumstances.” *Miller v. Commonwealth*, [77 S.W.3d 566, 572](#) (Ky. 2002).

The prosecuting attorney asked Sergeant Judah, “And are delayed disclosure cases rare in the crimes against children unit?” Sergeant Judah answered, “No. What I just told you all about most of the cases we get are delayed. At least it is very rare we get a case where we have a chance to go out and get physical evidence. And it is very, very common that you don’t, the case doesn’t come across the detective’s desk until two or three years, at least, after it happened. The nature of these offenses and the way they occur, it occurs with children who are afraid to go and report it to anyone.” (VR 12-10-09 at 10:40:21)

On direct examination, the prosecutor asked leading questions to Detective Merrick, “And sometimes does it take people five years, ten years, twenty years to come forward?” Detective Merrick replied, “Quite often most of our cases are like that”. (VR 12-11-09 at 10:42:00)

The prosecuting attorney continued asking leading questions to Detective Merrick, “And when it comes to these sort of cases [child sex abuse] do the

majority of them, do they usually get prosecuted . . .?” Detective Merrick answers, “No sir. Just like Detective Judah said, the majority of them do not.” (VR 12-10-09 at 2:16:57) Later in Detective Merrick’s testimony, he stated, “However, our juvenile victims, a lot of times they don’t disclose initially. Sometimes it takes a little while before they disclose sexual abuse to them.” (VR 12-11-09 at 10:41:54)

On direct examination, the prosecuting attorney asked a series of leading questions to Detective Mulhull, “If we can’t get a victim that will come into this courtroom, are cases dead?” Detective Mulhull answered, “Correct.” The prosecuting attorney continues his leading questioning, “And the perpetrator goes free?” Detective Mulhull responds, “Correct.”

The prosecuting attorney continues to ask the leading question to Detective Mulhull, “We have a delayed disclosure?” Detective Mulhull response, “Yeah.”

The prosecutor continues the leading question to Detective Mulhull, “And we have things like tentative disclosures where someone can go through the entire process of being with the professional, saying this happened, this happened, this happened, and come back a week later and say you know there is something I didn’t tell you.” Detective Mulhull answers, “Oh, all the time.”

The prosecutor continues his leading questioning, “Isn’t that one of the peculiarities of child sex abuse cases?” Detective Mulhall answers, “Oh yes.” Continuing with his leading questions he asked, “Isn’t it true that some types of kids won’t come forward at all, won’t talk to anybody?” Detective Mulhull

answers, “Four or five times before they say yes it happened.” (VR 12-11-09 at 11:38:23-11:39:17)

Snowden v. Singletary, 135 Fed.3d 732, 738 (11th Cir. 1998), a child sex abuse case, held that expert witness testimony about the truthfulness of the child witness “is improper in both state and federal trial can hardly be disputed.” See e.g. *United States v. Azure*, 801 Fed.2d 336, 340-41 (8th Cir. 1986) (expert testimony about credibility of alleged-child-sexual-assault victim improperly invades the province of the jury, which ‘may well have relied on [the expert’s] opinion and surrender[ed] their own common sense in weighing testimony’.)

Prosecutor in his argument to the jury, “stressed the significance of the expert’s opinion about the credibility of child victims of supposed sexual abuse.” *Id.* at 738.

“Witness credibility is the sole province of the jury. Very rarely will a state evidentiary error rise to a federal constitutional error; but, given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against *Snowden* - - considering the lack of other evidence of guilty - - violated his right to due process by making his criminal trial fundamentally unfair.” At page 739.

See *King v. Commonwealth*, [472 S.W.3d 523](#) (Ky. 2015) (Improper police officer’s testimony child sexual abuse syndrome), *Sanderson v. Commonwealth* [291 S.W.3d 610](#) (Ky. 2009) (testimony that sexual abuse victims commonly

delay reporting their abuse is reversible error), *Hellstrom v. Commonwealth*, [825 S.W.2d 612](#) (Ky. 1992) (improper testimony delayed disclosure).

LMPD officers expressed unqualified expert opinions relating to a phenomena of delayed reporting by child victims of sex abuse and unqualified opinions of characteristics or habits of persons, who by their mannerism, are deemed to be not to be believed or guilty.

These unqualified opinions were further enhanced by the prosecuting attorney's pressing questions on the matter, as well as his closing argument to the jury stressing the significance of these opinions to focus on the credibility of the alleged victim and diminishing the credibility of Petitioner.

Prosecutorial misconduct "can take a variety of forms, including improper questioning and improper closing argument." *Duncan v. Commonwealth*, [322 S.W.3d 81, 87](#) (Ky. 2010).

"In the prosecutor's argument to the jury, he stressed the significance of the expert's opinion about the credibility of the child victims of supposed sexual abuse. Over and over again the prosecutor hit the point hard . . ." *Snowden v. Singletary*, 135 Fed. 3d 732, 738 (11th Cir. 1998).

In Petitioner's case the prosecutor stated to the jury in closing argument:

We learned a lot about child sex abuses in this case from people who are on the front lines with this stuff and deal with delayed disclosure. That's the phenomena when a victim does not go immediately to a trusted adult or call 911. (VR 12-14-09 at 11:45:56)

* * * *

It is the nature of these sorts of cases that kids don't come forward. I hope when you go back there, say on one hand, we've got a victim who fits the profile of child abuse victim, okay,

a child sex abuse victim. This is it. (VR 12-14-09 at 12:01:47)

* * * *

That child grew to be an adult who started having nightmares, and they are getting better. Notice they are getting better when this process picks up. When we start the process of seeking justice, she is starting to get better. And that is an absolute appropriate response of a victim of child sexual abuse. (VR 12-14-09 at 12:18:13)

Petitioner asserts the issue of credibility was essential in this “he said, she said” fact situation. The prosecutor’s questioning and his improper closing remarks were even more prejudicial to Petitioner’s right to a fundamentally fair trial. The prosecutor’s questioning and remarks were extensive. He presented these arguments and stressed these arguments throughout his improper leading questions to police officers and stressing the same improper remarks to the jury. It can hardly be said that these remarks were accidental and can be no mistake the prosecutor deliberately placed these improper remarks before the jury. Lastly, “The strength of the evidence against Petitioner was the testimony of the alleged victim of an event ten years ago.” The prosecutor’s improper leading questions and remarks to the jury bolstering the alleged victim’s testimony.

In Petitioner’s case other than the alleged victim’s testimony of an incident occurring ten years in the past was the only direct evidence against the Petitioner, which he rebutted by his denial. This “he said she said” scenario did not present overwhelming proof of Petitioner’s guilt. Interestingly, the jury found guilt on the charge of Use of a Minor in a Sexual Performance, but was unable to reach a unanimous verdict on Sodomy in the First Degree.

In *Hodge v. Hurley*, 426 Fed.3d 368 (6th Cir. 2005) a case remarkably similar to Petitioner’s case, “A child-rape case where the only evidence sufficient to sustain a conviction was a jury determination that the complaining witness was more credible than the defendant. During his egregiously improper closing argument, the prosecuting attorney commented on the credibility of witnesses . . . all while defense counsel sat idly by.” Id. at 371.

The Sixth Circuit held, “Defendant’s trial counsel was constitutionally ineffective in failing to object to this misconduct.” Id. at 371. The court citing *Strickland v. Washington*, [466 US 668](#) at 690, “Although an attorney is ‘strongly presumed to have rendered adequate assistance’, the performance prong is satisfied if the representation at issue falls ‘outside wide range of professionally competent assistance.’ Id. at 690. We believe that trial counsel’s failure to object to any of the numerous improper statements in the prosecution’s closing argument is well outside this range.” Id. at 376.

The court went on to state, “To satisfy the prejudice prong, *Hodge* had to demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 694. “In a trial such as this one, where the result depended primarily on the jury’s belief as to whether [accused] or [complaining witness] was more credible, we believe there is a reasonable probability that the result of the proceeding would have been different.” Id. at 376.

On the issue of credibility the court held, “It is patently improper for a prosecutor either to comment on the credibility of a witness or to express a

personal belief that a particular witness is lying. *U.S. v. Young*, [470 US 1, 17-19](#)”.

“There are two separate harms that arise from such misconduct. First, ‘such comments can convey an impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury.’ (Cite omitted.) Second, ‘the prosecutor’s opinion carries with it the imprimatur of Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.’ *Young* at 18-19.”

The court pointed out, “This misconduct is especially prejudicial in this case given the extent to which the jury’s determination as to *Hodge*’s guilt or innocence hinged almost entirely on the credibility of [the accused] and [complaining witness].” *Id.* at 379.

Petitioner’s trial counsel’s failure to object during the prosecuting attorney’s closing argument and demand the trial court to cure denied Petitioner of a fundamentally fair trial and the error prevented Petitioner from raising the issue on appeal. Further, the failure of Petitioner’s post-conviction counsel to raise this IATC claim in the 11.42 Motion prevented Petitioner from raising this IATC claim in the post-conviction motion, as well as prevented that issue from being raised on the appeal of the post-conviction motion denied by the trial court.

