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Supreme Court of Kentucky

2017-SC-000044-MR

ROGER DALE EPPERSON — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 97-CR-000016

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In 2003, a Warren County jury convicted Roger Dale Epperson of two counts of complicity to commit murder, first-degree robbery, and first-degree burglary. The jury sentenced him to death. Following an unsuccessful direct appeal,[1] Epperson moved to set aside his convictions and sentence pursuant to RCr[2] 11.42, which the trial court denied after conducting evidentiary hearings. Epperson now appeals. Upon thorough review of the record and careful consideration of his claims, we affirm.

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[1] *Epperson v. Commonwealth*, 197 S.W.3d 46 (Ky. 2006).

[2] Kentucky Rules of Criminal Procedure.

I. BACKGROUND.

Epperson was first tried in 1987 for the murder, robbery and burglary of the victims in this case, both of whom were found dead in their home on June 17, 1985. One victim had two gunshot wounds in the back. The other had two gunshot wounds to the head and was also gagged. In that first trial, a jury convicted Epperson of robbery, burglary, and murder and sentenced him to death. However, those convictions were ultimately set aside by this Court on appeal because the trial court did not conduct individual voir dire on the issue of pretrial publicity. On retrial, a jury convicted Epperson of complicity to commit murder, robbery and burglary and sentenced him to death. On direct appeal, this Court affirmed.

Epperson then filed the underlying RCr 11.42 motion, alleging numerous violations of his constitutional right to effective assistance of counsel. Evidentiary hearings began in 2010 and concluded in 2014. The trial court ultimately determined that all claims of error were unfounded and denied his motion for relief. Epperson now appeals as a matter of right.

II. STANDARD OF REVIEW.

As the movant, Epperson bears the burden of establishing ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* This analysis involves mixed questions of law and fact. While we will not disturb the

trial court's factual findings if they are supported by substantial evidence, we review its conclusions of law de novo. *Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky. 2008). "When a defendant challenges a death sentence ..., the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069. A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

III. ANALYSIS.

A. Juror Issues.

Epperson argued that trial counsel was ineffective for failing to ask more probing questions of the jurors during voir dire regarding whether they could consider mitigating evidence. He claimed that his counsel's "boiler plate" voir dire, in which counsel asked jurors whether they could consider mitigating evidence, was insufficient to elicit deficiencies or juror bias that would have allowed jurors to be struck for cause. During the RCr 11.42 evidentiary hearing, Epperson attempted to introduce evidence, in the form of post-verdict affidavits, from jurors who sat on his jury panel, which he argued showed that they answered voir dire questions incompetently or untruthfully, thus masking their inability to meaningfully consider the full range of penalties and making them unfit to serve as jurors.

As an initial matter, post-verdict juror affidavits obtained ex parte generally do not support any valid basis for an RCr 11.42 motion because such evidence is generally incompetent under rules prohibiting jurors from being examined to establish grounds for a new trial. *See* RCr 10.04; *Haight v. Commonwealth*, 41 S.W.3d 436, 447 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *but see Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005) (considering affidavit of juror in attempting to ascertain whether juror failed to answer honestly a material question on voir dire); *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004) (considering affidavit of juror in attempting to ascertain whether juror failed to answer honestly a material question on voir dire); *Taylor v. Commonwealth*, 175 S.W.3d 68 (Ky. 2005) ("[A] defendant is free to establish that a juror did not truthfully answer on voir dire....Taylor is correct that he may challenge the juror's answers at voir dire with her testimony given during the post-conviction hearing."); *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) (juror affidavit used to show racial animus during jury deliberations). To prove juror mendacity and gain a new trial, "a party must demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003) (internal quotations and citation omitted).

The trial court rejected Epperson's claim, noting that voir dire is an inherently strategic part of trial, if not the most strategic part. As a matter of

strategy, the court questioned what could have possibly been achieved by trial counsel questioning the jurors about specific mitigating evidence that had not yet been presented; indeed, the strategy of making excuses for murder at the outset of trial is questionable. Moreover, without any evidence having been presented yet, and no clue as to each party's theory of the case, a reasonable juror might question the relevance of such specific questions concerning mitigating evidence. As the trial court observed, the questions an attorney chooses not to ask during voir dire are just as important as the questions he does ask. During the evidentiary hearing, Epperson's lead trial counsel was not asked about his voir dire strategy. Second chair counsel could recall very few specifics from the trial but testified generally that adequate voir dire was necessary and appropriate and that a juror's ability to consider mitigating evidence would be important.

During the evidentiary hearing, three jurors testified. Specific questions were posed to them regarding what evidence they would have considered in mitigation. They indicated that evidence of head injuries, child abuse, good behavior in prison and military service would not have affected their decision to impose the death penalty in Epperson's case, but all stated that they would have considered it while deliberating. The jurors further testified that they followed the instructions provided to them by the court and considered all evidence presented to them. Each stated they were able to consider the full range of possible penalties and had answered all voir dire questions honestly

and to the best of their ability. Each avowed that the penalty imposed would depend on the specific facts of the case before them.

With respect to their affidavits, the jurors testified that Epperson's post-conviction counsel had appeared on their doorsteps unannounced, years after the trial, asking them questions about their thoughts on mitigation, and executing an affidavit which the jurors signed. With respect to this approach taken by post-conviction counsel, we take the liberty of quoting the trial court's findings on this issue, as we could not have said it any better:

> For years, Epperson's post-conviction counsel has called these jurors, shown up at their house to conduct interviews, and subpoenaed them into this court for further proceedings. Counsel has done this for the sole purpose of attacking the effectiveness of Epperson's trial attorneys, not to allege wrongdoing or misconduct by the jurors themselves. This court can state, without hesitancy, the rationale of the *Maras [v. Commonwealth*, 470 S.W.3d 332 (Ky. 2015)] court is sound. This court believes these jurors did say, and would have said, whatever needed to be said just for Epperson's post-conviction attorneys and investigators to stop questioning them. One juror expressed his dissatisfaction with the court system as a whole, stated he lacked confidence that the difficult decision he faced will be honored, and swore he would never participate on another jury. The constant disruption of fellow citizens' lives, who are ordered into court to perform their civic duty for a mere $12.50 per day, serves only to poison the confidence our society has in its participation in criminal justice matters. This court does respect the decision this jury rendered and understands that asking someone to consider taking human life is a decision carefully measured – by most. It was proper to try those who extrajudicially sentenced and executed [the victims]; it was improper to try the jurors who judicially sentenced Epperson to a similar fate.

The trial court found that none of the post-verdict juror affidavits should have been admitted and declined to consider them. In so ruling, the court noted that "[a] juror cannot be examined to establish ground for a new trial,

except to establish that the verdict was made by lot." RCr 10.04. The trial court relied on this Court's recent decision in *Maras*, wherein we clarified that in limited circumstances, the rule set forth in RCr 10.04 must yield to constitutional demands. However, those limited circumstances "can be summed up rather simply: juror testimony is permitted when it 'concern[s] any overt acts of misconduct by which extraneous and potentially prejudicial information is presented to the jury[.]'" *Maras*, 470 S.W.3d at 335 (quoting *Commonwealth v. Abnee*, 375 S.W.3d 49, 54 (Ky. 2012)).

Here, Epperson did not allege that "any overt acts of misconduct by which extraneous and potentially prejudicial information" occurred with this jury. Epperson has not demonstrated that any of these three jurors failed to answer honestly a material question posed during voir dire, thus we need not address whether a correct answer would have served as a basis for a challenge for cause. As we stated in *Maras*, "[w]ithout more, *e.g.*, indication of overt influence, a facially valid jury verdict will not be upset based on post-trial juror statements." 470 S.W.3d at 337. Epperson has further failed to present any evidence to overcome the presumption that trial counsel's approach to voir dire was a result of trial strategy. We agree with the trial court that Epperson's claimed errors with respect to voir dire and juror misconduct are wholly unsupported.

B. Guilt Phase Issues.

Epperson asserted that trial counsel was ineffective during the guilt phase of his trial by failing to investigate and present evidence of alternative suspects, by presenting inconsistent defenses, and by failing to impeach co-defendant Donald Bartley. We disagree.

i. Alternative Suspects.

Epperson argued that trial counsel was ineffective for failing to investigate whom he termed "alternative suspects." In support, he pointed to the police reports in this investigation which referred to other persons who were investigated for these crimes but ultimately not charged. This police investigation, which was ongoing for a year before Epperson and his co-defendants were arrested, documented certain individuals' claims that people other than Epperson had committed the crimes. For instance, one police report documented a statement made by a confidential informant that certain individuals (other than Epperson) would regularly come to his house and ask about developments in this case. Notably, that police report also expressed concern about the reliability of this information. Another police report documented that an individual told detectives that two young boys had been bragging about having committed the murders.

At trial, the jury was informed that this case had been under investigation for more than a year before Epperson and his co-defendants were arrested. The jury was also advised that Epperson's arrest was made only after

co-defendant Donald Bartley confessed to the murders, implicating Epperson and defendant Hodge. No "alternative suspects" testified in any proceeding.

Epperson maintained that trial counsel's failure to investigate "alternative suspects" undermined the innocence defense that counsel presented. At the evidentiary hearing, Epperson's lead counsel was not asked about any investigation of alternative suspects. Second chair counsel was questioned and testified that he recalled reviewing police reports involving other suspects but did not recall conducting an independent investigation into other suspects. He conceded that any other alternatives to Epperson's involvement would have been important.

This Court has held that the failure to investigate a defense and present crucial witnesses to the defense may constitute ineffective assistance of counsel. *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007). The movant must show: (1) a reasonable investigation would have uncovered the defense; (2) the failure to present a defense was not a tactical decision by trial counsel; and (3) there is a reasonable probability that, but for counsel's failures, the result would have been different. *Id.* "If the decision was tactical, it is given a strong presumption of correctness, and the inquiry is generally at an end." *Id.* (internal quotations omitted). "On review, as a court far removed from the passion and grit of the courtroom, we must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially

regarding trial strategy and tactics." *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998).

Here, the information documented in the police reports regarding "alternative suspects" was insufficient to warrant arresting any of those individuals during the year-long investigation of these crimes. Epperson has not shown that these individuals would have testified that he was not guilty, or otherwise would have corroborated his defense. The trial court held that given the limited potential exculpatory value of these individuals as witnesses, the decision of trial counsel not to pursue an independent investigation into these leads was not objectively unreasonable. Further, even if the failure to investigate these alleged suspects was objectively unreasonable, the trial court was unconvinced that a reasonable probability exists that the outcome of Epperson's trial would have been different, especially given that the evidence against these individuals was not strong enough to merit any arrests. We agree with the trial court that this claim of error does not merit RCr 11.42 relief.

ii. Inconsistent Defense.

Epperson asserted that trial counsel was ineffective for presenting two mutually exclusive defenses, thus destroying the credibility of either. Epperson was charged with both murder and complicity to commit murder, as well as robbery and burglary. He argued that trial counsel's position that he did not know the victims, and concession that Epperson might have been the get-away driver because he did not want to be recognized by the victims, was mutually

exclusive and prevented the jury from returning a not guilty verdict on the murder charges. However, as the trial court noted, suggesting that Epperson did not want to be recognized does not concede that he knew the victims. He could have been complicit in the robbery and burglary and feared being seen and described by the victims later. That would indicate that Epperson believed the victims would survive, and perhaps the jury could have been persuaded that murder was never part of his plan.

