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Case No. 15-5147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 20, 2018
DEBORAH S. HUNT, Clerk

LEIF HALVORSEN,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
RANDY WHITE, WARDEN,	)	KENTUCKY
	)	
Respondent-Appellee.	)	
	)	

BEFORE: ROGERS, COOK, and McKEAGUE, Circuit Judges.

COOK, Circuit Judge. In a petition for a writ of habeas corpus, state prisoner Leif Halvorsen claims that trial court error, ineffective assistance of counsel, and prosecutorial and juror misconduct violated his constitutional rights. Determining that the Kentucky Supreme Court did not unreasonably reject these claims, we deny his petition and AFFIRM the district court's judgment.

I. BACKGROUND

The Kentucky Supreme Court adduced the following facts. In January 1983, Leif Halvorsen and Mitchell Willoughby shot Joe Norman, Joey Durrum, and Jacqueline Greene in Greene's and Norman's house. *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 923 (Ky. 1986). Halvorsen and Willoughby had come to smoke marijuana with Norman, but after Willoughby and

Norman began fighting over a bad check, Willoughby grabbed his gun and started shooting. *Id.* At trial, Willoughby "took all of the blame" for the murders, and testified that he remembered shooting Norman two or three times, but not the other victims. *Id.*

Susan Hutchens's testimony filled in the gaps. *Id.* Halvorsen and Willoughby had asked her to pick up ammunition for their pistols earlier that day. *Id.* Later, she decided to visit Greene, and upon arrival, saw Willoughby, Halvorsen, and Norman talking in the driveway. Hutchens and Greene went inside to speak to Durrum. *Id.* Afterwards, Willoughby, Halvorsen, and Norman came inside and, "all of a sudden," the shooting began. *Id.*

Hutchens put her hands over her eyes and heard numerous shots. *Id.* When the shooting stopped, she opened her eyes and saw both Halvorsen and Willoughby wielding pistols. *Id.* Norman and Durrum lay dead on the floor, and Hutchens watched Willoughby shoot Greene twice more, killing her. Both men directed her to pick up the bullet casings while they dragged the bodies out of the house and into their van. *Id.* Police later found the bodies dumped by a bridge, bound with rope. *Id.* at 922.

In July 1983, a jury found Halvorson and Willoughby guilty of murdering Norman, Durrum, and Greene. Following the jury's recommendation, the trial court sentenced Halvorsen to death for the Greene and Durrum murders, and life imprisonment for the Norman murder. The Kentucky Supreme Court affirmed Halvorsen's convictions and sentences, *Halvorsen*, 730 S.W.2d at 928, and the Supreme Court denied certiorari, *Halvorsen v. Kentucky*, 484 U.S. 970 (1987).

In February 1988, Halvorsen filed a petition for post-conviction relief. After a decade of delay, owing in part to a change of counsel and Halvorsen's filing an amended petition, the trial court conducted an evidentiary hearing that resulted in its denying all relief. Halvorsen's later state court appeals were similarly unsuccessful. *Willoughby v. Commonwealth*, Nos. 2006-SC-

000071-MR, 2006-SC-000100-MR, 2007 WL 2404461, at *3 (Ky. Aug. 23, 2007); *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 12 (Ky. 2007).

In August 2009, Halvorsen filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, initially advancing thirty grounds for relief. About three years later, he unsuccessfully moved to add an additional eleven claims. The district court denied the motion without holding an evidentiary hearing, denied relief on all the habeas claims, and issued a partial certificate of appealability. We later expanded the certification, ultimately including ten claims.[1]

II. STANDARD OF REVIEW

"In a habeas proceeding, we review the district court's legal conclusions de novo and its factual findings for clear error." *Henderson v. Palmer*, 730 F.3d 554, 559 (6th Cir. 2013).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), courts may grant a habeas writ only if the state court's adjudication of a claim either "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 "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." *Adams v. Bradshaw*, 826 F.3d 306, 310 (6th Cir. 2016) (citing *Nali v. Phillips*, 681 F.3d 837, 840 (6th Cir. 2012)); 28 U.S.C § 2254(d)(1)-(2). We may grant the writ under the "contrary to" clause only "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts." *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014) (citing *Brown v. Payton*, 544 U.S. 133, 141 (2005)). Alternatively, we may

[1] After oral argument, counsel filed a Notice of Clarification discussing two additional, uncertified claims which we do not consider.

grant the writ under the "unreasonable application" clause if, despite identifying the correct governing legal principle from the Supreme Court's jurisprudence, the state court "unreasonably applies that principle to the facts of the petitioner's case." *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007) (citing *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

III. ANALYSIS

A. Complicity Charges

At the end of the guilt phase of Halvorsen's trial, the state trial court instructed the jury that Halvorsen could be convicted either as a principal or as an accomplice to each of the three murders, even though the grand jury indicted Halvorsen only as a principal. Halvorsen objects to the court's addition of accomplice liability, arguing that it constructively amended the indictment and denied him due process by preventing trial counsel from developing a defense to all the charges against him. He proposes two grounds for relief: first, that the trial court erred by instructing the jury on accomplice liability, and second, that trial counsel was constitutionally ineffective for not anticipating or defending against the accomplice liability charge. He raised neither in state court.

1. Trial court error

Generally, before a court rules on the merits of a § 2254 petition, a "petitioner must have exhausted his available state remedies," and his "claims must not be procedurally defaulted." *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015) (citations omitted). A claim is procedurally defaulted when "a petitioner fails to present a claim in state court, but that remedy is no longer available to him." *Id.* The petitioner may avoid procedural default only if "there was cause for the default and prejudice resulting from the default," or if he can prove "that a miscarriage of

justice will result from enforcing the procedural default in the petitioner's case." *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).