LMPD officers offered testimony designed to impeach the credibility of Petitioner based on the non-expert opinion relating to characteristics of guilty people who have been accused of a crime. (Ground 8)

The prosecutor and LMPD officers injected their opinion that Petitioner's actions were those of a guilty person to impeach his denial of committing the crimes. This testimony was designed to impress upon the jury Petitioner's guilt and bolster the alleged victim's credibility. (Ground 8) *Ordway v. Commonwealth*, [391 S.W.3d 762](#) (Ky. 2013). (held improper police officer's testimony of Defendant did not act like a typical innocent person.)

This improper opinion testimony was a highly significant factor rendering the trial fundamentally unfair and deprived Petitioner of due process. These opinions invaded the province of the jury. The ultimate conclusion of credibility rest entirely with the jury. The prosecuting attorney's arguments to the jury stressed the significance of this opinion testimony to find guilt.

In *Cooper v. Sowders*, 837 Fed.2d 284 (6th Cir. 1988), a petition for writ of habeas corpus, held it was improper for a police officer presented as an "expert" to testify on his opinion the inculpatory nature of certain evidence. The court stated, "The opinion-testimony had a direct influence on the jury's consideration of Petitioner's guilt or innocence." *Id.* at 287

Prosecuting attorney asked Sergeant Judah about the controlled phone call to which he testified:

Typically, in my experience, when somebody has been [accused of a sex crime] when you drop that on somebody the reaction of a person . . . has been instead of saying 'okay' they say 'what

are you talking about?’ And generally they won’t continue with the conversation. And the more accusations you levy against someone like that, the more irate they become, the more adamant their objection. (VR 12-10-09 at 12:01:10)

* * * *

In the schools in interviewing that I’ve attended, the training I’ve had, when someone is trying to change the subject about something so serious that they are avoiding the issue, they are trying to change the question, it’s a sign of deception. (VR 12-10-09 at 12:02:56) The basis of my opinion, if someone, when you accuse somebody of taking pictures of a, taking sexual explicit pictures of a young girl, the first thing they’re going to do is tell you “you’re a liar”. (VR 12-10-09 at 12:07:46)

This inadmissible and improper opinion testimony was stressed by the prosecutor in closing argument to the jury.

“We did do the controlled phone call first, and I’m glad we did. I think that’s fantastic evidence. I don’t think that an innocent man says what he said there.” and Detective Judah – or Sergeant Judah now, kind of spelled it out for us right? The long pauses, the inappropriate answers. That’s what guilty people do.” (VR 12-14-09 at 12:10:00)

This continual opinion testimony gave the jury the impression these statements are facts and Petitioner is guilty.

The prosecutor throughout his closing argument continued this theme by presenting his opinion “what people do” when they lie. He carries this theme throughout the closing argument citing his opinions how to tell if a person is lying to the characteristics of Petitioner during the controlled call and his testimony in court. The prosecutor further asserted his opinion as to the Petitioner’s guilt by stating to the jury in his closing, “I’m afraid you are going to let him go out that door.” And a short time later stated, “I hope you don’t walk him out these doors because you are angry with the mother.”

Petitioner asserts each ground in and of itself is substantial, but in particular when the cumulative effect of all the grounds occurring during the trial violated Petitioner's right to due process and a fundamentally fair trial.

Ground 1. It is Petitioner's belief the admission of the seven photographs not depicting sexual conduct by a minor as defined by [KRS 531.300\(4\)](#), even though the Kentucky Court of Appeals found the admission of the photographs proper reflecting "the events which took place in Yarmey's living room". It is these photographs that led to the improper remarks of the prosecuting attorney during closing argument prejudicing the jury against Petitioner and influencing the jury's determination to find Petitioner guilty. Trial counsel made no objection. This deficient performance of Petitioner's trial attorney is a substantial IATC claim. This issue was not presented by his post-conviction counsel in the 11.42 Motion, which triggers *Martinez* exception.

Ground 2. It is the Petitioner's belief evidence that the camera had three undeveloped films remaining in the camera was substantial to provide a defense attacking the credibility of the alleged victim's testimony, but this evidence was not introduced nor argued by trial counsel. Trial counsel did not use this evidence to impeach the credibility of the alleged victim nor make this argument to the jury that should impeach her credibility.

Before the Kentucky Court of Appeals, the decision was focused on the camera being presented to the jury, and its determination that "since the remaining film was expended without producing any exculpatory evidence there was no demonstrated prejudice to Yarmey's defense." The Court of

Appeals did not make a decision on the impeachment issue to the alleged victim's testimony.

Grounds 9 and 10 relate to instructions to the jury. On the charge of use of a minor in a sexual performance the jury was presented with four alternate theories of guilty, but there was no designation by the jury which theory the jury relied in deciding guilt denying Petitioner's right to a unanimous verdict. Further, the instruction definition failed to define "obscene", a word used in one of the theories. The definition of "obscene" is provided in *Cooper's* instructions to the jury, Section 4.13 within the definition of "obscene" is "prurient interest" which has a definition instruction provided in *Cooper's* instruction, Section 4.13(a) was not a part of the definition instruction to the jury. Within the instruction definition relating to "sexual conduct by a minor" the definition of "physical contact with, or willfully intentionally exhibition of the genitals" did not include a definition of "in a lewd manner" as recommended by *Cooper's* Instructions, Section 4.18. The cumulative affect of all these missing definitions from the instructions left the jury with an uninformed means of determining a theory of guilt violated Petitioner's right to a unanimous verdict. *Purcell v. Commonwealth*, [149 S.W.3d 382](#) (Ky. 2004).

It is Petitioner's belief the hearsay statements attributable to non-testifying witness and comments relating to those hearsay statements made by the prosecuting attorney during his closing stated in Grounds 12 and 13 further reflects the deficient performance of his trial counsel for failure to object and the deficient performance by his post-conviction counsel for failing

to present these the IATC claims in the 11.42 Motion, which denied Petitioner's right to effective assistance of counsel resulting in a denial of his rights under the due process clause of the Fourteenth Amendment. Thereby has merit for review.

The alleged victim made several statements allegedly made by her non-testifying mother under direct examination by the prosecuting attorney the alleged victim stated when, "she came to me and said that her and Mark had decided that they were going to do a modeling portfolio for me, and she had cut a picture out of a magazine as an example of the kind of picture that I would be taking." (VR 12-09-09 at 3:13:05) This statement by the alleged victim could not be verified or challenged since her mother was not called as a witness. This statement is clearly hearsay and in violation of the confrontation clause of the Constitution.

The alleged victim also made additional hearsay statements, "He and my mom went and talked and my mom came back to me and said, 'they are going to take what Mark called shadow pictures, which I was, she asked me to take my bathing suit top off and I would be topless in the pictures but you couldn't see anything.'" (VR 12-09-09 at 3:16:13) "My mom and Mark went to another room to talk, and my mom came back and said, 'that she was tired but Mark wasn't done yet so she was going home. And he, when he finished with me, he was going to bring me home.'" (VR 12-09-09 at 3:27:50)

Further witness testimony the alleged victim stated non-testifying individual named "Keitha", with whom she confided, "she told me I needed to

tell my mom what happened.” (VR 12-09-09 at 3:38:18) Again, there was no way to challenge this statement or to confront the first name only individual who did not testify.

Other Commonwealth’s witnesses repeated hearsay statements allegedly made by the mother whom Ms. Shields spoke with her by telephone regarding the discovery of the photographs in her room, and when asked to come home the mother stated, “she was not ready to come home”. (VR 12-10-09 at 10:03:21) Ms. Shields continued to provide statements relating to the mother, “She [alleged victim] gave her mom money all the time. It was kind of ‘you have to give me money’ type of thing.” (VR 12-10-09 at 10:04:22)

Trial counsel failed to object to the hearsay statements designed to bolster the alleged victim’s testimony and elicit the jury’s sympathies.

The Sixth Amendment confrontation clause provides a criminal defendant the right to directly confront adverse witnesses and the right to cross examine adverse witnesses. “A face to face confrontation enhances the accuracy of the fact find by reducing the risk that a witness will wrongfully implicate an innocent person.” See *Porter v. Texas*, [380 US 400, 403](#) (1965) and *Maryland v. Craig*, [497 US 836, 846](#) (1990). In *Bullcoming v. New Mexico*, 131 Supreme Court 2705, 2716 (2011) the court stated, “[T]he clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provide a fair enough opportunity for cross examination”.

This extensive hearsay testimony was by design introduced to bolster the alleged victim's credibility to prove an uncorroborated ten year old story.

Had trial counsel raised an objection to this hearsay evidence, the jury would have focused on the fact credibility of the unverified testimony of the alleged victim.

Ground 14 it is Petitioner's belief the admission of the inaccurate and untrustworthy CACU report denied Petitioner his right to effective assistance of counsel and a fair trial.

