No. 14-5418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA S. CAUDILL,

Petitioner-Appellant,

v.

JANET CONOVER, Warden,

Respondent-Appellee.

O R D E R

Before: MOORE, SUTTON, and KETHLEDGE, Circuit Judges.

Virginia S. Caudill, a Kentucky death-row prisoner, appeals a district court judgment denying her petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court denied a certificate of appealability ("COA"). Caudill seeks one here. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)–(2).

Caudill and co-defendant Jonathan Wayne Goforth were convicted of murder, first-degree robbery, first-degree burglary, second-degree arson, and tampering with physical evidence, as well as a felony-murder aggravator. They were sentenced to death. After exhausting state-court remedies, Caudill filed a federal habeas corpus petition raising eighteen claims. The district court denied the petition and denied a COA. Caudill timely appealed, and now seeks a COA on ten of her claims.

A COA shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327

(2003). This analysis of the district court's review of the merits necessarily considers the standard for granting relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides for relief when a state-court decision on the merits: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Caudill's first claim is that the trial court erred in its handling of her *Batson* objection. The Kentucky Supreme Court summarized the relevant background: "The victim, Lonetta White, was an African-American woman. [Caudill and her co-defendant] are both Caucasians. The Commonwealth exercised eight of its nine peremptory strikes against Caucasian men and Appellants responded with a *Batson* challenge, claiming that the peremptories were both racially and gender motivated." *Caudill v. Commonwealth* ("*Caudill I*"), 120 S.W.3d 635, 657 (Ky. 2003). The trial court expressed some suspicion that a *Batson* claim could lie with respect to the exclusion of Caucasian men from a jury, but allowed the prosecution to explain its challenges. Then, "[w]ithout waiting for or soliciting a response from the defense, the trial court determined that, assuming the male jurors were members of a protected class, the prosecution had articulated a nondiscriminatory reason for striking them." *Caudill v. Conover* ("*Caudill III*"), No. 5:10-84-DCR, 2014 WL 349300, at *17 (E.D. Ky. Jan. 31, 2014).

Batson v. Kentucky, 476 U.S. 79 (1986), established a "three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause": "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful

discrimination." *Miller-El*, 537 U.S. at 328–29 (internal citations omitted). Because jurists of reason could debate whether the Kentucky Supreme Court's holding was contrary to or an unreasonable application of *Batson*, we grant a COA as to Caudill's *Batson* claim.

Next, Caudill asserts that the trial court gave unconstitutional guilt-phase instructions when it declined to instruct the jury on the lesser-included offenses of first-degree and second-degree manslaughter. The Kentucky Supreme Court rejected these arguments on direct appeal, finding that the evidence at trial did not support the issuance of Caudill's requested instructions. *See Caudill I*, 120 S.W.3d at 667–70. The U.S. Supreme Court has indicated that an instruction on a lesser-included noncapital offense is required when: (1) the evidence would support the instruction; and (2) the absence of the instruction would enhance the risk of an unwarranted conviction by leaving the jury just two options: convict the defendant of the greater offense or let her go free. *See Beck v. Alabama*, 447 U.S. 625, 634–38 (1980); *Schad v. Arizona*, 501 U.S. 624, 646–48 (1991).

The first-degree manslaughter instruction sought by Caudill would apply only if "[w]ith intent to cause serious physical injury to another person, [Caudill] cause[d] the death of such person." K.R.S. § 507.030(1)(a). Yet no evidence at trial could have supported a theory that the person who caused Lonetta White's death did so with the intent *only* to cause serious physical injury. Some evidence suggested that Caudill perpetrated the full attack herself, but the Kentucky Supreme Court did not unreasonably determine that the circumstances of that beating "preclude[] any reasonable doubt that whoever attacked Mrs. White intended to kill, as opposed to merely injure." *Caudill I*, 120 S.W.3d at 668. Other evidence at trial suggesting that Caudill merely "struck Ms. White only once or twice with a clock 'just enough to bleed,'" Application for COA at 15, could support a finding that Caudill acted with the intent only to injure White, but the evidence was clear that the cause of White's death was multiple blows to her head from a hammer-like object. Accordingly, even if the jury accepted this version of the evidence, it would not have had a basis to find that *Caudill* caused White's death, which would be necessary for the requested instruction.