Halvorsen first raised the issue of the trial court's complicity instruction in the district court. Because he never gave the state courts the opportunity to review or correct any error, the claim is procedurally defaulted. Conceding the default, Halvorsen maintains he can show cause to excuse it: the ineffective assistance of his appellate counsel who failed to allege this claim on direct appeal.

The excuse itself was not presented during Halvorsen's state court collateral review, but for good reason: until 2010—years after Halvorsen's claims finished percolating through the state court system—Kentucky did not recognize general ineffective assistance of appellate counsel claims. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010). Because we have previously permitted district courts to review the merits of these claims to ensure that a recognized federal right is not rendered non-cognizable, *see Boykin v. Webb*, 541 F.3d 638, 647–48 (6th Cir. 2008), we accept Halvorsen's invitation to address it here, examining whether his appellate counsel was constitutionally ineffective.

A successful ineffective assistance of counsel claim requires first, that a defense attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and second, that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* likewise governs claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Thus, Halvorsen must demonstrate that appellate counsel's choice to leave unchallenged the state court's complicity instructions "fell below an objective standard of reasonableness" and, but for the error, there is a reasonable probability that "the result of the proceeding would have

been different." *Strickland*, 466 U.S. at 688, 694. If he fails to prove either prong, his ineffective assistance of appellate counsel claim also fails. *Id.* at 697.

We can resolve this argument by deciding that Halvorsen suffered no prejudice. *See id.*; *see also Hall v. Vasbinder*, 563 F.3d 222, 237 (6th Cir. 2009) (applying *Strickland*'s prejudice prong to a procedural default analysis). Halvorsen was indicted as a principal offender in the Norman, Durrum, and Greene murders under Ky. Rev. Stat. Ann. § 507.020. The indictment alleged that while committing first-degree robbery, Halvorsen intentionally shot each of the three victims with a pistol. At the trial's conclusion, the court instructed the jury to consider both principal and accomplice liability. The jury found Halvorsen guilty of Norman's murder under an accomplice instruction, and of the Durrum and Greene murders under a combination instruction.

An indictment is constructively amended when jury instructions or the presentation of evidence "so modif[ies] essential elements of the offense charged such that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Mize*, 814 F.3d 401, 409 (6th Cir. 2016) (quoting *United States v. Martinez*, 430 F.3d 317, 338 (6th Cir. 2005)). In federal cases, "[c]onstructive amendments are 'per se prejudicial because they infringe on the Fifth Amendment's grand jury guarantee.'" *Id.* (quoting *United States v. Hynes*, 467 F.3d 951, 962 (6th Cir. 2006)). Although a state prisoner petitioning for habeas relief is not protected by the federal guarantee of charge by indictment, he still has a "due process right to be informed of the nature of the accusations against him." *Lucas v. O'Dea*, 179 F.3d 412, 417 (6th Cir. 1999).

To support his argument, Halvorsen principally relies on *Lucas v. O'Dea*. *Lucas*, however, concerns only superficially similar circumstances: while Lucas and two other men were robbing a pawn shop, one of them shot and killed the store's owner. 179 F.3d at 415. A grand jury indicted

Lucas for intentional murder, requiring the government to prove that he shot the store owner. *Id.* But the only witness to the crime was unable to identify which robber fired the fatal shot, and Lucas defended himself by asserting that he did not shoot the victim. *Id.* At the end of trial, the state court broadened the charge and instructed jurors to consider a different crime: wanton murder, a crime indifferent as to who fired the shot. *Id.* On habeas review, this circuit held that Lucas had been "deprived . . . of his Fourteenth Amendment right to notice of the charges against him" because he had been indicted for one crime (intentional murder), and the jury was charged with another (wanton murder). *Id.* at 417.

Not so here. The trial court instructed Halvorsen's jury on complicity, and under Kentucky law, "amending the indictment to include an allegation that the defendant is guilty of the underlying charge by complicity does not constitute charging an additional or different offense." *Commonwealth v. McKenzie*, 214 S.W.3d 306, 307 (Ky. 2007) (citing *Commonwealth v. Caswell*, 614 S.W.2d 253, 254 (Ky. Ct. App. 1981)). Indeed, "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980). "Thus, to convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant." *Parks v. Commonwealth*, 192 S.W.3d 318, 327 (Ky. 2006) (citing Ky. Rev. Stat. § 502.020(1)). Similarly, this circuit has held that it does not violate due process to indict a defendant only as a principal offender of a substantive crime, and then convict him of aiding and abetting its commission. *Hill v. Perini*, 788 F.2d 406, 407 (6th Cir. 1986) (citing *Stone v. Wingo*, 416 F.2d 857 (6th Cir. 1969)).

Because the underlying argument would have failed on the merits, Halvorsen cannot show that appellate counsel's choice not to challenge the state court's complicity instructions prejudiced

him. His ineffective assistance of appellate counsel claim fails, and cannot excuse the procedural default of his claim that the trial court erred by instructing the jury on complicity charges.

2. Ineffective assistance of trial counsel

Alternatively, Halvorsen asserts that because Kentucky law allowed Halvorsen to be tried as both a principal and an accomplice, his trial counsel was ineffective for arguing only that Halvorsen was not the shooter. Halvorsen first raised this issue when he moved to amend his habeas petition in district court four days after the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). He admitted that he had never raised the now procedurally defaulted claim in state court, but claimed that post-conviction counsel was ineffective for failing to do so. The *Martinez* decision, he contended, created a new framework under which this new ineffective assistance of post-conviction counsel claim establishes cause to excuse the default.