Detective Merrick testified whether the alleged victim had reported the alleged incident prior to her current testimony? Detective Merrick answered the alleged victim reported the incident to CACU in 2004. She presented a CACU report/entry log stating the alleged victim DOB as "3/7/2004". (VR 12-11-09 at 11:43:06) Six years after the alleged incident. When asked by the prosecuting attorney the date of the offense, the Detective read "6-21-1905". (VR 12-11-09 at 11:44:05) This "entry log" from CACU was admitted into evidence as an authentic record, despite the inaccuracies and untrustworthiness.

The prosecutor admitted in his closing argument, "her story was successfully corroborated and right down to the CACU entry log." This document was presented to to admit this entry log was to bolster the alleged victim's credibility of reporting prior to the date in 2009, which resulted in the indictment of charges against Petitioner.

In *Prater v. Commonwealth*, [954 S.W.2d 954](#) (Ky. 1997) stated, “Under [KRE 803\(8\)](#) contains a disclaimer that admission can be denied if, “the source of information or the method of circumstances of preparation indicates a lack of trustworthiness.”

Petitioner’s trial counsel failed to object to the admission of this untrustworthy evidence, and Petitioner’s post-conviction counsel failed to raise the issue in 11.42 Motion. The Sixth Circuit stated in *Ege v. Yukins*, 485 Fed.3d 364 (2007), “failure to exclude unreliable evidence violates due process”.

Post-conviction counsel failed to provide effective assistance of counsel by failing to include the IATC claim in Petitioner’s post-conviction motion, 11.42 Motion. Post-conviction counsel’s failure establishes “cause” to excuse procedural default of the IATC claims under the exception of *Martinez*. These failures on the part of post-conviction counsel to not raise these substantial IATC issues is cause to substantiate the deficient performance on the part of the post-conviction counsel that meets the ineffective assistance of counsel under *Strickland v. Washington*.

CONCLUSION

Petitioner filed his Amended Habeas Corpus presented IATC grounds subject to the exception in *Martinez*. The court should find these IATC claims are substantial. Petitioner’s post-conviction counsel failed to raise those claims in post-conviction Motion 11.42; thereby constituting an ineffective assistance of counsel by the post-conviction counsel. This failure on the part

of the post-conviction counsel is subject to the exception under *Martinez* to excuse the procedural default of the IATC claims.

Petitioner requests the court for an order finding “cause” to excuse the procedural default and to find the “substantial” nature of his IATC claims and schedule an evidentiary hearing for the court to consider the prejudice suffered by Petitioner.

Petitioner believes he has provided sufficient proof to show the IATC claims are “substantial” and either individually or cumulatively these claims have some merit.

Respectfully submitted,

/s/
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Attorney for Petitioner
richardcooperesq@gmail.com

CERTIFICATE OF SERVICE

I certify that on July 19, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Petitioner’s Reply to Response to Amended Petition For Writ of Habeas Corpus has been served, via ECF, to Leilani K. M. Martin, Assistant Attorney General.

/s/
RICHARD COOPER, P.S.C.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-cv-00528-RGJ-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, Warden

RESPONDENT

ORDER

The Court appointed counsel to represent Petitioner. Petitioner filed his superseding, amended petition. Respondent responded in opposition, and Petitioner has until July 21, 2021, to reply. This matter is before the Court on the motion of Respondent’s counsel to withdraw as attorney. [Docket Number (“DN”) 51].

This Order finds that the motion conforms to Local Rule 83.6, which provides that:

Unless a compelling reason exists, an attorney of record is not permitted to withdraw within twenty-one (21) days of trial or a hearing on any motion for judgment or dismissal. At any other time, an attorney of record may withdraw from a case only under the following circumstances:
(b) The attorney files a motion, certifies the motion was served on the client, makes a showing of good cause, and the Court consents to the withdrawal on whatever terms the Court chooses to impose.

because the motion states that:

The undersigned is transferring from her position as Assistant Attorney General in the Office of Criminal Appeals to another state agency. The undersigned’s last day of employment as an Assistant Attorney General will be Monday, July 19, 2021. Because of this transfer, the undersigned will no longer be representing Respondent in this action.

As required by LR 83.6(b), the undersigned certifies that on this date, she served a copy of this motion on Respondent via postal mail at Respondent’s state institution.

In light of the undersigned’s transfer, as well as that another Assistant Attorney General from the Kentucky Attorney General’s Office will enter his/her appearance in this action as counsel of record for Respondent, the undersigned asks that she be allowed to withdraw as counsel of record and discharged of all further duties as counsel.

[DN 51].

Therefore, the motion, [DN 51], is GRANTED. New counsel shall ENTER an appearance within 14 days of entry of this Order.

July 20, 2021


**Lanny King, Magistrate Judge
United States District Court**

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**NOTICE OF ADDRESS CHANGE
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Richard Cooper, PSC, counsel for Defendant, Mark Yarmey, hereby tenders notice of the change of mailing address, effective immediately. Counsel requests that all future pleadings, orders, correspondence or other communications be directed to the address listed below. Telephone number and electronic mail address for the undersigned shall remain the same.

**Richard Cooper, PSC
Attorney & Counselor at Law
P.O. Box 6313
Louisville, Kentucky 40206
502-587-6554
richardcooperesq@gmail.com**

Respectfully submitted,

/s/
RICHARD COOPER, PSC
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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

Civil Action No. 3:19-CV-528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVEN MAZZA, WARDEN

RESPONDENT

NOTICE OF APPEARANCE OF COUNSEL

Comes now the Respondent, Keven Mazza, Warden, and hereby gives notice that the undersigned counsel, Todd D. Ferguson, Assistant Attorney General, will be counsel for Respondent in the above-styled case.

Respectfully Submitted,

Daniel Cameron
Attorney General of Kentucky

s/Todd D. Ferguson
Todd D. Ferguson
Assistant Attorney General
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Criminal Appeals Unit
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(502) 696-5342
Todd.Ferguson@ky.gov

Counsel for Respondent

NOTICE AND CERTIFICATE OF SERVICE

I hereby certify that this 29th day of July, 2021, I electronically filed the foregoing Notice of Appearance with the Clerk of the Court and it was served through the ECF system on Hon. Richard Earl Cooper, Counsel for the Petitioner.

s/ Todd D. Ferguson
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-cv-00528-RGJ-LLK

MARK DAMIAN YARMEY

PETITIONER

v.

KEVIN MAZZA, Warden

RESPONDENT

FINDINGS OF FACT AND RECOMMENDATION

Petitioner filed, through appointed counsel, an amended petition under [28 U.S.C. § 2254](#) for a writ of habeas corpus by a person in state custody, [Docket Number (“DN”) 33], which superseded and replaced Petitioner’s original pro-se petition, [DN 1]. Respondent responded in opposition to the amended petition, and Petitioner replied. [DN 47, 52]. The Court referred the matter to the undersigned Magistrate Judge “pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\) & \(B\)](#) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter.” [DN 7].

Respondent argues that Petitioner’s ineffective assistance of trial counsel (“IATC”) claims are procedurally defaulted because, under Kentucky law, it is now too late to present them to the state courts. [DN 47 at 27 citing Kentucky Rule of Criminal Procedure (“RCr”) 11.42(3) and (10)]. Respondent admits that the procedural default is excused to the extent Petitioner shows that a claim is a “substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* quoting *Martinez v. Ryan*, [566 U.S. 1, 14](#) (2012).

Respondent’s argument is unpersuasive because Petitioner has made a colorable showing of a substantial IATC claim. Nevertheless, this Report finds (*sua sponte*) that Petitioner’s claims fail because he waived those claims when he pled guilty. *See Tollett v. Henderson*, [411 U.S. 258](#) (1973).

Therefore, the RECOMMENDATION will be that the Court DENY Petitioner’s amended petition, [DN 33], because Petitioner waived his claims when he pled guilty.

Procedural history in state court

Petitioner was indicted in Jefferson County, Kentucky, on charges of first-degree sodomy and using a minor in a sexual performance (“UMSP”). Petitioner was a photographer who was convicted of taking nude photographs of the victim at his home in 1999 or 2000 at the request of the victim’s mother, who was (at least, for some period of time) “being prosecuted in connection with the events of this night” at Petitioner’s house. *Yarmey v. Com.*, No. 2010-CA-000604-MR, [2011 WL 6743294](#), n.1 (Ky. Ct. App. Dec. 22, 2011) (hereinafter “*Yarmey I*”).

The sodomy count carried a maximum penalty of 20 to 50 years or life, and the UMSP count carried a maximum penalty of 10 to 20 years. [DN 13-1 at 87]. At trial, Petitioner testified in his own defense.

On December 14, 2009, the jury was hung (i.e., unable to reach a unanimous verdict) on the sodomy count but found Petitioner guilty on the UMSP count. [DN 13-1 at 88].

On December 15, 2009, Petitioner entered into a conditional plea agreement with the Commonwealth, pursuant to Kentucky Rule of Criminal Procedure (“RCr”) 8.09, to the effect that, in exchange for a plea of guilty to UMSP and waiver of a sentencing hearing, the Commonwealth agreed to dismiss the sodomy count without prejudice and to not oppose a 15-year sentence on the UMSP count. *Id.* The conditional plea agreement allowed Petitioner to appeal three pre-plea trial-error claims, which the Kentucky Court of Appeals considered and rejected on direct appeal.¹ *Id.*

On December 18, 2009, the trial court entered an Order declaring a “mistrial ... on count one of the indictment, sodomy in the first degree, based upon manifest necessity.” [DN 13-1 at 91].

