APPENDIX

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Bowling v. White, No. 15-6318 (6th Cir. June 8, 2017)-("in custody" split decision)

NOT RECOMMENDED FOR PUBLICATION
File Name: 17a0320n.06

No. 15-6318

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONNIE BOWLING,

Petitioner-Appellant,

v.

RANDY WHITE, WARDEN,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: CLAY, GIBBONS, and STRANCH, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. In 1989, Ronnie Lee Bowling was taken into custody on charges of murder, attempted murder, burglary, and robbery. In 1992, he was convicted of the murder, burglary, and robbery charges in Laurel County, Kentucky, and was sentenced to death plus eighty years' imprisonment. Four years later, he was convicted of the attempted murder charge in Rockcastle County, Kentucky, and was sentenced to twenty years' imprisonment, to run concurrently with his Laurel County sentences. In September 2012, after exhausting available state-court relief, Bowling filed a petition for a writ of *habeas corpus* in federal court under 28 U.S.C. § 2254(a), alleging numerous constitutional violations in the Rockcastle County proceedings. Finding that Bowling's twenty-year Rockcastle County sentence began in 1989, the district court held that it lacked jurisdiction to consider Bowling's petition because he was no longer "in custody" on this sentence when he filed his petition in

September 2012. We issued a certificate of appealability on the following question: whether Bowling was "in custody" under § 2254(a) at the time he filed his *habeas* petition in 2012, including whether the second exception under *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 405–06 (2001), applies to this case. For the reasons stated here, we affirm.

I.

On January 20, 1989, Ronald Smith was shot and killed while working alone at a gas station in Laurel County, Kentucky. Approximately one month later, on February 22, Marvin Hensley was shot and killed while working alone at a different Laurel County gas station. No suspects emerged until a similar crime occurred three days later at a gas station in nearby Rockcastle County, Kentucky. On February 25, 1989, Ronnie Lee Bowling entered a Rockcastle County gas station owned by Ricky Smith and began asking Smith about possible employment. After a short conversation, Bowling opened fire on Smith, who returned fire in self-defense, striking Bowling twice. After Bowling fled the gas station in his vehicle, Smith notified the police. Following a short pursuit, Bowling was arrested and taken into custody. Bowling was indicted for the Laurel County murders on March 17, 1989, and was indicted for the attempted murder of Smith in Rockcastle County on April 28, 1989. Bowling did not post bond in either case.

In late 1992, Bowling was tried and convicted on the Laurel County indictment for two counts of capital murder, two counts of first-degree burglary, and two counts of first-degree robbery. He was sentenced to death plus four consecutive twenty-year sentences (the "Laurel County sentences"). He was awarded 1,378 days of pre-trial custody credit, relating back to his February 25, 1989 arrest. Bowling's Laurel County conviction and sentences were upheld on direct appeal, and his attempts at state post-conviction relief were unsuccessful. He filed a

petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 in the Eastern District of Kentucky on January 15, 2003, which was denied. His appeal of that decision is currently pending before a separate panel of this court.

Bowling was tried on the Rockcastle County indictment on February 27–28, 1996. He was convicted of attempted murder and sentenced to twenty years' imprisonment (the "Rockcastle sentence" or the "Rockcastle conviction"). Although Bowling alleges that the sentencing judge orally ordered the sentence to run consecutive to the earlier Laurel County sentences, the written sentencing order did not specify whether the sentence was to run concurrently or consecutively. Pursuant to Kentucky law, the Rockcastle sentence was therefore required to run concurrently with the Laurel County sentences. *See* Ky. Rev. Stat. (KRS) § 532.110(2). The sentencing judge did indicate in his written order, however, that Bowling was not entitled to any pre-trial custody credit towards his Rockcastle sentence.

Bowling unsuccessfully pursued relief on his Rockcastle conviction and sentence in state court. On September 6, 2012, Bowling filed a § 2254 *habeas* petition in the Eastern District of Kentucky, asserting numerous claims for relief. The matter was referred to a magistrate judge, who concluded that the sentencing judge had erred in denying Bowling pre-trial custody credit under Kentucky law. The magistrate found that Bowling was "entitled to credit dating back to February 25, 1989," on his Rockcastle sentence and had, in fact, been awarded such credit by the Kentucky Department of Corrections (KDOC). DE 67, Page ID 1318–29. The magistrate thus recommended that the petition be dismissed on jurisdictional grounds—namely, that Bowling was not "in custody" under § 2254 because his twenty-year Rockcastle sentence had fully expired by the time he filed his petition in 2012.

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In assessing the magistrate's report and recommendation, the district court agreed that the sentencing court had erred in denying Bowling pre-trial custody credit on his Rockcastle sentence, but questioned whether KDOC had the legal authority to correct such errors by awarding Bowling the missing credit. Accordingly, the district court certified two questions to the Kentucky Supreme Court: (1) whether, legally, KDOC had authority to correct the sentencing court's failure to award jail-time credit; and (2) whether, factually, Bowling's Rockcastle sentence had expired by the time he filed his *habeas* petition in 2012.

The Kentucky Supreme Court accepted certification of the first question but expressly declined to consider the second question. Agreeing in dicta that Bowling was entitled, "as a matter of law," to 1,378 days of pre-trial custody credit on his Rockcastle sentence, the Kentucky Supreme Court held that KDOC not only had the authority to award an inmate pre-trial custody credit to which he was entitled, but was statutorily required to do so under KRS § 532.120(3) regardless of whether the sentencing court declined to award such credit. *Bowling v. White*, 480 S.W.3d 911, 917–18 (Ky. 2015).

With that answer in hand, the district court dismissed Bowling's *habeas* petition for lack of jurisdiction. Finding that KDOC had awarded Bowling the pre-trial custody credit to which he was entitled, the district court concluded that Bowling's Rockcastle sentence began in 1989 and expired in 2009. Accordingly, the district court held that Bowling was no longer "in custody" on the Rockcastle conviction when his petition was filed in September 2012. This appeal followed.

II.

Whether Bowling was "in custody" at the time he filed his § 2254 *habeas* petition is a jurisdictional question we review *de novo*. *See Steverson v. Summers*, 258 F.3d 520, 522 (6th Cir. 2001).

III.

The district court had jurisdiction to entertain Bowling's § 2254 *habeas* petition only if he was "in custody" on his Rockcastle conviction at the time he filed his petition in September 2012. *See* 28 U.S.C. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989). Whether Bowling was "in custody" on his Rockcastle conviction requires us to answer two questions. First, when did Bowling's Rockcastle sentence begin? Second, if Bowling's Rockcastle sentence began in 1989, what is the effect, for *habeas* purposes, of KRS § 532.120(1), which provides that the maximum terms of concurrent sentences in Kentucky "merge in" and are satisfied only by discharge of the longest term? For the reasons articulated here, we find that Bowling's Rockcastle sentence began in 1989 and that § 532.120(1) has no effect on whether Bowling was "in custody" within the meaning of § 2254. Accordingly, because Bowling was no longer "in custody" on his Rockcastle conviction when he filed his petition in September 2012, we affirm the district court's dismissal for lack of jurisdiction.

A.

Under Kentucky law, Bowling was entitled to pre-trial custody credit on his Rockcastle sentence dating back to February 25, 1989, and was, in fact, awarded such credit by KDOC. At the time Bowling was sentenced on his Rockcastle conviction, KRS § 532.120(3) provided:

> Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the

> commencement of the sentence shall be considered for all purposes as time served in prison.