Nor would jurists of reason debate the district court's holding with respect to the second-degree manslaughter instruction for voluntary intoxication. In Kentucky, "[i]ntoxication is a defense to a criminal charge" when it "[n]egatives the existence of an element of the offense." K.R.S. § 501.080(1). As the Kentucky Supreme Court recited in rejecting Caudill's argument, "[i]n order to justify an instruction on [voluntary] intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing." *Caudill I*, 120 S.W.3d at 669 (quoting *Springer v. Commonwealth*, 998 S.W.2d 439, 451 (Ky. 1999)). The Kentucky Supreme Court held that a voluntary-intoxication instruction was not warranted in this case because "[n]o evidence was introduced at trial to support" it, specifically pointing to Caudill's testimony "that she and Goforth parked Goforth's truck in a shopping center parking lot so that White would not suspect there was another person with her" and Goforth's testimony "that Caudill gained entry into White's residence under the pretext that she needed to use the telephone because they were having car trouble." *Id.* "These," the Kentucky Supreme Court concluded, "are not the actions of a person who was so intoxicated that she did not know what she was doing." *Id.* at 669–70. That decision was neither an unreasonable determination of the facts nor contrary to or an unreasonable application of federal law. Although there was evidence that Caudill had used crack cocaine and may have consumed alcohol as well, there was no evidence to suggest that "she did not know what she was doing." *Id.* at 669 (quoting *Springer*, 998 S.W.2d at 451). Accordingly, we decline to grant a COA as to Caudill's jury-instruction claims.

The third claim on which Caudill seeks a COA is her assertion that the prosecutor made improper arguments during the penalty phase. Under the standard applicable to allegations of prosecutorial misconduct in closing arguments, "[t]he relevant question is whether the prosecutors' 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. DeCristoforo*, 416 U.S. 637, 643 (1974)).

The first challenged comment involved a misstatement of the law governing intoxication as a mitigating factor. As the Kentucky Supreme Court found, "the prosecutor first stated the

correct test, then referred to an incorrect standard in a rhetorical question." *Caudill I*, 120 S.W.3d at 676. Nonetheless, "[t]he trial judge's instruction contained the correct test," so the Kentucky Supreme Court was "unpersuaded, considering the totality of the circumstances, that, absent this isolated reference, the death penalty may not have been imposed." *Id.* Given the presumption that the jury follows the law as instructed by the court, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), jurists of reason would not debate the reasonableness of the Kentucky Supreme Court's determination that the prosecutor's misstatement of the law regarding intoxication did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process,'" *Darden*, 477 U.S. at 181 (quoting *DeCristoforo*, 416 U.S. at 643).

The second comment challenged by Caudill is a series of statements by the prosecutor regarding the role of the jury in a death-penalty case:

> United States Supreme Court Justice Potter Stewart once wrote . . . 'If those who break the law do not receive the punishment that the public believes they deserve therein are sown the seeds of anarchy.' . . . The law says that in those aggravated murder cases those worst murder cases the death penalty may be imposed. . . . This is an aggravated murder. . . . We're here Mr. Malone and me, we're here to tell you that such a brutal heinous murder can not, can not and will not be tolerated in our community . . . You know it's been said these days people don't really care what happens unless it happens to them, that they really don't care what happens as long as it doesn't happen to them. Is that the kind of attitude you want in Lexington Kentucky? Is that the kind of community you want Lexington Kentucky to be? I hope not. . . . How many times have you watched the news on television or read the news in the newspaper and seen the horrible events that are reported and you said either to yourself or to someone else, they have got to do something about that. What are they going to do? Ladies and gentlemen the "they" they were talking about in this case is you the jury; the "they" is you. You have to decide what will happen when such a cold blooded vicious robbery burglary murder is planned and carried out in our community you must decide what punishment these convicted murders deserve. . . . Today you represent Fayette County.