On an unknown date, Petitioner filed a Motion to Enter Guilty Plea. [DN 13-1 at 89-90]. “The trial court held a ... colloquy in which Yarmey affirmed he was freely accepting the prosecution's offer.” *Yarmey*

¹ Those claims were whether the trial court erred in: 1) Admitting seven Polaroid photographs of the victim into evidence; 2) Denying Petitioner’s proposed limiting instruction for the photographs; and 3) Not allowing Petitioner to cross-examine the victim concerning a rape that occurred in Florida after the events in question in this case.

v. Commonwealth, No. 2016-CA-001245-MR, [2019 WL 169133](#) (Ky. Ct. App. Jan. 11, 2019) (hereinafter “*Yarmey II*”).² On March 1, 2010, the trial court entered its judgment of conviction, sentencing Petitioner to 15 years’ imprisonment for UMSP. [DN 13-1 at 111].

Petitioner filed a motion for postconviction review pursuant to RCr 11.42. The trial court denied the motion, and the Kentucky Court of Appeals affirmed. *Yarmey II*. Postconviction counsel represented Petitioner both at the trial court level and on appeal.

In his 11.42 motion, Petitioner claimed, among other things, that trial counsel was ineffective “because of [certain] medications [counsel] was taking during the trial,” which allegedly caused counsel not to “make certain objections during the trial.” *Yarmey II*, [2019 WL 169133](#), at *3. The Kentucky Court of Appeals summarily dismissed the claim for lack of specificity – both with respect to the medications and the objections.³

Procedural history in this Court

In July 2019, Petitioner filed a pro-se Section 2254 petition. [DN 1].

In January 2020, the undersigned entered a Memorandum Opinion and Order Appointing Counsel and Expanding the State-Court Record. [DN 20].

In July 2020, Petitioner filed, through counsel, an amended petition, which superseded and replaced his original pro-se petition. [DN 1, 33]. Respondent filed a “limited response” in opposition, arguing that the amended petition was subject to dismissal as a “mixed” petition containing both exhausted and unexhausted claims. [DN 39]. In February 2021, Petitioner replied. [DN 41].⁴

² This Report does not find in the state-court record submitted by Respondent a transcript or recording of the change of plea proceeding.

³ In the present amended petition, [DN 33], Petitioner now identifies (with specificity) the objections counsel allegedly should have made at trial.

⁴ In his reply, [DN 41], Petitioner requested an evidentiary hearing. While there is no pending motion for an evidentiary hearing in this case, this Report finds that there is no basis for an evidentiary hearing because (as a matter of law) Petitioner waived his claims when he pled guilty.

In February 2021, the undersigned entered a Memorandum Opinion and Order, finding, among other things, that “the undersigned has determined (tentatively, pending report and recommendation to the district judge) that all fourteen claims [in Petitioner’s Amended Petition at DN 33] are exhausted” and requiring Respondent to file an “unlimited response to Petitioner’s amended petition.” [DN 42 at 5].

Respondent filed a response, and Petitioner replied. [DN 47, 52]. Therefore, Petitioner’s amended petition, [DN 33], is ripe for ruling.

Petitioner’s ineffective assistance of trial counsel (“IATC”) claims

In his amended petition, [DN 33], Petitioner makes fourteen claims, and in his reply, [DN 52], he indicates abandonment of Claims 4, 5, and 11.⁵

Petitioner’s remaining claims are claims of IATC, which focus on trial counsel’s alleged failure to make certain objections, including not objecting to:

1. The jury instructions and verdict form, which allegedly evaded the unanimous verdict requirement and failed to define certain terms.
2. Entry into evidence of an allegedly unreliable and inadmissible CACU [meaning of acronym unknown to this Report] log, which allegedly indicated the victim complained about Petitioner’s crime five years before trial.
3. Testimony from the Commonwealth’s witnesses to the effect that: a) Victims of child sex abuse often do not come forward and report to authorities until years later; and b) Perpetrators of child sex abuse often deny they committed such acts when questioned by authorities.
4. Testimony from the Commonwealth’s witnesses referencing certain statements allegedly made by Petitioner’s non-testifying codefendant (the victim’s mother).

⁵ Claims 4, 5, and 11 are either identical to or are related to claims adjudicated by the state courts on direct appeal and postconviction review (in *Yarmey I* and *Yarmey II*). To prevail in the present habeas context, Petitioner would have to show that the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” [28 U.S.C. § 2254\(d\)\(1\)](#).

5. The Commonwealth's closing argument, which improperly referenced 3.a. and 4. (above); and
6. The Commonwealth's closing argument to the effect that, although none of the photographs was per-se incriminating: "That picture is a crime scene, that child is about to get molested, that child is being exploited. ... You can go back and look at these pictures and say, you know what, this whole transaction was criminal."⁶

Respondent's argument is unpersuasive.

As indicated above, Respondent argues that Petitioner's IATC claims are procedurally defaulted because, under Kentucky law, it is now too late to present them to the state courts. [DN 47 at 27 citing RCr 11.42(3) and (10)]. Respondent admits that the procedural default is excused to the extent Petitioner shows that a claim is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* quoting *Martinez v. Ryan*, [566 U.S. 1, 14](#) (2012). Respondent argues that all of Petitioner's IATC claims are insubstantial. *Id.* at 25-42. For the reasons below, this Report finds that Petitioner has made a colorable showing of a substantial IATC claim.

As in *Hodge v. Hurley*, "[t]his is a child-[abuse] case where the only evidence sufficient to sustain a conviction was a jury determination that the complaining witness was more credible than the defendant." *Hodge v. Hurley*, [426 F.3d 368, 371](#) (6th Cir. 2005). During the closing argument in *Hodge* (and allegedly in this case as well), trial counsel "sat idly by," while the prosecutor made an "egregiously improper closing argument." *Id.*

At the time of the events in question, Hodge was living with his girlfriend, who allegedly caught him abusing her 3-year-old daughter – making Hodge and his girlfriend the only competent witnesses of what occurred. *Hodge* held that trial counsel was ineffective for not objecting to the prosecutor's closing argument and that this deficient performance was prejudicial because, "[i]n a trial such as this one, where

⁶ While Petitioner's amended petition and reply brief, [DN 33, 52], quote from the trial and particularly from the Commonwealth's closing argument, this Report does not find in the state-court record submitted by Respondent a transcript or recording of the trial.

the result depended primarily on the jury’s belief as to whether [the defendant] or [the complaining witness] was more credible, we believe there is a reasonable probability that the result of the proceeding would have been different” if counsel had objected. *Id.* at 376.

In his reply, Petitioner argues that the Commonwealth’s closing argument unfairly made him look less credible to the jury than the victim. [DN 52]. The Commonwealth allegedly referred to certain statements from the victim’s mother, which Petitioner was unable to cross examine because she did not testify. The Commonwealth allegedly referred to testimony to the effect that victims of child sex abuse often do not come forward and report to authorities until years later. Arguably, this amounted to an “improper vouching by prosecutors.” *Hodge*, [426 F.3d at 378](#). Finally, the Commonwealth argued that, although no photograph was per-se incriminating: “That picture is a crime scene, that child is about to get molested, that child is being exploited. ... You can go back and look at these pictures and say, you know what, this whole transaction was criminal.”

The *Tollett* waiver principle

Nevertheless, this Report finds (*sua sponte*) that Petitioner waived his IATC claims, [DN 33], when he pled guilty.⁷

Under federal law, a guilty plea represents a break in the chain of events that preceded it in the criminal trial process. *Tollett v. Henderson*, [411 U.S. 258, 267](#) (1973). When a defendant who has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights, including ineffective assistance of counsel, that occurred prior to the entry of the guilty plea. *Id.* He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel to plead guilty was ineffective. *Id.* In other words, “[c]laims of pre-plea ineffective assistance not

⁷ The undersigned opted to submit this Report, to which the parties may object, rather than order another round of briefing in light of this case’s already extensive procedural history before this Court.

relating to the acceptance of the plea are waived under the rule announced in *Tollett v. Henderson*.” *Rose v. Warden Chillicothe Corr. Inst.*, No. 18-3997, [2019 WL 5260158](#), at *3 (6th Cir. July 17, 2019).

Similarly, under Kentucky law, the general rule is that “pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense.” *Dickerson v. Com.*, [278 S.W.3d 145, 148](#) (Ky. 2009). However, with a conditional plea agreement (as in the present case), there is no waiver of “issues ... expressly set forth in the conditional plea documents.” *Id.* at 149.⁸

In summary, an unconditional guilty plea results in waiver of all pre-plea claims except not charging an offense, and a conditional guilty plea results in waiver of all pre-plea claims not specifically excepted by the plea agreement. This Report will refer to these concepts in shorthand as the “*Tollett* waiver principle.”