Further, as the trial court noted, the Commonwealth presented substantial evidence that robbery and burglary were indeed Epperson's main objectives. Thus, Epperson's defense was not objectively unreasonable or inconsistent: deny all involvement, but if involved, deny involvement in the murders. In fact, as the trial court pointed out, this defense strategy likely built credibility with the jury and succeeded to some measure. Epperson was indicted for, among other things, two counts of murder. The jury disregarded the Commonwealth's theory of the case and found him guilty of complicity to commit murder, effectively finding that he was not the principal actor. In terms of trial strategy, the trial court observed:

> Admitting involvement in the robbery and burglary does not concede an agreement to commit murder, and trial counsel's choice to build some credibility with the jurors in order to spare Epperson's life at a later point could have been an effective strategic decision. However, this trial strategy must also be considered in light of the fact that Epperson had already been incarcerated for thirteen years at the time of his second trial in 2003. Thus, if the jury convicted him only on the robbery and burglary charges, the minimum sentence could have been two 20-year sentences served concurrently. Epperson, being eligible for parole after serving 85% of the sentence, could have potentially served out his sentence after an additional four years. It was not

unreasonable to strategically concede involvement in the robbery and burglary once the Commonwealth presented its case in chief.

Considering the foregoing, we believe the trial court properly concluded that Epperson had failed to meet his burden of proving that trial counsel presented an inadequate defense to the charges to merit RCr 11.42 relief.

iii. Impeachment of Co-defendant Bartley.

Epperson asserted that trial counsel was ineffective for failing to impeach co-defendant Bartley, who implicated him in the murders. Epperson argued that trial counsel should have followed up on Bartley's alleged false statement regarding the sentence he received in return for his testimony at Epperson's trial, and should have confronted Bartley with respect to his inconsistent confessions, including one in which Bartley allegedly stated that he had framed Epperson to save his own life. These general allegations are set forth in only three sentences of Epperson's appellate brief, and he failed to elaborate or identify any resulting prejudice. Accordingly, we will only address these claims to the extent he raised them in this Court. We decline to address any other claims not expressly raised before this Court.

Epperson alleged that Bartley falsely told the jury that he had received a sentence of life with parole eligibility in 25 years in exchange for his testimony in this case, when he received a 45-year sentence. The record shows that Bartley did receive a 45-year sentence for his involvement. However, as the trial court noted, the relevant take away for the jury was that Bartley essentially agreed to spend the rest of his life in prison in exchange for his testimony in Epperson's case, and that point was made clear to the jury. The

court concluded that counsel's decision not to obtain the judgment imposing sentence upon Bartley to impeach him with respect to this distinction was not objectively unreasonable. And even if it was, no reasonable probability exists that the difference between a 25-year sentence and 45-year sentence for Bartley would have affected the jury's verdict on Epperson's guilt. We agree.

C. DNA Issues.

Ed Taylor, a serologist at the Kentucky State Crime Lab, testified at Epperson's first trial that no physical evidence linked Epperson to the crime scene. Nevertheless, the jury still returned a verdict of guilty and a sentence of death. Thereafter, but prior to Epperson's retrial, at Epperson's request, his DNA was tested along with 2 hairs retrieved from the victims' bodies. Taylor analyzed the test results, which indicated that one hair was not testable, and the other hair that was found on one of the victim's nightgown did not match Epperson or his co-defendants. Evidently, Taylor did not forward the test results to Epperson or the Commonwealth's Attorney. At Epperson's retrial, Taylor's testimony from his first trial was read into evidence since Taylor was unavailable to testify at retrial. Taylor's testimony from the first trial made no mention of the DNA test results since the testing had not yet been performed at that time.

In 2008, Epperson's post-conviction counsel discovered in the record Epperson's motion for DNA testing and the court order authorizing it. At that time, Epperson filed a motion for a new trial and amended his RCr 11.42 motion to add claims relating to DNA testing. Epperson argued that Taylor, as

a state employee, had knowledge of the test results before Epperson's retrial and thus the Commonwealth, as a government agency, also was charged with knowledge and failed to provide the results to him, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Epperson maintained that because Taylor's testimony from the first trial was read into the record on retrial, without alteration to include the DNA test results, the Commonwealth knowingly submitted materially false information to the jury. Notably, Epperson did not argue that anyone in the Commonwealth's Attorney's office knew of the DNA test results prior to 2008; instead, he asserted that because the record contained his motion for DNA testing and the court order authorizing it, the Commonwealth had a duty to seek the results of that testing. Epperson further alleged that his own trial counsel was ineffective for failing to obtain the results and failing to present those results to the jury.

The burden is upon the party collaterally attacking a conviction to prove the elements of a *Brady* violation. *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

> *Brady* obviously does not apply to information that is not wholly within the control of the prosecution. There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the information is available from another source, because in such cases there is really nothing for the government to disclose.

Id. (internal quotations and citations omitted). In other words, "*Brady* only applies to information which had been known to the prosecution but unknown to the defense." *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007)

(internal quotations and footnote omitted). "*Brady* does not give a defendant a second chance after trial once he becomes dissatisfied with the outcome if he had a chance at trial to address the evidence complained of." *Commonwealth v. Parrish*, 471 S.W.3d 694, 698 (Ky. 2015) (internal quotations and citation omitted).

The trial court bifurcated the evidentiary hearing on Epperson's DNA-related claims from the hearing on his remaining RCr 11.42 claims by agreement of the parties, all of whom believed that if Epperson prevailed on the DNA claims, then a new trial would be the appropriate result. At the evidentiary hearing, Epperson's lead trial counsel testified that he did not recall receiving any DNA test results during his representation of Epperson and did not recall if any DNA test results were in the record when he took over the case in 2000. He further testified that he and co-counsel decided not to have Epperson's DNA tested to see if it matched the victim's hair because the Commonwealth did not have any scientific evidence linking Epperson to the crime scene; thus, counsel did not see the need to rebut the absence of any such evidence. Counsel stated that had he known of the DNA test results, he would have attempted to introduce those results into evidence, but that the existence of the DNA test results did not alter his argument to the jury that no scientific evidence linked Epperson to the crime scene. He stated that the existence of the test results would not have altered the trial strategy since the results did not exonerate Epperson or show he was not at the scene of the crime; they simply showed the hair on the victim was not his.

Following the evidentiary hearing, the trial court entered an order denying Epperson's motion for a new trial, finding that the DNA testing was performed at Epperson's request, and no one employed at the Commonwealth's Attorney's Office received the test results, or even knew about them until 2008. Thus, the court found no *Brady* violation occurred since the Commonwealth did not even have the evidence in its possession to suppress. We agree. The Commonwealth was under no obligation to obtain results of testing performed at the behest of defense counsel simply because a state agency facilitated the transfer of samples. To suggest otherwise would place a burden on the Commonwealth to keep track of defense counsel's motions. Epperson made the DNA request himself, thus had the responsibility to obtain the test results and provide them to the Commonwealth through reciprocal discovery.

With respect to Epperson's claim that the Commonwealth presented false testimony through Taylor, who testified at Epperson's first trial that no physical evidence linked Epperson to the crime scene, the trial court held that Taylor's testimony was still accurate and not perjured, and the existence of the DNA test results did not significantly alter it, despite Epperson's argument that excluding someone as a source of a hair was more exonerating than simply not finding any evidence of a person at a crime scene. Even assuming Taylor's testimony should have been supplemented to include the test results, the court found no reasonable probability exists that the outcome of Epperson's retrial would have been any different as a result. We agree.

Lastly, the trial court noted that Epperson's motion requesting DNA testing, and the court order authorizing it, had been in the record and readily available to Epperson's counsel since 1998. Accordingly, the court concluded that Epperson's trial counsel had been deficient for failing to thoroughly review the record. That said, the court held that no reasonable probability exists that the outcome of his trial would have been different had the test results been presented to the jury. Epperson speculated that the jury's verdict or sentence would have been different, but the jury was not persuaded that Epperson committed the murders himself; thus, they convicted him of complicity to commit murder. The fact that a hair taken from the body of a victim did not match Epperson's hair is entirely consistent with this verdict and would not have necessarily excluded Epperson from the crime scene. Accordingly, even though his trial counsel failed to uncover or present the DNA test results, we agree with the trial court that no prejudice resulted that would merit post-conviction relief.

D. Sentencing Issues.

Epperson alleged that trial counsel was ineffective for failing to investigate his past to uncover mitigating evidence and present that evidence during the sentencing phase of trial. Specifically, he averred that the jury should have been advised that he had been born "blue," had grown up impoverished, had been subjected to physical and emotional abuse by his father, had difficulties at school, witnessed friends die in violent circumstances, and suffered some form of brain damage caused by head

injuries. He claimed that had trial counsel presented this mitigating evidence to the jury, it might have imposed a sentence other than death; thus, counsel's decision not to present this evidence was inherently unreasonable.

Trial counsel has a clear "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. However, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 2541, 156 L.Ed.2d 471 (2003). The question before the *Wiggins* court was "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce evidence of Wiggins' background *was itself reasonable.*" *Id.* at 523, 123 S.Ct. at 2536. "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527, 123 S.Ct. at 2538.

Here, most of the mitigating evidence was presented by corrections officers who testified that Epperson was a model prisoner, implying that he was not a current danger to anyone. Epperson's mother, father, and sister also testified during sentencing, but none of them addressed any abuse during Epperson's childhood. For summary purposes, they testified that Epperson

grew up in a normal childhood home. Trial counsel's closing argument during sentencing was essentially a collateral attack on the death penalty as an institution; counsel did not attempt to make excuses for Epperson's actions.

Epperson argued that trial counsel should have presented certain mitigation evidence, such as the Dr. Peter Young report and the mitigation report generated by Anna Chris Brown. Prior to Epperson's retrial, Dr. Young generated a report noting that Epperson may have suffered from brain injuries that occurred during his childhood. Also prior to retrial, Epperson's former counsel retained mitigation specialist Anna Chris Brown, who conducted an interview with Epperson and his mother, and noted that Epperson's father whipped him with a mining belt; Epperson had an impoverished childhood; and he witnessed a close friend die after being shot by a constable deputy. During that interview, Epperson also stated that his father threw a brick at the back of his head, which knocked him to the ground but did not knock him unconscious; he reported to the treating physician that he had fallen while drunk. Epperson also claimed that his father had hit him in the head with a claw hammer. In that same interview, Epperson discussed his fortune in having "never been hurt" and "never even had a black eye." Both Dr. Young's and Anna Chris Brown's reports were in Epperson's case file and available to trial counsel. Epperson's position is that these reports should have generated red flags and caused trial counsel to investigate further.

At the evidentiary hearing, Epperson's lead trial counsel was unable to recall whether he contacted Anna Chris Brown, but stated that he did not

retain a mitigation specialist for retrial. He was unable to recall several files that were presented to him, including memorandums regarding Epperson's family life, but he stated that he did interview Epperson's family. He was unable to recall whether he learned of Epperson's alleged child abuse prior to trial, or after the fact in subsequent interviews with post-conviction counsel. He did recall learning that Epperson had witnessed close friends dying. Counsel testified that it would be good practice to investigate allegations of abuse and trauma if there was a valid reason to do so. Lead counsel stated that the only additional medical evidence he pursued with regards to Epperson's alleged brain injuries, beyond the reports in the file, were hospital records that reflected an automobile accident. He did not recall communicating with Dr. Young about his report with respect to Epperson's potential brain injuries but remembered reviewing psychological reports that revealed nothing of mitigating value, and counsel consciously chose not to produce those reports at sentencing. Lead counsel further testified that he believed introducing evidence of head injuries, emotional abuse and trauma during the sentencing phase of a capital murder trial must be evaluated on a case by case basis. Co-counsel testified at the evidentiary hearing that he had worked on capital murder cases before Epperson's, but customarily did not perform sentencing work. Based on his interactions with Epperson, he did not suspect Epperson suffered from any brain damage.