Caudill III, 2014 WL 349300, at *63. The Kentucky Supreme Court focused in particular on the misquotation of Justice Stewart, and found "no fundamental unfairness from this particular dramatic flourish" and that the argument did not "diminish the jury's sentencing responsibility or shift that responsibility from the jury to Justice Stewart (which seems to be the gist of this aspect

of the argument)." *Caudill I*, 120 S.W.3d at 677. Jurists of reason would not debate the reasonableness of the Kentucky Supreme Court's determination that the prosecutor's comments, rather than suggesting to the jury that the responsibility for imposing a death sentence lay elsewhere, actually made clear that the jury was responsible and therefore did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *DeCristoforo*, 416 U.S. at 643).

Caudill next asserts that the State withheld impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, a prosecutor must disclose evidence that is favorable to the accused and material to guilt or punishment. *See id.* at 87. Evidence is *favorable* if it is either exculpatory or impeaching, *see Strickler v. Greene*, 527 U.S. 263, 281–82 (1999), and *material* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The evidence must also have been "suppressed by the State, either willfully or inadvertently." *Strickler*, 527 U.S. at 282.

The claimed *Brady* violations relate to three witnesses who testified against Caudill—Cynthia Ellis, Julia Davis, and Jeanette Holden. During her state post-conviction proceeding, Caudill claimed that the prosecution had failed to disclose the details of plea deals made with the three. *See Caudill v. Commonwealth* ("*Caudill II*"), No. 2006-SC-000457-MR, 2009 WL 1110398, at *9 (Ky. April 23, 2009). The Kentucky Supreme Court rejected this argument, concluding that "plea agreements are matters of public record" and that Caudill "was aware that plea agreements had been reached in all three cases, and each witness was cross-examined on this fact." *Id.* Jurists of reason would not debate the district court's conclusion that, under AEDPA's deferential standard, this decision did not contravene federal law in holding that publicly available plea information does not qualify as having been "suppressed." *Strickler*, 527 U.S. at 282. Indeed, we have held *Brady* inapplicable to publicly available sentencing materials. *See Bell v. Bell*, 512 F.3d 223, 234–36 (6th Cir. 2008) (en banc). Our own decision adopting a

position similar to that of the Kentucky Supreme Court suggests that it was not so incorrect as to warrant habeas relief under § 2254(d)(1), as "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Caudill then asserts five distinct ineffective-assistance-of-counsel claims: (1) that her counsel should have obtained a blood-spatter expert "to explain how Lonetta White's blood could have gotten on Caudill's shoes without her being Ms. White's killer," COA Application at 35; (2) that her counsel should have introduced evidence suggesting that Caudill's co-defendant owed a $3,000 debt and was being evicted from his home, giving him a distinct motive to rob and murder the victim; (3) that counsel failed properly to impeach three prosecution witnesses using evidence related to her *Brady* claim; (4) that counsel should have introduced the testimony of Jeffery Spence that Caudill's co-defendant confessed to killing the victim on his own; and (5) that counsel should have introduced significant additional evidence and testimony during the penalty phase. To establish ineffectiveness, Caudill must show that (1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and (2) it prejudiced the defense—"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). Jurists of reason would not debate the district court's holdings regarding the first four ineffective-assistance claims:

Blood-Spatter Expert: The prosecution's expert at trial testified that spatter of White's blood that was found on Caudill's shoes suggested that it may have been produced "consistent with a beating or similar action" occurring when "the shoes were within three feet of where the blood originated." *Caudill II*, 2009 WL 1110398, at *2. The expert, "however, qualified her testimony by explaining this was only one explanation, and that other potential ways existed that would cause the blood to spatter." *Id.* In post-conviction proceedings, Caudill presented an affidavit from an investigator relating a conversation with another blood-spatter expert, who "stated that there was no way of telling if the spatter . . . was caused by impact spatter . . . or by

satellite spatter," which Caudill asserted "could have occurred" at a later date during a car accident in which Caudill sustained minor injuries. *Id.* The Kentucky Supreme Court rejected the contention that Caudill's counsel was constitutionally ineffective for failing to seek out an expert to provide similar testimony, given that the prosecution's expert at trial had conceded that means other than impact spatter could have created the spatter and that Caudill's counsel utilized this concession to argue that the spatter "occurred while Caudill helped Goforth remove White's body from the home." *Id.* Jurists of reason would not dispute that the Kentucky Supreme Court's determination that the minimal addition provided by the expert subsequently interviewed would not have created "a reasonable probability that . . . the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, was a reasonable application of *Strickland*.