Petitioner’s IATC claims are waived under the *Tollett* waiver principle.

The parties cite and the Court finds no case applying the *Tollett* waiver principle in the present context where a defendant pleaded guilty to an offense **after** the jury had already found him to be guilty of that offense. Nevertheless, there is no reason apparent why the principle should **not** apply inasmuch as Petitioner received the benefits of the conditional plea agreement. Specifically, Petitioner secured a 15-year sentence on the UMSP count, which carried a maximum penalty of 20 years, and, “[r]ather than facing retrial [on the sodomy count, which carried a possible life sentence], Yarmey entered a conditional guilty plea to the charge of the use of a minor in a sexual performance.” *Yarmey I*, [2011 WL 6743294](#), at *3. Additionally, Petitioner was permitted to and did appeal three trial error claims.

Here, application of the *Tollett* waiver principle is straightforward: When he pled guilty, Petitioner waived all pre-plea claims of trial error not allowed by the conditional plea agreement. All of Petitioner’s

⁸ As noted above, in this case, the conditional plea agreement allowed Petitioner to appeal three claims that the trial court erred in: 1) Admitting seven Polaroid photographs of the victim into evidence; 2) Denying Petitioner’s proposed limiting instruction for the photographs; and 3) Not allowing Petitioner to cross-examine the victim concerning a rape that occurred in Florida after the events in question in this case.

nonabandoned IATC claims, [DN 33], preceded his guilty plea. Therefore, Petitioner’s IATC claims are waived under the *Tollett* waiver principle.

Trial counsel was not ineffective for advising Petitioner to plead guilty.

As indicated above, a defendant waives all pre-plea claims (even those of constitutional magnitude), leaving only the possibility that counsel’s advice to plead guilty was ineffective. Such a defendant may “only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel” was ineffective. *Tollett*, [411 U.S. at 267](#). Because a guilty plea works a waiver of certain constitutional rights, it must be a voluntary, knowing, and intelligent act “done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, [397 U.S. 742, 748](#) (1970).

In this case, the evidence indicates Petitioner was aware that, by pleading guilty, he would be waiving the right to appeal all but three trial error claims. Petitioner’s Motion to Enter Guilty Plea, which is signed by Petitioner but undated, states, in pertinent part:

5. I further understand the Constitution guarantees me the following rights:

- (a) The right not to testify against myself;
- (b) The right to a speedy and public trial by jury at which I would be represented by counsel and the Commonwealth would have to prove my guilty beyond a reasonable doubt;
- (c) The right to confront and cross-examine all witnesses called to testify against me;
- (d) the right to produce any evidence, including attendance of witnesses, in my favor;
- (e) **The right to appeal my case to a higher court.** (*emphasis added*)

I understand that if I plead “GUILTY,” I waive these rights.

[DN 13-1 at 89].⁹

Trial counsel was not ineffective for advising Petitioner to plead guilty because, in pleading guilty, Petitioner: 1) Avoided possible conviction, upon retrial, of first-degree sodomy, which carried a maximum

⁹ This Report does not find in the state-court record submitted by Respondent a transcript or recording of the change of plea proceeding.

penalty of life; 2) Secured a 15-year sentence on the UMSP charge, which carried a maximum penalty of 20 years; and 3) Secured the right to appeal three trial error claims.¹⁰

The Court should DENY a certificate of appealability.

Before Petitioner may appeal this Court's decision, a certificate of appealability ("COA") must issue. [28 U.S.C. § 2253\(c\)\(1\)\(A\)](#); [Fed. R. App. P. 22\(b\)](#).

A certificate of appealability ("COA") may issue only if a petitioner has made "a substantial showing of the denial of a constitutional right." [28 U.S.C. § 2253\(c\)\(2\)](#); *Slack v. McDaniel*, [529 U.S. 473, 483](#) (2000). "Where a district court has rejected the constitutional claims on the merits ... [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When, however, "the district court denies a habeas petition on procedural grounds without reaching the 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." *Id.* "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." *Id.* In such a case, no appeal is warranted. *Id.*

Here, the recommendation is denial of Petitioner's amended petition based on a plain procedural bar, i.e., the *Tollett* waiver principle. Admittedly, this Report applies the principle to a unique fact pattern in which Petitioner pled guilty to an offense of which the jury had already found him guilty. However, as indicated above, there is no reason apparent why the principle should **not** apply, and its application is straightforward.

¹⁰ Admittedly, from a subjective standpoint, trial counsel, having lost at trial, would be in an awkward position advising his client to waive any claim that the trial was lost due to IATC.

Therefore, Petitioner has not shown “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.” *Id.* Thus, the Court should deny a COA.

RECOMMENDATION

For the foregoing reasons, the Magistrate Judge RECOMMENDS that the Court: 1) DENY Petitioner’s pro-se petition, [DN 1], as superseded and replaced by his amended petition; 2) DENY Petitioner’s amended petition, [DN 33], because Petitioner waived his claims when he pled guilty; and 3) DENY a certificate of appealability.¹¹

September 1, 2021


**Lanny King, Magistrate Judge
United States District Court**

NOTICE

Therefore, under the provisions of [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) and [\(C\)](#) and [Fed. R. Civ. P. 72\(b\)](#) and [Fed. R. Crim. P. 59\(b\)\(2\)](#), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, [474 U.S. 140, 147](#) (1985).

September 1, 2021


**Lanny King, Magistrate Judge
United States District Court**

¹¹ In the event, the Court finds that Petitioner did **not** waive his claims when he pled guilty (and perhaps also if it finds that the matter warrants a COA), the Magistrate Judge RECOMMENDS that the Court REJECT this Report and RECOMMIT the matter to the undersigned for expansion of the state-court record (to include, if available, a transcript or recording of the change of plea proceeding and the trial and particularly closing arguments) and a full review of Petitioner’s claims.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**PETITIONER’S OBJECTIONS TO
FINDINGS OF FACT AND RECOMMENDATION
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Petitioner objects to the Findings of Fact and Recommendation [DN 56] filed by Magistrate Judge King on September 1, 2021 sua sponte finds “Petitioner’s claim failed because he waived those claims when he pled guilty. See *Tollett v. Henderson*, [411 U.S. 258](#) (1973).” Petitioner further objects to the Magistrate Judge’s recommendation denying a Certificate of Appellability.

As outlined in the Findings of Fact and Recommendation under procedural history in this court, Petitioner’s §2254 Petition has been pending before the court from July 2019 to the present. During this long history before the court there have been several pleadings filed by Respondent in opposition to the Petition arguing issues and defenses to the Pro Se Petition and Amended Petition. Throughout Respondent’s pleading the procedural default under *Tollett* determined sua sponte by the Magistrate Judge was never raised.

“[P]rocedural default is normally a “defense” that the State is obligated to raise” and “[p]reserve[e]” if it is not to “lose the right to assert the defense thereafter”. Cite omitted *Trest v. Cain*, [522 U.S. 87](#) at 88 (1997).

“When a party fails to preserve a defense by neglecting to raise it in the district court, that defense is usually deemed to have been forfeited.” *Cradler v. U.S.*, 891 Fed.3d 659, 665 (6th Cir.) citing *Wood v. Milyard*, [566 U.S. 463, 470 n.4](#) (2012)

The courts have cautioned the use of its authority to sua sponte raise a forfeited defense and “should reserve that authority for use in exceptional cases”. *Wood* at 473.

Respondent forfeited the procedural defense asserted sua sponte by the Magistrate Judge. A finding should be entered that the Respondent’s failure to raise the procedural default operates as a forfeiture of its rights to defend on that ground. “When a party fails to preserve a defense by neglecting to raise it in the district court, that defense is usually deemed to have been forfeited.” *Wood v. Milyard* [566 US 463-470 n.4](#). (2012).

Therefore, the Magistrate Judge should not exercise his authority to enter a sua sponte procedural defense. See *Cradler v. US*, 891 Fed.3d 659 at 665-666 (6th Cir. 2018).

Petitioner demands to vacate the Magistrate Judge’s use of the discretionary sua sponte authority raising the procedural defense presented by *Tollette v. Henderson* and consider the merits of Petitioner’s §2255 Motion.

In the Findings of Fact and Recommendation the Magistrate Judge found “Respondent’s argument is unpersuasive because Petitioner has made a colorful showing of a substantial IATC claim”. [DN 56, page 1]

However, Magistrate Judge found Petitioner’s trial counsel was not ineffective for advising Petitioner to plead guilty following a trial of the case where the jury was unable to reach a unanimous verdict on sodomy of a minor, but found guilt on using a minor in a sexual performance. The Magistrate Judge stated: “Admittedly from a subjective standpoint, trial counsel, having lost a trial would be in an awkward position advising his client to waive any claim that the trial was lost due to IATC.” (Footnote 10 of [DN56, page 9].