The trial court found that lead counsel had reviewed the case file containing evidence of mitigating value but did not interview the authors of the

reports contained in the case file. The court further found that co-counsel communicated with Epperson's family but performed no other investigation into mitigating evidence. The court concluded that neither counsel communicated with any mitigation specialist during their representation of Epperson, but they did have access to documents generated by a previously-retained mitigation specialist.

Based on the testimony and the documents presented, the court found that a reasonable probability exists that a juror could have concluded that Epperson suffered traumatic brain injuries, as well as physical and emotional abuse as a child, and was deprived of oxygen at birth. Still, the court found Epperson's allegations of child abuse to be wanting, considering the inconsistent statements he made during his mitigation interview that he had "never been hurt," and his mother's trial testimony that he had lived in a normal childhood home. The court also questioned just how much mitigating weight a jury would have afforded Dr. Young's report had it been presented; his report also concluded that Epperson exhibited antisocial behaviors, though stopped short of diagnosing Epperson as antisocial. The court noted that the clinical attributes of antisocial behavior as defined in Dr. Young's report include a person who is "narcissistic, fearless, pugnacious, daring, blunt, aggressive, assertive, irresponsible, impulsive, ruthless, victimizing, intimidating, dominating, self-reliant, revengeful, vindictive, dissatisfied, and resentful." The court observed that these descriptions aligned with the Commonwealth's theory of the case; that is, Epperson was the "straw boss"

and intelligent enough to plan murder. They further supported trial counsel's implicit conclusion that presentation of this report was not in Epperson's best interest.

Lastly, the trial court questioned how evidence in the form of death certificates of the friends who Epperson witnessed die would have shed any light on lead counsel's testimony that he was aware that Epperson had witnessed friends' deaths. Moreover, the court expressed doubt about how Epperson's witnessing death would lead a jury to show mercy for premeditated murder. Many people have witnessed loved ones die but did not engage in robbery, burglary, and murder of others as a result.

The trial court distinguished this case from *Wiggins*, in that Epperson's trial counsel had the detailed reports in the case file; in *Wiggins*, trial counsel was found to be ineffective since they could have obtained mitigating reports had they investigated further. 539 U.S. at 524–526, 123 S.Ct. at 2537–38. The trial court noted that no meaningful evidence had been presented during Epperson's evidentiary hearing that counsel should have discovered, but failed to discover, evidence due to poor investigatory work. Rather, most of the reports Epperson cited were already in the file, which led the trial court to conclude that because the evidence in the file was so detailed, counsel's decision not to present this mitigation evidence was a strategic one.

The court further held that even if it was to find that trial counsel was deficient for failing to investigate and present certain mitigating evidence, no reasonable probability exists that Epperson's sentence would have been any

different. The court found that the cold-blooded execution of the victims was beyond mitigating, and no juror would have granted him sympathy. To wit, Epperson has been twice convicted and sentenced to death for these crimes: 24 individuals have sat in judgment of him, and all found him guilty of robbing the victims. In his first trial, 12 jurors concluded that he also murdered the victims. The 12 jurors who sat on his second trial found him guilty of complicity to murder the victims. All 24 jurors sentenced him to death.

We find the trial court's findings of fact and conclusions of law sound. The record reveals substantial mitigating evidence that Epperson's trial counsel presented to the jury during the sentencing phase. More importantly, the mitigating evidence that Epperson alleges his trial attorney should have investigated further and presented to the jury seemingly conflicts with other mitigating evidence that trial counsel did present to the jury, which could have undermined all mitigating evidence presented.

For example, as it relates to Epperson's mental health, Epperson alleges that he suffers from brain damage; however, the same doctor WHO testified as to this brain damage also testified that Epperson has an average to above-average IQ. Additionally, the testimony of Epperson's family members as to, what they call, his "normal" and "good" childhood seriously undermines the almost completely different picture that Epperson painted of his purportedly horrible childhood. Differing testimony, like this, would have seriously undermined Epperson's credibility and may have caused the jury to think less of the totality of the mitigating evidence presented before it.

Additionally, we find the Eleventh Circuit's discussion of this issue particularly relevant here:

> [W]e have never held that counsel must present all available mitigating circumstance evidence in general, or all mental illness mitigating circumstance evidence in particular, in order to render effective assistance of counsel. To the contrary, the Supreme Court and this Court in a number of cases have held counsel's performance to be constitutionally sufficient when no mitigating circumstance evidence at all was introduced, even though such evidence, including some relating to the defendant's mental illness was available. In an even larger number of cases we have upheld the sufficiency of counsel's performance in circumstances...Where counsel presented evidence in mitigation but not all available evidence, and where some of the omitted evidence concerned the defendant's mental illness or impairment. Our decisions are inconsistent with any notion that counsel must present all available mitigating circumstance evidence, or all available mental illness or impairment evidence, in order to render effective assistance of counsel at the sentence stage.... Instead, our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington.*

Water v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995). Having identified in detail the circumstances of Epperson's case, we find that the totality of circumstances favors a finding that trial counsel did not render ineffective assistance of counsel for failing to present the purported mitigating evidence that Epperson suggests should have been presented to the jury during the sentencing phase. We cannot say that trial counsel acted "unreasonably" in his conducting of the penalty phase or that his purported failure to act constitutes ineffective assistance.

If Epperson's argument is that trial counsel should have presented the mitigating evidence he suggested, in lieu of the evidence that trial counsel

presented, this argument fails, as well. As stated, the evidence that Epperson wanted trial counsel to discuss conflicted with the mitigating evidence that trial counsel submitted. Epperson's evidence purported to show that he was a tormented and brain-damaged soul that should garner sympathy, while the evidence of record purported to show that Epperson was really a good person who acted uncharacteristically. Both theories constitute reasonable, viable theories of mitigation; simply because one theory of mitigation failed in hindsight does not make trial counsel's pursuance of that theory or failure to pursue the alternative theory unreasonable.

"When a defendant challenges a death sentence...the question is whether there is a reasonable probability that...the sentence...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Even if we did find that counsel was deficient for failing to introduce, investigate, or pursue the mitigating evidence that Epperson argues should have been admitted, we agree with the trial court that no reasonable probability exists that Epperson's sentence would have been any different. We fail to see how the jury would have ruled differently had the mitigating evidence Epperson argues should have been introduced, that Epperson allegedly suffers from brain damage and had a bad childhood, in the face of the overwhelming evidence against Epperson, referred to as the "straw boss" who gave orders, and the brutal nature of his crimes. The Commonwealth also points out that it could have countered nearly all of Epperson's purported mitigating evidence with its own evidence.

E. McCoy v. Louisiana, 138 S.Ct. 1500 (2018).

Related to his assertion of ineffective assistance of counsel because of counsel's presentation of what Epperson refers to as "inconsistent defenses," Epperson alleges that the recently decided U.S. Supreme Court case of *McCoy v. Louisiana* affects the propriety of his convictions. On the facts of this case known to us at this time, we disagree.

The Court in *McCoy* held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right 'to have the *Assistance* of Counsel for *his* defense,' the Sixth Amendment so demands." *Id.* at 1505. "[W]e agree with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *Id.* at 1510. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *Id.* at 1511.

The defendant in *McCoy* was indicted on three counts of first-degree murder, for which the prosecution sought the death penalty. *Id.* at 1506. The defendant pleaded not guilty, and throughout the proceedings consistently maintained that he was out-of-state at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. *Id.* The defendant's counsel determined that the evidence against the defendant was overwhelming

and that, absent a concession at the guilt stage that the defendant was the killer, a death sentence would be impossible to avoid. *Id.*

The defendant was "furious" when told that his counsel would concede guilt. *Id.* The defendant told counsel "not to make that concession," and counsel knew of the defendant's "complete opposition" to the concession. *Id.* The defendant pressed counsel to pursue acquittal. *Id.* When the defendant and counsel sought to end their relationship, the trial court refused. *Id.* The trial court stated, "You are the attorney," when told counsel expressed disagreement with the defendant's wish to put on a defense case, and additionally, "You have to make the trial decision of what you're going to proceed with." *Id.*

At trial, during his opening statement, counsel told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than [the defendant] was the cause of these individuals' death[s]." *Id.* The defendant protested; out of earshot of the jury, the defendant told the trial court that counsel was "selling him out" by maintaining the defendant's guilt. *Id.* The trial court reiterated that counsel was "representing" the defendant and that the court would not permit "any other outbursts" from the defendant. *Id.* at 1506-07. Continuing his opening statement, counsel told the jury the evidence is "unambiguous" and, "my client committed three murders." *Id.* at 1507.

The defendant testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. *Id.* In closing argument, counsel

reiterated that the defendant was the killer. *Id.* On that issue, counsel told the jury that he "took the burden off of the prosecutor." *Id.*

The jury returned a unanimous verdict of guilty of first-degree murder on all three counts, recommending a sentence of death. *Id.*

In its analysis, the Court contrasted its decision in *Florida v. Nixon*, 543 U.S. 175 (2004), with that of *McCoy*. 138 S.Ct. at 1509-10. The Court held in *Nixon* "that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." *Id.* at 1505 (citing *Nixon*, 543 U.S. at 181). In *Nixon*, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *McCoy*, 138 S.Ct. at 1505 (citing *Nixon*, 543 U.S. at 186). Counsel did not negate the defendant's autonomy by overriding the defendant's desired defense objective, for the defendant in *Nixon* never asserted any such objective. *McCoy*, 138 U.S. at 1509 (citing *Nixon*, 543 U.S. at 181).

Importantly, the defendant in *Nixon* complained about the admission of his guilt only after trial, *McCoy*, 138 U.S. at 1509 (citing *Nixon*, 543 U.S. at 185), unlike the defendant in *McCoy*, who "opposed [counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S.Ct. at 1509. In contrast to *Nixon*, the defendant in *McCoy* "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. "If a client

declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." *Id.* at 1509.

We highlight in detail the factual circumstances of *McCoy* because the factual circumstances in the case at hand are very different. On the facts that we have available in this record, nothing of the sort that occurred in *McCoy* occurred in Epperson's case. As discussed in our analysis of Epperson's "inconsistent defenses" argument, counsel for Epperson simply suggested to the jury that Epperson's involvement in this case, if any, was driving the getaway car. Epperson claims that counsel elicited evidence on this fact during cross-examination of a witness and then told the jury in closing argument that Epperson had driven the getaway car. This fact, and this fact alone, is the only fact that Epperson points to in the entirety of his argument on this point.

Epperson has not evidenced "intransigent" or "vociferous" objection to trial counsel's strategy, nor has he evidenced objection to trial counsel's strategy "at every opportunity, before and during trial, both in conference with his lawyer and in open court." Id at 1509. More importantly, it does not appear that counsel ever explicitly conceded guilt on any of Epperson's charges but rather stated that Epperson may have been or was the getaway driver during the commission of the crimes. This concession does not appear to be the type of concession upon which *McCoy*'s holding is predicated. And even if it were, the lack of evidentiary and factual support for Epperson's claim leads us to the conclusion that it is meritless.

Because we find striking dissimilarities between Epperson's case and *McCoy*, we reject Epperson's argument on this point.

F. Cumulative Error.

Since we have found no merit in any of Epperson's individual claims, no cumulative error can exist.

IV. CONCLUSION.

As the trial court noted, "trials are never perfect, and with decades to sit and wonder what could have been, it becomes easy to latch onto small imperfections and believe they made the difference." We agree with the trial court that Epperson has failed to meet his burden to obtain relief under RCr 11.42. For the foregoing reasons, we affirm the Warren Circuit Court's order denying Epperson's RCr 11.42 motion for post-conviction relief.