(West 1997).[1] Despite this seemingly clear mandate, the sentencing court awarded Bowling "0 days" of pre-trial custody credit on his Rockcastle sentence. DE 13-8, Page ID 198. The district court, finding that the sentencing court had erred, nonetheless concluded that KDOC had corrected the sentencing court's mistake and had awarded Bowling 1,378 days of pre-trial custody credit dating back to 1989. Bowling disagrees with both findings, arguing that the sentencing court properly denied him any pre-trial custody credit on his Rockcastle sentence and further that KDOC did not "fix" any supposed error by the sentencing court. To support his first point, Bowling cites various KDOC policies concerning the calculation of custody time credit. On his second point, Bowling relies on documentary evidence, which allegedly demonstrates that KDOC did not award him any pre-trial custody credit on his Rockcastle sentence. Each argument falls short.

Bowling's reliance on KDOC policies to support his argument that he was entitled to pre-trial custody credit on only his Laurel County sentences ignores the contrary, and controlling, requirements imposed by Kentucky statute. True, KDOC Policy 28-01-08(II)(A)(2) provides: "Where multiple felony indictments are involved, any applicable credit shall be applied to the indictment which is sentenced first." And § 28-01-08(II)(A)(6) further states: "If an offender is being sentenced on more than one felony indictment at the same time, custody time credit shall be calculated separately for each indictment . . . . If those felony detainments overlap, one indictment shall receive credit while the other indictment shall have fewer or zero (0) days credit." But these policies directly conflict with § 532.120(3), which, at the time Bowling was convicted, explicitly required that "[t]ime spent in custody prior to the commencement of a

[1] KRS § 532.120(3) was amended in 2011, replacing "by the court imposing the sentence" with "by the Department of Corrections."

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sentence as a result of the charge that culminated in the sentence *shall* be credited by the court imposing sentence." KRS § 532.120(3) (West 1997) (emphasis added). Thus, the Rockcastle sentencing court (and later KDOC under the amended statute) had no discretion to deny Bowling pre-trial custody credit for the time he spent in custody as a result of the Rockcastle attempted-murder charge. *See Bartrug v. Commonwealth*, 582 S.W.2d 61, 63 (Ky. Ct. App. 1979) ("Based upon the mandatory language of [§ 532.120(3)], the word 'shall' precludes any discretion on the part of the trial court in crediting time for preconviction custody.").

This interpretation of § 532.120(3) is consistent with the Kentucky Supreme Court's understanding of the statute. In answering the district court's certified question, the Kentucky Supreme Court noted, albeit in dicta, that "Bowling was entitled, as a matter of law, to the custody credit that he now wishes to decline." *Bowling*, 480 S.W.3d at 917. Although we are not bound by this statement, it is certainly persuasive. Moreover, even KDOC's policies contemplate this result under § 532.120(3) as it relates to concurrent sentences. *See* CPP 28-01-08(II)(A)(8) ("Since a misdemeanor and felony sentence run concurrently by statute, *overlapping credit* may be calculated." (emphasis added)). Accordingly, because Bowling was first taken into custody pursuant to the Rockcastle charge on February 25, 1989, he was entitled to 1,378 days of pre-trial custody credit on his Rockcastle sentence under § 532.120(3). To the extent KDOC's policies deny Bowling such credit, they are inconsistent with Kentucky statutory law and are thus void. *See* KRS § 13A.120(2)(i); *Franklin v. Nat. Res. & Envtl. Prot. Cabinet*, 799 S.W.2d 1, 3 (Ky. 1990).

That does not necessarily end the inquiry, however. Unlike the district court, we do not believe it is clear, at least from the record, that KDOC corrected the sentencing court's mistake. Some evidence suggests KDOC awarded Bowling pre-trial custody credit on his Rockcastle

sentence. In a March 2012 letter, for example, a KDOC official informed Bowling that his Rockcastle sentence had been "served out" as of that date, which predated his September 2012 filing. DE 1-1, Page ID 99. But other evidence is less clear. Bowling's Resident Record Card, for instance, attributes 1,378 days of jail credit to only his Laurel County burglary conviction and not explicitly to his Rockcastle conviction. Yet, it also lists his total time served as "22y 3m 13d" without differentiating between his Laurel County and Rockcastle sentences, suggesting that Bowling began serving both in 1989.[2] DE 13-10, Page ID 205.

On balance, however, we conclude that KDOC awarded Bowling pre-trial custody credit on his Rockcastle sentence. Although the record evidence is ambiguous as to this fact, the Warden's repeated concession, throughout this litigation, that Bowling was no longer "in custody" on his Rockcastle sentence at the time he filed his § 2254 petition is enough to satisfy us that such credit was awarded. This court, of course, must independently determine its own jurisdiction. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). But the Warden is the Kentucky state officer that would have custody of Bowling if he was still serving his Rockcastle sentence, and the Warden's assertion that he did not have such custody in September 2012 carries great weight. This is especially true where his assertion is consistent with what § 532.120(3) requires: an award of pre-trial custody credit for time spent in custody on a charge that culminates in a sentence. Accordingly, we find that Bowling was credited with 1,378 days

[2] Bowling's strongest piece of evidence is an April 19, 2016 letter from a KDOC official indicating that, pursuant to KDOC policies, Bowling was awarded pre-trial custody credit on only his Laurel County sentences because it was the indictment sentenced first. But this letter was not in the record before the district court, and we decline to supplement the record to include it. In any event, this letter, at best, furthers the ambiguity in the record and is not dispositive of the outcome here.

of pre-trial custody credit on his Rockcastle sentence, resulting in that sentence having expired in 2009 and rendering him no longer "in custody" at the time he filed his September 2012 petition.[3]

B.

We also find that KRS § 532.120(1) has no effect on the § 2254 "in custody" determination. This provision provides that, "[w]hen a person is under more than one (1) indeterminate sentence, the sentences shall be calculated as follows: If the sentences run concurrently, the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run."[4] KRS § 532.120(1)(a). Bowling argues that regardless of when his Rockcastle sentence began, his Rockcastle and Laurel County sentences have "merged" under KRS § 532.120(1), such that he is "in custody" on his Rockcastle sentence so long as he is serving his Laurel County death sentence. The Commonwealth disagrees, contending that § 532.120(1) has no bearing on whether Bowling is "in custody" under § 2254.

To support his interpretation of § 532.120(1), Bowling cites to *Commonwealth v. Propes*, No. 2010-CA-002315-MR, 2011 WL 5600619 (Ky. Ct. App. Nov. 18, 2011). In *Propes*, the defendant was convicted of murder and sentenced to life imprisonment in 1974, but was paroled after eight years. *Id.* at *1. A year after being released on parole, the defendant was convicted of a separate rape and was sentenced to two concurrent ten-year terms, both of which were to be served concurrent with his life sentence. *Id.* After being paroled again in 1994, the defendant

[3] It is important that we note the strange posture of this case. Bowling asks us not to free him from allegedly unlawful custody, but rather to extend such custody so that he may pursue further relief. In the usual case, Bowling has already won—the Commonwealth concedes that Bowling is not in custody under his Rockcastle sentence and has not been since 2009. Thus, should he succeed in having his Laurel County convictions overturned, Bowling would be a free man. Despite this, he seeks to reach a counterintuitive result that would require that we ignore not only the Commonwealth's own concessions, but also what Kentucky law requires. And Bowling asks us to contort our *habeas* jurisprudence in a case where even the equities are not in his favor. There is no evidence that the Warden misinformed Bowling to his detriment or otherwise acted to prejudice Bowling's ability to seek federal review of his state court proceedings.

[4] In Kentucky, all felony sentences are deemed "indeterminate," KRS § 532.060(1), while misdemeanor convictions result in a "definite term" of imprisonment, *id.* § 532.090.

violated his parole and returned to prison in 2004. *Id.* As a result, the Commonwealth required him to register as a sex offender under new registry requirements promulgated in 1998, which applied to individuals "incarcerated" on sex crimes as of that date. *Id.* The defendant objected, claiming that he had fully served his rape sentence prior to 1998 and was therefore incarcerated on only the murder charge. *Id.* Applying § 532.120(1), the Kentucky Court of Appeals found that the defendant's ten-year rape sentence had "merged" into his life sentence, rendering him incarcerated on the rape charge when he violated his parole in 2004, despite the ten-year sentence having run well before that date. *Id.* at *2; *see also Stewart v. Ky. Parole Bd*, No. 2001-CA-002264-MR, 2003 WL 1860278, at *3 (Ky. Ct. App. April 11, 2003). But *Propes* was not issued by the Kentucky Supreme Court, nor was it a published decision. And, importantly, it did not involve a § 2254 "in custody" determination. Thus, it is neither controlling nor persuasive here.

The case on which the Commonwealth primarily relies, *Mays v. Dinwiddie*, 580 F.3d 1136 (10th Cir. 2009), also fails to resolve the issue. In *Mays*, an Oklahoma prisoner filed a § 2254 petition challenging a fully discharged burglary sentence, reasoning that he was still in custody for a separate crime whose sentence ran concurrent to the burglary sentence. *Id.* at 1138–40. The Tenth Circuit dismissed the petition, holding that a prisoner who was still serving the longer of two concurrent sentences, but that had completed the term of the shorter sentence, was no longer "in custody" under § 2254 for purposes of challenging the conviction underlying the shorter sentence. *Id.* at 1140–41. Although the facts of *Mays* are closely analogous to those here, it is distinguishable because Oklahoma lacked a merger statute similar to that of § 532.120(1).

The record evidence is similarly unhelpful. To be sure, some of the documentary evidence indicates that Bowling's Laurel County and Rockcastle sentences have merged, such that he is serving an "aggregate sentence of death." DE 114-1, Page ID 1688; DE 1-1, Page ID 97; DE 13-10, Page ID 205. But KDOC's calculation of Bowling's total term of imprisonment under § 532.120(1) is distinct from a determination of whether Bowling was still "in custody" on the Rockcastle conviction in 2012 for purposes of collaterally attacking it under § 2254.

We hold that § 532.120(1) does not alter the fact that Bowling's twenty-year Rockcastle sentence expired in 2009. First, the primary focus in a § 2254 "in custody" determination is whether the prisoner is suffering "present restraint" from the challenged conviction. *Maleng*, 490 U.S. at 492. Because Bowling's twenty-year Rockcastle sentence began in 1989, he was suffering no restraint from this conviction when he filed his petition in September 2012. In fact, KDOC informed Bowling in March 2012 that if his "death sentence [was] vacated," his Rockcastle sentence "would be recalculated" and "[u]pon recalculating [his] time, [he] would have a total sentence length of 20 years which would be served out and [he] would be released from DOC custody." DE 1-1, Page ID 99. The Kentucky Court of Appeals agreed. *See Bowling v. Commonwealth*, No. 2010-CA-000490-MR, 2012 WL 95425, at *5 (Ky. Ct. App. Jan. 13, 2012) (noting in dicta that, at the time the decision was rendered in January 2012, "Bowling ha[d] served the twenty years' imprisonment to which he was sentenced" on the Rockcastle conviction). Construing § 532.120(1) to extend federal *habeas* jurisdiction to situations where the prisoner no longer suffers restraint from the challenged conviction, as Bowling's interpretation does, "would read the 'in custody' requirement out of the statute." *Maleng*, 490 U.S. at 492.

Second, we have previously recognized that the merger language contained in § 532.120(1) does not create custody for *habeas* purposes where it would not otherwise exist. In *Johnson v. O'Dea*, 19 F.3d 19, 1994 WL 51581 (6th Cir. Feb. 18, 1994) (table decision), we noted that § 532.120(1) was "enacted to provide statutory guidance for the administrative task of calculating the maximum total time for which individuals may be incarcerated when serving multiple sentences," and "not to merge consecutive sentences for purposes of collaterally attacking them." *Id.* at *4 (citing 1974 Commentary, Kentucky Revised Statutes). Although it is true that *Johnson* dealt with consecutive sentences and not concurrent ones, the reasoning applies with equal force here.[5] Moreover, other courts interpreting similar merger statutes in the *habeas* context have reached the same conclusion. *See, e.g.*, *Hurdle v. Sheehan*, No. 13-cv-6837, 2016 WL 4773130, at *3–4 (S.D.N.Y. Sept. 12, 2016).

Third, Bowling's interpretation of § 532.120(1) contravenes the policy underlying the federal *habeas* statute. As the Supreme Court has noted, the "core purpose" of federal *habeas* review is to "shorten [a] term of incarceration" in the event a petitioner "proves unconstitutionality." *Garlotte v. Fordice*, 515 U.S. 39, 47 (1995). Bowling's interpretation would have the opposite result; it would lengthen potentially unconstitutional confinement. And this court "has clearly indicated an intention not to 'open the door' to the creation of jurisdiction for sentences which have been fully served." *Johnson*, 1994 WL 51581, at *3. Bowling's interpretation of § 532.120(1) does just that. Accordingly, we find that § 532.120(1) does not

[5] It is true that the Supreme Court has allowed *habeas* challenges to consecutive sentences that were either already served, *see Garlotte*, 515 U.S. at 45–46, or had yet to be served, *Peyton v. Rowe*, 391 U.S. 54, 67 (1968). This makes sense because a successful challenge to a consecutive sentence (whether expired or impending) will necessarily shorten the prisoner's term of incarceration. *See Garlotte*, 515 U.S. at 47. The same is not true of challenging an expired concurrent sentence. Even if successful, invalidation of an expired concurrent sentence will have no effect on the ultimate length of incarceration. *See Mays*, 580 F.3d at 1140–41.

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perpetuate Bowling's twenty-year Rockcastle sentence until the expiration of his death sentence for purposes of challenging it under § 2254.

IV.

Finally, Bowling argues that, even if his Rockcastle sentence had expired by the time he filed his September 2012 petition, we should nonetheless entertain his *habeas* petition under *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001). In *Lackawanna County*, the Supreme Court reaffirmed its prior holding from *Daniels v. United States*, 532 U.S. 374 (2001), that "once a state conviction is no longer open to direct or collateral attack in its own right . . . , the conviction may be regarded as conclusively valid." *Lackawanna Cty.*, 532 U.S. at 403. It further held that even "[i]f [the] conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.* at 403–04. A plurality of the Court fashioned an exception to this latter holding, however, which Bowling argues is applicable here. This exception applies where the "defendant can[not] be faulted for failing to obtain timely review of [the] constitutional claim" because the state court, "without justification, refuse[d] to rule on [the] constitutional claim that [was] properly presented to it." *Id.* at 405. The plurality reasoned that, "[i]n such situations, a habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction." *Id.* at 406. This exception is not broad enough to encompass Bowling's claim.

As an initial matter, because Bowling's Rockcastle sentence has fully expired, he may invoke this exception only if his § 2254 petition can be construed as challenging his 1992 Laurel County sentences, as enhanced by the allegedly invalid Rockcastle conviction. *See id.* at 401, 403. This construction of Bowling's petition is tenuous given his § 2254 petition only nominally

references his Laurel County conviction and sentences. Moreover, because Bowling currently has a separate § 2254 petition pending before this court in which he explicitly challenges the constitutional defects in his Laurel County conviction, interpreting his petition in this manner is duplicative and would require dismissal under 28 U.S.C. § 2244.

More importantly, Bowling's Rockcastle conviction could not have been used to enhance his Laurel County sentences because it occurred four years *after* those sentences were imposed. Recognizing this defect, Bowling argues that *Lackawanna County* nevertheless applies because *evidence* of the Rockcastle crime led to his Laurel County convictions. But as the Commonwealth notes, this evidence was admissible under Kentucky Rule of Evidence 404(b) regardless of whether Bowling was ever tried and convicted on the Rockcastle crime. *See Bowling*, 942 S.W.2d at 301. Thus, even if Bowling's Rockcastle conviction was permeated with unconstitutional defects, invalidation of that conviction would have no effect on his Laurel County sentences.

The cases on which Bowling relies to support an extension of *Lackawanna County* to this case are inapposite. In those cases, it is true, the petitioner was permitted to invoke *Lackawanna County* to challenge a *later* expired conviction that adversely affected an *earlier* conviction under which the petitioner was still confined. *See Brattain v. Cockrell*, 281 F.3d 1279, 2001 WL 1692470, at *2 (5th Cir. Nov. 27, 2001); *Ward v. Wolfenbarger*, 323 F. Supp. 2d 818, 827–28 (E.D. Mich. 2004). But in both of those cases, *Lackawanna County* applied only because the later conviction was adversely affecting the petitioner's parole eligibility on the earlier sentence. *See Brattain*, 2001 WL 1692470, at *2; *Ward*, 323 F. Supp. 2d at 827–28. The same cannot be said of Bowling's Rockcastle conviction. Because Bowling was sentenced to death for his

Laurel County crimes and is thus not eligible for parole, his Rockcastle conviction will have no effect on future parole eligibility or the length of his Laurel County sentences.

Lastly, there is no evidence that the state court, "without justification, refuse[d] to rule on [Bowling's] constitutional claim that [was] properly presented to it." *Lackawanna Cty.*, 532 U.S. at 405. Instead, it appears that the state court diligently considered and ruled on Bowling's various motions throughout the state-court proceedings. Bowling simply chose a circuitous route through the state courts that rendered him no longer "in custody" on his Rockcastle sentence when his § 2254 petition was filed in September 2012. *Lackawanna County* cannot save him.

V.

For the foregoing reasons, we affirm.

STRANCH, Circuit Judge, dissenting. I write separately to address the factual issue that underlies our legal ruling—whether Ronnie Bowling was still "in custody" on his Rockcastle County conviction at the time he filed his habeas petition, as required for federal jurisdiction. Because Bowling was not owed pre-trial custody credit toward his Rockcastle County sentence, nor did he receive it, I believe he was "in custody" and, therefore, respectfully dissent.

As the majority notes, to determine whether Bowling was in custody on his Rockcastle County sentence, we must first determine to which sentence his pre-trial custody credit applies. Kentucky law and Kentucky Department of Corrections (KDOC) policies guide the inquiry regarding his pre-trial custody credit, and clarify how that credit is calculated in a factual scenario involving multiple indictments and sentences. KDOC Policy 28-01-08(II)(A)(2) states: "Where multiple felony indictments are involved, any applicable credit shall be applied to the indictment which is sentenced first." KDOC Policy 28-01-08(II)(A)(6) states: "If an offender is being sentenced on more than one felony indictment at the same time, custody time credit shall be calculated separately for each indictment . . . . If those felony detainments overlap, one indictment shall receive credit while the other indictment shall have fewer or zero (0) days credit." And that is what happened here: Bowling's credit was applied to his first Laurel County sentence. The KDOC Resident Record Card confirms this, noting that Bowling was given 1,378 days of jail credit on his Laurel County burglary sentence, and no days of credit for his five other Laurel County sentences or his Rockcastle County sentence.

KRS § 532.120(3) does not conflict with the KDOC policies cited above—the policies and the statutory language are easily read together, and appear to have been created to do so. The statute uses mandatory language ("shall") to prevent defendants from being completely

denied their custody credit. It does not mandate or explain how credit should be applied. KDOC policies specify exactly how the credit is awarded in different situations. This makes practical sense. The Department of Corrections regularly deals with issues of custody credit in multiple convictions, including situations in which a defendant was convicted and sentenced in different counties on different dates, as here. In light of this expertise, it is not surprising that nothing in the statute attempts to reach the level of granularity that would specify to which sentence a credit should apply and that such decision is instead entrusted to the KDOC.

This reading is consistent with the Kentucky Supreme Court's decision in *Bowling v. White*, 480 S.W.3d 911, 913 (Ky. 2015). In certifying questions to the Kentucky Supreme Court, the district court assumed that Bowling was due credit for his pre-trial custody time, that the sentencing court did not give him that credit, and that the KDOC did credit Bowling with that time. (R. 88, PageID# 1487-91) ("Seven years elapsed between Ronnie Lee Bowling's arrest and his conviction for attempted murder. Bowling spent those seven years in jail. Kentucky law requires what common sense suggests: That those seven years should be credited towards his resulting 20-year sentence. But the sentencing court did not credit Bowling with those years, and Bowling never appealed. Kentucky's Department of Corrections, however, did credit Bowling with that time. The question presented by this case is whether the Department of Corrections can remedy the sentencing court's error.").

Bowling, proceeding pro se at the time, did not challenge these erroneous factual assumptions. The Kentucky Supreme Court expressly assumed the facts as presented by the district court, and left any fact finding about Bowling's situation up to the district court. *Bowling*, 480 S.W.3d at 913 ("The record in this case is sparse because it concerns the certification of a question of law, and we are thus dependent on the facts as articulated by the

district court at its request."). The state Supreme Court went on to hold that the KDOC did have the power to alter a mistake, a holding Bowling does not contest. *See id.* In a situation where an individual was mistakenly denied credit by a trial court, the KDOC is authorized to correct the error. *See id.* However, this holding is not relevant to the determination facing this panel: if Bowling was actually owed credit on his Rockcastle County sentence, and if he received it.

Justice Seay's dissent highlighted this problem.

> The Rockcastle trial court correctly awarded Bowling zero days custody time credit . . . . This court does not have Bowling's Rockcastle [Presentence Investigation Report], but if Probation and Parole calculated his custody time credit according to applicable statutes and policy, the PSI should have shown Bowling was entitled to zero days custody time credit. This is because Corrections would have already applied the entire custody time credit to the Laurel conviction, which was the "indictment which is sentenced first."
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> . . .
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> While the U.S. District Court found the Rockcastle court mistakenly awarded Bowling zero days custody time credit, there appears to be no basis in the record upon which the court could base that finding. It appears more likely the Rockcastle trial court's award of zero days was correct, based upon Corrections' likely initial calculation and applicable statutes and policies. The U.S. District Court also found Corrections "recalculated" Bowling's custody time credit. There also appears to be no basis in the record upon which the court could base that finding.

Id. at 918-20 (Seay, J., dissenting).

The *Bowling* decision does not address the issue at hand. Under Kentucky law and KDOC policies, Bowling's credit was properly applied to his first Laurel County sentence, as reflected in the record. He was not entitled to have pre-trial jail custody credit on his Rockcastle County sentence, and neither KRS § 532.120(3) nor the Kentucky Supreme Court say otherwise.

Further, the evidence does not show that Bowling was awarded credit on his Rockcastle sentence, rather just the opposite. The majority points to a March 20, 2012 letter from a KDOC official to support the contention that the KDOC awarded Bowling pre-trial custody credit on his Rockcastle County sentence. But that letter is not a "concession" that the KDOC did not have

custody over Bowling. Rather, it is premised on a hypothetical—if Bowling were "granted a new trial and [his] death sentence [was] vacated," his sentence would be recalculated. (R 1-1, PageID# 99). Upon recalculation, the letter states, his sentence would have been considered served out and he would be released from custody. It makes sense that if Bowling's Laurel County sentence were vacated, his pre-trial custody credit would transfer to his Rockcastle County conviction pursuant to KRS § 532.120(3). Thus, if his Laurel County sentences were vacated, the KDOC would no longer have custody of Bowling. *See* KRS § 532.120(4). This letter explains what would happen in a hypothetical situation that has not occurred, but it does not demonstrate that Bowling received credit on his Rockcastle County sentence.

The evidence showing that Bowling did not actually receive credit on his Rockcastle sentence is strong. His Resident Record Card indicates that his entire credit was applied to just one of his Laurel County convictions. Bowling also asks the panel to take judicial notice of two letters, both from the Assistant District Supervisor of the KDOC. The first states that Bowling was given zero days of credit for his Rockcastle sentence, and the second clarifies that because he was sentenced first in Laurel County, his full credit was applied solely to that case. In sum, the record does not support the conclusion that custody credit was ever applied to Bowling's Rockcastle County sentence.

Because Kentucky law and KDOC policies do not mandate that Bowling receive pre-trial custody credit on his Rockcastle County sentence, and because the evidence does not show that he was ever awarded such credit, he was still "in custody" for federal habeas purposes at the time he filed his petition. Therefore, I respectfully dissent.

APPENDIX

B1

6th Circuit Court, Case No. 15-6318,denied rehearing July 12,2017

No. 15-6318

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 12, 2017
DEBORAH S. HUNT, Clerk

RONNIE BOWLING,

Petitioner-Appellant,

v.

RANDY WHITE, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: CLAY, GIBBONS, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Stranch would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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APPENDIX

C1 - C5

Bowling v. White, No. 6:12-cv-00189-ART-HAI, R. 95, filed 11/02/15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

RONNIE LEE BOWLING,	)	
	)	
Petitioner,	)	Civil No. 12-189-ART
	)	
v.	)	
	)	**ORDER**
RANDY WHITE, *Warden*,	)	
	)	
Defendant.	)	

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

Ronnie Lee Bowling was arrested for attempted murder in 1989. He remained in state custody for seven years before he was tried for that crime. A jury eventually convicted him, and the state court sentenced him to twenty years in prison in 1996. Then, in 2012, Bowling filed a habeas petition pursuant to 28 U.S.C. § 2254. R. 1. Therein he challenged his conviction for attempted murder. *Id.*

Soon after Bowling filed that petition, a question arose as to whether this Court had jurisdiction over his case. Kentucky prisoners are entitled to a "jail-time credit," *i.e.*, they may credit toward their total sentence any "time spent in custody prior to the commencement of [that] sentence." Ky. Rev. Stat. § 532.120(3). And since Bowling has been in state custody since 1989, it would seem that he had already served his 20-year sentence by 2009. Thus, he was not in state custody when he filed a habeas petition in 2012. If so, this Court would lack jurisdiction over that petition. For under § 2254, "the United States district courts [have] jurisdiction to entertain petitions for habeas relief"

only if the petitioner is in state custody "under the [challenged] conviction or sentence at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490 (1989).

Unfortunately, the Court discovered a wrinkle in the analysis above. Although Kentucky law required that Bowling receive jail-time credit, the state court awarded "0 days" of such credit to Bowling here. R. 39-20 at 2. And although the Kentucky Department of Corrections did apply the jail-time credit and thus determined that Bowling had completed his sentence in 2012, it was not clear that the Department had the legal authority to make that determination. *Compare Winstead v. Commonwealth*, 327 S.W.3d 479, 483 (Ky. 2010) (holding that the "[Kentucky] Department of Corrections . . . is ultimately responsible for determining when prisoners in its custody are eligible for release."), *with Bard v. Commonwealth*, 359 S.W.3d 1, 5 (Ky. 2012) (rejecting the notion that the Department of Corrections could "set or modify presentencing custody credit" and holding instead that "the responsibility to credit a defendant for presentencing jail time belonged exclusively to the trial court").

As a result, the Court certified to the Kentucky Supreme Court the following question: "Whether *Bard* controls this case, so that the Department of Corrections lacked the authority to correct the sentencing court's failure to award jail time credit[.]" R. 88 at 5. The Kentucky Supreme Court answered as follows: "We conclude that . . . the Department of Corrections may award an inmate jail-time credit that was mistakenly left off the judgment of conviction and sentence." *Bowling v. White*, No. 2014-SC-000235-CL, slip op. at 13 (Ky. Sept. 24, 2015).[1]

[1] *See also id.* at 12 ("The simple fact is that Bowling was entitled, as a matter of law, to the custody credit that he now wishes to decline. Though defendants can take advantages of mistakes in their favor, as did the defendant in *Bard*, they cannot decline correction of a mistake simply because the correction would not be

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That answer makes this case an easy one to resolve. Under Kentucky law, it is clear that a prisoner is indeed entitled to jail-time credit. Ky. Rev. Stat. § 532.120(3). Thus the state court surely "left [that credit] off the judgment of conviction and sentence" by mistake. *Bowling*, No. 2014-SC-00235, slip op. at 13. It is equally clear that the Department of Corrections awarded a jail-time credit to Bowling. Bowling's prison records indicated that he had served more than 22 years in prison by 2011. R. 39-21. The Department informed Bowling that, although he had initially arrived in prison "with a Death sentence [and] an additional 20-year concurrent sentence," he had only "an aggregate term [of] Death" remaining by February 2012. R. 57-8 at 5. And the Department informed Bowling in March 2012 that he had already served his 20-year sentence for attempted murder. *See id.* at 7 ("[As of 2012], you would have a total sentence length of 20 years[,] which would be served out and you would be released from DOC custody[.]"). Thus, the record shows that the Department exercised its authority to "award [Bowling] jail-time credit that was mistakenly left off [his] judgment of conviction and sentence." *Bowling*, No. 2014-SC-000235-CL at 12.

In sum, the Kentucky Supreme Court has now made clear that the Department of Corrections may award jail-time credit to a prisoner even though the state's trial court mistakenly failed to do so. And the Department awarded such credit to Bowling here. Thus, Bowling finished serving his attempted-murder sentence in 2009, which means that Bowling was no longer in state custody "under [that] sentence" when he challenged it via a habeas petition in 2012. *Maleng*, 490 U.S. at 490. This Court therefore lacks jurisdiction over Bowling's petition. *See* 28 U.S.C. § 2254.

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in their favor."); *id.* at 12 n.7 (discussing some reasons why a defendant might want to remain in custody even after his sentence has expired) (citing *The Shawshank Redemption* (Castle Rock Entertainment 1994)).

Now that the Kentucky Supreme Court has answered the certified question, it is clear that Magistrate Judge Ingram's recommended disposition, R. 67, correctly interpreted Kentucky law. In that disposition, however, the Magistrate Judge recommended granting Bowling a certificate of appealability. The reason for this was that, before now, Kentucky law was unclear as to whether the state trial court's denial of "any credit for time spent in pretrial custody" meant that Bowling was still serving his 20-year sentence. R. 67 at 12. Thus, the Magistrate Judge said, "jurists of reason could find debatable whether that denial of credit means Bowling's sentence ha[d] not expired." *Id.* But Kentucky law on that point is now clear. And given that the Kentucky Supreme Court is the authority that cleared it up, reasonable jurists could not disagree that Bowling's 20-year sentence has expired already, that he is thus no longer "in custody," and that this Court therefore lacks jurisdiction over his habeas petition. Hence Bowling is not entitled to a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that, to obtain a certificate of appealability, a petitioner must show that "reasonable jurists would find the district court's assessment of [petitioner's] claims debatable or wrong.") With the exception of the certificate-of-appealability analysis, then, the Court agrees with the Magistrate Judge's recommended disposition and adopts that disposition and its concurrent reasoning as the Court's own opinion.

Accordingly, it is hereby **ORDERED** that:

(1) Bowling's petition for a writ of habeas corpus, R. 1, is **DISMISSED** for lack of jurisdiction.

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(2) The Magistrate Judge's recommended disposition, R. 67—with the exception of the certificate-of-appealability analysis, R. 67 at 11-12—is reinstated and adopted as the Court's opinion.

This, the 2nd day of November, 2015.

Signed By:
Amul R. Thapar AT
United States District Judge

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APPENDIX

D1

U.S. District Court, No. 6:12-cv-00189-ART-HAI, R. 96, filed 11/03/15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

RONNIE LEE BOWLING, Petitioner, v. RANDY WHITE, *Warden*, Respondent.	)	Civil No. 12-189-ART **JUDGMENT**

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

Consistent with the Order entered yesterday, R. 95, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is **ORDERED** that:

(1) Bowling's petition for a writ of habeas corpus, R. 1, is **DISMISSED** for lack of jurisdiction.

(2) **JUDGMENT IS ENTERED** in favor of the respondent.

(3) This is a **FINAL AND APPEALABLE JUDGMENT**, and there is no just cause for delay.

This the 3rd day of November, 2015.

Signed By:
Amul R. Thapar AT
United States District Judge

-D1-

APPENDIX

E1 - E12

Bowling v. White,No.6:12-cv-00189-ART-HAI,R. 67,filed 01/06/14

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

RONNIE LEE BOWLING, Petitioner, v. RANDY WHITE, Respondent.	)	No. 6:12-CV-189-ART-HAI RECOMMENDED DISPOSITION

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

Prisoners rarely take the position that their sentence has not expired when the officer having custody of them says it has. Kentucky state inmate Ronnie Lee Bowling makes that rare assertion. Rarer still is this Court's jurisdiction to entertain a habeas claim attacking a sentence that has fully expired. Because the Court finds that Bowling's sentence expired before his habeas petition was filed, jurisdiction is lacking and the Court therefore recommends dismissal.

BACKGROUND

On September 4, 2012, Petitioner Ronnie Lee Bowling, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. D.E. 1. He challenges a twenty-year term of imprisonment imposed by the Rockcastle Circuit Court on May 7, 1996, following a guilty verdict returned by a jury on a charge of criminal attempt to commit murder. D.E. 1 at 2; D.E. 13-8. The judgment reads "IT IS HEREBY ORDERED AND ADJUDGED that the defendant shall be confined in the state penitentiary for a maximum of twenty (20) years." D.E. 13-8 at 2. Bowling was originally arrested on February 25, 1989—the date of the attempted murder, and remains in custody to this day. D.E. 39 at 9. The threshold issue is whether he

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remains in custody pursuant to the twenty-year sentence imposed by the Rockcastle Circuit Court.

Between his original arrest and the May 7, 1996 sentencing, Bowling was charged, tried, and convicted in the Laurel Circuit Court of murder, first-degree burglary, and first-degree robbery. In that case, on December 4, 1992, he was sentenced to death and four consecutive twenty-year sentences. D.E. 39 at 10. Bowling filed a petition for a writ of habeas corpus in the capital case pursuant to 28 U.S.C. § 2254 in this Court on January 15, 2003, which District Judge Thapar has denied. *See Bowling v. Haeberlin*, No. 03-28-ART, 2012 WL 4498647 (E.D. Ky. Sept. 28, 2012). Bowling appealed, and that appeal remains pending.

Respondent contends that the twenty-year sentence imposed by the Rockcastle Circuit Court has expired and, but for the sentence in the capital case, Bowling would be eligible for immediate release. For his part, Bowling argues that the twenty-year sentence has not expired and that he was in custody pursuant to that sentence on September 4, 2012, the date he filed his habeas petition. Bowling is incorrect.

DISCUSSION

Pursuant to Rule 4 of the Rules Governing Section 2254 cases, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." "The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody* in violation of the Constitution or laws or treaties of the United States.'" *Maleng v. Cook*, 490 U.S. 488, 490 (1989) (emphasis in original). This means a section 2254 petitioner, like Bowling, must "be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Id.* Thus, the relevant date

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is whether Bowling was in custody pursuant to the Rockcastle Circuit Court's judgment on September 4, 2012.[1]

The facts and several Kentucky statutes combine to compel the conclusion that the Rockcastle Circuit Court's sentence has expired. The first statute, KRS § 532.110(2), is implicated because the judgment imposing that sentence is silent as to whether it was to run concurrently with, or consecutively to, the sentence in the capital case. At the time of Bowling's sentencing, that statute read "If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve." Ky. Rev. Stat. Ann. § 532.110(2) (West 1997).[2] The Rockcastle Circuit Court's judgment (D.E. 13-8) does not specify the manner in which the twenty-year term was to be served, and therefore the plain language of this statute requires that sentence to run concurrently with any other sentence.

Respondent points out that "the trial court indicated that it would run the sentence consecutive to any other sentence currently being served," D.E. 39 at 9, but that that requirement was not included in the court's judgment. Even if that intention were expressed by the Rockcastle Circuit Judge on the record, the absence of an order from the court specifying consecutive sentences means Bowling's twenty-year sentence was to be served concurrently with the imprisonment terms previously imposed by the Laurel Circuit Court. "In Kentucky, a court speaks through the language of its orders and judgments." *Glogower v. Crawford*, 2 S.W.3d 784, 785 (Ky. 1999). "KRS 532.110(2) clearly states that sentences will run concurrently when

[1] Respondent concedes that Bowling's section 2254 petition herein was timely filed in accordance with the one-year statute of limitations contained in 28 U.S.C. § 2244(d)(1)(A). D.E. 13. Notably, Bowling filed a motion to alter, amend, or vacate the Rockcastle Circuit Court's judgment pursuant to CR 59.05 of the Kentucky Criminal Rules on April 10, 2000, that was not ruled upon until February 2010.

[2] That operative language remains in the current version of KRS § 532.110(2). Now, however, the statute provides for exceptions that are not relevant herein, specifically offenses committed while imprisoned, during an escape from imprisonment, pending sentencing, or awaiting trial. *See* Ky. Rev. Stat. Ann. § 532.110(2) (West 2013).

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an order does not specify the manner in which sentences are to run." *Major v. Commonwealth*, 275 S.W.3d 706, 723 (Ky. 2009) (so holding despite a notation in the trial court's judgment that the jury had recommended consecutive sentences).

Given that the twenty-year term imposed by the Rockcastle Circuit Court is statutorily-required to run concurrently with Bowling's sentence imposed by the Laurel Circuit Court, the next question is whether that twenty-year term has expired. The Supreme Court of Kentucky has artfully phrased this question as "When sentences are to run concurrently—when do they start and when do they end?" *Brock v. Sowders*, 610 S.W.2d 591, 592 (Ky. 1980). The court when on to state "The Kentucky legislature has provided answers." *Id.*

KRS § 197.035 has stated, since the time of its enactment in 1963:

> (1) A sentence, on conviction of a felony, imposed upon a confined prisoner for a crime committed prior to the date of his instant commitment, if designated to be served consecutively, shall be added to the sentence or sentences being served.
>
> (2) **If the sentence is designated to be served concurrently, or the commitment is silent, he shall be considered as having started to serve said sentence on the day he was committed on the first sentence.**

Ky. Rev. Stat. Ann. § 197.035 (West 2013) (emphasis added). Of course, Bowling was confined, pursuant to the Laurel Circuit Court's judgment of December 2, 1992, at the time the Rockcastle Circuit Court entered its judgment on May 2, 1996. *See* D.E. 13-9. Thus, the concurrent nature of the second sentence had "the legal effect of causing the [second] term of [Bowling's] sentence . . . to relate back in time to the date when [the first] sentence started." *Ingram v. Commonwealth*, 338 S.W.3d 302, 305 (Ky. Ct. App. 2011).

Indeed, concurrent sentences afford "the right to have time served on the first sentence to be credited against the second sentence." *Rodgers v. Wingo*, 467 S.W.2d 369, 370 (Ky. Ct. App.

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1971). Thus, service on a more recent sentence "must be considered as having started on the day [the prisoner] began serving" the previous sentence. *King v. Commonwealth*, No. 2011-SC-000-187-MR, 2013 WL 1789860 (Ky. April 25, 2013).

These rules are simple enough to apply when a prisoner has committed a crime, is convicted, and committed to custody, with a concurrent sentence imposed thereafter. Here, however, pre-trial custody complicates the analysis. Bowling was first taken into custody on February 25, 1989, the same day he committed the attempted murder underlying the Rockcastle Circuit Court's judgment. *See* D.E. 39 at 9. The Laurel Circuit Court's judgment came next on December 4, 1992. *Id.* at 10. In that judgment, Bowling was credited with 1,378 days of pre-sentence custody, which is the entire period he had been in custody since February 25, 1989. *Id.* The Rockcastle Circuit Court's judgment was entered on May 7, 1996. D.E. 1 at 2; D.E. 13-8.

It is true that the Rockcastle Circuit Court's May 7, 1996 judgment denies Bowling credit for time served by stating "Defendant . . . is hereby credited with the time spent in custody prior to the commencement of sentence, namely 0 days, toward service of the maximum term of imprisonment." D. 13-8 at 2. But that was error. At the time of his conviction, KRS 532.120(3) stated:

> Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered **for all purposes** as time served in prison.

Ky. Rev. Stat. Ann. § 532.120(3) (West 1997).[3] In Kentucky, "[a] sentence of imprisonment for a felony shall be an indeterminate sentence[.]" Ky. Rev. Stat. Ann. § 532.060 (West 1997). The

[3] KRS 532.120(3) was amended on June 8, 2011, by replacing "by the court imposing the sentence" with "by the Department of Corrections." *See* Ky. Rev. Stat. Ann. § 532.120(3) (West 2013).

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effect of KRS § 532.120(3) is plain – a court must give credit for time served on the charge of conviction. "Based upon the mandatory language of this statute, the word 'shall' precludes any discretion on the part of the trial court in crediting time for preconviction custody." *Bartrug v. Commonwealth*, 582 S.W.2d 61, 63 (Ky. Ct. App. 1979). "KRS 532.120(3) is only mandatory if the accused spends time in custody relating to a charge which ultimately culminates in a conviction. Therefore, a trial court is not usually required to give credit for time served as a result of other charges." *Lemon v. Corrections Cabinet*, 712 S.W.2d 370, 371 (Ky. Ct. App. 1986). Credit given for the latter is within the trial court's discretion. *Id.*

Here the Rockcastle Circuit Court had no discretion to deny credit for time served because Bowling was first taken into custody on February 25, 1989, when arrested for the attempted murder in Rockcastle County. He remained in custody until convicted of that crime. So Bowling was in custody beginning on February 25, 1989, as a result of the charge that culminated in the Rockcastle Circuit Court's judgment dated May 7, 1996. Bowling was and is "legally entitled to credit for every day spent in confinement" pursuant to KRS § 532.120(3). *Commonwealth v. Walker*, 989 S.W.2d 165, 166 (Ky. 1999). Thus, despite being imposed after the Laurel Circuit Court's judgment, the twenty-year sentence Bowling challenges in this case started on February 25, 1989, and had therefore long-since expired before Bowling filed his section 2254 petition on September 4, 2012.

Importantly, Respondent, who is the Kentucky state officer that would have custody of Petitioner, concedes that Bowling's sentence had expired and he was therefore not in custody pursuant to the Rockcastle Circuit Court's judgment at the time he filed his section 2254 petition: "[I]n the unlikely event that the sentences from [the] Laurel Circuit Court case were ever vacated, the [sic] Bowling would be entitled to immediate release because he has more than

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served the 20 year sentence imposed in the present case." D.E. 39 at 10. The Court obviously has to independently determine whether it has jurisdiction, but the concession by the Kentucky state officer that would have custody of Bowling if the sentence were not expired that he does not have such custody is certainly persuasive.

The expiration of Bowling's twenty-year sentence was explained to him during administrative review by the Kentucky Department of Corrections before he filed his habeas petition. Importantly, "[t]he Executive Branch, in the form of the Department of Corrections—not the judicial branch—is ultimately responsible for determining when prisoners in its custody are eligible for release." *Winstead v. Commonwealth*, 327 S.W.3d 479, 483 (Ky. 2010).

According to Bowling, on February 11, 2012, he pursued his rights under Kentucky Correctional Policy & Procedure 17.4 by submitting a letter asking "if he is or is not served out on this 20-year-sentence for attempted murder from Rockcastle County." D.E. 57-1 at 10. The response to that letter, dated February 14, 2012, quoted KRS 532.120, and stated "the sentence lengths are combined together. You were received in Corrections with a Death sentence and later received an additional 20-year concurrent sentence. You now have an aggregate term Death." D.E. 57-8 at 5. KRS 532.120 states that, for concurrent sentences, "the maximum terms merge in and are satisfied by the discharge of the term which has the longest unexpired time to run[.]" Ky. Rev. Stat. Ann. § 531.120(1)(a) (West 2013).

Bowling appealed that decision, and the expiration of the twenty-year sentence was explained. By letter dated March 20, 2012, an Offender Information Supervisor with the Offender Information Services (which is within the Kentucky Department of Corrections) informed Bowling that:

> I concur with the response you received . . . on 2/1/4/2012. I will add that if you are granted a new trial and your death sentence is

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> vacated or you are released by the court on this case, your sentence would be recalculated. Upon recalculating your time, you would have a total sentence length of 20 years **which would be served out and you would be released from DOC custody** to the custody of the sheriff of Laurel County.

D.E. 57-8 at 7.[4] This explanation mirrors Respondent's position. Furthermore, this explanation carries great weight with the Court as it was provided by the branch responsible for determining Bowling's release eligibility under Kentucky law. *Winstead*, 327 S.W.3d at 483.

Bowling appears to have misunderstood this explanation as he contends it "clearly state[s] . . . Ronnie Bowling is NOT served out on this 20-year-sentence from Rockcastle County." D.E. 57-1 at 12. The source of his confusion is the merger of the maximum terms of his sentences pursuant to KRS 531.120(1)(a). Because the death sentence is a longer maximum than twenty years, he remains in custody. But, that merger does not eliminate the concurrent nature and expiration of the sentence imposed by the Rockcastle Circuit Court. In other words, despite the merger of the mandatory terms, the concurrent nature of the twenty-year sentence under attack and this Court's duty to assess its jurisdiction requires analyzing whether the ***shorter*** sentence has expired.

Additionally, the Court of Appeals of Kentucky stated, in its January 13, 2012 opinion affirming the denial of Bowling's motion for new trial and to set aside judgment, that "Bowling has served the twenty years' imprisonment to which he was sentenced." D.E. 13-7 at 11. This was mentioned when declining to address the Commonwealth's argument that Bowling's appeal was mooted by Bowling having served out. Because the Court of Appeals addressed Bowling's appeal on the merits, this statement by the Court was not necessary to its decision, but does provide useful background for this Court's decision.

[4] The Kentucky Department of Corrections Resident Record Card also indicates Bowling had, as of June 15, 2011, served "22y 3m 13d." D.E. 39-21.

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To recap, Kentucky law indicates Bowling's twenty-year sentence has fully expired, just as contended by the Warden, as explained by the Kentucky Department of Corrections, and as mentioned by the Kentucky Court of Appeals. ***In other words, if the Laurel Circuit Court death sentence somehow went away, Bowling would immediately be released by the Department of Corrections***.

The expiration of the sentence Bowling attacks in his section 2254 motion is fatal to this Court's jurisdiction. In *Mays v. Dinwiddie*, 580 F.3d 1136 (10th Cir. 2009), the court considered the dismissal of a section 2254 petition for failure to satisfy the in custody requirement. Specifically, the court granted a certificate of appealability on the sole question of "Whether a prisoner who is still serving the longer of two concurrent sentences, but has completed the term of the shorter sentence, is 'in custody' within the meaning of 28 U.S.C. § 2254 for the purpose of raising a constitutional challenge to the conviction underlying the shorter sentence." *Mays*, 580 F.3d at 1138. The court recognized that being "in custody" extends to some situations in which a petitioner is not incarcerated. *Id.* at 1138-39. The court also recognized that, in *Garlotte v. Fordice*, 515 U.S. 39 (1995), the Supreme Court expanded the "in custody" requirement to allow a petitioner "to challenge the conviction underlying a sentence that he had completed but that was the first in a series of consecutive sentences that he was serving." *Id.* at 1140.[5]

The court in *Mays* described the evolution of Supreme Court precedent concerning the in custody requirement, noting the change over time from a strict application of that requirement to recognition in *Garlotte* that jurisdiction exists over a challenge to a completed sentence that is viewed as one component of a "'continuous stream.'" *Id.* at 1140 (quoting *Garlotte*, 515 U.S. at

[5] Bowling mistakenly believes the twenty-year term for attempted murder runs consecutively to the sentences imposed by the Laurel Circuit Court. He therefore relies upon *Garlotte* in attempting to establish that he is "in custody." *See* D.E. 57-1 at 5-10. However, as described above, the twenty-year term imposed by the Rockcastle Circuit Court runs concurrently with the Laurel Circuit Court setenences, rendering *Garlotte* inapposite.

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41). But despite that evolution, the court held that "*Garlotte's* continuous stream is not wide enough to cover a now-expired sentence that was imposed concurrently with sentences that a habeas petitioner continues to serve." *Id.* at 1137. Because the petitioner in *Mays* was challenging a sentence that he had fully served, jurisdiction was therefore lacking. It was the concurrent nature of that sentence that was fatal to the court's jurisdiction. The court rejected the view that custody resulting from the longer, unexpired concurrent sentence sufficed as a restraint to enable the petitioner to challenge the shorter sentence. *Id.* at 1140. The court also held that jurisdiction was lacking under *Maleng v. Cook*, 490 U.S. 488 (1989), because the Court therein explained that despite having liberally construed the in custody requirement, "'we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction.'" *Id.* at 1141 (quoting *Maleng*, 490 U.S. at 492).[6] This Court agrees with *Mays*. Because the concurrent sentence challenged herein has fully expired, jurisdiction is lacking.

The Sixth Circuit, in an unpublished decision, has agreed with the result in *Mays*. In *Clark v. Russell*, 977 F.2d 580, 1992 WL 259355 (6th Cir. Oct. 5, 1992), the district court dismissed a section 2254 petition for lack of exhaustion of state remedies. On appeal, the Sixth Circuit found "that dismissal of the petition was appropriate on other grounds." *Clark*, 1992 WL 259355 at 1. Specifically, the court, noting that the sentence being challenged "was concurrent to [petitioner's] other sentences," held that the "petition is simply not cognizable under § 2254 because it was filed after his sentence had fully expired." *Id.* *Clark* gives even greater weight to the well-reasoned opinion in *Mays*.

In sum, Bowling was taken into pre-trial custody on February 25, 1989, on a charge of attempted murder. He remained in custody and was convicted of that charge on May 7, 1996,

[6] The Court in *Maleng* also stated "We have never held, however, that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Maleng*, 40 U.S. at 491.

and sentenced to a twenty-year imprisonment term to be served concurrently with a death sentence he received in 1992. He remains in custody pursuant to the death sentence, but under KRS § 532.120(3), Bowling is entitled to credit for every day spent in confinement before the twenty-year term was imposed, meaning credit dating back to February 25, 1989. That sentence, which Bowling now attacks pursuant to 28 U.S.C. § 2254, had therefore fully expired before his petition was filed on September 4, 2012. The Kentucky Department of Corrections, which has the constitutional responsibility for determining his release date, has said as much. Jurisdiction is lacking as a result, and his petition must be dismissed.

CERTIFICATE OF APPEALABILITY

A Certificate of Appealability may issue where a petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a petitioner to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003) (discussing development of standard). The reviewing court must indicate which specific issues satisfy the "substantial showing" requirement. 28 U.S.C. § 2253(c)(3); *see Bradley v. Birkett*, 156 F. App'x 771, 774 (6th Cir. 2005) (noting requirement of "individualized assessment of . . . claims") (citing *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001)). For dismissals on procedural grounds, as to when a Certificate of Appealability should issue, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

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The undersigned is convinced that the recommendation made herein is correct. However, the language of the Rockcastle Circuit Court's May 7, 1996 judgment expressly denies Bowling any credit for time spent in pre-trial custody. Jurists of reason could find debatable whether that denial of credit means Bowling's sentence has not expired. For that reason, a certificate of appealability is warranted.

CONCLUSION

Having reviewed the whole record, the Court concludes that Rule 4 requires dismissal for lack of jurisdiction, obviously meaning it plainly appears that Bowling is not entitled to relief. Therefore, the Court **RECOMMENDS** that the petition (D.E. 1) be **DISMISSED**. The Court also **RECOMMENDS** that a Certificate of Appealability should issue.

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under subsection (B) of the statute. *See also* Rules Governing Section 2254 Proceedings, Rule 8(b). Within fourteen days after being served with a copy of this decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, de novo, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and normally will, result in waiver of further appeal to or review by the District Court and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981).

This the 6th day of January, 2014.

Signed By:
Hanly A. Ingram
United States Magistrate Judge

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