In *United States of America v. Kentucky Bar Association*, [439 S.W.3d 136](#) (Ky. 2014) the issue was the ethical consideration of ineffective assistance of counsel waivers and plea agreements. While this case was more focused on the particular issue of plea agreement waiving IATC claims, the court did present the facts and dilemma presented to an attorney counseling his client during plea agreement. The court held, “The Sixth Amendment requires more than simple disclosure of plea agreement terms to quality as “effective”. Conflict-free counsel is also demanded.” Footnote omitted. *U.S. v. KBA* at page 148.

The court went on to say, “Attorney’s personal conflict that affects the terms of the plea agreement could, of course, be highly prejudicial.” Footnote omitted. *Id.* Indeed, counsel’s performance complicated by possible personal conflict may fall “below an objective standard for reasonableness”. Footnote omitted. *Id.* Perhaps because of the attorney’s advice, there may be “reasonable probability that but for counsel’s unprofessional errors the result of the proceeding would have been different.” Footnote omitted. *Id.*

These considerations made by the Kentucky Supreme Court should be apparent in this case Petitioner, having “made a colorful showing of a substantial IATC claim”, that the merits of his claims should be allowed to proceed and not allow a discretionary sua sponte procedural decision.

To allow the sua sponte discretion to stand prevents Petitioner from proceeding with what is stated “Petitioner has made a colorful showing of substantial IATC claim.” It is Petitioner’s belief based on arguments presented in his objections and contained within his Amended Petition that reasonable jurists may debate the use of the sua sponte discretion and allow Petition to proceed further.

The court in *Tollett* dealt with a state criminal defendant asserting his attorney’s failure to advise him prior to this plea of his constitutional right to object that negroes were systematically excluded from serving on grand juries. *Strauder v. West Virginia*, [100 US 303](#) (1880).

The court following the ruling in *McMann v. Richardson*, [397 US 759](#) stated, “If a prisoner pleads guilty on the advice of counsel he must demonstrate that the advice was not ‘within the range of competence demanded of attorneys in criminal cases’. *McMann* at 771. In Petitioner’s case the advice of his counsel to enter a plea “was not within the range of competence demanded of attorneys in criminal cases”. The Magistrate Judge has determined that Petitioner’s IATC claims in his Petition “has made a colorful showing of substantial IATC claims.” Therefore, it cannot be founded that Petitioner’s attorney provided reliable advice.

In Petitioner’s case he was found guilty by a jury, then subsequently entered a plea to a sentencing agreement on the advice of his trial counsel, who would have been readily aware of issues at trial that denied his constitutional rights. These issues have been outlined in the Amended Petition as IATC claims.

The *Tollett* waiver principle is based on a plea of guilty voluntarily and intelligently made by defendant with adequate advice from counsel. *Tollett* at 263. If Petitioner’s trial counsel was competent as a reasonable attorney in a criminal case, he would have known of the constitutional issues listed by Petitioner in his IATC claims. This is a different assessment than *Tollett* decision wherein it was stated, “It is not sufficient for the criminal defendants seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance . . .”. *Id.* at 267 (Emphasis added)

If the Magistrate Judge’s Findings and Recommendation based upon the sua sponte procedural authority will not be vacated, then Petitioner seeks a Certificate of Appellability.

CERTIFICATE OF APPELLABILITY

A Certificate of Appellability may issue where a movant has made a “substantial showing of the denial of a constitutional right”. [28 USC §2253\(c\)\(2\)](#). This standard requires a movant to demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claim

debatable or wrong”. *Slack v. McDaniel*, [529 U.S. 473, 483](#) (2000). The reviewing court must indicate which specific issues satisfy the “substantial showing” requirement. [28 USC §2253\(c\)\(3\)](#). For dismissals on procedural grounds, as to when a Certificate of Appellability should issue, the movant 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 the jurists reason would find it debatable whether the district court was correct in its procedural ruling”. *Slack* at 483.

The court in *Slack* stated, “We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner 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. *Id.*”

Respectfully submitted,

/s/ _____
RICHARD COOPER, P.S.C.
P.O. Box 6313
Louisville, Kentucky 40206
(502) 587-6554
Attorney for Petitioner
richardcooperesq@gmail.com

CERTIFICATE OF SERVICE

I certify that on September 15, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Petitioner's Objections to Findings of Fact and Recommendation and Certificate of Appellability has been served, via ECF, to Leilani K. M. Martin, Assistant Attorney General.

/s/ _____
RICHARD COOPER, P.S.C.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**ORDER
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Upon Petitioner's Objections to Findings of Fact and Recommendation,
IT IS HEREBY ORDERED the Findings of Fact and Recommendation relating to sua sponte procedural default as a defense to Petitioner's Section 2255 Amended Petition is hereby vacated and recommit the matter for further proceedings.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

**v. MOTION FOR RULING ON PETITIONER’S OBJECTIONS
TO FINDINGS OF FACT AND RECOMMENDATION
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Magistrate Judge entered Findings of Fact and Recommendation [DN 57] on September 1, 2021 sua sponte finding Petitioner’s Amended Petition under 28 USC §2254 for Writ of Habeas Corpus [DN 33] failed because Petitioner waived his claims when he pled guilty. *Tollett v. Henderson*, 411 U.S. 258 (1973).

Petitioner timely filed his Objections to Findings of Fact and Recommendation on September 15, 2021 [DN 57] to Magistrate Judge’s sua sponte Findings of Facts and Recommendation. Respondent has failed to reply to Petitioner’s Objections, and the matter stands submitted to the Court.

Wherefore, Petitioner requests the Findings of Fact and Recommendation relating to the sua sponte procedural default as a defense to Petitioner’s §2254 Amended Petition be vacated and recommend the matter for further proceedings.

Respectfully submitted,

/s/ Richard Cooper

RICHARD COOPER, P.S.C.

P.O. Box 6313

Louisville, Kentucky 40206

(502) 587-6554

Attorney for Petitioner

richardcooperesq@gmail.com

CERTIFICATE OF SERVICE

I certify that on September 22 2022 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Motion for Ruling on Petitioner's Objections to Findings of Fact and Recommendation have been served, via ECF, to Todd D. Ferguson, Assistant Attorney General.

/s/ Richard Cooper

RICHARD COOPER, P.S.C.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**ORDER
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Upon Petitioner's Objections to Findings of Fact and Recommendation,
IT IS HEREBY ORDERED the Findings of Fact and Recommendation relating to sua sponte procedural default as a defense to Petitioner's Section 2254 Amended Petition is hereby vacated and recommit the matter for further proceedings.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

**v. MOTION FOR RULING ON PETITIONER’S OBJECTIONS
TO FINDINGS OF FACT AND RECOMMENDATION
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Magistrate Judge entered Findings of Fact and Recommendation [DN 57] on September 1, 2021 sua sponte finding Petitioner’s Amended Petition under 28 USC §2254 for Writ of Habeas Corpus [DN 33] failed because Petitioner waived his claims when he pled guilty. *Tollett v. Henderson*, 411 U.S. 258 (1973).

Petitioner timely filed his Objections to Findings of Fact and Recommendation on September 15, 2021 [DN 57] to Magistrate Judge’s sua sponte Findings of Facts and Recommendation. Respondent has failed to reply to Petitioner’s Objections, and the matter stands submitted to the Court.

Wherefore, Petitioner requests the Findings of Fact and Recommendation relating to the sua sponte procedural default as a defense to Petitioner’s §2254 Amended Petition be vacated and recommend the matter for further proceedings.

Respectfully submitted,

/s/ Richard Cooper
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P.O. Box 6313
Louisville, Kentucky 40206
(502) 587-6554
Attorney for Petitioner
richardcooperesq@gmail.com

CERTIFICATE OF SERVICE

I certify that on September 22 2022 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the above Motion for Ruling on Petitioner’s Objections to Findings of Fact and Recommendation have been served, via ECF, to Todd D. Ferguson, Assistant Attorney General.

/s/ Richard Cooper
RICHARD COOPER, P.S.C.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00528-JRW-LLK**

MARK DAMIAN YARMEY

PETITIONER

v.

**ORDER
(Electronically Filed)**

KEVEN MAZZA, WARDEN

RESPONDENT

* * * * *

Upon Petitioner’s Objections to Findings of Fact and Recommendation,
IT IS HEREBY ORDERED the Findings of Fact and Recommendation
relating to sua sponte procedural default as a defense to Petitioner’s Section
2254 Amended Petition is hereby vacated and recommit the matter for further
proceedings.

FILED
JAMES J. VILT, JR. - CLERK

FEB 21 2023

U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

02/17/2023

FROM: Mark Yarmey
4012 Mulberry Row Way
Louisville, KY. 40299

TO: Clerk of the Court
601 W. Broadway, Rm 106
Snyder United States Courthouse
Louisville, KY 40202

Dear Clerk,

I am requesting the status of (Civil Action) Case NUMBER: 3:19-CV-02528-JRW-LLK. The attorney in this case, Richard Cooper P.S.C., last filed: Objections to the Commissioner Recommendation [DN 57] filed on 15 September 2021 was December 2021. When no ruling was forthcoming, he filed a Motion for Ruling on 22 September 2022 [DN 59]. Would you please inform me of the status of this case and please send me a case history for the same.

Respectfully Requested,

Mark Yarmey



Mark Yarmey
4012 Mulberry Row Way
Louisville, KY. 40299

LOUISVILLE KY 400

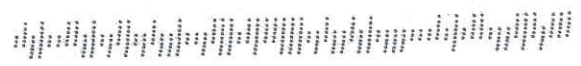
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FILED
JAMES J. VILT, JR. - CLERK
FEB 21 2023
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

Clerk of the Court
601 W. Broadway, Rm 106
Snyder United States Courthouse
Louisville, KY. 40202

40202-222731



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARK DAMIAN YARMEY

Petitioner

v.

Civil Action No. 3:19-cv-528-RGJ-LLK

KEVEN MAZZA, WARDEN

Respondent

MEMORANDUM OPINION AND ORDER

Petitioner Mark Damian Yarmey (“Yarmey”) Objects [DE 57] to Magistrate Judge Lanny King’s (“Magistrate Judge”) Findings of Fact and Recommendation [DE 56 (“R&R”)] denying Yarmey’s § 2254 petition and certificate of appealability. The Respondent, Keven Mazza, the Warden, did not respond to the objections. Yarmey also filed a motion for ruling on his objections. [DE 58]. This matter is ripe. For the reasons below, the Court **DENIES** Yarmey’s Objections [DE 57], **ADOPTS** the R&R [DE 56], and **GRANTS** Yarmey’s Motion for Ruling [DE 58].

I. BACKGROUND

Yarmey was indicted in Jefferson County, Kentucky, on charges of first-degree sodomy and using a minor in a sexual performance (“UMSP”). Yarmey was a photographer who was convicted of taking nude photographs of the victim at his home in 1999 or 2000 at the request of the victim’s mother, who was (at least, for some period of time) “being prosecuted in connection with the events of this night” at Yarmey’s house. *Yarmey v. Commonwealth*, No. 2010-CA-000604-MR, 2011 WL 6743294, n.1 (Ky. Ct. App. Dec. 22, 2011) (“*Yarmey I*”).

The sodomy count carried a maximum penalty of 20 to 50 years or life, and the UMSP count carried a maximum penalty of 10 to 20 years. [DE 13-1 at 87]. At trial, Yarmey testified in his own defense.

On December 14, 2009, the jury was unable to reach a unanimous verdict on the sodomy count but found Yarmey guilty on the UMSP count. [DE 13-1 at 88].

On December 15, 2009, Yarmey entered into a conditional plea agreement with the Commonwealth, pursuant to Kentucky Rule of Criminal Procedure (“RCr”) 8.09, to the effect that, in exchange for a plea of guilty to UMSP and waiver of a sentencing hearing, the Commonwealth agreed to dismiss the sodomy count without prejudice and to not oppose a 15-year sentence on the UMSP count. *Id.* The conditional plea agreement allowed Yarmey to appeal three pre-plea trial-error claims, which the Kentucky Court of Appeals considered and rejected on direct appeal.¹

On December 18, 2009, the trial court entered an Order declaring a “mistrial . . . on count one of the indictment, sodomy in the first degree, based upon manifest necessity.” [DE 13-1 at 91]. On an unknown date, Yarmey filed a Motion to Enter Guilty Plea. [DE 13-1 at 89–90]. “The trial court held a . . . colloquy in which Yarmey affirmed he was freely accepting the prosecution’s offer.” *Yarmey v. Commonwealth*, No. 2016-CA-001245-MR, 2019 WL 169133, at *4 (Ky. Ct. App. Jan. 11, 2019) (“*Yarmey II*”). On March 1, 2010, the trial court entered its judgment of conviction, sentencing Yarmey to 15 years’ imprisonment for UMSP. [DE 13-1 at 111].

Yarmey filed a motion for postconviction review pursuant to RCr 11.42. *Yarmey II*, 2019 WL 169133, at *4. The trial court denied the motion, and the Kentucky Court of Appeals affirmed. *See id.* Postconviction counsel represented Yarmey both at the trial court level and on appeal.

In his RCr 11.42 motion, Yarmey claimed, among other things, that trial counsel was ineffective “because of [certain] medications [counsel] was taking during the trial,” which allegedly caused counsel not to “make certain objections during the trial.” *Id.* at *3. The Kentucky

¹ Those claims were whether the trial court erred in: 1) Admitting seven Polaroid photographs of the victim into evidence; 2) Denying Yarmey’s proposed limiting instruction for the photographs; and 3) Not allowing Yarmey to cross-examine the victim concerning a rape that occurred in Florida after the events in question in this case.

Court of Appeals summarily dismissed the claim for lack of specificity—both with respect to the medications and the objections.

On July 18, 2019, Yarmey filed his *pro se* § 2254 petition and supporting memorandum before this Court setting forth several claims. [DE 1]. On January 6, the Magistrate Judge entered a Memorandum Opinion and Order Appointing Counsel and Expanding the State-Court Record. [DE 20].

On July 28, 2020, Yarmey filed, through counsel, an amended petition, which superseded and replaced his original *pro se* petition. [DE 33]. Respondent filed a “limited response” in opposition, arguing that the amended petition was subject to dismissal as a “mixed” petition containing both exhausted and unexhausted claims [DE 39] and Yarmey replied [DE 41]. Pursuant to this Court’s referral order, the Magistrate Judge issued an R&R on Yarmey’s § 2254 petition. [DE 56]. The R&R recommended dismissing the Petition and that the Court deny a Certificate of Appealability. [*Id.*]. Yarmey timely objected to the R&R. [DE 57]. The Court now considers the R&R and Yarmey’s objections.

II. STANDARD

A. Standard of Review

A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). “A magistrate judge must promptly conduct the required proceedings . . . [and] enter a recommended disposition, including, if appropriate, proposed findings of fact.” Fed. R. Civ. P. 72(b)(1). This Court must “determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). The Court need not review under a de novo or any other standard those aspects of the report and recommendation to which no specific objection is made and may adopt the

findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas v. Arn*, 474 U.S. 140, 149–50, 155 (1985).

A specific objection “explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic.” *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (alterations in original) (citation omitted). A general objection that fails to identify specific factual or legal issues from the R&R is not permitted as it duplicates the magistrate judge’s efforts and wastes judicial resources. *Howard v. Sec’y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). After reviewing the evidence, the Court is free to accept, reject, or modify the magistrate judge’s proposed findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

B. Standard for Relief from a State Conviction under Federal Habeas Statute

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (“AEDPA”) governs Yarmey’s claims. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA applies to all habeas corpus petitions filed after April 24, 1996 and requires “heightened respect” for legal and factual determinations made by state courts. *See Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). The pertinent section 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.

28 U.S.C. § 2254(d). This standard is “difficult to meet and [is a] highly deferential standard” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). When the

state court articulates the correct legal rule in its review of a claim, a “federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *see also Tolliver v. Sheets*, 594 F.3d 900, 916 (6th Cir. 2010). Instead, the Court must ask “whether the state court’s application of clearly established federal law was objectively unreasonable.” *Williams*, 529 U.S. at 409.

The Supreme Court has concluded that “a federal habeas court may overturn a state court’s application of federal law only if it is so erroneous that there is no possibility fairminded [*sic*] jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (per curiam) (internal quotation marks omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). As to § 2254(d)(2), a federal habeas court may not substitute its evaluation of the state evidentiary record for that of the state trial court unless the state determination is unreasonable. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006). This subsection applies when a petitioner challenges the factual determinations made by the state court. *See Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001) (challenging the state court’s determination that the evidence did not support an aiding and abetting suicide instruction); *Clark v. O’Dea*, 257 F.3d 498, 506 (6th Cir. 2001) (challenge to state court’s factual determination that Sheriff has not seen letter before Clark’s trial).

A state court decision is not contrary to United States Supreme Court precedent simply because it does not specifically cite Supreme Court cases. *Early v. Packer*, 537 U.S. 3, 8 (2002). Indeed, the state court does not even have to be aware of the controlling Supreme Court precedent, so long as neither the reasoning nor the result of the state court decision contradicts that precedent. *Id.* at 8; *Brown v. Bobby*, 656 F.3d 325, 3321 (6th Cir. 2011).

III. DISCUSSION

Yarmey objects to the R&R for two reasons: (1) Respondent waived any procedural defense under *Tollett v. Henderson*, 411 U.S. 258 (1973) and (2) the Court should consider the merits of Yarmey's ineffective assistance of counsel claim. [DE 57].

A. Waiver

i. Standard for Waiver Under Tollett

Under federal law, a guilty plea represents a break in the chain of events that preceded it in the criminal trial process. *See Tollett*, 411 U.S. at 267. When a defendant who has admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights, including ineffective assistance of counsel, that occurred prior to the entry of the guilty plea. *Id.* He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel to plead guilty was ineffective. *Id.* In other words, “[c]laims of pre-plea ineffective assistance not relating to the acceptance of the plea are waived under the rule announced in *Tollett v. Henderson*.” *Rose v. Warden Chillicothe Corr. Inst.*, No. 18-3997, 2019 WL 5260158, at *3 (6th Cir. July 17, 2019).