In *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) the Supreme Court ruled that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 566 U.S. at 9. *Martinez* modified this holding in certain circumstances: if the first time a defendant can address a claim is at state court collateral review, but his constitutionally ineffective counsel fails to raise it, a federal habeas court can examine the claim under *Martinez*. *Id.*

Although the district court recognized that *Martinez* could theoretically excuse the default, the district court denied Halvorsen's motion, because

> [t]he only barrier faced by Martinez or Halvorsen alike to asserting their ineffective assistance claims was the need to argue for an exception to the *Coleman* rule, an argument Martinez made but Halvorsen did not. The Supreme Court's ultimate decision four years later in *Martinez* was not a condition precedent to making a viable argument for such an exception [to *Coleman*], but only to ensuring its success. Halvorsen chose to forego [sic] this argument three years ago, and he may therefore not make it now, long after the parties have thoroughly briefed their

> substantive claims on the merits as well as related questions regarding the necessity and propriety of permitting discovery and expanding the record with respect to them.

Essentially, the district court determined that Halvorsen bore responsibility for preserving any arguments he wished to pursue. We agree. We find no abuse of discretion in the district court's denial of leave to amend to raise a new claim almost thirty years after Halvorsen was convicted.

In a final attempt to resuscitate this claim, Halvorsen cites *Woolbright v. Crews*, where, applying *Martinez*, a panel of this court recognized that Kentucky prisoners' procedurally defaulted ineffective assistance of trial counsel claims could be excused if they showed that they lacked effective assistance of counsel in initial-review collateral proceedings. 791 F.3d 628, 635–36 (6th Cir. 2015). But *Woolbright* is distinguishable because, like Martinez, Woolbright actually argued his trial counsel's ineffectiveness in his initial habeas petition. *Id.* at 630–632.

Because Halvorsen has not shown caused excusing the procedural default, we do not reach the merits of the underlying claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

B. Prosecutorial Misconduct and Due Process

1. Due Process Issues

Halvorsen maintains that the prosecutor's closing argument during sentencing denied him a fair trial because the prosecutor (1) argued that Halvorsen presented a future danger to the community; (2) suggested that the imposition of the death penalty deters other crime; (3) compared him to notorious murderers; and (4) criticized Halvorsen for exercising his constitutional rights.

The Kentucky Supreme Court reviewed the first three claims on direct appeal and found them meritless. *Halvorsen*, 730 S.W.2d at 925. "Brief portions of the argument were irrelevant," the court explained, "but on the whole, the argument was fair comment on the evidence." *Id.* The court also considered the "overwhelming nature of the evidence against Halvorsen," *id.*, and did

not accept that the prosecutor's argument "could have added much fuel to the fire anyway." *Id.* (quoting *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977). Halvorsen did not raise the fourth claim in state court.

The Supreme Court has said that a conviction cannot stand when a "prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). AEDPA limits our review to correcting decisions contrary to or involving an unreasonable application of federal law as established by Supreme Court precedent. It follows that Sixth Circuit cases cannot "form the basis for habeas relief under AEDPA," *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam), and prove useful in this circumstance only to the extent that they accurately reflect *Darden*'s highly generalized standard. Our deference "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)).

Darden grants state courts significant leeway to evaluate prosecutorial misconduct claims on a case-by-case basis. *Parker*, 567 U.S. at 48. Thus, we grant habeas relief only when misconduct is "so serious that it implicates a petitioner's due process rights." *Ross v. Pineda*, 549 F. App'x 444, 449 (6th Cir. 2013). The misconduct must so clearly violate *Darden* that the state court's failure to identify it was not just erroneous, but "objectively unreasonable." *Williams*, 529 U.S. at 409.

Future dangerousness: At sentencing, the prosecutor asked the jury to consider that a murderer who is sentenced to life in prison may still pose a danger to society. Halvorsen points to the following passage in particular:

> I wonder if the anti-death penalty people have ever really considered—ever really considered the welfare of hundreds and thousands of people who are subjected to the risk of convicted murders. Is the inmate population safe? The young man convicted of burglary or larceny, theft, who goes to the penitentiary, is he safe? What prevents a convicted murderer with a life sentence from getting a shiv and holding it to the kid's neck, the young burglar's neck, and demanding escape? What prevents that?
>
> Well, that's easy to say—the answer, segregation from prison population. Well that's fine, but what about the prison officials, people like George Coons, people who have to handle the murderer with the multiple life sentence? That's a reality. That's in this world. Every second every person who is in this capacity of watching, of being in control, has to have a razor sharp sense of awareness in a penitentiary, because their laxness can be the opportunity, the chance, for the convicted murderer to effect his escape. That's reality. . . . Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is.

The district court decided that the Kentucky Supreme Court's conclusion was not objectively unreasonable, structuring its analysis around a multipart test sanctioned by this circuit in prosecutorial misconduct cases, and other Sixth Circuit precedent. Again, the Supreme Court has sharply critiqued this multipart approach, reminding us that "[t]he highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit." *Parker*, 567 U.S. at 49.

Despite the flaws in its reasoning, the district court's conclusion is meritorious. Halvorsen cites no Supreme Court precedent suggesting that these comments clearly violate *Darden*—likely because none exists. Halvorsen also ignores the context of this passage—one of a handful in the

middle of a thirty-eight-page closing argument—and fails to account for "their effect on the trial as a whole." *Darden*, 477 U.S. at 182.