Goforth's Motive: "At a bench conference mid-trial, the Commonwealth asked defense counsel if he planned to inquire of a witness if she knew about Goforth's outstanding drug debt. Caudill's counsel replied that he would not ask this question because he was concerned the additional evidence of Goforth's drug debts would hurt Caudill as well." *Caudill II*, 2009 WL 1110398, at *6. Caudill's counsel later added that the line of questioning "would have elicited additional testimony regarding [Caudill's and Goforth's] extensive drug use, which he feared would act to the detriment of his client." *Caudill III*, 2014 WL 349300, at *31. The Kentucky Supreme Court rejected the claim that this constituted ineffective assistance, finding that Caudill failed to establish *Strickland* prejudice because the prosecution's theory already was that Goforth and Caudill each had somewhat distinct motives—Goforth to rob White to get money for drugs; Caudill both to get more money from White and also to exact revenge when White refused—so proof of an additional related motive on the part of Goforth did not reasonably stand to undermine the theory that Goforth and Caudill acted in concert. *Caudill II*, 2009 WL 1110398, at *6. Even assuming, as the district court did, that the claim is subject to de novo review, *Caudill III*, 2014 WL 349300, at *32–33, jurists of reason would not debate that Caudill's ineffective-assistance claim must fail. Any benefit the evidence could have had in bolstering Caudill's version of events was minimal in light of the other evidence of Goforth's motive and the prosecution's theory that Caudill and Goforth each had motive and acted in concert.

Accordingly, counsel's strategic decision to forego introducing additional evidence of Goforth's motive in order to avoid the introduction of additional evidence regarding drug use by Goforth and Caudill does not fall outside the realm of reasonable performance. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.") (internal quotation marks omitted).

Impeachment of Witnesses: As discussed in connection with Caudill's *Brady* claim, three witnesses testified for the prosecution, and Caudill claims that certain facts regarding their plea agreements with the government were not disclosed and therefore not used to cross-examine those witnesses for bias. Caudill argues that her counsel was ineffective for failing to investigate these witnesses, uncover the additional information, and use it during cross-examination. In each case, however, jurists of reason would find reasonable the Kentucky Supreme Court's holding that counsel was not ineffective because the testimony at trial already accurately discussed the agreements.

As the district court held, Ellis's testimony at trial that she "had already agreed to do a plea bargain" in her own case before speaking with law enforcement about Caudill was accurate, although a formal agreement was entered afterward. *Caudill III*, 2014 WL 349300, at *22–23. The Kentucky Supreme Court thought that there was no divergence between Ellis's lay testimony that she was told "that 'no deals were to be made' in exchange for her cooperation" and the fact that the prosecutor at Ellis's sentencing informed the court of her cooperation, while stressing that the government made no sentencing recommendation based on that cooperation. *Caudill II*, 2009 WL 1110398, at *8, 10. Thus, the Kentucky Supreme Court held that "counsel was not deficient for failing to cross-examine Ellis about a benefit from the Commonwealth that was never bestowed." *Id.* at *10. Jurists of reason would not debate the district court's determination that the Kentucky Supreme Court's conclusion was not an unreasonable determination.

With regard to Davis, the Kentucky Supreme Court found that her testimony, too, conveyed accurate information regarding the sentence she faced in her own case and what she received. *See id.* The district court agreed, noting that Davis had accurately told the jury that she faced a sentence of five to seven years, but was sentenced to a two-year term. *See Caudill III*, 2014 WL 349300, at *27. Caudill's COA Application does not articulate a clear response on this issue, and nothing in the record suggests that jurists of reason would debate whether the Kentucky Supreme Court's finding that Davis's testimony about her sentence was accurate was an unreasonable determination of the facts.