Similarly, under Kentucky law, the general rule is that “pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense.” *Dickerson v. Commonwealth*, 278 S.W.3d 145, 148 (Ky. 2009). However, with a conditional plea agreement as entered by Yarmey, there is no waiver of “issues . . . expressly set forth in the conditional plea documents.” *Id.* at 149.

ii. *Analysis*

Yarmey objects to the R&R because the Magistrate Judge found that Yarmey's ineffective assistance of counsel claim was waived pursuant to *Tollett*. [DE 57 at 718]. The Magistrate Judge applied *Tollett* sua sponte. [DE 56 at 712]. Yarmey argues that the Magistrate Judge is prevented from applying *Tollett* because Respondent failed to preserve the defense. [DE 57 at 718].

Yarmey cites a handful of cases in support of his argument. [*Id.* at 717–18]. However, none of these cases discuss waiver under *Tollett*. Yarmey cites *Trest v. Cain*, 522 U.S. 87, 90 (1997), but, in *Trest*, the Supreme Court held that it would not decide whether the Fifth Circuit could raise procedural default sua sponte on appeal. Moreover, *Trest* did not involve waiver under *Tollett*. See 522 U.S. at 88 (reviewing procedural default for failure to timely raise federal claims in state court). The other two cases Yarmey cited also required courts to review timeliness requirements. [DE 57 at 718 (citing *Cradler v. United States*, 891 F.3d 659 (6th Cir. 2018) and *Wood v. Milyard*, 566 U.S. 463 (2012))]. Accordingly, the Court finds that it is bound by *Tollett*.

Here, Yarmey pleaded guilty to an offense after the jury had already found him guilty of the offense. See *Yarmey II*, 2019 WL 169133, at *1. His plea agreement secured a 15-year sentence on one count of UMSP, which carried a maximum penalty of 20 years. *Yarmey I*, 2011 WL 6743294, at *3. “Rather than facing retrial [on the sodomy count, which carried a possible life sentence], Yarmey entered a conditional guilty plea to the charge of the [UMSP].” *Yarmey I*, 2011 WL 6743294, at *3. Additionally, Yarmey was permitted to and did appeal three trial error claims.

Under *Tollett*, Yarmey's guilty plea represented a break in the chain of events that preceded it in the criminal trial process. See 411 U.S. at 267. Yarmey's “[c]laims of pre-plea ineffective assistance not relating to the acceptance of the plea are waived.” *Rose*, 2019 WL 5260158, at *3.

The Court has reviewed the R&R and finds that the Magistrate Judge did not err in his application of *Tollett* and his analysis of Yarmey’s ineffective assistance of counsel claims. Yarmey’s objection is overruled.

B. Ineffective Assistance of Counsel

i. Standard on Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must show that: (1) “counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment”; and (2) “the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. “Judicial scrutiny of counsel’s performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to 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.” *Id.* at 689.

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. For example, if the Court determines the defendant fails to satisfy the prejudice prong then it need not determine whether counsel's performance was deficient. *Id.*

When a habeas petitioner claims that his counsel has been ineffective, the assessment of trial counsel's judgment requires another layer of deference: the Court is "required not simply to give [the] attorney[] the benefit of the doubt, but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as [he] did." *Cullen*, 563 U.S. at 196 (internal quotation marks and citation omitted). Thus, the nexus of the AEDPA and *Strickland* compels the Court to be "doubly deferential," and "give[] both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Strickland* at 190) (internal quotation marks omitted).

ii. Analysis

Yarmey objects to the R&R on the basis that his trial counsel was ineffective in advising him to enter a guilty plea. [DE 57 at 719]. The Magistrate Judge found that trial counsel was not ineffective because pleading guilty (1) avoided possible conviction, upon retrial, of first-degree sodomy, which carried a maximum penalty of life; (2) secured a 15-year sentence on the UMSP charge, which carried a maximum penalty of 20 years; and (3) secured the right to appeal three trial error claims. [DE 56 at 714–15].

As explained *supra* Section III.A., Yarmey waived all pre-plea claims. The only claim of ineffective assistance of counsel that may remain is based on counsel's advice to plead guilty. Yarmey may "only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was ineffective. *Tollett*, 411 U.S. at 267. Because a guilty

plea works as a waiver of certain constitutional rights, it must be a voluntary, knowing, and intelligent act “done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

“Under 28 U.S.C. § 2254(d), the availability of federal habeas relief is limited with respect to claims previously ‘adjudicated on the merits’ in state-court proceedings.” *Harrington*, 562 U.S. at 92. Here, the Kentucky Court of Appeals adjudicated Yarmey’s ineffective assistance of counsel claim on its merits. *See Yarmey II*, 2019 WL 169133, at *4. The Court ultimately held that Yarmey’s “claim of ineffective assistance of counsel regarding the guilty plea was properly dismissed.” Therefore, federal habeas relief may not be granted unless Yarmey demonstrates the state appellate court’s adjudication of the ineffective assistance of counsel claim “was contrary to, or involved an unreasonable application of” *Strickland*. *See Harrington*, 562 U.S. at 100–101. The “contrary to” clause of § 2254(d)(1) only allows the Court to 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 412–13.

Yarmey’s objection [DE 57] fails to cite any cases indicating that the Kentucky Court of Appeals arrived at a conclusion contrary to one reached by the Supreme Court on a question of law. *See Williams*, 529 U.S. at 412–13. It also fails to cite any cases indicating that the Kentucky Court of Appeals reached a conclusion contrary to the Supreme Court on a set of materially indistinguishable facts. *See id.* Yarmey cites *McMann v. Richardson*, 397 U.S. 759, 771 (1970), which holds that counsel is required to exercise judgment “within the range of competence demanded of attorneys in criminal cases.” [DE 57 at 720]. Yarmey then states that his counsel’s

advice fell below this standard. [*Id.*]. However, Yarmey fails to explain how his counsel’s advice was ineffective. [*Id.* at 720–21].

The Kentucky Court of Appeals clearly explained that “Yarmey faced sentencing for a Class B felony, stemming from a sex crime against child, and possible additional proceedings relating to the first-degree sodomy charge. Accordingly, advising Yarmey to mitigate a potentially longer sentence than one of 15 years was not irrational, even though he would serve 85% of it before becoming parole eligible.” *Yarmey II*, 2019 WL 169133, at *4. The Magistrate Judge also noted that Yarmey was aware that, by pleading guilty, he would be waiving the right to appeal all but three trial error claims. [DE 56 at 714]. Among the rights waived was the right to appeal to a higher court. [DE 13-1 at 89].

For these reasons, Yarmey has failed to demonstrate that the ruling the Court of Appeals of Kentucky “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. Thus, the state court’s analysis is not contrary to federal law, and the R&R contains no error on this point.

The Court has reviewed the R&R and finds that the Magistrate Judge did not err in his analysis of Yarmey’s ineffective assistance of counsel claim. Yarmey’s objections are overruled.

C. Certificate of Appealability

Finally, Yarmey objects to the Magistrate Judge’s recommendation that a Certificate of Appealability (“COA”) be denied on the ineffective assistance of counsel claim. [DE 57 at 721–22].

A COA may issue only if the petitioner has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).


“Where a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. When “the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner 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. *Id.*

Here, the Court held that Yarmey’s ineffective assistance of counsel claim was denied on its merits. Yarmey has not shown “that reasonable jurists would find the district court’s assessment of any of the constitutional claims debatable or wrong.” *Id.* Thus, a COA is denied.

III. CONCLUSION

Accordingly, for the reasons stated, and the Court being otherwise sufficiently advised, **IT IS ORDERED** that

- 1) The Court **ADOPTS** the R&R [DE 56];
- 2) The Court **DENIES** Yarmey’s Objections [DE 57];
- 3) A Certificate of Appealability is **DENIED**; and
- 4) Yarmey’s Motion for Ruling [DE 58] is **GRANTED**.
- 5) The Court will enter separate judgment.


Rebecca Grady Jennings, District Judge
United States District Court

May 11, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARK DAMIAN YARMEY

Petitioner

v.

Civil Action No. 3:19-cv-528-RGJ-LLK

KEVEN MAZZA, WARDEN

Respondent

* * * * *

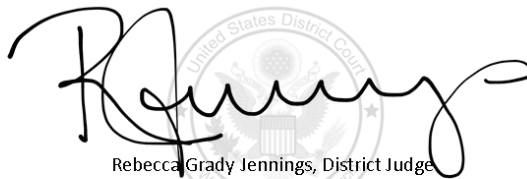
JUDGMENT

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

(1) Yarmey's Petitions [DE 1; DE 33] are **DISMISSED WITH PREJUDICE** and judgment is entered in favor of Respondent.

(2) The issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is **DENIED** as to all claims.

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

A handwritten signature in black ink, appearing to read 'Rebecca Grady Jennings', is written over a circular official seal of the United States District Court for the Western District of Kentucky.

Rebecca Grady Jennings, District Judge

United States District Court

May 11, 2023