Further undermining his position, the Supreme Court endorses a jury's consideration of future dangerousness during sentencing. *See Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (noting that a state could constitutionally "enact a system of capital sentencing in which a defendant's future dangerousness is considered"); *California v. Ramos*, 463 U.S. 992, 1005–06 (1983) (because there is no constitutional bar to considering future dangerousness at sentencing, the Court deferred to state's decision to permit juries to consider possibility of governor commuting a life sentence with no possibility of parole). These cases preclude us from determining that the Kentucky Supreme Court acted contrary to clearly established Supreme Court precedent.

Death Penalty as Deterrence: During his closing argument at sentencing, the prosecutor urged the jury to consider the deterrent effect of the death penalty:

> And his bargaining power, the throat of an innocent person whose job it is just to maintain the person. Well, our response to that person in the penitentiary, don't kill him now, Frank, because if you do we're going to give you a life sentence. Is that a deterrent to a person who's been convicted of murder, with a life sentence, multiple murders? Well I suggest to you that the death penalty is a needed, much needed deterrent for the inmate population of our penal institutions.
>
> . . . Well what about the death penalty as a deterrent? Does it actually stand as a threat to the criminal who is out there right now, thinking about an armed robbery of a liquor store or the burglary of somebody's home? Do they kill the eye witness? Do they think about that and thus escape capture because nobody can identify them?
>
> Obviously nothing that occurs in a judgment or verdict will totally affect every citizen, every potential murderer or criminal. The death penalty conviction will not stop future murders in this community. It will not, totally. Won't stop them all. But it most certainly is a valuable and effective deterrent to individuals—to certain individuals—who really believe the death penalty will be enforced by Commonwealth Attorney's offices and juries, the citizens in the community. If they really believe that, then it can be a deterrent.

Although Halvorsen argues that these ruminations on the death penalty as deterrence violated his due process rights, he fails to support his claim with Supreme Court precedent. Citations to a variety of circuit court decisions cannot form the basis of habeas relief, *Parker*, 567 U.S. at 48–49, particularly when they employ the very same test for prosecutorial misconduct that the Supreme Court rejected in *Parker*. *See, e.g.*, *Goff v. Bagley*, 601 F.3d 445, 480 (6th Cir. 2010). Additionally, this circuit found a quite similar general deterrence argument to be proper in *Irick v. Bell*, because as of the time of petitioner's appeal in state supreme court, "the United States Supreme Court had never held that appeals to general deterrence are impermissible in sentencing arguments." 565 F.3d 315, 325 (6th Cir. 2009). Irick exhausted his state court direct appeals in 1988, two years after the Kentucky Supreme Court affirmed Halvorsen's convictions. If no clearly established law forbade references to general deterrence in 1988, we have no reason to disturb the Kentucky Supreme Court's 1986 determination that Halvorsen's entire trial was fundamentally fair despite the prosecutor's arguments that the death penalty generally works to deter crime.

Reference to Notorious Murderers: Next, Halvorsen asserts that he was denied a fair trial because the prosecutor compared him to Richard Speck, James Earl Ray, Charles Manson, and Gary Gilmore during sentencing.

> Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is. In the last few years, we saw Martin Luther King, the greatest black leader who ever lived, gunned down; the person caught, arrested [unintelligible] convicted, sentenced and placed in the extremely tight security of the Tennessee maximum prison in Brushy Mountains, and he escaped, and thank God he broke his ankle when he jumped down and he was gone for three days but they finally caught him.
>
> . . . If the belief is that you'll never get the death penalty, then the value of the life, of the potential innocent victim eye witness, goes way down. The question of deterrence is easily resolved. As to the future threat of the convicted murderer to society, Gary Gilmore will never kill another college student, ever. Can the Illinois

> authorities guarantee that for Richard Speck? Can California authorities guarantee that about Charles Manson?

The district court rejected this argument for two reasons. First, Halvorsen supports his claim with circuit court cases, which cannot constitute "clearly established" federal law under AEDPA. Second, the prosecutor never compared Halvorsen to any member of this cast of characters—the prosecutor just listed a few notorious murderers, some of whom were not sentenced to death, and suggested that they could still commit crime.

Darden sets a high standard for defendants asserting prosecutorial misconduct. Prosecutors in *Darden* compared the defendant to an "animal" who "shouldn't be out of his cell unless he has a leash on him," and urged the jury to impose death to "guarantee" Darden would not commit "a future similar act." 477 U.S. at 180. Halvorsen does not even clear that bar—much less the extra height imposed by AEDPA. The contested statements are part of a broader commentary on deterrence, during which the prosecutor never referred to Halvorsen, much less directly compared Halvorsen to any of the murderers. Isolated references to notorious killers, while undesirable, did not disturb the ultimate fairness of the trial as a whole, and do not provide grounds under AEDPA for granting habeas relief.

Constitutional rights: Finally, Halvorsen argues that the prosecutor improperly suggested that he exercised constitutional rights that the victims were denied:

> As far as mercy is concerned, it's kind of ironic. For three weeks you observed first hand the criminal justice system in this Commonwealth. Some of you didn't know anything about the criminal justice system, some of you did. But you have observed—if you're not a student of the constitution of the United States—you've observed safeguards, every safeguard accorded to these defendants by the constitution. You've seen their rights protected, protections of a person charged with a crime, their right to be represented by an attorney . . . . You've seen their right to cross examine and confront witnesses who testified against them. That's the constitution. And you—you've seen their right exercised to be able to pick a jury of their peers. If they don't want certain men, strike-em; if they don't want

> certain women, strike 'em. . . . They have a right to have a judge preside over this trial and insure [sic] that it's conducted fairly. Some countries you don't have that. You're just guilty and you go to jail. And you're presumed innocent. You're not innocent but you're presumed innocent on July 5th when you start this trial, and you're presumed innocent until it's proven against you. A right that is very rare in this world.
>
> Well these murderers enjoyed these rights. They enjoyed every one of them during this trial. What rights did their victims enjoy? Did they have attorneys? Did their victims have an impartial jury to decide their fate []? Did they have a judge to insure [sic] that they had a fair trial? Now I'll tell you something. There sits the judge and the jury and the executioner of three people.
>
> These defendants will ask for mercy through their lawyer and when they do, ask how much mercy they gave their victims.

This claim was not raised in state court and is procedurally defaulted. To excuse the default, Halvorsen again argues that his appellate counsel was ineffective for failing to raise it. As already discussed, an ineffective assistance of appellate counsel claim will succeed only if "counsel's representation fell below an objective standard of reasonableness" and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 668, 694. At bottom, "appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

The district court considered the argument insubstantial. The prosecutor's questions could not be read as criticizing Halvorsen's exercise of his constitutional rights, and therefore had not infected the trial with unfairness. It follows that appellate counsel could not have been ineffective for choosing not to broach the issue.

We agree. Kentucky law permits prosecutors "reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly." *Murphy v. Commonwealth*, 509 S.W.3d 34,

52 (Ky. 2017) (quoting *Lynem v. Commonwealth*, 565 S.W.2d 141, 145 (Ky. 1978)). Prosecutors may say that the defendant "had been given a lot of constitutional rights" during trial while "the victim had not been extended similar rights" as long as, on general review, closing arguments are not "prejudicial or sufficient to affect the outcome of the trial or the penalty." *Alley v. Commonwealth*, 160 S.W.3d 736, 742 (Ky. 2005). And in this case, the Kentucky Supreme Court examined the closing arguments and found no merit to Halvorsen's complaint of prosecutorial misconduct. "Brief portions of the argument were irrelevant, but on the whole the argument was fair comment on the evidence" and any irrelevant portions were outweighed by the "overwhelming nature of the evidence against Halvorsen." 730 S.W.2d at 925.

Appellate counsel reasonably chose not to make an argument unsupported by law, and Halvorsen did not prove that he was prejudiced by this failure when these comments were but a small fraction of closing argument. The procedural default stands.

2. Eighth Amendment Issues

Halvorsen contends that during closing arguments at sentencing, the prosecutor asked the jury not to consider mitigation evidence, thereby denying him a fair hearing under the Eighth Amendment. Specifically, he points to three sentences nestled within the prosecutor's response to Halvorsen's defense that he was too intoxicated to have deliberately murdered the victims.

> Do we want to say to this community that with a verdict of a life sentence that it's less serious because they were on drugs? I don't think so. Do we want to establish a standard with a verdict that taking the lives of three human beings is less serious because a person consumes drugs and alcohol, but could still remember everything they did?

Although Halvorsen failed to raise this claim in state court and it cannot now be presented there, *McDaniel v. Commonwealth*, 495 S.W.3d 115, 121–22 (Ky. 2016), he proposes that he can overcome his procedural default by asserting that his appellate counsel was ineffective. Again,

applying *Strickland*, a defendant will generally overcome the presumption of effective assistance of counsel only by showing that "ignored issues are clearly stronger than those presented." *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate advocacy is not a "kitchen-sink" activity; it demands selectivity of argument. *See Jones v. Barnes*, 463 U.S. 745, 752 (1983).

"It is beyond dispute that in a capital case, 'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Mills v. Maryland*, 486 U.S. 367, 374 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). True, particularly egregious prosecutorial misconduct can "'constrain the manner in which the jury was able to give effect' to mitigating evidence." *DePew v. Anderson*, 311 F.3d 742, 748 (6th Cir. 2002) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998)). But Halvorsen does not establish that the prosecutor's remarks did anything of the sort, much less explain how raising this issue as an Eighth Amendment violation rather than a due process one would have resulted in the Kentucky Supreme Court's finding that any remarks were not "[b]rief" or mostly "irrelevant." *Halvorsen*, 730 S.W.2d at 925. He cites no cases to vindicate his position, omits critical phrases when quoting the prosecutor's closing argument in his brief, and ignores the context in which they were delivered—namely, a methodical explanation of how preposterous the prosecution found Halvorsen's alleged inability to appreciate "the criminality of [his] acts" or "conform his conduct to the law because of intoxication." The prosecutor explained that Halvorsen "didn't miss any shots" when murdering the victims, deliberately "gathered up the shells" to avoid being caught, removed other traces of evidence from the scene of the crime, and waited until dark to dispose of the corpses to avoid further incrimination. In no way was the prosecutor instructing

the jurors to wholly ignore the mitigation evidence—he was just asking them to examine it critically.

We agree with the district court: Halvorsen does not show that, but for counsel's decision to omit the claim, he would have succeeded on appeal, and we therefore cannot excuse the procedural default of his Eighth Amendment claims. *See Allen v. Harry*, 497 F. App'x 473, 481–82 (6th Cir. 2012) (requiring that appellant demonstrate the substantial likelihood of a different result had counsel acted differently before excusing a procedural default).

C. Ineffective Assistance of Trial Counsel

Halvorsen argues that his trial counsel was constitutionally ineffective for failing to present sufficient mitigation evidence during the penalty phase. Specifically, Halvorsen argues that his counsel did not present evidence of brain damage caused by years of drug abuse and exposure to neurotoxins. Evidence of brain damage, Halvorsen contends, is the most forcefully sympathetic mitigation evidence, and should never be omitted in a capital case.

On post-conviction review in state court, Halvorsen claimed ineffective assistance of trial counsel, broadly asserting that his "[c]ounsel failed to adequately investigate, prepare and present relevant mitigating evidence at the penalty phase." On appeal, he also averred that mitigation evidence should have been presented at the guilt phase and argued anew at the penalty phase of the trial. The Kentucky Supreme Court disposed of the issue under *Strickland*'s prejudice prong, finding it unlikely that the additional mitigation evidence Halvorsen advanced would have changed the result because the proposed evidence was cumulative, contraindicated by reasonable strategy to keep Halvorsen from testifying, or non-prejudicial. *Halvorsen*, 258 S.W.3d at 5–7.

The standards created by *Strickland* and AEDPA are each highly deferential, and, taken together, "review is 'doubly' so." *Richter*, 562 U.S. at 105 (quoting *Knowles v. Mirzayance*, 556

U.S. 111, 123 (2009)). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102.

Halvorsen asserts that the jury failed to hear compelling mitigating evidence during his original trial: namely, Halvorsen suffered from organic brain damage because of years of persistent drug abuse and exposure to neurotoxins at his workplace. He argues that his trial counsel spoke only to Halvorsen and his parents, did not obtain a mental health or neurological evaluation for anything other than Halvorsen's competency to stand trial, and failed to investigate the "red flags" of chronic drug abuse, paranoia, sleep deprivation, and memory loss in that competency report.

In evaluating Halvorsen's post-conviction motion on appeal, the Kentucky Supreme Court determined that Halvorsen "failed to show that any omitted investigation would have probably changed the result." *Halvorsen*, 258 S.W.3d at 3–4. The court reviewed the "abundance of testimony [that] was offered at the RCr 11.42 hearing regarding [Halvorsen's] drug use" but determined that it was "cumulative of testimony that was presented at trial." *Id.* at 6. Specifically, the court noted that numerous witnesses testified to Halvorsen's depression after his divorce, increased drug usage, and sudden unemployment, and that trial counsel introduced medical and employment records. *Id.* at 4–5. The affidavits from specialists that Halvorsen introduced during post-conviction proceedings, while helpful, were "largely inconclusive" and would not have significantly moved the needle. *Id.* at 8. Dr. E. Don Nelson, a pharmacologist, testified that Halvorsen's long-term drug history and usage right before the murders would have impaired his judgment, but made no specific conclusions about any effects Halvorsen suffered from exposure to toxic solvents at his workplace. *Id.* And clinical psychologist Dr. Eric Y. Drogin broadly

suggested that there was some evidence of drug-induced neuropsychological impairment, but more evaluation and testing was warranted. *Id.*

It is almost disingenuous for Halvorsen to contend that his jury heard nothing of his drug usage. The same jury sat in judgment for the guilt and penalty phases of the trial and considered "all evidence introduced in the guilt phase" during sentencing. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998) (citing *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988)). And a number of witnesses firmly established the narrative of Halvorsen's copious drug usage at trial. Halvorsen's codefendant, Mitchell Willoughby, testified that Halvorsen had ingested a variety of opiates in the days leading up to the murders. A friend, Jeff Luce, testified that he saw Halvorsen the day of the murder, and he "seemed kind of spacy, you know, like he wasn't comprehending very quick." The trial court even instructed the jury to consider Halvorsen's intoxication during deliberation.

At the penalty phase, trial counsel introduced additional evidence of Halvorsen's substance abuse through several witnesses. His father explored Halvorsen's history with drugs, beginning in high school and worsening with time after his divorce. His mother testified that drugs had affected his personality, and chronicled failed attempts at therapy and rehabilitation. Halvorsen himself testified that he began using marijuana at thirteen, graduating to LSD and amphetamines at fifteen or sixteen. He characterized his drug usage as a crutch for his spiraling depression, and, unable to kick the habit in the months leading up to the murders, he crashed a company truck, lost the job he had held for nine years, and was denied unemployment benefits. Halvorsen committed the murders a month later while binging on drugs and alcohol. He described the crime as sudden, "spur of the moment," and unpremeditated. Counsel also called Dr. David Atcher, an assistant

professor of psychiatry at the University of Kentucky trained in drug abuse, to discuss the intoxication and withdrawal effects of all the drugs Halvorsen and Willoughby were taking.

Similarly, Halvorsen's argument that counsel improperly failed to investigate red flags in Halvorsen's competency report lacks merit. The author of the report, Dr. C. I. Schwartz, a psychiatrist familiar with Halvorsen from his prior rehabilitation treatment, found no evidence of any cognitive or perceptual dysfunction, and deemed Halvorsen competent to stand trial. After speaking with Halvorsen, trial counsel also did not believe that Halvorsen was suffering from any mental deficiencies and saw no reason to retain a mental health expert. Instead, he focused on other possible defenses.

During post-conviction proceedings, Dr. Nelson submitted a three-page report, briefly stating that Halvorsen was genetically predisposed to chemical dependency, and that he was involuntarily intoxicated and operating with impaired judgment during the shooting. He also noted that Halvorsen was exposed to industrial solvents at his factory job, and that those solvents could further impair judgment and mental functioning when in the body. Nelson did not, however, judge whether the solvents could still have been circulating in Halvorsen's system two weeks after he was fired. "In fact," the Kentucky Supreme Court concluded, "he made no specific findings in relation to [Halvorsen]." *Halvorsen*, 258 S.W.3d at 8. Dr. Drogin also prepared a psychological evaluation, concluding that Halvorsen's chronic substance abuse had impaired elements of Halvorsen's brain function and memory. The Kentucky Supreme Court failed to see how either expert's "largely inconclusive" findings may have changed the result at sentencing. *Id.*

Halvorsen also seeks to bolster his ineffective assistance claim by contending that his trial counsel admitted having "missed something" during a post-conviction evidentiary hearing. Even

if this did not substantively misrepresent his counsel's testimony—which it does[2]—*Strickland* calls for "an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110. An adverse verdict at trial may lead "even the most experienced counsel" to "magnify their own responsibility for an unfavorable outcome" and perversely incentivize falling on the sword at the habeas stage to derail a death sentence. *Id.*

Against this backdrop, Halvorsen theorizes that additional evidence of his drug abuse, positive commentary from coworkers and friends, and further examination by forensic psychologists, neurologists, and pharmacologists would have drastically altered the narrative at sentencing. But AEDPA forbids this kind of Monday morning quarterbacking, for "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 88. And Supreme Court precedent does not require such a deep dive into every possible nook and cranny of a defendant's background for the best possible mitigation evidence—the baseline for effective assistance is far lower. For example, in *Wiggins v. Smith*, the Supreme Court decided that counsel did not exercise reasonable professional judgment when he failed to investigate a defendant's family or social history beyond reviewing the presentence investigation report and Department of Social Services records even after learning that the defendant's youth was miserable, he grew up with an alcoholic mother who often abandoned him for days without

[2] Halvorsen states that trial counsel "admitted that individuals who did drugs with Halvorsen should have been interviewed." There is no basis in the record for such an assertion. Trial counsel testified that "as a policy" he did not believe that interviewing drug users was productive, and, while there are exceptions to every rule, in Halvorsen's case specifically he didn't think it helpful. Halvorsen also asserts that trial counsel "admitted that he might have missed something in Halvorsen's competency evaluation." This too mischaracterizes his remarks. Trial counsel explained that he read the competency report and did not find a basis for hiring other psychiatric experts to evaluate Halvorsen: "I did not see where there was something else there. I maybe just overlooked it. I didn't see anything else." He also testified that he spoke to Dr. Schwartz, the author of the competency evaluation, about the impact that Halvorsen's drug abuse may have had on his "ability to function" and "know what [he] was doing."

food, was shuttled between foster homes as a child, suffered emotional difficulties in foster-care, and was frequently absent from school for long periods of time. 539 U.S. 510, 524–25 (2003). And in *Porter v. McCollum*, the Supreme Court determined that counsel was deficient when he presented no mitigation evidence about the defendant's mental health, personal history, family background, or military service, when simply consulting family members or any records at all would have revealed that defendant was a decorated Korean War veteran with severe post-traumatic stress, had an abusive childhood, and suffered from brain damage and alcohol abuse. 558 U.S. 30, 32–37 (2009) (per curiam).

Trial counsel did much more than the attorneys in *Wiggins* and *Porter*, and there is certainly a reasonable argument that counsel satisfied *Strickland*. Thus, out of the deference to state court decisions mandated by AEDPA, we will not disturb the Kentucky Supreme Court's denial of relief on this claim.

D. Juror Misconduct

Halvorsen asserts that a juror named Walter Garlington incorporated a Bible in jury deliberations during both the guilt and penalty phases of the trial. This conduct, he argues, violated his Sixth Amendment right to an impartial jury, and his Eighth Amendment right to an individualized sentencing determination. Halvorsen relies on an affidavit from an investigator who interviewed Garlington in November 2003. *Willoughby*, 2007 WL 2404461, at *1.[3]

[3] Here too, counsel misrepresents the record. The investigator claimed that Garlington "said while serving as a juror in Leif Halvorsen's case, he had his Bible with him all the time, even in the room where the jury deliberated Leif Halvorsen's convictions and sentences." Garlington also allegedly said that he read passages from the Bible to comfort the jury while they were sequestered and away from their families. Nothing in the affidavit suggests that Garlington admitted using the Bible to determine Halvorsen's guilt or sentence.

Halvorsen first raised this issue in 2004 through a Kentucky Rule of Civil Procedure 60.02(f) motion. *Id.* The state supreme court identified two problems with this approach. First, Rule 60.02(f) requires that a petitioner seek relief within a "reasonable time" of judgment, and Halvorsen's motion was filed "over twenty years after the trial" itself, and nearly "twenty years" after the Kentucky Supreme Court's decision on direct appeal. *Id.* at *2.

Second, and perhaps more important, Rule 60.02 was not the appropriate vehicle for raising this claim. In Kentucky, Rule 60.02 acts as a substitute for the common law writ of coram nobis—"not a separate avenue of appeal to be pursued in addition to other remedies," but "available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). A criminal defendant must first "avail himself of [Criminal Procedure Rule] 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *Id.* Rule 11.42 governs collateral attacks on convictions. Ky. R. Crim. P. 11.42. Halvorsen interviewed two jurors in 1985 and could have learned of any alleged jury misconduct then. *Willoughby*, 2007 WL 2404461, at *1. Since he did not file his Rule 11.42 motion until 1988, he had adequate time to include these allegations in his original collateral challenge. *See id.* at *3.

Halvorsen raised this claim again in district court on habeas corpus review. The court determined that it was procedurally defaulted and denied Halvorsen's request for an evidentiary hearing.

AEDPA requires federal courts to give their state counterparts a "full and fair" opportunity to resolve any alleged constitutional violations of state prisoners' rights. *Hand v. Houk*, 871 F.3d 390 (6th Cir. 2017) (quoting *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990)). Thus, if a claim is not fairly presented to state courts because defendant violated a state procedural rule,

the claim is procedurally defaulted and will be reviewed only upon a showing of cause and prejudice. *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1068 (6th Cir. 2015) (citing *Coleman*, 501 U.S. at 729, 750). "A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir.2010) (en banc).

"A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). To establish cause, the prisoner must point to an "objective factor external to the defense" that "cannot fairly be attributed" to the prisoner, and "impeded counsel's efforts to comply with the State's procedural rule." *Id*. (first quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986); then quoting *Coleman*, 501 U.S. at 753). Under this standard, a defendant could demonstrate cause by "showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray*, 477 U.S. at 488.

Halvorsen first alleges that the claim is not defaulted, maintaining that he fully complied with Kentucky procedure because a defendant cannot raise a juror misconduct claim in a Rule 11.42 motion. He cites two cases for that theory—*Thompson v. Parker*, No. 5:11-CV-31, 2012 WL 1567378, at *3 (W.D. Ky. May 2, 2012), and *Bowling v. Commonwealth*, 168 S.W.3d 2, 9–10 (Ky. 2004). But both cases advance exactly the opposite proposition: defendants claiming that

jurors considered improper information during sentencing should raise that claim in a Rule 11.42 motion. *See also Thompson v. Parker*, 867 F.3d 641, 646 (6th Cir. 2017). And Kentucky courts routinely deny review of juror misconduct claims incorrectly brought under Civil Rule 60.02 rather than Criminal Rule 11.42. *See, e.g.*, *Woodall v. Commonwealth*, No. 2004-SC-0931-MR, 2005 WL 2674989, at *2 (Ky. Oct. 20, 2005); *Simpson v. Commonwealth*, No. 2003-CA-002279-MR, 2006 WL 1560734, at *3 (Ky. Ct. App. June 9, 2006); *Turner v. Commonwealth*, No. 2004-CA-000261-MR, 2004 WL 2563668, at *2 (Ky. Ct. App. Nov. 12, 2004).

Alternatively, to overcome any procedural bar, Halvorsen argues that neither Garlington's voir dire nor his courtroom behavior provided Halvorsen with any reason to suspect misconduct. The two 1985 juror interviews revealed no impropriety, and no further juror interviews were permitted until 2001, when the Kentucky Supreme Court decided *Cape Publications, Inc. v. Braden*, 39 S.W.3d 823 (Ky. 2001), allowing defendants to interview jurors without first showing good cause.

Halvorsen had access to all the facts he needed to lodge a juror misconduct claim well before 2003. Garlington was clear about his religious convictions during voir dire, explaining that he was a pastor and quoting a biblical passage in response to questions about his views on the death penalty. At the end of the trial, with the court's permission, he led the courtroom in prayer, thanking God for "coming into the midst and guiding us all." In 1985, the trial court allowed Halvorsen to interview any jurors willing to discuss their experience. *Willoughby*, 2007 WL 2404461, at *2. Two agreed to an interview. *Id.* As the district court appropriately concluded, Halvorsen's failure to discover any evidence of juror misconduct at this time was not an "objective factor external to [the defense]."

Halvorsen argues that under *Williams v. Taylor*, a juror's refusal to answer questions post-trial establishes cause for his procedural default. This is incorrect. In *Williams*, a juror lied about not knowing a witness (her ex-husband) and the prosecutor (her divorce attorney) during voir dire. 529 U.S. at 440–41. Unlike in this case, where the trial transcript is rife with evidence of Garlington referencing religion in the courtroom, the record in *Williams* contained "no evidence which would have put a reasonable attorney on notice" of any of these relationships. *Id.* at 442. It was not until habeas counsel began interviewing the jury that petitioner discovered the truth. *Id.* at 443.

Similarly, Halvorsen's suggestion that *Cape Publications* eliminated Kentucky's requirement that parties show good cause before interviewing jurors is meritless. That case said no such thing—it explained that unlike parties, news media may interview jurors without showing good cause. *Cape Publ'ns*, 39 S.W.3d at 826. *See also In re Bowling*, No. 2004-SC-1000-MR, 2005 WL 924323, at *3 (Ky. Apr. 21, 2005) ("*Cape Publications, supra,* was simply a freedom of the press decision and does not abrogate RFCC 32 or the authority of the circuit court to enforce that rule.")

Because Halvorsen's claim is procedurally defaulted and he has not demonstrated cause to excuse the default, we need not reach the merits of the underlying claim of juror misconduct.

E. Constitutionality of State Proportionality Review

Halvorsen argues that the Kentucky Supreme Court's proportionality review violates the Eighth Amendment and denied him due process because it (1) did not consider cases where the death penalty was not returned, and (2) considered cases predating *Furman v. Georgia*, 408 U.S. 238 (1972), in which the death sentences were presumptively excessive. *See McCleskey v. Kemp*,

481 U.S. 279, 301 (1987) (noting that before *Furman*, "the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive").

We disagree on both fronts. First, this circuit decided that the Kentucky Supreme Court need not compare the petitioner's case to others in which the death penalty was not imposed. *Wheeler v. Simpson*, 852 F.3d 509, 520–21 (6th Cir. 2017). And second, the Eighth Amendment does not require proportionality review in capital cases. *Pulley v. Harris*, 465 U.S. 37, 43–46, 50–51 (1984). Inasmuch as Halvorsen alleges that Kentucky's proportionality-review statute creates a liberty interest protected by due process, that interest merely requires Kentucky to follow its own statute—which it did. *See Halvorsen*, 730 S.W.2d at 928; *Thompson*, 867 F.3d at 653. "[W]hen it comes to a petitioner's liberty interest in state-created statutory rights, absent some other federally recognized liberty interest, 'there is no violation of due process as long as Kentucky follows its procedures.'" *Id.* (quoting *Bowling v. Parker*, 344 F.3d 487, 522 (6th Cir. 2003)).

IV. CONCLUSION

For these reasons, we AFFIRM the district court's denial of habeas relief.