Minton, C.J.; Cunningham, Hughes, Keller, VanMeter and Venters, JJ., concur. Wright, J., not sitting.

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Supreme Court of Kentucky

2017-SC-000044-MR

ROGER DALE EPPERSON — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
CASE NO. 97-CR-000016

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING AND REISSUING OPINION

The Court, being fully and sufficiently advised, ORDERS that:

1. Appellee's motion filed April 11, 2018, to publish our opinion in *Epperson v. Commonwealth*, 2017-SC-000044-MR, rendered March 22, 2018, is DENIED;
2. Appellant's motion filed May 18, 2018, entitled "CR 76.34 motion for leave to supplement petition for rehearing and consolidated supplement to petition for rehearing", is GRANTED;
3. Appellant's motion, filed May 18, 2018, entitled "CR 76.34 motion to stay proceedings regarding the petition for rehearing, to maintain jurisdiction, and to issue a limited remand for the circuit court to make additional findings and conclusions of law in light of

the intervening decision of *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)", is DENIED;

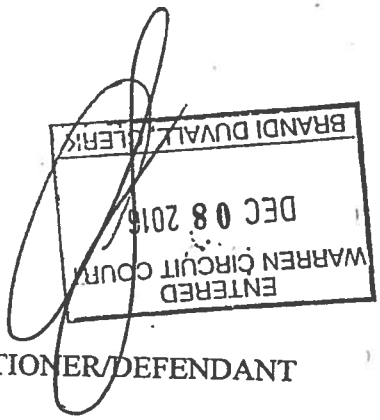
4. Appellant's Petition for Rehearing is GRANTED; and,
5. The Opinion of the Court rendered herein on March 22, 2018, is hereby withdrawn, and the attached Opinion is reissued in lieu thereof.

Minton, C.J., Cunningham, Hughes, Keller, VanMeter and Venters, JJ., sitting. All concur. Wright, J., not sitting.

ENTERED: August 16, 2018.

CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. 1
INDICTMENT NO. 97-CR-00016



RODGER DALE EPPERSON PETITIONER/DEFENDANT

v.

ORDER OVERRULING
DEFENDANT'S 11.42 MOTION

COMMONWEALTH OF KENTUCKY RESPONDENT/PLAINTIFF

****

This matter is before the Court on Defendant Rodger Epperson's motion pursuant to RCr 11.42. Epperson has alleged numerous violations of his constitutional right to effective assistance of counsel. As grounds for relief, Epperson requests that this Court vacate his sentence and grant him a new trial. In the alternative, Epperson requests his sentence be vacated and he be resentenced, or to have this Court commute his sentence to life without parole. Having considered the legal arguments and authorities presented by counsel, and the record as a whole, and being otherwise fully and sufficiently advised, the Defendant's Motion is OVERRULED.

FINDINGS OF FACT

1. Epperson was convicted on July 17, 2003, of complicity to commit murder, burglary, and robbery. The victims were Edward Morris and Bessie Morris.
2. During this retrial, Epperson was represented by attorneys Mike Jackson and Frank Jewell.

3. Epperson had been previously tried and convicted for murder in relation to this crime, and had been represented by different counsel during that trial. Epperson's previous attorneys gave their entire case file to Jackson and Jewell.
4. Epperson appeared before a sentencing jury on July 17, 2003.
5. During sentencing; Epperson's defense attorney presented mitigation evidence for approximately 22-23 minutes. This time period included cross examination of witnesses by the Commonwealth, and the witnesses' entrance and exit from the witness stand. (Trial Tape 5; 7/17/03 3:52:55 – 4:15:00)
6. The majority of the mitigating evidence was presented by corrections officers who testified that Epperson was a model prisoner.
7. Epperson's mother, father, and sister testified during sentencing. None of these witnesses discussed allegations of abuse in Epperson's childhood. For summary purposes, they testified that Epperson grew up in a normal childhood home.
8. Trial counsel's closing argument at sentencing can be summarized as a collateral attack on the death penalty as an institution.
9. At the conclusion of this evidence and closing remarks by counsel, Epperson was sentenced to death.
10. Prior to Epperson's retrial, Dr. Peter Young generated a report noting Epperson may have suffered from brain injuries that had occurred throughout childhood. This report was in the case file tendered to Jackson and Jewell.
11. Prior to Epperson's retrial, former counsel retained mitigation specialist Anna Chris Brown. She conducted an interview with Epperson and his mother. These interviews noted that Epperson's father whipped him with a mining belt, that his initial childhood

home could be described as impoverished, and that Epperson witnessed a close friend die after being shot by a constable deputy. Epperson also discussed an incident in which his father threw a brick at the back of his head, which knocked him to the ground but did not knock him unconscious. Epperson stated that he told the doctor that evening he fell while he was drunk. Epperson also claimed his father hit him in the head with a claw hammer for allowing his bicycle to turn over. In the same interview, Epperson discussed his fortune in having "never been hurt," in fact, he's "never even had a black eye." (Ex. 77 at 25)

12. Mike Jackson testified at an evidentiary hearing on April 30, 2015.

13. Jackson testified that, to the best of his recollection, the trial strategy was to argue that Epperson was not involved in the actual slaying of Ed and Bessie Morris. (EH 4/30/15 1:45:43 – 1:45:51)

14. Jackson testified that he had been involved in capital murder cases before the Epperson case. (EH 4/30/15 1:23:30 – 1:24:55)

15. Jackson testified that it was not his customary practice to engage in sentencing work. (EH 4/30/15 1:27:40)

16. Jackson did not suspect Epperson suffered from any brain damage based on his conversations with Epperson. (EH 4/30/15 1:44:10 – 1:44:37)

17. Frank Jewell also testified at the evidentiary hearing on April 30, 2015.

18. Jewell was unable to recall whether or not he contacted Anna Chris Brown, a mitigation specialist that had previously generated mitigation evidence for Epperson in this case. (EH 4/30/15 3:09:20 – 3:09:26)

19. Jewell stated he did not retain a mitigation specialist in Epperson's case. (EH 4/30/15 3:09:44 – 3:09:53)

20. Jewell was unable to recall several files that were presented to him, including memorandums regarding Epperson's family life. (EH 4/30/15 3:00:00 – 3:09:20)

21. Jewell testified Jackson interviewed Epperson's family. (EH 4/30/15 2:57:08 – 2:57:15)

22. Epperson was convicted of a murder in Letcher County that occurred within months of the murders in this case. The Letcher County case will be referred to at certain points in this opinion as it becomes relevant to the actions of Epperson's trial attorneys in this case.

23. Jewell remembered discussing Epperson's post-conviction action in Letcher County with Epperson's attorney in that case. (EH 4/30/15 2:55:34 – 2:55:44)

24. Jewell remembered the Letcher County case being remanded due to mitigation reasons. (EH 4/30/15 2:55:34 – 2:55:44)

25. Jewell stated that the only additional medical evidence he pursued in regards to Epperson's alleged brain injuries, beyond the reports in the file, were hospital records that would reflect an automobile accident. (EH 4/30/15 2:57:53 – 2:58:00)

26. Jewell did not recall communicating with Dr. Young about his report noting Epperson's brain injuries. (EH 4/30/15 3:15:26 – 3:15:43)

27. Jewell did review psychological reports that revealed nothing of mitigating value and he consciously chose not to produce these reports in sentencing. (EH 4/30/15 3:10:52 – 3:11:22)

28. Jewell was unable to state whether he learned Epperson was abused as a child prior to trial, or if he learned of that fact after trial in subsequent interviews with post-conviction counsel. (EH 4/30/15 3:12:22 – 3:12:47)

29. Jewell remembered learning that Epperson witnessed close friends dying. (EH 4/30/15 3:13:52 – 3:14:11)

30. Jewell testified it is his belief that introducing evidence of head injuries, emotional abuse, and trauma during the penalty phase of a capital murder trial must be evaluated on a case by case basis. (EH 4/30/15 3:16:04 - 3:16:18)

31. Jewell testified that it would be good practice to investigate allegations of abuse and trauma if there is valid reason to. (EH 4/30/15 3:16:18 - 3:16:30)

32. Based on the forgoing findings of fact, this Court finds that Jackson communicated with Epperson's family, but performed no other investigation into mitigating evidence.

33. Based on the forgoing findings of fact, this Court finds that Jewell reviewed the case file containing evidence of mitigating value, but he did not interview the authors of the reports contained in the case file.

34. Based on the forgoing findings of fact, this Court finds that neither Jewell nor Jackson communicated with any mitigation specialist during their representation of Epperson, but they did have access to documents generated by a previously retained mitigation specialist.

35. Based on the testimony and documents this Court has reviewed, there is a reasonable probability that a juror could conclude Epperson suffered traumatic brain injuries, as well as physical and emotional abuse as a child, and that he was deprived of oxygen at birth. Notwithstanding what a reasonable juror could conclude, this Court finds Epperson's allegations of child abuse to be wanting, considering the inconsistent statements of his mitigation interview that he has "never been hurt," and the trial testimony of his mother prior to Epperson's sentence that he lived in a normal childhood home.

36. This Court will cite directly to the record any additional facts necessary as they are addressed in this Court's Conclusions of Law.

CONCLUSIONS OF LAW

I

Standard of Review

The controlling law for this motion was established by the United States Supreme Court, and adopted by the Kentucky Supreme Court. See Strickland v. Washington, 466 U.S. 668 (1984); Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687.

The Supreme Court has explicitly instructed the reviewing court to grant high deference to the performance of counsel, and the court must be sure to avoid second-guessing counsel's effectiveness after a harsh sentence has been imposed. It would be improper to conclude counsel must have been deficient merely because he was unsuccessful. "Because of the difficulties inherent in making the evaluation, 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.'" Id. at 688.

However, our Kentucky Supreme Court has acknowledged that the "prejudice prong" of Strickland only requires the reviewing court to find a reasonable probability that a different outcome could have occurred, not that the alleged error was outcome-determinative. Martin, 207 S.W.3d at 4. Moreover, the fact that an error was rejected on direct appeal under the palpable error standard does not proscribe a defendant from alleging his counsel was ineffective for allowing the alleged error to occur without objection. Id.

II

Pretrial

Epperson claims two errors denied him effective counsel during the pretrial phase. First, he claims his attorney failed to convince him to accept a guilty plea that would have carried a sentence less than death. Second, he claims that the trial judge improperly communicated with him in an attempt to convince him to plead guilty, and that his attorney's failure to object to this communication was constitutionally deficient. Neither claim is persuasive.

The ultimate decision to plead guilty in a criminal case rests with the defendant alone. RCr 8.08. Moreover, the terms of any plea negotiations are subject to the Commonwealth's agreement. See Commonwealth v. Corey, 826 S.W.2d 319, 321 (Ky. 1992). A defendant's attorney has no control over what the Commonwealth will offer and for how long the offer will stand. While Epperson offers plenty of opinions from trial attorneys discussing the importance of building rapport with their client in hopes of convincing them to plead guilty, he offers no binding case law to support his position that his own failure to accept before the Commonwealth retracted the offer is the fault of his attorney. He has not alleged that his attorney advised him

against taking an offer, only that his attorney should have tried harder to convince him to accept. Lafler v. Cooper, 132 S.Ct. 1376 (2012) is inapplicable.

Somewhat paradoxically, Epperson argues on the one hand that he did not receive enough counsel to convince him to plead guilty, but then objects to the fact that the trial judge allegedly counseled him to consider a plea deal as well. Nevertheless, his objection is immaterial. Even if the conversation occurred, of which there is no recording and the only hint it exists was a lone statement made by the trial court in a pretrial hearing, Epperson cannot prove he was prejudiced by his counsel's failure to take corrective action. The only action his counsel could have taken would have been to ask the trial court to recuse himself and there is no indication that motion would have been granted. He could not have asked for a mistrial, because no trial had occurred yet. Moreover, the fact the trial court may have advised Epperson to save his own life shows, if there was any bias at all, it was in Epperson's favor. Failure to ask a trial judge, who is sympathetic to one's client, to recuse himself is neither objectionably unreasonable nor can Epperson prove how he was prejudiced under these facts.

III

Guilt-or-Innocence Phase

Epperson alleges several errors committed by counsel during the guilt-or-innocence phase. This Court finds none to be persuasive, but will address them each in turn.

A. Trial counsel was not ineffective for failing to investigate alternative suspects.

First, Epperson alleges that his attorney was ineffective for failing to investigate alternative suspects. He argues that Detective Ronnie Gay gathered information regarding five alternative suspects, and mentioned them by name in his police reports. Some people, including confidential informants as well as named individuals, stated that Wayne McDowell, Odie Crowe,

and an unknown suspect were somehow involved. These individuals allegedly were seen at the victims' house the weekend prior to their murder, one allegedly was "carrying a 9mm or something," and allegedly they were interested in obtaining money from the victims. A confidential informant said that these individuals would come to his house and ask about developments in the case regularly. Another individual told detectives that two young boys were bragging about having committed the murder.

Epperson argues that the failure of his attorney to follow any of these leads was ineffective. He cites Richey v. Bradshaw, 498 F.3d 344 (6th. Cir. 2007). In that case the defendant was convicted of murder by arson. The Sixth Circuit held that the failure of trial counsel to adequately cross examine the State's forensic arson expert, and the failure to conduct his own investigation into the fact that several testing methods used by the State expert were not standard practices, resulted in a violation of the defendant's Sixth Amendment right to counsel. The Sixth Circuit noted that the prosecution's case rested on scientific evidence and such evidence is exceedingly powerful. "The scientific evidence of arson was thus fundamental to the State's case. Yet Richey's counsel did next to nothing to determine if the State's arson conclusion was impervious to attack." Id. at 362. The Sixth Circuit went on to say, "A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises *sufficient doubts as to that question to undermine confidence in the verdict*, renders deficient performance." Id. (emphasis added).

Epperson also relies on Ramonez v. Berghuis, 490 F.3d 482, 487 (6th. Cir. 2007) for the proposition that, "At the simplest level, counsel has an 'obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence.'" (Def. RCr. 11.42 Mot. 108). In that case, the defendant told the trial court during a bench conference that he had

instructed his attorney to interview, and call to the stand, three eye witnesses that would discredit the victim's testimony. The trial attorney told the judge it was his strategic choice not to investigate or call the witnesses because they were not inside the house that evening. At an evidentiary hearing during post-conviction relief, the witnesses stated they could see what was happening during the crime through a window, and their version of events corroborated the defendant's. The Sixth Circuit held that counsel's failure to interview these particular witnesses was objectively unreasonable. Id. at 489.

Epperson's reliance on Ramonez is misplaced. First, the witnesses Ramonez's attorney failed to investigate were witnesses willing to testify on behalf of the defendant and could provide exculpatory evidence. Epperson alleges his attorney failed to interview witnesses that would have at best inculpated themselves in a murder, or at worst, would have accused others of murder. One set of potential suspects were allegedly seen one week before the crime at the victims' house, not the night in question. The other set were young boys bragging. Rumors and speculation surrounding a small town murder are very different than an attorney's failure to investigate the prosecution's use of junk science, and they certainly do not raise "sufficient doubts as to that question to undermine confidence in the verdict." Richey, 498 F.3d at 362. None of the alleged witnesses could testify that Epperson was not guilty, and corroborate Epperson's story, unlike Ramonez's potential witnesses.

Given the limited exculpatory value of the witnesses who have never testified before this Court in any proceeding, it was not objectionably unreasonable for Epperson's attorney to not follow these leads. Even if the failure to investigate these suspects was objectionably unreasonable, there is no indication this evidence would have called into question the confidence of the verdict because to this day this Court has yet to hear this evidence. Because the failure to

investigate these alternative suspects was not deficient counsel, the failure to present this evidence, and the failure to cross-examine detectives about this information was not objectively unreasonable either.

B. Trial counsel was not ineffective for presenting inconsistent defenses.

Epperson also argues that his trial attorney presented two mutually exclusive defenses, thus destroying the credibility of either. Epperson was charged with both murder and complicity to commit murder, as well as robbery and burglary. During opening statements, defense counsel stated that the only verdict that could be returned was one of not guilty. In order to escape both murder and complicity to commit murder, Epperson argues that his attorney should have disavowed his involvement entirely. (Def. RCr. 11.42 Mot. 125). However, Epperson suggests that his attorney failed in this regard, and actually elicited testimony from Sherri Hamilton[1] that Epperson was the get-away driver. In closing, defense stated both that Epperson did not know the victims, and also that he was the get-away driver because he did not want to be recognized by the victims.

Epperson argues that it is mutually exclusive to argue he was not involved because he did not know the victims, and then to argue that he was involved as a get-away driver because he did not want to be recognized. Epperson argues that because his attorney stated he was involved, his attorney conceded a fact that led to him being convicted of complicity to commit murder, an offense punishable by death. (Def. RCr. 11.42 Mot. 128). However, suggesting Epperson did not want to be recognized does not concede that he knew the victims. He could have been complicit in the robbery and burglary, and feared being seen and described by the victims at a later time.

[1] Hamilton was married to Hodge during the murders and during the first trial, when Hodge and Epperson were tried together. She has since divorced Hodge.

That would indicate Epperson believed the victims would survive. Hamilton testified that Hodge admitted to shooting Ed Morris after Morris reached for a gun on top of the refrigerator. (Trial Tape 5; 07/16/03 9:45:37 – 9:46:32) Therefore, perhaps the jury could have been persuaded that murder was never part of the plan. But the Commonwealth produced substantial evidence that robbery and burglary were indeed Epperson's main objectives. Admitting involvement to some of the charges, but denying involvement in others, is not an inconsistent defense, but rather, serves to build credibility with the jury. Jackson testified during the evidentiary hearing that it was the defense strategy to deny involvement in the slaying. Having reviewed the closing argument, defense counsel clearly argued that Epperson was not involved in any conduct that occurred inside the Morris residence. Had the jury found that Epperson planned the robbery and burglary, but never agreed to the victims being murdered, he would not have been convicted of a capital crime.

Admitting involvement in the robbery and burglary does not concede an agreement to commit murder, and trial counsel's choice to build some credibility with the jurors in order to spare Epperson's life at a later point could have be an effective strategic decision. However, this trial strategy must also be considered in light of the fact Epperson had already been incarcerated for thirteen years at the time of his second trial in 2003. Thus, if the jury convicted him only on the robbery and burglary charges, the minimum sentence could have been two 20 year sentences served concurrently. Epperson, being eligible for parole after serving 85% of the sentence, could have potentially served out his sentence after an additional four years. It was not unreasonable to strategically concede involvement in the robbery and burglary once the Commonwealth presented its case in chief.

C. Trial counsel was not ineffective for failing to investigate three witnesses who would have testified that Donald Bartley confessed to the murders.

Epperson states that three witnesses should have been used to impeach Donald Bartley, the key Commonwealth witness. First he claims that Tammy Gentry testified during the first trial in 1988 that Bartley confessed to murdering the victims. Epperson argues that his trial counsel had access to these transcripts and should have followed up with Gentry by presenting her testimony in an attempt to impeach Bartley. Gentry met Bartley in the Laurel County Jail. Her previous testimony was:

> Q. Did you and Mr. Bartley at anytime have an opportunity to discuss the murder of Ed and Bessie Morris in Jackson County?
>
> A. Yes.
>
> Q. What did he tell you about that murder?
>
> A. He told me that Benny and Rodger wasn't at fault and he done what he done to help his mother because she needed money and he was strung out on coke real bad.
>
> Q. So you understand him to be telling you he killed them is that correct?
>
> A. Uh huh.

(Def. RCr 11.42 Mot. Ex 23). Upon cross-examination, the following exchange occurred.

> Q. And where did you happen to meet Donald Terry Bartley? Are the men and women kept together down at jail?
>
> A. No they are not.
>
> Q. Where did you happen to meet him?
>
> A. He was in cell next to me and at times they opened our door and let Donnie come in there and play guitar.

Id. Gentry also admitted that she was a convicted felon who was serving a sentence for forgery. Epperson and Hodge were ultimately convicted in that trial. Whether or not it was objectively unreasonable for trial counsel to investigate this witness is immaterial. Her testimony had been used before and it did not spare Epperson from a murder conviction and death sentence. There is

no reasonable probability that the testimony of a convicted felon, who was serenaded by a male inmate with his own subjective motives, would have changed the outcome of Epperson's retrial, considering the fact it made no difference in Epperson's first trial. Moreover, the fact that Bartley allegedly confessed to murder does not mean that Epperson could not be found guilty of complicity to commit murder. The jury did not find Epperson guilty of murdering Ed and Bessie Morris.

The second witness Bartley allegedly confessed to was Mark Thompson. Like Gentry, Thompson was a felon lodged in state prison. He sent a letter from Eastern Kentucky Correctional Complex, as well as one from Northpoint Training Center, inquiring the date of Epperson's trial because he was to be a defense witness. (R. on Appeal Vol. X at 1062, 1134). He would have testified that Bartley confessed to entering the Morris' home with another person to rob and kill them and that Bartley also framed Hodge and Epperson for the murder of Tammy Acker in Letcher County in order to avoid the death penalty himself. (PT 3; 9/28/98; 3:40:00 – 3:50:30) However, it would have been a poor strategic decision to elicit testimony from a witness who would claim Epperson was involved in another murder, even if that testimony would have been that Epperson was framed for that murder. If the jury failed to believe the witness, they would have also heard Epperson was accused of another murder.

And finally, Epperson claims his attorney should have presented testimony from Elizabeth Shaw. He purports that Shaw would have bolstered the credibility of Hamilton, who testified that Hodge confessed to her that he and Bartley entered the house and killed Ed and Bessie Morris. Allegedly, Hamilton made the same statement to Shaw as she made under oath at trial. Again, even if the failure to investigate this witness was objectively unreasonable, the only evidence Shaw would have provided is that Hamilton's trial testimony is consistent with what

she told Shaw at a previous time. If the jury believed Hamilton was lying, they would have believed she lied to Shaw. If they believed Hamilton was telling the truth, then Shaw's testimony would have been cumulative and unnecessary. Epperson makes much of the fact that Hamilton was a known liar, but maintains the belief that testimony from other convicted felons is somehow more credible.

Moreover, if trial counsel had performed as Epperson urges he should have, then counsel would have presented "inconsistent defenses." Hamilton testified that Hodge admitted he and Bartley went into the house and committed the murders after Ed Morris reached for a gun on top of the refrigerator. Supposedly, Thompson would have suggested Bartley acted without Hodge or Epperson, and Gentry could only assert that "Rodger wasn't at fault." Not-at-fault does not mean not-involved. If it is ineffective assistance of counsel to present inconsistent defenses, as Epperson urges it should be, then defense counsel should have either pursued the theory that Bartley acted without Hodge and Epperson, and used Thompson's testimony, or that Hodge and Bartley were the murderers while Epperson remained outside, which was Hamilton's testimony. Trial counsel could not have maintained both defenses. There is no evidence to support the belief that Thompson's testimony, which would have informed the jury of Epperson's other murder charge, would have had a reasonable chance of producing a different outcome at trial.[2]

[2] For the reasons established in this subsection, Epperson's claim that counsel was ineffective for failing to impeach Bartley with confessions he made to other convicted felons is rejected. This alleged error was not objectively unreasonable, nor would it induce a reasonable probability that the outcome would have been different. As noted time and time again, the jury did not convict Epperson for the murders of Ed and Bessie Morris. They very well could have believed Bartley committed the murders and still found Epperson was complicit in that outcome.

D. The prosecution did not violate Epperson's constitutional rights for failing to correct "false testimony," and trial counsel was not ineffective for failing to object to the same.

Epperson claims that Bartley tendered false testimony by stating he received a sentence of life with parole eligibility in 25 years in exchange for his testimony in this case, when he really received a 45 year sentence. This is inaccurate and Bartley did receive a life sentence with parole eligibility in 25 years for his involvement in the Letcher County murders. (Def. RCr. 11.42 Mot. Ex. 71 at 834). Epperson has argued, "The deal as it was agreed upon between the Commonwealth and Bartley was 200 years on the murders and 20 years each for the robbery and burglary." (Def. RCr. 11.42 Mot. at 156) However, the presentence report, cited by Epperson, actually says, "On December 10, 1987, [Bartley] and his attorney changed their minds regarding who they wanted to 'sentence' [Bartley], and as a result, Letcher Circuit Judge, F. Byrd Hogg, sentenced [Bartley] to 'Life in prison without the Benefit of Probation or Parole for Twenty-five years.'" (Def. RCr. 11.42 Mot. Ex. 71 at 834). Epperson is correct that Bartley received a 45 year sentence for his involvement in this case, which was to run consecutively with his Letcher County sentence. (Def. RCr. 11.42 Mot. Ex. 73 at 858). Thus, Bartley essentially agreed to spend the rest of his life in prison in exchange for his cooperation with the Commonwealth in both cases.

This objection is unpersuasive. The jury would not care if Bartley was eligible for parole in 25 years (as he testified), received a full 45 year sentence (as Epperson claims he received), or that he will spend the rest of his life in prison (as is reality). What is important is that Bartley testified to save himself from a death sentence and that point was made clear to the jury. (Trial Tape 5; 7/17/03 9:16:30). The fact that Epperson was not convicted of principal murder reveals

that the jury did not believe Bartley. For these reasons, it was also not objectively unreasonable for counsel to fail to obtain the judgment imposing sentence on Bartley in order to impeach him.

E. Trial counsel was not ineffective for failing to object to Bartley's prior testimony being introduced on Confrontation Clause grounds or objecting that the testimony did not comport to KRE 804(b)(1).

Epperson claims that the admission of Bartley's prior testimony violated his Sixth Amendment right to confront witnesses and that it did not meet the requirements of KRE 804(b)(1). However, this assertion is unpersuasive and his trial attorney was not ineffective for failing to object. Epperson admits that he had an opportunity to cross-examine Bartley at the first trial, but not an "adequate" opportunity. (Def. RCr. 11.42 Mot. 153.) Epperson argues that at the time of the first trial, Bartley's plea deal had not been finalized. Therefore, he was unable to cross-examine Bartley about the specifics of the plea deal at the first trial. He also argues that Bartley could not be impeached with Hamilton's testimony in the first trial because she invoked spousal privilege. These arguments disguise the fact that trial counsel did use Hamilton's testimony during the second trial to collaterally impeach Bartley, and that the jury did hear the specifics of Bartley's deal at the second trial. Although Epperson asserts the jury heard "false testimony" regarding Bartley's deal, as this Court has noted, the jury understood very well that Bartley was spared a death sentence in exchange for his testimony.[3] Epperson was not denied an adequate opportunity to confront his accuser and the requirements of KRE 804(b)(1) were met. See Epperson v. Commonwealth, 197 S.W.3d 46, 55 (Ky. 2006).

[3] For these reasons, Epperson's additional claim, that counsel failed to cross-examine Bartley about the plea deal effectively, is rejected.

F. The Commonwealth's interjection of victim impact testimony did not deprive Epperson of a fair trial, and his trial attorney was not ineffective for failing to object.

Epperson alleges certain statements were improper victim impact evidence. The Kentucky Supreme Court rejected this argument in Epperson, 197 S.W.3d at 58. Epperson claims that the failure of his attorney to object, and preserve this error for review, resulted in ineffective counsel. However, the Kentucky Supreme Court gave no indication that this alleged error was rejected because of the high standard for reversing lower courts based on palpable error. Rather, the Kentucky Supreme Court stated this objection would have been overruled had it been made. "We have previously upheld the testimony regarding the character and background of the victim during the guilt phase of the trial." Id. (citing Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997) (overruled on other grounds by McQueen v. Commonwealth, 339 S.W.3d 441 (Ky. 2011)); Bussell v. Commonwealth, 882 S.W.2d 111 (Ky.1994)). Epperson's trial counsel was not objectively unreasonable for failing to object, and Epperson was not prejudiced by this alleged failure because the objection would not have resulted in a mistrial or reversal on direct appeal.

G. Trial counsel's examination and cross-examination of Sherri Hamilton was not constitutionally deficient.

Epperson claims that his attorney elicited impermissible hearsay evidence from Hamilton that placed Epperson at the scene. Hamilton testified that Hodge confessed to her that he and Bartley committed the murders while Epperson waited outside. She also testified that, in response to a news program that appeared shortly after the murders explaining the Morris' deaths, Bartley stated, "This, that's what we done man. That's what we done." However, Epperson objects to the fact that his attorney asked, "Now the plan was for Rodger to wait in the automobile. Correct?" (Def. RCr 11.42 Mot. 161) Epperson states that prior to this question,

Hamilton had never placed Epperson at the scene. Therefore, according to Epperson, his attorney inculpated him in the murder by suggesting he was present.

Again, as mention in Subsection C of this Section, admitting Epperson was involved in the robbery and burglary does not constitute an admission that he agreed to commit murder. Counsel could have been attempting to build credibility by conceding involvement in the robbery, while emphasizing the point that Hodge and Bartley were the actual murderers. Bartley testified that Epperson entered the house.[4] Defense counsel had to counter this assertion. The evidence at his disposal was Hamilton's testimony. The fact that the Commonwealth objected in an attempt to keep this testimonial exchange from occurring shows that the testimony hurt the Commonwealth, and thereby helped the defendant. It was not objectively unreasonable for defense counsel to examine Hamilton in this manner.

H. Trial counsel was not ineffective for failing to investigate and present evidence Epperson did not know the victims.

Next, Epperson alleges that he did not know the victims, contrary to the Commonwealth's assertions, and that failure to present this fact to the jury resulted in ineffective assistance of counsel. The only evidence counsel would have allegedly discovered, had he performed this investigation, is a statement from Epperson's parents that they had not communicated with their son for three years. The Commonwealth asserted that Epperson's parents knew the victims and so did Epperson. Epperson argues that evidence he had not spoken to his parents for three years is proof he did not know the victims. However, those two facts are not mutually exclusive. Individuals can be acquainted with the same people as their parents despite the fact they no

[4] This witness's testimony is the primary reason why it was not ineffective for Epperson's attorneys to not produce speculative evidence of young boys bragging and other alternative suspects not seen at the house on the night in question. Bartley testified at the first trial and Epperson's attorneys knew he would testify again. Baseless speculation that alternative suspects committed the crime would have detracted from the defense's credibility. A more effective strategy, the one chosen, would be to minimize the defendant's involvement.

longer communicate with their parents. Epperson's claim that his attorney was ineffective for failing to prove a negative, that he did not know the victims, is unpersuasive.

H. The cumulative effect of these alleged errors did not deprive Epperson of any constitutional rights.

Epperson argues that if this Court rejects each of his individual claims of errors, then this Court must consider the cumulative effect of all of the errors. However, errors did not occur simply because Epperson alleged that they did. While it may be true that the cumulative effect of errors may demonstrate a lack of due process, and call into question the fundamental fairness of a trial, there must first be at least one error. This Court found none.

IV

Sentencing Phase

Epperson alleges several errors committed by his counsel during the sentencing phase. The majority of his claims can be summarized: trial counsel failed to conduct a reasonable investigation into Epperson's past to uncover mitigating evidence, that any strategic decision to not produce mitigating evidence was inherently unreasonable due to counsel's failure to investigate, and that had counsel presented the mitigating evidence discussed in this Court's findings of fact that there is a reasonable probability the outcome would have been different. Epperson has alleged other sentencing errors, but in his tendered version of Findings of Fact and Conclusion of Law, he abandons them. Any claim this Court does not address is due to Epperson's concession that the claims do not warrant the relief he seeks.

In Hodge v. Commonwealth, 68 S.W.3d 338, (Ky. 2001), the Kentucky Supreme Court was faced with a similar situation. As noted previously, Hodge was convicted in Letcher County of murdering Tammy Acker by stabbing her multiple times. Epperson was Hodge's codefendant, and was convicted of robbery, burglary, attempted murder, and murder. Both defendants claimed

they received ineffective assistance of counsel because their attorneys failed to conduct a mitigation investigation. The trial court denied their request for an evidentiary hearing on the matter, which the Kentucky Supreme Court held was reversible error.

> In the case at bar, the trial court did not determine whether either defense counsel conducted any investigation for mitigating evidence. From the record before us, it appears that neither Epperson's nor Hodge's defense counsel conducted any investigation, though an evidentiary hearing might prove otherwise. *If there was no investigation, then their performance was deficient.*" Id. at 344 (emphasis added).

The case was then remanded for the trial court to determine whether an investigation had occurred, and whether the fruits of the investigation would have had a reasonable probability of changing the outcome. Jewell testified during the evidentiary hearing that he was aware of this Kentucky Supreme Court decision prior to Epperson's retrial in this matter.

Later, in Hodge v. Commonwealth, 2011 WL 3805960, (Ky. 2011) (UNPUBLISHED), the Kentucky Supreme Court received the case again after the trial court held the evidentiary hearing and still denied Hodge's RCr 11.42 motion. Of specific importance, "Here, the Commonwealth concedes that the performance of Hodge's defense counsel was deficient in conducting a reasonable investigation to find mitigation evidence. Thus, the inquiry must focus only on the prejudicial effect of this deficiency." Id. at *3. Hodge had presented evidence in his RCr 11.42 hearing that he suffered a traumatic childhood and brain injuries. Nevertheless, the Court found that Hodge's actions in callously murdering a young woman, by stabbing her several times, was beyond mitigating and that no juror would have granted him sympathy.

In this case, the Commonwealth has not conceded that defense counsel's investigation was deficient. To determine what constitutes a reasonable investigation, this Court is guided by the United States Supreme Court opinion Wiggins v. Smith, 539 U.S. 510 (2003). Wiggins was convicted of murder during a bench trial and was sentenced to death by a jury for drowning a 77

year-old woman in her bathtub. Wiggins' attorneys attempted to bifurcate the sentencing phase and relitigate Wiggins' innocence before one jury. If that strategy failed, the attorneys wanted to present mitigating evidence to a different jury. Wiggins' attorneys, despite knowing the jury would be informed of his bench trial conviction, believed the proper strategy was to deny involvement in the crime. However, the attorneys also believed that if the jury rejected this strategy, the attorneys would not be considered credible when they admitted guilt and then asked for mercy. Their attempt to bifurcate the juries was rejected by the trial court. Id. at 515. The attorneys then proffered evidence they would have presented had their motion to bifurcate been granted. The attorneys never mentioned Wiggins' life history. Id. at 517.

Wiggins later sought post-conviction relief on grounds that his attorneys were ineffective for failing to conduct a mitigation investigation. Wiggins argued that, had his attorneys followed leads in their possession, they would have uncovered a wealth of information regarding Wiggins' troubled childhood. To support his claim Wiggins introduced, for the first time into the record, a psychological report generated by Hans Selvog. Id. at 516.

> According to Selvog's report, petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner-an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Id. at 516-17 (internal citations omitted).

Wiggins' post-conviction relief was denied by the trial court and affirmed by the Maryland Court of Appeals. That court determined trial counsel had made "'a deliberate, tactical decision to concentrate their effort at convincing the jury' that appellant was not directly responsible for the murder." Id. at 518. The Maryland Court of Appeals recognized that trial counsel did not have the detailed Selvog report in their possession, but determined that a presentencing report and "a more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation," was sufficient to alert the attorneys of Wiggins' troubled childhood, and thus their decision not to pursue a mitigation strategy was made on the basis of a reasonable investigation. Id.

The United States Supreme Court reversed, citing Strickland, 466 U.S. at 690-91 (emphasis added):

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation *are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.*"

The question before the Wiggins court was "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable.*" Wiggins, 539 U.S. at 523 (emphasis original). In determining the reasonableness of trial counsel's investigation, the Court noted the attorneys drew upon only three sources: a psychological report indicating Wiggins "had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *These reports* revealed nothing, however, of petitioner's life history." Id. (emphasis added). The only reports available to counsel discussing

Wiggins' childhood was his own account that it was "disgusting," and documentation regarding his lodging with foster parents. Id. Counsel took no further investigatory steps.

The Supreme Court stated that it was consistent with professional norms to hire a mitigation specialist so that a report may be generated.

> As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history *report*. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a *report*. . . Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a *narrow set of sources*.

Id. at 524 (emphasis added). The Supreme Court agreed with the District Court's determination that the foster care reports should have alerted the attorneys to dig deeper into Wiggins' past. "Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable." Id. at 525. The Supreme Court then held, "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

This case is distinguishable from Wiggins. Epperson has argued extensively about the power of the mitigation evidence within his case file, such as the Dr. Young report and the mitigation report generated by Anna Chris Brown. Epperson essentially argues that these reports should have generated red flags, and caused his attorneys to investigate further. However, the fundamental flaw in this argument is that *because* the evidence in the file is so detailed, it leads this Court to believe the choice to not put forth this mitigation evidence was a strategic decision

made by trial counsel. In Wiggins, it was the fact that trial counsel *could have* obtained the Selvog report had they investigated further that caused them to be ineffective. That is different than saying Wiggins' attorneys had the Selvog report in their possession and continued to pursue the strategic choice of denying involvement in the crime. Epperson's attorneys had the Dr. Young report and the Anna Chris Brown report. The combined details in these reports, in a light most favorable to the defendant, still fall short of the mitigating value provided in the Selvog report in Wiggins. Indeed, it is only necessary for trial counsel to obtain a mitigation *report* when the Department of Public Advocacy makes funds available. See id. at 524. It is unnecessary for counsel to reinvent the wheel and hire their own mitigation specialist.

This Court has reviewed trial counsel's penalty phase evidence and closing argument. The evidence consisted largely of prison guards claiming Epperson was a model prisoner. Counsel's argument for leniency was to attack the death penalty as an institution. He made repeated claims that killing Epperson would not cause Mr. and Mrs. Morris to come back to life. (7/17/03 VR: 5:05:25-5:06:30). He showed, through testimony of the guards, that Epperson was not a current danger to anyone. At one point, counsel even stated that he could make excuses for Epperson but that he would not. (7/17/03 VR: 5:11:55-5:12:40). Trial counsel left no room for doubt that he did not want to make excuses, even advising the jury that the Commonwealth "wants them to think" Epperson was making excuses. (7/17/03 VR: 5:11:55-5:12:40). Considering the fact that many intelligent legal scholars hold a similar distaste for the death penalty as an institution, it is not an unreasonable strategy to collaterally attack the institution, rather than to claim *possible* brain damage requires leniency. Trial counsel tactically decided to appeal to the jury's logos instead of its pathos. Indeed, it is unclear if the jurors would have

accepted an appeal to their emotion. They had just concluded Epperson was the "brains" of the entire plan, and premeditated the murder of Mr. and Mrs. Morris.

Moreover, it is unclear just how much mitigating weight Dr. Young's report and testimony would have provided. His report also concluded that Epperson exhibited antisocial behaviors, although he testified in other proceedings and stopped short of diagnosing Epperson as antisocial. Coincidentally, this hesitancy to diagnose comes after Epperson stands convicted and sentenced to death. The clinical attributes of antisocial behavior includes a person who is "narcissistic, fearless, pugnacious, daring, blunt, aggressive and assertive, irresponsible, impulsive, ruthless, victimizing, intimidating, dominating, self-reliant, revengeful, vindictive, dissatisfied, and resentful." (Dr. Young Report, Ex. 29 at 5). These descriptions align with the Commonwealth's theory of the case, in that Epperson was the "straw boss," and intelligent enough to plan murder. The Selvog report in Wiggins did not contain such vivid descriptions of the defendant, which in this case would provide valuable rhetorical fodder for the prosecution. Despite repeated claims that Epperson suffered brain damage, none of his other psychological reports caused Jewell to believe the introduction of this evidence was in Epperson's best interest.

Even if counsel's investigation was deficient as a matter of law, Epperson has not convinced this Court that the evidence presented would have a reasonable probability of producing a different outcome. In fact, no meaningful evidence was presented during the evidentiary hearings that counsel should have discovered, but failed to discover as a result of poor investigatory work.[5] Most of the testimony presented was that of witnesses reading the reports already

[5] The only documents introduced that were not in the original case file were the death certificates of James Noble, Calvin Hurt, and Raleigh Riddle, friends of Epperson he witnessed die. However, Jewell testified he was aware that Epperson witnessed a close friend die. It is unclear how these death certificates would have shed any additional light on this fact. It is also unclear how Epperson witnessing a close friend die would lead a jury to show mercy for premeditated murder. Many people have witnessed loved ones die and did not engage in robbery and burglary.

contained in the case file. Considering the cold-blooded execution of Mr. and Mrs. Morris while their hands were bound behind their back, it is clear that the murder was the product of planning, and even though Hodge was the weapon, the jury believed it was Epperson's plan to cause that weapon to fire. This Court doubts any mitigating evidence would have saved Epperson.[6] See Epperson v. Commonwealth, 2016 WL 5245215 *4 (Ky. 2016).

V

Juror Claims

Epperson's objections to the *voir dire* process can be summarized: he believes his attorney should have asked more probing questions regarding whether the jurors could consider mitigating evidence. Epperson objects to his attorney's alleged "boiler plate" *voir dire*, in which his attorney asked if the jurors could "consider" mitigating evidence. Epperson claims this question elicits a "pretty meaningless" response because most jurors do not understand what "consider" means and they have no concept of what mitigation evidence is. Epperson claims his attorneys should have used qualifiers, and asked if the jury could "seriously consider" mitigating evidence. Epperson argues that had his attorney examined the jurors in this manner, he would have discovered deficiencies in jurors that would have allowed them to be struck for cause.

Epperson relies, in part, on Fugett v. Commonwealth, 250 S.W.3d 604 (Ky. 2008). However, the juror in Fugett should have been struck for cause largely because he admitted during *voir dire* a family member was a police officer and he believed police officers were more credible witnesses. He also stated that he would not consider *any* mitigating factors in response to direct questioning. The error in Fugett was allowing the needle to remain in the haystack once found,

[6] For the same reasoning, counsel was not ineffective for failing to object to Bobby Morris sitting at the Commonwealth's table during closing argument. Whether Bobby Morris sat in the gallery or at the table, the Commonwealth still could have pointed to him and made the statements Epperson claims were objectionable.

not that Fugett's attorneys inadequately searched the haystack. Epperson provides no case law holding trial counsel to be ineffective based on the *voir dire* questions they did *not* ask. Morgan v. Illinois, 504 U.S. 719 (1992) is inapplicable. In that case, the trial court was solely responsible for *voir dire* and counsel was unable to contribute to the process.

Voir dire is an inherently strategic part of trial, if not the most strategic part. This is trial counsel's first impression with the jury. Epperson claims his attorney should have divulged what mitigating evidence would be presented in order to better understand whether each juror could consider it. However, if the jury has no concept of what evidence will be presented, or what any party's theory of the case may be, what strategic advantage is developed when defense counsel asks questions designed to make excuses for murder? "Can you consider brain damage as a mitigating factor?" "Can you consider good behavior in prison?" A reasonable juror may wonder why these questions are relevant, because if the defendant is not guilty, of what importance is brain damage? The questions an attorney chooses not to ask during *voir dire* are just as much the culmination of a "seriously considered" strategy as are the questions he "considers" asking. Trial counsel's *voir dire* was not ineffective.

Epperson attempts to produce evidence from these jurors that they were unfit to sit on the jury. Not only does this Court find no merit for this argument in fact, none of the juror testimony should have been admitted and it will be ignored. "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. Recently, in Maras v. Commonwealth, 470 S.W.3d 332, 335 (Ky. 2015) the Kentucky Supreme Court clarified and reaffirmed its prior decision in Commonwealth v. Abnee, 375 S.W.3d 49 (Ky. 2012). In Abnee, the Court said

> The rule serves several important purposes. It aids in protecting the sanctity and finality of judgments based upon jury verdicts. It promotes open and frank discussion among the jurors during deliberations. By barring the use of a juror's testimony to attack a verdict, the rule protects individuals who have served on juries from potentially corruptive influences that, in the hope of altering a verdict, might otherwise be brought to bear against a former juror. Id. at 53.

In clarifying this rule, the Maras court said,

> But the rule is not ironclad. Over time, we have acknowledged limited circumstances where the clear text of the rule must yield to constitutional demands. These limited circumstances can be *summed up rather simply*: juror testimony is permitted when it "concern[s] any overt acts of misconduct by which extraneous and potentially prejudicial information is presented to the jury[.]" Maras, 470 S.W.3d at 335 (emphasis added).

Epperson has not alleged that "any overt acts of misconduct by which extraneous and potentially prejudicial information" occurred with this jury. This Court took testimony from jurors concerning their thought processes, prior to the clearly established rule in Maras. For years, Epperson's post-conviction counsel has called these jurors, shown up at their house to conduct interviews, and subpoenaed them into this Court for further proceedings. Counsel has done this for the sole purpose of attacking the effectiveness of Epperson's trial attorneys, not to allege wrongdoing or misconduct by the jurors themselves.

This Court can state, without hesitancy, the rationale of the Maras Court is sound. This Court believes these jurors did say, and would have said, whatever needed to be said just for Epperson's post-conviction attorneys and investigators to stop questioning them. One juror expressed his dissatisfaction with the court system as a whole, stated he lacked confidence that the difficult decision he faced will be honored, and swore he would never participate on another jury. The constant disruption of fellow citizens' lives, who are ordered into court to perform their civic duty for a mere $12.50 per day, serves only to poison the confidence our society has that its

participation in criminal justice matters. This Court does respect the decision this jury rendered and understands that asking someone to consider taking human life is a decision carefully measured – by most. It was proper to try those who extrajudicially sentenced and executed Ed and Bessie Morris; it was improper to try the jurors who judicially sentenced Epperson to a similar fate.

VI

Conclusion

Rodger Epperson, Benny Hodge, and Donald Bartley are no strangers to our court system. Twenty four people have sat in judgment of Epperson and they all found him guilty of robbing and burglarizing Ed and Bessie Morris. Twelve people originally decided Epperson murdered the married couple, but in this case, twelve people found him complicit in their murders. All twenty four sentenced Epperson to death. There is no doubt that Epperson was at the Morris' residence the night their lives were tragically taken. Trials are never perfect, and with decades to sit and wonder "what could have been," it becomes easy to latch onto small imperfections and believe they made the difference. This Court is specifically instructed not to allow hindsight to cloud its judgment. Epperson's right to counsel, protected by the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution, was not violated.

ORDER

The Court, having considered Defendant's Motion for a New Trial or to Vacate Sentence pursuant to RCr 11.42, all responses, replies, supplemental memorandums, arguments of counsel, the record as a whole, applicable laws, and all other matters, orders:

IT IS HEREBY ORDERED that

1. Defendant's Motion for a New Trial is DENIED.

2. Defendant's Motion to Vacate Sentence is DENIED.

There being no just cause for delay, this is a FINAL and APPEALABLE order.

HON. STEVE ALAN WILSON
WARREN CIRCUIT COURT
DIVISION 1

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Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

AHMAD SAYED HASHIMI,
Petitioner,
v.

UNITED STATES OF AMERICA,

Respondents

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Parties:

PETITIONER:
AHMAD SAYED HASHIMI
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RESPONDENT:
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Washington, DC 20530-0001

QUESTION PRESENTED

Whether the case of United States v. Ahmad Hashimi, (No. 16-4846 – Fourth Cir.) should be remanded for review and decision by the Fourth Circuit Court of Appeals in light of the United States Supreme Court's case of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), decided/issued on May 14, 2018.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

No. _____

In The
Supreme Court of the United States

AHMAD SAYED HASHIMI,
Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ahmad Sayed Hashimi respectfully requests a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The U.S. Court of Appeals for the Fourth Circuit issued in an unpublished opinion on January 22, 2018, Case 16-4846, Doc. 1000226868, on appeal from a finding of guilt found on September 28, 2016, in case No. 1:16-cr-00135 from the US District Court of the Eastern District of Virginia. The court of appeals denied a timely petition for rehearing *en banc* on March 12, 2018 Doc. 1000255831.

JURISDICTION

The judgement of the U.S. Court of Appeals for the Fourth Circuit was entered on January 22, 2018, Case 16-4846 Doc. 1000226868. The court of appeals denied a timely petition for rehearing *en banc* on

March 12, 2018 Doc. 1000255831. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Sixth Amendment to the Constitution guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

STATEMENT OF THE CASE

Ahmad Hashimi was denied his Sixth Amendment right to choose the objective of his defense when his trial counsel made an admission of guilt during closing argument. In accordance with the Supreme Court holding in *McCoy v. Louisiana*, this Court must reverse the judgment of the Fourth Circuit Court of Appeals and remand this case for further proceedings.

Mr. Hashimi was not consulted prior to his trial counsel making the admission of guilt, and because it was done during closing argument he was not given an opportunity to maintain his innocence in open court. He subsequently filed a motion for new counsel which was denied by the district court, despite having asked the court to appoint a new attorney for him at least five times because of the severe lack of communication with his trial attorney.

The petition for *McCoy v. Louisiana* was filed on March 6, 2017. Briefs were filed in November of 2017 and oral arguments were heard on January 17, 2018, nearly a week prior to the Fourth Circuit opinion delivered in Hashimi's case. All this should have been enough to provide adequate notice to Hashimi's appellate lawyer to file a notice to the Fourth Circuit Court of Appeals that the Supreme Court was currently hearing a case highly pertinent to Mr. Hashimi's case.

Facts

On April 8, 2016, Ahmad Hashimi was charged in the U.S. District Court in the Eastern District of Virginia with four crimes: Count I - conspiracy to distribute oxycodone, Count II - conspiracy to distribute cocaine, Count III - interstate kidnapping, and Count IV - interstate domestic violence. *U.S. v. Hashimi*, 718 Fed. Appx 178, 179 (4th Cir. 2018). Mr. Hashimi's case went to trial, and on September 28, 2016, Mr. Hashimi was found guilty of all four counts.

During closing argument, without consulting Mr. Hashimi, his trial counsel argued against guilt for the drug convictions, but conceded guilt for the interstate kidnapping and interstate domestic violence counts. He said:

> *The last few days I've done very little, if no questioning relating to the kidnap and domestic violence. Shame on Mr. Hashimi, shame on him. I am sure he was humiliated that Hilina* [the victim] *was cheating on him behind his back, I am sure, but that doesn't excuse what he did. And if he were allowed to, he would accept responsibility for that right in front of you.*

J.A. 792.

On December 16, 2016, a sentencing hearing was held and the court rendered its final judgment: 240 months of incarceration on Count I and II; 300 months of incarceration on Count III; and 120 months of incarceration on Count IV, all to run concurrently. J.A. 918-23.

Mr. Hashimi had moved the court to appoint new counsel to replace his trial counsel on at least five different occasions complaining that he was being pressured to plead guilty, that his communications with counsel totaled only 45 minutes, that he had not

seen nor discussed discovery, again noting trial counsel's lack of communication, and for failing to comply with the court's direction when he was told counsel had not received discovery. J.A. 62-64, 71, 934, 151, 171. The court denied all of his requests for new counsel. J.A. 72-73, 159, 172.

Mr. Hashimi appealed the conviction. The appeal was denied on January 22, 2018. In the unpublished opinion issued by the Fourth Circuit Court of Appeals, the appellate court said:

> *Hashimi argues that trial counsel was ineffective because he conceded Hashimi's guilt on Counts 3 and 4 during closing argument without Hashimi's consent. However, because this may have been a strategic decision, counsel's ineffectiveness does not appear on the face of the record and thus Hashimi should raise this claim, if at all, in a* 28 U.S.C. § 2255 (2012) *motion.*

Hashimi, 718 F. App'x at 181.

A Final Mandate was stayed until after the request for a re-hearing *en banc* was decided. The request for a re-hearing *en banc* was denied on March 12, 2018. The Final Mandate was issued on March 20, 2018.

REASONS FOR GRANTING THE PETITION

Mr. Hashimi's Sixth Amendment right to counsel was effectively violated when his trial counsel made an admission of guilt without consulting his client and despite his client's objections. The Supreme Court recently held in *McCoy* that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even if doing so is considered part of counsel's trial strategy. *McCoy*, 138 S. Ct. at 1505.

I. HASHIMI'S RIGHT TO MAINTAINING HIS INNOCENCE WAS VIOLATED BY TRIAL COUNSEL.

The Sixth Amendment guarantees each criminal defendant "the Assistance of Counsel for his defence" but this does not surrender control entirely to counsel. *Id.* at 1503. Trial management may be the domain of the lawyer, but autonomy to decide that the objective of the defense is to assert innocence belongs to the client. *Id.*

A. Hashimi's autonomy in deciding the objective of his defense was stripped of him by trial counsel.

A client's right to autonomy is decided differently than a complaint of counsel's competence. *Id.* at 1510–11. The Supreme Court held that the violation of the protected autonomy right was complete when the court allowed counsel to usurp control of an issue within the defendant's sole prerogative. *Id.* at 1511. The Sixth Amendment guarantees a right to secured autonomy and violation of that right is a structural error because it protects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* Counsel's admission of a client's guilt over the client's express objection blocks the defendant's right to make a fundamental choice about his own defense and requires that defendant be accorded a new trial without any need to first show prejudice. *Id.*

Autonomy to decide the objective of the defense is different than decisions of strategy; insisting on innocence even in the face of overwhelming evidence to the contrary is not a strategic choice about how to best achieve a client's objectives but rather a choice about what the client's objectives are. *Id.* at 1508.

An admission of guilt is a decision that must be made by the client, and Hashimi was not given the

opportunity to make that decision. He insisted upon his innocence despite trial counsel's continuous pressure to plead guilty, and counsel never formally asked him whether he approved of his strategy to concede guilt to two counts in order to bolster support against the other two counts. Furthermore, Hashimi received the harshest sentence on Count III. Trial counsel's admission of guilt automatically created five more years of incarceration than Hashimi could have faced if he had only been sentenced on Counts I and II. Consequently, his trial counsel stripped him of his autonomy and this fact demands granting a new trial in accordance with *McCoy*.

B. Hashimi had no opportunity to contest his trial counsel's admission of guilt during closing argument.

The Supreme Court held in *McCoy* that when a client makes it plain that the objective of his defense is to maintain innocence, his lawyer must abide by that objective and may not override it by conceding guilt. *Id.* at 1504. This standard is illustrated by comparing the facts of *McCoy* to *Florida v. Nixon*. In the latter case, Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense for he was "generally unresponsive" during discussions of trial strategy and only complained about counsel's admission of guilt after trial. *Id.* The Supreme Court contrasts this with *McCoy*, who opposed his counsel's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. *Id.*

The *McCoy* opinion makes it very clear that a client cannot complain about counsel's admission of guilt only after trial, but this assumes a client who was aware of counsel's trial strategy prior to its use. Hashimi had previously complained about his counsel's lack of communication and pressure to plead guilty. However, Hashimi was never consulted regarding his trial counsel's proposed strategy of admitting guilt to Counts III and IV. Furthermore, the fact that the admission was entered during closing

argument immediately before jury instructions meant that there was effectively no moment where Hashimi could have contested this admission openly in court. This is in contrast to the defendant in *McCoy* who was able to testify to his own innocence after his counsel made the admission of guilt. Even if this fact does not constitute an outright reversal of the Fourth Circuit's opinion, it still demands a remand in order to interpret Hashimi's claim in light of *McCoy*.

CONCLUSION

The petitioner's Sixth Amendment right to secured autonomy was violated by his trial counsel which demands the Supreme Court reverse the lower court's opinion. For the foregoing reasons, the petition for a writ of certiorari should be granted and this case should be remanded to the Fourth Circuit Court of Appeals for review in light of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

Respectfully submitted,

/s/ *Ahmad S. Hashimi*
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APPENDICES

No. 18-5184

IN THE SUPREME COURT OF THE UNITED STATES

AHMAD SAYED HASHIMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

No. 18-5184

AHMAD SAYED HASHIMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 4-7) that his Sixth Amendment right to counsel was violated when, during closing arguments at his criminal trial, his attorney admitted his guilt on two of four counts. According to petitioner, defense counsel made that concession without consulting petitioner and over petitioner's objections. See Pet. 2-6. When petitioner raised that claim below, the court of appeals reasoned that counsel's concession "may have been a strategic decision" and concluded that petitioner

"should raise this claim, if at all," in a motion under 28 U.S.C. 2255. Pet. App. 8.[1]

After the court of appeals issued its decision and denied a petition for rehearing en banc, this Court held in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), that a defendant has a Sixth Amendment right to insist that counsel refrain from admitting guilt. Id. at 1505. The Court stated that, "[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." Id. at 1509. In contrast, if counsel is "[p]resented with express statements of the client's will to maintain innocence, * * * counsel may not steer the ship the other way." Ibid.

The record in petitioner's case does not reveal whether petitioner did, in fact, insist that his trial attorney refrain from admitting guilt. See Gov't C.A. Br. 34. In rejecting petitioner's claim on direct appeal, however, the court of appeals discussed only whether trial counsel's concession of guilt was a strategic decision. Accordingly, the appropriate course in light of McCoy is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand the case for further

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This memorandum refers to the pages as if they were consecutively paginated.

consideration of petitioner's challenge to his attorney's concession of guilt during closing argument.[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018

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[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.