Finally, with respect to Holden, the Kentucky Supreme Court found that her testimony "that she received no benefit on her own charges that were pending at the time she cooperated with investigators" was accurate because the ultimate cooperation benefit Holden received was "in exchange for her testimony against her co-defendant, not Caudill." *Caudill II*, 2009 WL 1110398, at *9. Caudill fails to supply anything from which we could determine that jurists of reason would debate whether the Kentucky Supreme Court's finding was an unreasonable determination of the facts. Indeed, her habeas petition acknowledged "that she has no proof that Holden's plea bargain had any relation to her testimony in Petitioner's trial." R. 1 (Petition at 73) (Page ID #73); *see also id.* at 76 (Page ID #76) ("Petitioner admits that there is scant evidence that [Holden] got consideration for her testimony in this case.").

Goforth's Confession: Shortly before trial, Jeffery Spence contacted the prosecution, claiming that Goforth had confessed to having killed White and to pinning the blame on Caudill. Spence then "openly solicited" release from custody on his own charges, including the charge of assaulting his girlfriend. *Caudill II*, 2009 WL 1110398, at *3. He told investigators that his girlfriend planned to drop the charges against him "because she had simply fallen down the stairs by accident. This statement proved false and his girlfriend denied any intention to drop the charges." *Id.* The government informed Caudill's counsel of the statement. *See id.* The Kentucky Supreme Court found that it was professionally reasonable for Caudill's counsel to decline to use a witness so lacking in credibility. *See id.* In assessing the alleged deficiency of counsel's performance through AEDPA's deferential lens, we ask "not whether counsel's actions

were reasonable"; rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. Reasonable jurists would agree that there are arguments that counsel met this standard in declining to call such an unreliable witness. Counsel could have questioned whether Spence would have testified in accord with his statement, despite not receiving the deal he sought in exchange. Even then, Spence's testimony would have been weak, in light of the fact that his assertions were "utterly devoid of any specific information about the events of that night which might have lent his story some credibility," *Caudill III*, 2014 WL 349300, at *35, along with Spence's claim that Goforth called the killing accidental, despite strong forensic evidence suggesting that it could not have been, *Caudill II*, 2009 WL 1110398, at *3. Finally, counsel could reasonably have feared that calling such an unreliable informant would actually bolster the credibility of the three informants called by the government.

Jurists of reason could debate the Kentucky Supreme Court's holdings regarding counsel's failure to call additional witnesses during the penalty phase, however. The Kentucky Supreme Court rejected the suggestion that Caudill's counsel should have called other witnesses, including "former teachers, workers at a domestic violence shelter where Caudill once sought help, and former boyfriends who would admit that they had abused her." *Caudill II*, 2009 WL 1110398, at *4. The Kentucky Supreme Court found that evidence had been admitted of "the violence and abuse that was an everyday part of Caudill's childhood," Caudill's "struggle with substance abuse, and her history of abusive relationships with men." *Id.* at *5. Furthermore, a psychologist gave background information while giving his expert opinion, and this background "included a description of Caudill's violent and abusive relationships with former boyfriends, and the abuse she suffered as a child at the hands of her father." *Id.* The Kentucky Supreme Court thus held that Caudill's ineffective-assistance challenge was merely a claim "that defense counsel failed to present *more* mitigation evidence of the same quality that had already been presented." *Id.* Because jurists of reason could debate whether counsel's failure to call the additional witnesses identified by Caudill amounted to ineffective assistance of counsel, we grant a COA as to this claim.

The final claim on which Caudill seeks a COA is her assertion that the cumulative effect of the trial errors denied her due process. We have held that cumulative-error claims are "not cognizable on habeas." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). Furthermore, "[a] published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016) (quoting *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009)). We therefore deny a COA as to Caudill's cumulative-error claim.

Accordingly, Caudill's application for a COA is **GRANTED IN PART AND DENIED IN PART**. The Clerk's Office is directed to issue a briefing schedule as to the following issues: (1) whether the trial court contravened *Batson v. Kentucky*, 476 U.S. 79 (1986), by accepting the prosecution's explanations for its peremptory strikes without investigation, explanation, or findings; and (2) whether Caudill's trial counsel was constitutionally ineffective for failing to call additional witnesses during the penalty phase of proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk