Appendix A

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No. 18-6184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

JOHNNY PHILLIPS,

Petitioner-Appellant,

v.

ANNA VALENTINE, Warden,

Respondent-Appellee.

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

BEFORE: COLE, Chief Judge; and BOGGS and SUTTON, Circuit Judges.

BOGGS, Circuit Judge. Johnny Phillips shot and killed Phil Glodo in 2007 with a shotgun loaded with birdshot after a day-long argument in which Glodo had been the belligerent party. In 2009, a Kentucky jury convicted Phillips of wanton murder and sentenced him to thirty years in prison. The key evidence at trial was autopsy photographs and medical testimony showing that Glodo had been three feet away or more when the fatal shot had been fired and that he was shot directly in the back of the head between the ears. But in 2013, Phillips discovered an X-ray of the deceased Glodo's skull that was taken by the medical examiner's office and not turned over in the course of *Brady* discovery. He filed a petition for a writ of habeas corpus on this basis. Phillips argues that this X-ray shows, or could be used in conjunction with expert testimony to show, that the fatal blast was fired at an angle rather than straight-on from behind, which he further argued suggested either that there had been a struggle and that he had indeed been acting in self-defense or, alternatively, that he had not acted wantonly by pointing the gun squarely at the back of Glodo's

head and pulling the trigger. The district court denied Phillips's habeas motion, and Phillips appealed.

Since the state concedes that that the X-ray was suppressed, the appeal turns on whether the X-ray is favorable and material. *See Brooks v. Tennessee*, 626 F.3d 878, 890 (6th Cir. 2010). Most of the evidence at Phillips's trial was equivocal; the physical evidence that purported to show that he had shot Glodo squarely in the back of the head, and from far enough away not to have been in a close physical struggle, was crucial. Had the X-ray been made available to Phillips at the time of his trial, that trial could have been turned into a "battle of the experts." This is different enough from what actually happened to "undermine[] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). Accordingly, we reverse.

I. FACTUAL AND PROCEDURAL HISTORY

A. The Shooting

On the evening of October 18, 2007, Johnny Phillips shot and killed Phillip Glodo. They had started that day as friends. Phillips and Glodo lived in Laurel County, Kentucky, near London. Earlier that day, they had traveled to Tennessee to get a boat license. *Phillips v. Commonwealth*, 2010 WL 2471669, at *1 (Ky. June 17, 2010). According to a mutual friend, Randy Capps, they had begun drinking even before that trip. *Ibid.* When they returned after the trip to Phillips's house, they had planned to hold a cookout. Instead, Phillips took a nap, while Glodo drank beer on the patio. Medical tests taken after Glodo's death would indicate that his blood-alcohol level had been at least 0.14 that day. It seems that when Phillips woke up, he said something that Glodo construed as accusing him (Glodo) of stealing fifty dollars from Phillips. Glodo flew into a rage and stayed in one for the rest of the day.

The two parted ways that afternoon with the quarrel unresolved. That evening, Phillips and his wife Angie visited the house of Randy Capps and his family. Capps was a mutual friend of both men; in fact, Glodo usually visited his house about four nights a week, while Phillips came by about once a week. Capps told Phillips that Glodo had called him repeatedly that afternoon, threatening to "kick [Phillips's] ass." As the Phillipses socialized with Capps, each man received more calls from Glodo, who told Capps that he would sic his two Great Danes on Phillips. *Phillips*, 2010 WL 2471669, at *1. Angie could hear Glodo screaming into the phone when he was talking with Phillips directly. Later, profanity-laced voicemails from Glodo would be found on Phillips's phone.

After thirty to forty-five minutes at the Cappses, Phillips and Angie left. Phillips drove his wife home, and then, leaving behind the motorcycle they had been riding, he returned to the Cappses' house alone in his pickup truck. As it would transpire, the truck had a shotgun in the back.[1] Phillips and Capps were in the driveway talking about a boat tarp; they had been there for about five to ten minutes when, just before 10 P.M., Glodo pulled up and said, "What now, MFer?" *Ibid.* Glodo and Phillips began to argue. At this point, Capps, pointing out that he had children inside, asked them to take their quarrel somewhere else. *Id.*

Phillips got into his truck and left first, heading in the direction of his house; Glodo let him out, then followed close behind. "As Phillips prepared to pull away Glodo yelled 'I'll ram your ass.'" *Phillips*, 2010 WL 2471669, at *1. Capps could hear Glodo gunning his engine as he drove after Phillips, though he doubted the former could catch the latter, as Phillips had a new truck and

[1] At trial, another friend of Phillips, Jerry Blanton, testified that this was Phillips's "rabbit gun," and that it would have been rare for Phillips *not* to have had a shotgun in his truck during hunting season. At the prosecution's request, the court took notice that it was not rabbit-hunting season on the night of the crime. Angie Phillips testified that Johnny Phillips had not taken anything from the house to his truck when he dropped her off, and Blanton testified that had Phillips wanted to hurt a person, he had other guns that would have been more suitable.

Glodo's was an older vehicle. As the two men drove down the narrow country road, two riders on horseback approached from the other direction, followed by a truck towing a large horse trailer. Phillips and Glodo pulled into the gravel parking lot of a church to allow these to pass. Once in the lot, they each exited their trucks.

Within mere minutes, Glodo lay on the ground, dying from a single gunshot wound that entered the back of his head.[2] Phillips called 911, and remained at the scene as police and paramedics arrived. A Green River fixed-blade knife was recovered from the scene; no usable fingerprints were found on it, but some DNA was recovered. This was enough to exclude Phillips as the source of the DNA but could not rule Glodo out or in. Neither man had previously been seen with that knife.[3] "[F]ollowing the shooting Phillips gave a statement to the police in which he claimed, inconsistently, that the shooting was both accidental and done in self-defense." *Phillips*, 2010 WL 2471669, at *3. In part, he said:

> It was an accident.... It really was an accident. The gun went off prematurely.
>
> I used it [the shotgun] to push him away from me and it went off.... He was standing like this at me and had something in this hand.... When he come at me.... He rushed my truck, he rushed to the side of my truck, I pushed him away from the truck with my truck door, know what I mean.... He come up to my truck. I was watching him in the mirror and they weren't moving quick enough for me to go on the horses and stuff coming down that hill.... I pushed him off, basically used my door to get some room to get out of the truck, and as I come out of the truck I come with the gun, I pulled a shotgun out beside me. I was trying to scream at him get back in your damn truck, get the hell away from me and leave me alone and he was coming like this and his hand was at his side. In this hand right here is the one he had had the knife in, all I could see was shiny chrome and he carries a .44 that long ... in that hand cause he was coming at me like this, know what I mean, with this arm extended, with his forearm like extended....

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[2] Capps would later testify that it was two to three minutes "at the most" from when the two men left his driveway until he heard the gunshot. A witness who had been one of the men on horseback said that the gunshot came roughly thirty seconds to one minute after he passed the two trucks.

[3] Phillips produced testimony that this was unlike the sort of knife he would own, while the state evinced testimony from Randy Capps that Capps had never seen Glodo with a knife.

> That's when he come at me with his forearm, I didn't know if he was going to try and push me.... I raised that gun up cause he had that thing in his left hand when I raised the gun up. He was coming at me and I took the gun and give it that and he didn't move four inches and the gun went off.
>
> ...
>
> I swear on my mother's grave I didn't mean to shoot that man.

Ibid. (ellipses in original). Physical evidence produced at trial did give some indications of what happened at the scene. According to police, the two trucks were found about half a car length apart "or more." The night was very dark. Phillips told police he was standing about at the rear driver-side wheel well of his truck when the fatal shot was fired; the location of the ejected shotgun shell roughly confirmed this. Holes were found in the driver's side windshield of Glodo's truck, which the prosecution argued corresponded to shotgun pellets and therefore indicated the gun had to be pointed more level than up, though the angle of fire was not established with any great deal of precision.

B. Phillips's Trial

Phillips was tried in the Laurel Circuit Court on June 2 and 3, 2009. *Phillips*, 2010 WL 2471669, at *1. Prior to his trial, Phillips moved for the discovery of *Brady* evidence, including for '[a]ny results or reports of physical or mental examinations, and of scientific tests or experiments' concerning the deceased." The trial court ordered *Brady* discovery. The state turned over its autopsy report and several color photographs, but not the X-ray in question in this appeal.

At trial, the Commonwealth called Dr. Jennifer Schott, the then-state medical examiner who had performed the autopsy. The Commonwealth also showed the jury postmortem photographs of the back of Glodo's head, which, as the prosecutor put it when arguing for admission, "show[] a central location of the wound between -- you see both ears in the photo." Dr. Schott was directly examined on these photographs as they were shown to the jury. She agreed that it showed that Glodo was shot "in the back of the head" and told the jury that the wound was

"in the middle" (as opposed to on the "right-hand side [or] the left-hand side"). She also explained that a photo in which Glodo's hair had been shaved post-mortem showed markings around the wound ("satellite lesions") that indicated the spread of shotgun pellets, as the shot moved further from the mouth of the gun. This in turn indicated, she argued, that the end of the gun was "three feet or more" from Glodo's head, though she caveated that "for a definitive answer, you would need a firearms examiner."[4] (The state did produce a firearms examiner, Gareth Deskins, but not to testify to this point; rather, he testified that the shotgun used in the shooting had a normal trigger-pull weight and a functioning safety, thus rebutting any suggestion that the gun accidentally discharged.) Dr. Schott testified to the direction from which the shot had been fired:

> **Q** **Clarifying, you said you also examined the back of his head, correct.**
>
> A The pellets entered the back of his head.
>
> **Q** **Pellets. Not bullet. Pellets entered the back of his head. Did you recover some of those pellets?**
>
> A Yes. I did.
>
> **Q** **And where'd you recover them from?**
>
> A From the inside of the head.
>
> **Q** **Okay. And that would lead us to believe -- that would lead you to believe that the direction of the pellets' track?**
>
> A In general, the direction was back to front.
>
> **Q** **Meaning the back of Mr. Glodo's head to the front?**
>
> A Yes.

In addition to this physical evidence, the state introduced evidence of the inconsistencies of Phillips's story on the night of the shooting—mainly his switching back and forth between

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[4] Somewhat incongruously, the Kentucky Court of Appeals, in Phillips's 2012 collateral attack on insufficient assistance of counsel, took a different view:

> Dr. Schott clearly stated she was not a firearms examiner; however, she testified that she had performed approximately 1200 autopsies as a medical examiner. Dr. Schott performed an examination and autopsy of the victim; consequently, we believe she was qualified to render an opinion regarding the manner in which the wounds were inflicted.

Phillips v. Commonwealth, 2012 WL 5457645, at *5 (Ky. Ct. App. Nov. 9, 2012).

explaining the shooting as an accident and as self-defense and inconsistencies in some of the details, such as where Glodo was shot, how far away Glodo was when shot, and how Phillips got out of his truck—both through police testimony and by playing recordings of his 911 call and police interviews. Nevertheless, the stress laid on the physical evidence that Phillips had been shot squarely in the back of the head cannot be overstated. In its opening, the Commonwealth declared that, "what we will be asking this jury to find is that the defendant is guilty of murder. We will be asking the jury to find that because the defendant intentionally took a 12-gauge shotgun, pointed it at the back of the victim's head, and pulled the trigger." At the close of Phillips's jury trial, the prosecutor addressed the jury again:

> Ladies and gentlemen, don't -- I keep saying he was shot in the back of the head. That's obvious. But don't forget what Dr. Schott told us, that the bullets were traveling from back to front, okay? That doesn't give credence to his story that he was shot from the side and grazed and took a chunk of his head off. He was shot from the back, and the bullets were from back to forward -- the pellets did, not bullets. But the pellets went from back to forward, which means that shotgun was fired directly from his back into his head. That is intentional murder.

The jury found Phillips guilty of wanton murder, the next charge down, not intentional murder. But the basis for the wanton-murder instruction was that Phillips had "*point[ed]* a loaded gun at somebody's head."[5] (Emphasis added.) Moreover, the instructions for wanton murder required "circumstances manifesting in [sic] extreme indifference to human life." It is hard to see how the prosecution's argument that "the pellets went from back to forward, which means that shotgun was fired directly from his back into his head" would not therefore have gone to this charge as well as that of intentional murder.

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[5] The prosecution's closing argument does not contain a clear separate argument for why Phillips should be found guilty of wanton murder, as opposed to the intentional-murder argument just quoted. Nevertheless, in explaining the meaning of the charges to the jury, the prosecutor said, "Anytime you pull a loaded gun on somebody, we all know what could happen. We all know the worst-case scenario is that gun goes off, okay? If you think that's what happened, he's guilty of wanton murder."

The defense theory at trial was, as Phillips now describes it, that:

> Glodo had been shot during a physical altercation that he had initiated. According to defense counsel, Glodo had attacked Phillips with the knife found at the scene after threatening him throughout the day and into the night. Phillips, acting in self-defense, attempted to push Glodo away with his gun, and a struggle in the dark ensued. Phillips's gun went off, and Glodo was killed. To support that theory, defense counsel pointed to statements Phillips made to the 911 dispatcher and to the detective that he believed he may have shot Glodo in the face, upper torso, or chest, suggesting that Phillips had no idea that he had shot Glodo in the back of the head.

Brief for Petitioner at 10–11 (record citations omitted). Phillips was helped by the extensive testimony from prosecution witness Randy Capps and defense witness Angie Phillips showing that Glodo had been the belligerent one all day. On the other hand, he was hampered by the fact that both his statements on the night of the shooting and his counsel's argument at trial continued to equivocate over whether the shooting had been accidental or self-defense. The biggest problem, as Phillips now points out, is that "the defense lacked any evidence to challenge the centerpiece of the Commonwealth's case—Dr. Schott's testimony regarding the gunshot wound in the back of Glodo's head."

The jury was given instructions on (intentional) murder,[6] wanton murder,[7] second-degree manslaughter,[8] and reckless homicide.[9] The jury found him guilty of wanton murder after a brief, same-day deliberation, and then deliberated again and arrived at a sentence of thirty years. Phillips appealed as of right to the Kentucky Supreme Court, which upheld his conviction and sentence. *Phillips*, 2010 WL 2471669.

C. State and Federal Post-Conviction Proceedings

In 2011, Phillips filed a collateral challenge to his conviction in the Kentucky state courts. *Phillips v. Commonwealth*, 2012 WL 5457645, at *2 (Ky. Ct. App. Nov. 9, 2012). As part of this

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[6] "Instruction number 5, 'Murder,' 'You will find the defendant guilty of murder under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: That in this county on or about October 18, 2007, and before the finding of the indictment herein, he killed Phillip Glodo by shooting him with a shotgun and that in so doing he caused the death of Phillip Glodo intentionally and that in so doing he was not privileged to act in self-protection.'"

[7] "Instruction number 6, 'Murder,' [sic] 'If you do not find the defendant guilty under instruction number 5, you will find the defendant guilty of murder under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: That in this county on or about October 18, 2007, and before the finding of the indictment herein, he killed Phillip Glodo by shooting him with a shotgun and that in so doing he was wantonly engaging in conduct which created a grave risk of danger to another and thereby caused the death of Phillip Glodo under circumstances manifesting in extreme indifference to human life and that he was not privileged to act in self-protection.'"

[8] "Instruction number 7, 'Second-Degree Manslaughter,' 'If you do not find the defendant guilty under either instruction number 5 or number 6 you will find the defendant guilty of second-degree manslaughter under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: That in this county on or about October 18, 2007, and before the finding of the indictment herein, he killed Phillip Glodo by shooting him with a shotgun and that in so doing though otherwise privileged to act in self-protection, the defendant was mistaken in his belief that it was necessary to use physical force against Phillip Glodo in self-protection or in his belief in the degree of force necessary to protect himself, and that when he killed Phillip Glodo he was aware and consciously disregarded a substantial and unjustifiable risk that he was mistaken in that belief and that his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would've observed in the same situation.'"

[9] "Instruction number 8, 'Reckless Homicide,' 'If you do not find the defendant guilty under instruction number 5, number 6, or number 7, you will find the defendant guilty of reckless homicide under this instruction if and only if you believe from the evidence beyond a reasonable doubt all the following: That in this county on or about October 18, 2007, and before the finding of the indictment herein, he killed Phillip Glodo by shooting him with a shotgun and that in so doing, though otherwise privileged to act in self-protection the defendant was mistaken in his belief that it was necessary to use physical force against Phillip Glodo in self-protection, or in his belief in the degree of force necessary to protect himself, and that when he killed Phillip Glodo he failed to perceive a substantial and unjustifiable risk that he was mistaken in that belief and that his failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would've observed in the same situation.'"

challenge, Phillips engaged forensic scientist Larry Dehus, who raised the possibility that X-rays would have been taken of Glodo's skull at autopsy. The state denied that any such X-ray existed, and the Kentucky Court of Appeals ultimately rejected the argument as procedurally barred. *Phillips*, 2012 WL 5457645, at *4.

In 2013, however, a state open-records request filed on Phillips's behalf revealed that such an X-ray did exist, and in April 2014, the state turned it over. Phillips thereupon brought a *Brady* claim in state court; this was rejected on the grounds that such an argument should have been raised on direct appeal. *Phillips v. Commonwealth*, 2016 WL 2894026, at *3 (Ky. Ct. App. May 13, 2016).

Phillips then turned his efforts to federal court, where he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, based (in pertinent part) on the *Brady* violation. A magistrate judge initially recommended denying Phillips's claim. The district court reversed the magistrate judge and ordered an evidentiary hearing on the significance of the X-ray.

At that evidentiary hearing, the Commonwealth produced as its sole witness Dr. Jennifer Schott, the coroner and forensic pathologist who testified at Phillips's trial, while Phillips's attorney produced forensic scientist Larry Dehus, who had first anticipated the existence of the X-ray in Phillips's 2011 challenge. Some problems resulted from this mismatch of specialties. Dr. Schott echoed testimony she had given at trial and conceded that she was not a firearms expert. Dehus was forced to admit that, not being a doctor, he was not properly trained in reading X-rays. In particular, Dehus stated (in response to a question from the court) that the X-ray was taken from the back of the head up toward the face, but Dr. Schott pointed out that the X-ray had been taken from the face down toward the back of the head. (Dehus doubled and then tripled down on his contention.) The district court, meanwhile, at certain times seemed to misapprehend the standard

by which *Brady* evidence is to be evaluated, framing the inquiry as one into the sufficiency of the evidence: "What I'm interested in learning is, how does this x-ray change anything? Why is it or is it not *material to the medical examiner's determination*? . . . . And let's talk about . . . whether or not that even differs with her original testimony." (Emphasis added.)

The heart of Dehus's testimony concerned the X-ray:

> A. . . . . The opaque particles are pieces of shot.
>
> Q. And are you familiar with the type of projectile that was used in this case?
>
> A. It was birdshot ammunition, yes.
>
> Q. Explain to the Court what birdshot is.
>
> A. Well, it's a large number of small BBs. And I think indicated, when I read the report, about .12 inches in diameter. And depending on the size of the load, there could be anywhere from 170 to 220 pellets in that type of birdshot.
>
> Q. And it would be fair to say that the x-ray that we have, there's not 200 birdshot in the skull, is there?
>
> A. It certainly doesn't appear to be that number. It's not possible from the x-ray to individually count each pellet. But it doesn't seem -- it *doesn't appear to be anywhere near that number*.

(Emphasis added.) Phillips's attorney also elicited testimony confirming that shot had not exited through the front of Glodo's skull. From this, and from the lack of shotgun wadding on the X-ray,[10] Dehus concluded that Glodo must have been shot at an angle. (As the district court pointed out in its opinion after the hearing, the wadding and exit wound testimony are procedurally barred from being a basis for relief, because both were knowable prior to the discovery of the X-ray.)[11] On

[10] Dehus argued that, "There is no mention of the recovery of the plastic shotgun wadding from the wound or any mention of it being found in the area of the scene. If a -- in a direct shot to the back of a head at a distance of three feet, a wound would be expected -- it would be expected that the plastic shotgun wadding would travel with the shot and enter the wound in the head."

[11] Dehus had had access in 2011 to both the autopsy report and autopsy photographs, from which the exit-wound and wadding points could be gleaned. Indeed, Dehus appear to have made them in the report he made in support of Phillips's 2011 state collateral challenge. The Kentucky Court of Appeals rejected an ineffective-assistance-of-counsel challenge based on the failure to hire a ballistics expert at the time of the original trial; the opinion specifies that only Phillips's "own conflicting statements" were provided as evidence for this theory. *Phillips*, 2012 WL 5457645, at *4.

redirect, Dehus would go on to opine that, indeed, the direction of the shot could be determined from the X-ray itself:

> Q. What does the x-ray show you as a ballistics person?
>
> A. If you know where the entrance wound is and you know where the bullet or the majority of the shot ends up, then that can give you an indication of the direction of travel of the bullet or shot in the body.
>
> Q. And in this case, did it show you that?
>
> A. Yes.
>
> Q. What direction did it show you?
>
> A. In my opinion, it's -- the shot ended up in the right side of the head, and the entrance was towards the left side of the head.

Finally, it is worth noting that in both his argument to the court and his direct- and cross-examinations, Phillips's counsel repeatedly seemed to conflate angle (whether the shot was fired straight-on or from an angle) and distance (whether the muzzle was closer to or further from Glodo's skull). So too did Dehus and Phillips himself (who spoke briefly at this hearing). Each used the phrase "execution style" to characterize "walking up behind the individual and shooting squarely in the back of the head" This phrase, and indeed this concept, was not used at the original trial—and it would come back to bite them.

For the Commonwealth, Dr. Schott testified that, in keeping with standard practice for gunshot wound victims, the state's autopsy technicians would have taken the X-ray before she performed her autopsy. The X-ray was taken to tell what kind of projectile—shot or bullets—was in the skull pre-autopsy. She also testified that during the autopsy, she had recovered 19 pellets as a representative sample "for the purpose of them being examined" by the crime lab. Dr. Schott emphasized that as the X-ray was only a two-dimensional image, without another X-ray from the side, she could not tell the exact location of any shot. Therefore, she said, the X-ray had "no bearing on direction of the injury." When asked, "can you tell from the x-ray how many pellets are -- in

the head[,]" she responded, "[n]o." Dr. Schott did not testify directly one way or the other to whether all the shot one would expect was there; on cross-examination her position was that she could not speak to firearms questions, and thus that position prevented her from reaching the question. The state also seemed at pains to affirm that Dr. Schott still believed the victim to have been shot "in the back of the head." Dr. Schott confirmed there was no exit wound.

After the hearing, the district court ruled that "the x-ray is not favorable to the defendant. Nor is it material." *Phillips v. Valentine*, 2018 WL 4976801, at *2 (E.D. Ky. Oct. 15, 2018). First, it set aside information that could have been obtained before the discovery of the X-ray. Then, the court found that what was left was the X-ray evidence bearing on, as Dehus had put it, "the 'direction of the shot and the relative quantity of the shot.'" The heart of the district court's opinion is that:

> Dehus's testimony about the significance of the x-ray is not reliable. He testified that "as best [he could] tell," the x-ray was taken from the back of Glodo's head. (DE 137, Tr. at 19, 20-21, 50.) Jennifer Schott, the medical doctor who performed the autopsy of Glodo, however, testified that the x-ray was taken front to back. (DE 137, Tr. at 31.) Dehus conceded that he was not qualified to say whether the x-ray was taken from the front or the back because his is not a medical doctor. (DE 137, Tr. at 52.) Dr. Schott is a medical doctor. Further, she served as the medical examiner for the Kentucky Department of Justice (Pf. Ex. I, Tr. at 2-3) and would necessarily be more familiar with its procedures. Thus, her testimony on the angle of the x-ray is more credible. Because Dehus believed the x-ray was taken from the back of Glodo's head, any conclusions that he drew from the x-ray are unreliable.
>
> Even assuming, however, that Dehus's opinion is correct and that Glodo was shot from behind at an angle and at a distance, that does not undermine confidence in the jury's finding that Phillips committed wanton murder. A person is guilty of wanton murder under Kentucky law when he "wantonly engages in conduct which creates a grave risk of death to another person and thereby causes" the person's death. KRS § 507.020(1)(b). Evidence that Phillips shot Glodo from behind at a distance is not inconsistent with the jury's verdict. Wanton murder does not require a finding that Glodo was shot "execution style" in the back of the head. If anything, evidence that Phillips shot Glodo in the back of the head from a distance contradicts Phillips' claim that he shot Glodo in self-defense. Further, Dr. Schott did not testify at trial that Glodo was shot "execution style." In the portion of the trial testimony that Phillips provided the Court at the hearing, Dr. Schott, testified that Glodo was

> shot at "three feet distance or more." (DE 137, Tr. at 39; Pf. Ex. I, Tr. at 13; DE 30-7, Com. Bf. at 13.)
>
> For all these reasons, the Court does not find the x-ray favorable to Phillips or material to his guilt.

Id. at *4–5. The district court thus denied the petition for the writ of habeas corpus but granted a certificate of appealability as to the *Brady* issue. The matter is now before us.

II. STANDARD OF REVIEW

This is a habeas proceeding following an evidentiary hearing. Therefore, we review the district court's conclusions of law and of mixed questions of law and fact *de novo*, while reviewing its factual findings for clear error. *King v. Westbrooks*, 847 F.3d 788, 795 (6th Cir. 2017); *see also Bennett v. Brewer*, 940 F.3d 279, 286 (6th Cir. 2019).

The Kentucky state courts held that Phillips's *Brady* claim had been procedurally defaulted on appeal. Therefore, Phillips must demonstrate both cause for the default and prejudice from the alleged constitutional error. *Brooks v. Tennessee*, 626 F.3d 878, 890 (6th Cir. 2010). Where the error is a *Brady* violation, however, the test for assessing cause and prejudice merges into the test for assessing the *Brady* claim on the merits:

> To demonstrate a Brady violation, a habeas petitioner must establish three elements: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). A habeas petitioner demonstrates prejudice by showing that the suppressed evidence is "material." *Id.* at 282, 119 S.Ct. 1936.
>
> A state's suppression of Brady evidence constitutes cause under the procedural-default doctrine. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The prejudice prong for both analyses is the same. *Id.* Thus, a petitioner who proves a Brady violation demonstrates cause and prejudice to excuse procedural default of the Brady claim. *Id.*

Brooks, 626 F.3d at 890–91.

III. ANALYSIS

A. The X-Ray Was Suppressed

To take the easiest question first, there is no question that the X-ray was suppressed. The government itself acknowledges "the prosecution's inadvertent suppression of the X-ray of the victim's head[.]" *Brady* does not require that the suppression be deliberate. *Strickler*, 527 U.S. at 281–82; *see also Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 465 (6th Cir. 2015). Nor does *Brady* require that the prosecutor's office have had knowledge or possession of the material at the time of trial. *See id.* at 281. (In our case, the Commonwealth maintains that prosecutors denied the existence of the X-ray before the courts in 2013 because it never knew that the X-ray existed. The Commonwealth's current attorney admitted at the evidentiary hearing, however, that this was only speculation.

The Commonwealth admits on appeal that, "Phillips has established cause for the default in that the X-ray was not turned over to Phillips until an open records request was made." As we have seen, "cause for the default" and the *Brady* suppression inquiry are the same. *Brooks*, 626 F.3d at 890–91. Therefore, the government has conceded the suppression element of the *Brady* test.

B. The X-Ray Was Favorable

Phillips's argument is that the X-ray shows that there was far less shot in Glodo's skull than one would expect had the fatal blast been fired straight-on from behind, as the prosecution alleged at trial. The blast, in other words, must have been at an angle, so that only some of the shot emitted from the shotgun entered his skull. This in turn, Phillips argues, shows—or would have allowed him to argue at trial—that the prosecution's theory of the case was incorrect, and that physical evidence corroborated Phillips's tale of self-defense. The evidence could have been used

for impeachment of prosecution witnesses (Dr. Schott and forensic examiner Deskins) as well as to serve as the basis for expert testimony in the plaintiff's case-in-chief. The X-ray evidence and the argument built from it, finally, would have played a role in mitigation, as well as exculpation. Without it, jurors convicted Phillips of the second-most-serious crime charged; with it, even if he were not acquitted, perhaps they would have found him guilty only of a lesser included offense.

We evaluate the argument just outlined through two discrete parts of the *Brady* test. The first, which asks whether the X-ray was "favorable" "asks only which party the evidence favors." *Clark v. Warden*, 934 F.3d 483, 492 (6th Cir. 2019). Evidence providing an alternative explanation of how the decedent died or undermining the prosecution's theory of the case is favorable. *See, e.g., Jamison v.* Collins, 291 F.3d 380, 385 (6th Cir. 2002). Moreover, because the favorability inquiry "asks *only* which party the evidence favors," *Clark*, 934 F.3d at 492 (emphasis added), credibility inquiries are not appropriate at this stage. *Ibid.* Normally, the question of credibility arises in the context of witness testimony. *See, e.g., ibid.* In our case, however, we have an X-ray that does not 'speak for itself,' particularly to those not trained to read one. For this exact reason, the district court had originally ordered an evidentiary hearing, observing that "the Court lacks a medical degree and cannot on its own determine what [the X-ray] shows." As we have seen, at that evidentiary hearing, the Commonwealth produced Dr. Schott as its sole witness, while Phillips produced forensic scientist Dehus. In making its determinations, the district court appears to have equated the *value* of the X-ray with the *credibility* of the expert witnesses. The court then used the question of which direction the X-ray was taken from (about which the court questioned both witnesses) as a touchstone for which witness was more credible.

Dehus's mistake as to the direction of the X-ray is damaging, as is his insistent doubling-down in the face of medical testimony to the contrary. However, when stripped of matters we

cannot now take into account (such as the wadding issue, or the lack of marring of Glodo's face) and of matters on which Dr. Schott rebutted him (his over-confident statements regarding the direction of the shot, given her points about inability to trace this in a 2-D image), the heart of his testimony is: 1) There were 170 to 220 pieces of shot in the shell that was fired. 2) Had the shell been fired straight-on at the distance indicated, these should all have wound up in Glodo's skull. 3) The X-ray does not show anywhere near that number in Glodo's skull. 4) Therefore, the shot must have been fired at an angle. It is upon the third of these points—whether or not the X-ray shows what one would expect to see—that the question of favorability turns.[12] Here, it seems noteworthy that Dr. Schott did *not* rebut this point directly. She testified that she could not tell "from the x-ray how many pellets are . . . in the head[.]" But elsewhere, she stated that X-rays of this type "give me a general idea of the distribution of the pellets or of the bullet."

Given how X-rays work, there would be a significant and visible difference between an X-ray of a skull with a full load of 170-220 metal pellets in it (or nearly that many) and one with far fewer than that. That observation was the heart of Dehus's argument: "It's not possible from the x-ray to individually count each pellet. But it doesn't seem -- it doesn't appear to be anywhere near that number." As Dr. Schott herself admitted (indeed, argued), the X-ray is a two-dimensional photograph. Therefore, Dehus's error as to whether it had been taken from the front or the back does not seem to affect the basic ability to argue such points as the density of shot shown. Even with Dehus's skill somewhat in question, we conclude that we cannot dismiss his basic conclusion that there was not nearly enough shot in the skull to support the Commonwealth's theory. Or to put it another way, the X-ray provides some support for Phillips's theory. We particularly cannot

[12] Dr. Schott admitted that she was not qualified to address the first point, but at trial, the state's firearms witness gave testimony suggesting this general type of shell might have "2 or 300 shot" shot in it. Thus, we can take Dehus's testimony on this point as relatively uncontested. The state produced no evidence—nor argued—to suggest the second point is wrong, at least as to the vast majority of the shot.

discount this conclusion in view of the Commonwealth's and Dr. Schott's inability to rebut it directly.

Phillips also developed—better on appeal than at the evidentiary hearing—a second, somewhat weaker argument: It is possible to use the X-ray to tell if the shot was fired at an angle or straight-on based solely on the distribution of the shot in the X-ray in terms of being on or off-center. This is subject to similar analysis as that above about the sheer quantity of shot. Dr. Schott demonstrated at the evidentiary hearing why the 2-D image could not be used to trace the directionality of any given pellet. But if the mass of the pellets is to one side, that would suggest that they were fired at an angle. As Phillips points out, the mistake over whether the X-ray was taken back-to-front or front-to-back would not matter for this inquiry, because either way, off-centeredness would remain. But Dehus's testimony at the evidentiary hearing was less well developed on whether this was so than in the case of the sheer-quantity argument above.

As to the district court's equating Dehus's credibility with the value of the X-ray, had Dehus's testimony itself been the *Brady* material, this kind of credibility judgement would have been inappropriate. *Cf. Clark*, 934 F.3d at 492. Here, however, we are in a somewhat anomalous situation: The *Brady* material is the X-ray itself, and as an inanimate object, it does not present a "credibility" question in the usual sense—but on the other hand, most judges cannot evaluate it without an expert intermediary. Thus, as compared to *Clark*, this situation poses a slightly different question: what is the role of the court in evaluating the credibility of the experts who will help it evaluate the meaning (rather than the credibility) of the *Brady* material?

On the one hand, courts perform a screening role constantly as to expert credibility, both before testimony is given at trial and in evidentiary hearings. Such a role, to some extent, seems necessary here: obviously, it would be a recipe for chaos (and injustice) if courts were obligated

to accept as true any testimony, no matter how blatantly incorrect and self-serving, regarding the value of a supposed piece of *Brady* evidence. On the other hand, however, we have recognized "the Supreme Court's directive that 'the criminal trial . . . [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" *Clark*, 934 F.3d at 492 (quoting *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014) (quoting *United States v. Jernigan*, 492 F.3d 1050, 1056–57 (9th Cir. 2007) (en banc) (quoting *Kyles*, 514 U.S. at 440) (brackets in original))). If the evidence suffices to create a battle of the experts, such a battle should be waged at trial, not simply before a judge in a post-hoc setting.

There are good reasons to think that the threshold for the favorability inquiry should be fairly low. Most of the key cases treat it only glancingly[13] or even omit to discuss it.[14] (We note, however, that this is likely due to the fact that the *Brady* material in question is usually either testimony or police notes that, if believed, are obviously favorable.) The physical evidence here obviously does not have an innate credibility problem, and nor was the testimony surrounding it blatantly self-serving or dishonest. To the contrary, despite an unfortunate misstep or two, it made out the "favorability," in the *Brady* sense, of the X-ray evidence to Phillips. In short, we hold that the evidence was favorable, and thus we move on to materiality.

C. The X-Ray Was Material

The materiality inquiry asks if there is a "'reasonable probability' of a different result . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict *worthy of confidence*." *Kyles*, 514 U.S. at 434 (emphasis added); *see also*

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[13] *See, e.g. Banks*, 540 U.S. at 691; *Clark*, 934 F.3d at 492.

[14] *See, e.g. United States v. Tavera,* 719 F.3d 705, 710–11 (6th Cir. 2013).

Castleberry v. Brigano, 349 F.3d 286, 291 (6th Cir. 2003). "A 'reasonable probability' of a different result" is said to have been demonstrated "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). We are warned, moreover, not to conflate materiality with the sufficiency-of-the-evidence inquiry. *Kyles*, 514 U.S. at 434–45; *Bies v. Sheldon*, 775 F.3d 386, 399 (6th Cir. 2014). In particular, "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Bies*, 775 F.3d at 399 (quoting *Kyles*, 514 U.S. at 434–45).

In assessing this part of the *Brady* analysis, it is important to note how equivocal much of the evidence at Phillips's trial was. For most of the two days, including from many of the prosecution witnesses, the jury heard at length about *Glodo's* anger and aggression that day. But Dr. Schott's testimony, and her explanation of the photographs of the back of Glodo's skull, appeared to show as a matter of uncontroverted fact that Glodo had been shot squarely from behind (and from a distance of over three feet away). These, combined with Phillips's inconsistent explanations on the day of the shooting—characterizing the shooting on the 911 call and in a police interview as both an accident and self-defense—were, on our reading of the trial transcript, the key turning points. Here was the indisputable (or so it seemed) evidence: Phillips had raised a shotgun, aimed it squarely at the back of Glodo's head when there was a distance of at least three feet between them, and pulled the trigger. No matter what had come before, that is not self-defense, and it is very hard to square with accident. As we have seen, the prosecution strongly emphasized this key point in both its opening and closing arguments.

Viewed in this light, it is easy to see how different the trial could have been had Phillips had the X-ray and expert(s)—firearms and, perhaps, medical—of his own. Instead of an equivocal

case swayed by one piece of indisputable evidence, the jury would have seen an equivocal case plus a battle of the experts. Relying on the X-ray, Phillips could have produced an expert to testify that the physical evidence was consistent with his account of a glancing shot, fired in the course of a struggle. Phillips may also have called a medical examiner, so as to have covered some of the weaknesses that Dehus, alone, clearly created.

His counsel could also have used the X-ray for impeachment purposes. Dr. Schott testified at the trial that, based on the pellets she recovered from inside Glodo's head, "the direction [of the pellet's track] was back to front." Phillips's counsel could have impeached this conclusion on the basis of the X-ray. Moreover, Dr. Schott testified at the evidentiary hearing that, during the autopsy and after her technician had taken the X-ray, she recovered only a sample (19, out of an unknown total) of the pellets in the head so that these could be submitted to the police lab for examination. As we have seen, she strongly disclaimed the ability to track the direction of the shot on the basis of the X-ray, saying that it had "no bearing on the direction of the injury." Introducing the X-ray would have allowed the defense to cross-examine Dr. Schott as to why she was so confident that this representative recovery, conducted to obtain material for ballistic analysis, allowed her to reconstruct the path of the shot, while finding no use at all for the X-ray in this regard. Similarly, the X-ray could have been used to weaken Dr. Schott's testimony regarding the photograph, showing the central location of the wound: the argument presumably would be that though the entry wound was in the middle of the back of the head, the X-ray showed that the shot had been at an angle, not straight-on.

The Commonwealth also called a firearms expert at trial for the purpose of showing that the trigger and safety of the shotgun worked normally. Phillips outlines to us the line of questioning on cross-examination of this witness that the X-ray would have made possible:

> Apprised of the x-ray of Glodo's skull, counsel could have elicited compelling testimony from Deskins that Glodo had been struck at a significant angle. Counsel could have asked Deskins to count the number of pellets in the x-ray, and compare that number to the number in the shell. Counsel could have asked Deskins about the pattern of pellets in the x-ray, and compare that to the normal pattern of distribution of shotgun pellets. Finally, counsel could have asked the ultimate question—whether the x-ray indicated a direct shot or an angled shot.

Brief of Appellant at 34. Moreover, as Phillips now points out, the availability of these lines of cross-examination liberates the value of the X-ray (to some degree) from the credibility of Dehus: with the X-ray alone, such lines of cross-examination would have been possible. After all, it is our confidence in the *trial*, not our confidence in *Dehus's* testimony, that is the question before us today.

There is also the role this evidence might have played in mitigation. *Brady* evidence need only be material to *either* guilt or punishment. *Strickler*, 527 U.S. at 280. Phillips was charged with intentional murder, wanton murder, second-degree manslaughter, and reckless homicide. (*See supra*, p. 9 & nn.6–9.) The two lesser-included charges, below that of which Phillips was convicted, have self-defense elements.[15] So if the jurors believed that the X-ray indicated the shot was at an angle, and agreed that such a fact indicated that there had been a struggle, then even if they were not convinced that this evidence was wholly exculpatory, they may well have decided that it showed imperfect self-defense and so "mitigated" down to a lesser charge. This would be "mitigation" in only the colloquial sense: really, the jury would be finding him innocent of one charge (wanton murder) and guilty of another, lesser charge.

[15] These were the reckless-homicide and second-degree-manslaughter charges, respectively. *See* nn.8 & 9 *supra*. Each is a type of imperfect self-defense. In each, the defendant had to a) be entitled to act in self-defense; but b) be mistaken in his belief that it was necessary to use force or to use the degree of force employed. In the case of second-degree manslaughter, the jurors would also have to find he was "*aware and consciously disregarded* a substantial and unjustifiable risk that he was mistaken in that belief" and that his disregard was grossly unreasonable. In the case of reckless homicide, that "*he failed to perceive* a substantial and unjustifiable risk that he was mistaken in that belief" and that his disregard was grossly unreasonable.

But it is quite conceivable, alternatively, that they might have mitigated in the technically accurate sense. As Phillips argues:

> Evidence tending to prove that Phillips did not shoot Glodo directly in the back of the head, but rather at a significant angle, would have mitigated Phillips's conduct and likely convinced jurors to impose a more lenient sentence at or near the twenty-year mandatory minimum sentence for the crime of wanton murder.

This argument also undermines confidence in the sentencing decision. When the jury convicted Phillips of wanton murder, they likely found that the discharge was indeed accidental, but that raising a loaded gun and pointing it squarely at the back of a man's head was wanton behavior. For that reason, evidence indicating that the gun was not *leveled* at Glodo might have gone a long way to mitigate the penalty. A gun held in his general direction, and a nervous slip of the finger, would be very different than taking dead-aim at the back of Glodo's head. Thus, a jury that was provided with the X-ray might well have sentenced Phillips to fewer than the thirty years chosen by the jury.

We have not, we must note, been able to find a case in which *Strickler*'s instruction that *Brady* is material to punishment as well as guilt, 527 U.S. at 280, has been applied outside the capital context. Were we ruling solely on this basis, that might give us more pause. However, as pointed out above, this is not the sole basis for our ruling; moreover, the Supreme Court is clear on this rule, even if it has not been broadly applied.

The state argues that notwithstanding the X-ray, the evidence showed that Phillips returned to Capps's house, where Glodo was to be found about four nights a week, with a loaded gun in his car; that he got out of his car in the parking lot and that shortly before the fatal shots were fired, he was using a loaded gun to fend off Glodo, and that the gun must have been at least relatively level since holes, arguably from some of the shot, were found in Glodo's windshield. *Cf. Phillips*, 2012 WL 5457645, at *5. This, the argument then goes, was enough for the jury to find him guilty

of wanton murder, defined as "wantonly engaging in conduct which created a grave risk of danger to another and [shooting him] . . . under circumstances manifesting in extreme indifference to human life," regardless of the X-ray. The district court found this argument persuasive, concluding that: "Even assuming . . . that Dehus's opinion is correct and that Glodo was shot from behind at an angle and at a distance, that does not undermine confidence in the jury's finding that Phillips committed wanton murder." *Phillips,* 2018 WL 4976801, at *5.

The problem, however, is that this is precisely the form a sufficiency-of-the-evidence analysis takes, and the Supreme Court has told us explicitly that the *Brady* inquiry is not to be equated to such a test. The district court framed the question as whether it could reconcile the new evidence with jury's verdict, rather than whether, in light of the new evidence, it still had confidence in "the outcome of the trial." *Kyles,* 514 U.S. at 434. Compare the statement of the district court that "[e]vidence that Phillips shot Glodo from behind at a distance is *not inconsistent* with the jury's verdict," *Phillips*, 2018 WL 4976801, at *5 (emphasis added), with that of the Supreme Court that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434–45. It was error for the district court to rule on this basis.

The dissent ably presents the case for how a good prosecutor could still have obtained a conviction for wanton murder and a 30-year sentence. The proper legal question, however, is whether the X-ray is "material" in the sense that it undermines our confidence in the course of the trial, not that it requires a conclusion that the outcome would necessarily have been different, or even that it is 50.1% likely that there would have been a different outcome. If there is to be a battle of the documents from the record, the reader is invited to consider whether, as a defense attorney, you would rather go to the jury with only the dissent's photo (Dissent Appendix A), and

accompanying testimony; or with the jury also having access to the X-ray (Appendix A to this opinion), and the best accompanying testimony, cross-examination, and argument that could be based on the X-ray ("Where are all the pellets?"). The answer would seem obvious. And as a prosecutor, would you feel that you still could obtain the same conviction and sentence, but you would prefer that the defense not have the X-ray? Again, the answer is clear.

The jury's verdict required it to find that Phillips was not privileged to act in self-protection, which is easier to find when there is a full-on shot to the back of the head. It is easier to find reasonable doubt on that point if Phillips's theory of a struggle and pushing Glodo away is buttressed by evidence that the shot was at a slanting angle. You may consider it a judgment call as to *how much* better it would be for the defense attorney, and *how much* harder for the prosecutor, but there is no gainsaying the direction of effect. It is our task to make the call of how much it takes to "undermine confidence." Under the facts and law, as shown above, our confidence is not destroyed but it is undermined.

As a final word, we also find convincing our recent case *Carusone v. Warden, N. Cent. Corr. Inst.*, 966 F.3d 474 (6th Cir. 2020). Carusone had been in a fight over money with another man, whom he admittedly stabbed at least once in the arm and once in the chest; the other man died. *Id.* at 476. The state tried and convicted Carusone "exclusively on the theory—as the prosecution repeatedly emphasized in its closing argument at trial—that Carusone 'plunged [a] knife into the victim's heart.'" *Id.* at 475. Later, "Carusone discovered that the State had withheld five pages of the hospital's records (including the ER doctor's report *and a chest x-ray*) . . . ." *Id.* at 476–77 (emphasis added). This *Brady* evidence showed that the hole in the side of the victim's heart was consistent with a needle used at the hospital to drain blood from around his heart ("pericardiocentesis"). *Ibid.* The victim had actually died of a heart attack induced by drugs, stress,

and the fight with the Carusone. *Id.* at 477. In state post-conviction relief proceedings, Carusone produced somewhat better expert testimony than we have in this case, and the state court acknowledged that he had "plainly discredit[ed]" the theory that the state had relied upon at trial. *Id.* at 475 (brackets in original); *see id.* at 477. But the state appeals court applied *Brady* as though it were a sufficiency-of-the-evidence test: It upheld the conviction on an alternate theory that the struggle with Carusone had led, in part, to the fatal heart attack. *Id.* at 478–79. We granted Carusone a writ of habeas corpus, noting that "the test for materiality under *Brady* 'is not a sufficiency of evidence test'" but rather that "the suppressed evidence 'undermine[s] confidence in the verdict.'" *Id.* at 479 (quoting *Kyles*, 514 U.S. at 434, 435) (brackets in original).

The parallels to our case are plain. Kentucky relied "exclusively on the theory"—which "the prosecution repeatedly emphasized in its closing argument at trial"—that Phillips had shot Glodo "directly from his back into his head." *Carusone*, 966 F.3d at 474. Like Carusone, Phillips later discovered an X-ray that called this theory into serious question. And the Ohio courts in Carusone's case erroneously treated the *Brady* inquiry as a sufficiency-of-the-evidence inquiry, just as the district court did here. But that is *not* the correct inquiry. *Kyles*, 514 U.S. at 434. If the prosecution suppressed evidence, inadvertently or otherwise, that calls into serious question the theory of death in a murder trial—as it did here and in *Carusone*—we cannot simply hand-wave that away. We hold that there has been a material *Brady* violation.

We are reluctant to undo a jury verdict finding someone guilty of such a serious crime. That is particularly true in a situation like this one, where so much of the case turned on the jury's judgment as to what was in someone's mind and, to a lesser extent, on an understanding of local conditions and culture. But we are convinced that, had Phillips had the X-ray to rely on, the course

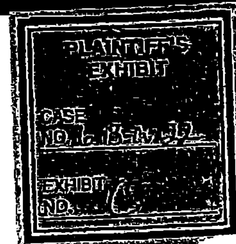
of his trial would likely have been quite different. We are not, in short, "confiden[t] in the outcome of the [original] trial." *Ibid.*

IV. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment of the court below and **REMAND** with instructions to grant a conditional writ of habeas corpus, ordering the state to either retry or release Phillips.

Appendix A to opinion of Boggs, J.

A-407



SUTTON, Circuit Judge, dissenting. In this harmless error case about the materiality of an x-ray, there is much to say, as I will say over the next few pages. But nothing shows the harmlessness of this omission more than the picture of the back of Phillip Glodo's head, the victim of the crime. See it for yourself at Appendix A. Read what you wish, but nothing illustrates my points better than the picture itself.

No one doubts that Johnny Phillips shot and killed Glodo. And no one doubts that, when the State neglected to provide Phillips with an x-ray of Glodo's skull, it legitimately exposed itself to this *Brady* claim. But a governmental mistake of this ilk, all agree, does not by itself entitle Phillips to habeas relief. Phillips had to show that the x-ray's suppression cast "the whole" of his trial in "such a different light as to undermine confidence in the [jury's] verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Phillips cannot do that. The suppressed x-ray does not support his defense. Its introduction at trial indeed would have worsened his lot. With respect, I see no basis for vacating his conviction.

Jurors at this murder trial heard two different accounts of what transpired on October 18, 2007, in the parking lot of Star of Bethlehem Church in Laurel, Kentucky.

From Phillips' vantage point, the jurors heard that Glodo charged him with a knife while he clutched a loaded shotgun. The two grappled in close quarters, and during this altercation Phillips shot and killed him. Phillips at first called the shooting an accident but later changed his mind and described it as an act of self-defense.

From the victim's vantage point, jurors heard—and saw through Appendix A—that Phillips shot Glodo in the back of his head. He did so from a distance of at least three feet measured muzzle to cranium—and at least five feet counting the length of the shotgun's barrel. That, the prosecution argued, amounts to murder, not an accident or self-defense.

As between these accounts, the jury voted to convict Phillips of wanton, but not intentional, murder. That was sensible. And the forensic evidence leaves no room for doubt to this day.

Where does the suppressed x-ray come in? Mostly in support of the State's case. Phillips built much of his defense around the supposed proximity between him and Glodo. In his original interview with the police, he claimed to shoot Glodo from just four inches away. At trial, Phillips argued that he and Glodo stood "close together" and remained "next to each other" when the gun went off. ROA at 88–89. The x-ray undermines those claims. According to Larry Dehus, Phillips' expert witness, the x-ray confirms that Phillips shot Glodo from a distance of at least three feet and likely four feet or more. That coincides with the estimates the State's expert witness, Dr. Jennifer Schott, provided of "three feet distance or more." R. 137 at 41. The x-ray thus calls Phillips' credibility into doubt.

But, Phillips insists, there is a more favorable way to use the x-ray. It allowed him to undermine the State's insinuation that he shot Glodo "execution style" directly from behind him. *Id.* at 18; *see Carusone v. Warden, N. Cent. Corr. Inst.*, 966 F.3d 474, 479 (6th Cir. 2020). According to Dehus, the x-ray suggests that the birdshot entered at an angle. If true, that means Phillips pulled the trigger while standing off Glodo's centerline.

But is this characterization true? Dehus concedes he has little experience reading x-rays because he isn't a doctor. That inexperience became apparent during the evidentiary hearing when he repeatedly misinterpreted the skull's orientation within the image. Dr. Schott, by contrast, has plenty of practice handling x-rays and a medical degree to boot. She testified that the lack of an additional image showing Glodo's skull from the side made it impossible to deduce anything about the angle of Phillips' shot. After listening to both experts, the district court found Dehus' testimony unreliable. *See Phillips v. Valentine*, No. 6:13-22, 2018 WL 4976801, at *2 (E.D. Ky. Oct. 15,

2018). We may disturb that finding of fact only if it sinks to clear error. *See Bennett v. Brewer*, 940 F.3d 279, 286 (6th Cir. 2019).

Even granting Phillips the benefit of the doubt about what the x-ray establishes, his argument does little. The State never argued, not once, that Phillips shot Glodo execution style. During opening and closing remarks the prosecutor promised only to show that Phillips "took a 12-gauge shotgun and intentionally pulled the trigger and shot [] Glodo in the back of the head." ROA at 77, 367. The jury could convict Phillips of intentional murder, he argued, if it found that he "intentionally act[ed]" (by pointing his gun at Glodo and pulling the trigger) with "[a] result in mind" (killing Glodo). *Id.* at 373. Nothing in the statements depends on the angle of Phillips' shot.

Dr. Schott, true, testified that the birdshot travelled from "back to front" in Glodo's head. *Id.* at 190. And the prosecutor, true also, discounted in closing argument that the birdshot merely "grazed" Glodo by noting that it went "directly from [Glodo's] back into his head." *Id.* at 373. But the x-ray supports both statements. As for Dr. Schott's statement, the birdshot did move from the back of Glodo's head toward the front. That it also moved laterally somewhat (that is, from the center of Glodo's head to one side) is neither here nor there. As for the prosecutor's statement, the birdshot did go "into [Glodo's] head," and the pellets did enter his head "directly from his back." *Id.* Dehus said as much: "[L]et's be clear, the victim was shot in the back of the head." R. 137 at 13. The prosecutor's comments describe only the shot's placement on the skull, not the angle of entry. The x-ray does nothing to change that. So it could not have undermined, let alone "plainly discredited," the "actual theory upon which the prosecution obtained a conviction." *Carusone*, 966 F.3d at 479.

All of this, it should be remembered, was put in the clearest context for the jury and would have been put in the same clear context with the x-ray: the autopsy photos of Glodo. Those photos dispel any doubt that Glodo sustained a direct shotgun blast to the back of his head. Look at Appendix A to see one of them for yourself.

In the face of this photo and others like it submitted to the jury, ankle-biting disputes about the precise direction of the shotgun blast—from back to front directly or from back to front at an angle—represent the epitome of non-material information. That is all the more true in view of what the jury did. It acquitted Phillips of intentional murder as is, making non-evidence-based talk about an execution-style murder irrelevant to that count. *See Kyles*, 514 U.S. at 443 n.14. And the precise angle of Phillips' shot could not have dissuaded a reasonable juror from convicting him of wanton murder. The jury had instructions to convict Phillips of that offense if it found that he engaged in conduct that "created a grave risk of danger to another" in a manner "manifesting [] extreme indifference to human life." ROA at 344; *see also* Ky. Rev. Stat. § 507.020. Discharging a shotgun in the general direction of a person, even without aiming the shotgun, clears that bar by a large and comfortable margin. *See, e.g.*, *Crane v. Kentucky*, 833 S.W.2d 813, 817 (Ky. 1992); *Kruse v. Kentucky*, 704 S.W.2d 192, 193 (Ky. 1985).

Nor could the x-ray have swayed any reasonable juror to favor convicting Phillips of manslaughter or reckless homicide. Those offenses differ from wanton murder in that they concern circumstances where the defendant had the privilege to act in self-defense and misapprehended the need to use force or mistook the degree of force required. *See* Ky. Rev. Stat. §§ 507.030, 507.050. Evidence that Phillips' shot came in at an angle—but still from the back of the head—does not bear on any apprehension of risk.

The court suggests another possible benefit of Phillips having the x-ray. It could incline the judge or jury towards lenity during sentencing. But the court offers no explanation why the x-ray could have won Phillips sympathy. This was a murder trial, not a marksmanship contest. That Phillips did not hit Glodo squarely might say something about his aim, but it says nothing about the culpability of discharging a weapon at, or even near, a person when they are turned away. If anything, the x-ray's tendency to undermine his self-defense theory increased the risk of receiving a harsher sentence. While Phillips' 30-year sentence exceeds the 20-year statutory minimum for wanton murder, it does not approach the statutory maximum of life in prison.

I respectfully dissent.

Appendix A to dissent of Sutton, J.

Appendix B

No. 18-6184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 09, 2020
DEBORAH S. HUNT, Clerk

JOHNNY PHILLIPS,

Petitioner-Appellant,

v.

ANNA VALENTINE, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: COLE, Chief Judge; and BOGGS and SUTTON, Circuit Judges.

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Thapar recused himself from participation in this ruling.

Appendix C

No. 18-6184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 19, 2020
DEBORAH S. HUNT, Clerk

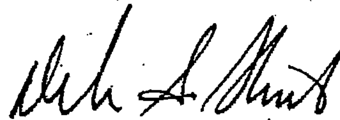
JOHNNY R. PHILLIPS,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
ANNA VALENTINE, Warden,	)	
	)	
Respondent-Appellee.	)	

Before: COLE, Chief Judge; BOGGS and SUTTON, Circuit Judges.

The appellee moves for a stay of the mandate in this matter where the opinion issued September 1, 2020, and en banc review was denied by order entered October 9, 2020. The appellant moves for release pending appeal.

The court being fully advised, it is hereby **ORDERED** that the motion to stay the mandate is **DENIED**. The motion for release pending appeal is also **DENIED**. The petitioner may seek release from the district court in the first instance.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 18-6184

Filed: October 19, 2020

JOHNNY R. PHILLIPS

Petitioner - Appellant

v.

ANNA VALENTINE, Warden

Respondent - Appellee

MANDATE

Pursuant to the court's disposition that was filed 09/01/2020 the mandate for this case hereby issues today.

COSTS: None

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

JOHNNY PHILLIPS, **Petitioner,** **V.** **ANNA VALENTINE,** ***Warden*** **Respondent.**	**CIVIL ACTION NO. 6:13-22** **<u>OPINION AND ORDER</u>**

****

This matter is before the Court on the petitioner's motion for a writ of habeas corpus under 28 U.S.C. § 2254 (DE 1, 68) and on the petitioner's motion to amend his § 2254 petition (DE 134). The

The facts and procedural history of this matter have been set forth now in multiple opinions, including an opinion by the Kentucky Supreme Court, *Phillips v. Commonwealth*, No. 2009-SC-000633-MR, 2010 WL 2471669, at *6 (Ky. June 17, 2010). Likewise, Magistrate Judge Edward B. Atkins and former U.S. District Judge Amul Thapar have set forth the relevant facts and history in opinions in the record of this matter (DE 85, Report and Recommendation; DE 89, May 25, 2017 Order.)

In brief, the plaintiff Johnny Phillips was found guilty in state court of wanton murder in the death of his friend, Phillip Glodo. He was sentenced to 30 years imprisonment. Magistrate Judge Atkins and Judge Thapar interpreted his habeas petition to assert three constitutional errors in the state court proceedings: first, that the trial court violated his constitutional rights by instructing the jury on wanton murder (with a related argument that there was insufficient evidence to convict him of this charge); second, that his trial counsel was ineffective for failing

to seek a directed verdict on the wanton-murder charge, for failing to object to the jury being instructed on wanton murder, for failing to offer proof at trial to rebut the wanton-murder charge, for failing to request an occupied-vehicle instruction, and for failing to call two experts; and third, that the government failed to disclose exculpatory evidence to him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (DE 85, Recommendation at 3; DE 89, Order.)

Judge Atkins entered a recommendation that Phillips' petition be denied as to all claims. In his May 25, 2017 order, Judge Thapar accepted that recommendation with regard to all but the *Brady* claim. As to that claim, Phillips argued that the government had failed to provide him post-mortem x-rays of Glodo's skull. There is no dispute that the government denied the x-rays existed and Phillips eventually obtained one x-ray through an open-records request.

Magistrate Judge Atkins ruled that Phillips had not demonstrated any prejudice from the failure to disclose the x-ray. Phillips argued that the x-ray would show that Glodo was not shot in the back of the head but rather from the side of the head as a result of a struggle for the gun. (DE 85, Recommendation at 20.) Phillips asserted that the x-ray helped prove that he shot Glodo in self-defense. Judge Thapar ruled that, in order to determine whether the x-ray is "material" as necessary to excuse Phillips' failure to raise the *Brady* issue on direct appeal in state court, an evidentiary hearing was necessary. (DE 89, Order at 18.) After Judge Thapar was confirmed as a judge on the Sixth Circuit Court of Appeals, the matter was reassigned to the undersigned.

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "Evidence is material under *Brady* if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Jells v. Mitchell*, 538 F.3d

478, 501–02 (6th Cir. 2008). "A reasonable probability is one that sufficiently undermines confidence in the outcome of the trial." *Id.* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

The Court appointed counsel to represent Phillips and conducted a hearing on the materiality of the x-ray. After hearing the evidence, the Court concludes that the x-ray is not favorable to the defendant. Nor is it material.

In his petition, Phillips argues that the x-ray proves that Glodo "was not shot straight-on in the back of the head, as alleged by the prosecution, but was struck by a shot from the side of the head as a result of a struggle." (DE 1, Petition at 8.) He argues that the x-ray "totally refut[es] that the victim was shot from behind." (DE 68, Petition at 3.) He asserts that the x-ray supports his argument that he shot Glodo accidentally during a struggle after Glodo charged after him with a knife. (DE 1-3, Petition at 20.)

At the hearing, Larry M. Dehus, a forensic scientist, testified on Phillips' behalf. He testified that "the victim was shot in the back of the head with a shotgun." (DE 137, Tr. at 13.) However, Dehus opined that the victim was not shot "at close range straight on." (DE 137, Tr. at 13.) Further, Dehus opined that Phillips was shot at "a significant angle from left to right." (DE 137, Tr. at 13-14.) Dehus opined that the shooting "wasn't just execution style, walking up behind the individual and shooting squarely in the back of the head." (DE 137, Tr. at 14.)

Nevertheless, much of this opinion was not derived from the x-ray. Dehus opined by a letter dated April 7, 2011 – years before the x-ray was produced – that "this was not a direct shot to the back of the head, but was more likely at an angle." (Pf. Ex. A.) He made that

determination based not on the x-ray but on "[t]he fact that the shotgun wadding did not enter the wound with the shot." (Pf. Ex. A.) He explained at the hearing that his conclusion that Glodo was shot in the back of the head but not at "close range straight on" was based on the fact that, if Glodo had been shot at a distance of less than four feet: 1) the entrance wound would have been much smaller; 2) the shotgun wadding would have entered the wound; and 3) there would likely have been destructive damage to Glodo's face. (DE 137, Tr. at 13.) These facts were known without the x-ray.

Dehus testified that the only information he obtained from the x-ray that he could not obtain from the photographs and other evidence in the record was the "direction of the shot and the relative quantity of the shot." (DE 137, Tr. at 19.) Thus, according to Dehus, the relevance of the x-ray is that it shows that Glodo was shot in the back of the head but at an angle, from left to right.

Further, Dehus's testimony about the significance of the x-ray is not reliable. He testified that "as best [he could] tell," the x-ray was taken from the back of Glodo's head. (DE 137, Tr. at 19, 20-21, 50.) Jennifer Schott, the medical doctor who performed the autopsy of Glodo, however, testified that the x-ray was taken front to back. (DE 137, Tr. at 31.) Dehus conceded that he was not qualified to say whether the x-ray was taken from the front or the back because his is not a medical doctor. (DE 137, Tr. at 52.) Dr. Schott is a medical doctor. Further, she served as the medical examiner for the Kentucky Department of Justice (Pf. Ex. I, Tr. at 2-3) and would necessarily be more familiar with its procedures. Thus, her testimony on the angle of the x-ray is more credible. Because Dehus believed the x-ray was taken from the back of Glodo's head, any conclusions that he drew from the x-ray are unreliable.

Even assuming, however, that Dehus's opinion is correct and that Glodo was shot from behind at an angle and at a distance, that does not undermine confidence in the jury's finding that Phillips committed wanton murder. A person is guilty of wanton murder under Kentucky law when he "wantonly engages in conduct which creates a grave risk of death to another person and thereby causes" the person's death. KRS § 507.020(1)(b). Evidence that Phillips shot Glodo from behind at a distance is not inconsistent with the jury's verdict. Wanton murder does not require a finding that Glodo was shot "execution style" in the back of the head. If anything, evidence that Phillips shot Glodo in the back of the head from a distance contradicts Phillips' claim that he shot Glodo in self-defense. Further, Dr. Schott did not testify at trial that Glodo was shot "execution style." In the portion of the trial testimony that Phillips provided the Court at the hearing, Dr. Schott, testified that Glodo was shot at "three feet distance or more." (DE 137, Tr. at 39; Pf. Ex. I, Tr. at 13; DE 30-7, Com. Bf. at 13.)

For all these reasons, the Court does not find the x-ray favorable to Phillips or material to his guilt.

After the hearing, Phillips filed a motion to amend his petition. This motion is based on Dr. Schott's testimony that, during the course of the autopsy, she made a diagram of the injuries to Glodo. (DE 137, Tr. at 27.) Phillips states that this diagram was not provided to him during the trial. The Court did not permit testimony about the diagram at the hearing. (DE 137, Tr. at 30.) Phillips argues, however, that the government's failure to provide him the diagram during trial violated *Brady*.

Phillips states that the diagram is "material" because it disproves the government's theory that Glodo "was shot in the back of the head execution style with the shot [t]raveling from back to front." (DE 134-1, Mem. at 3.) Again, however, Dr. Schott's testimony at trial was that the

shot to Glodo's head was from a distance of at least three feet, not that he was shot execution style. Further, even Phillips' expert Dehus testified unequivocally that "the victim was shot in the back of the head with a shotgun." (DE 137, Tr. at 13.) He testified that "obviously the victim was shot in the back of the head." The relevance of the x-ray, according to Dehus, was that it showed that the shot was at an angle, "a significant angle from left to right." (DE 137, Tr. at 13-14.)

Even assuming that Phillips shot Glodo in the back of the head but at an angle from left to right, as explained above, it does not undermine confidence in the jury's verdict that Phillips committed wanton murder. Further, as also explained above, testimony that Glodo was shot in the back of the head at a distance contradicts Phillips' argument that he shot Glodo in self-defense. Like the x-ray, the diagram is neither favorable to Phillips nor material to his guilt.

For all these reasons and those stated in the magistrate judge's report and recommendation (DE 85) and the Court's May 25, 2017 opinion (DE 89), the Court hereby ORDERS as follows:

1) The petition for writ of habeas corpus (1, 68) is DENIED; and
2) The petitioner's motion to amend his petition for writ of habeas corpus (DE 134) is DENIED.

Dated October 15, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at LONDON

CIVIL ACTION NO. 6:13-22-ART

JOHNNY PHILLIPS, PETITIONER,

V.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

DON BOTTOMS,
Warden, Northpoint Training Center, RESPONDENT.

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

I. INTRODUCTION

Johnny Phillips (hereinafter "Phillips"), was found guilty of wanton murder in the Laurel Circuit Court and sentenced to thirty (30) years imprisonment. [R. 1]. In this action brought under 28 U.S.C. § 2254, Phillips challenges his conviction arguing that it was the result of errors in the trial court's instruction to the jury on wanton murder, and constitutionally ineffective assistance of counsel. These claims were previously presented to the state's highest courts for consideration and allowed him no relief. For the reasons stated more fully below, they likewise provide no relief in this action.

Phillips also contends that his conviction was the result of the Commonwealth's failure to produce material as required by Brady v. Maryland, 373 U.S. 83 (1963). This claim was not raised by Phillips on direct appeal from his conviction for wanton murder, but upon arguing the claim in his RCr 11.42 motion and appeal, the Kentucky Court of Appeals found this claim to be procedurally defaulted, and declined to consider the argument. As a result, the undersigned finds that Phillips' Brady claim is procedurally defaulted, and because he fails to show cause for

failure to timely present the claim, and resulting prejudice, it provides him no relief in this action.

II. FACTUAL AND PROCEDURAL BACKGROUND

Following his conviction on the charge of wanton murder in the Laurel Circuit Court, Phillips appealed to the Kentucky Supreme Court, which summarized the facts of this case as follows:

> Phillips and victim Phillip Glodo were friends. On October 18, 2007, they traveled together to Tennessee to get a boat license. Afterward, they returned to Phillips's home. At some point Phillips made a comment which Glodo construed as accusing him of stealing $50.00 from Phillips. Glodo became upset at Phillips because of the comment, and remained so until the shooting later that evening.
>
> Phillips and Glodo had a mutual friend, Randy Capps, who testified at trial. Capps testified that when he first saw Phillips and Glodo at his residence on October 18, 2007, it appeared to him that both men had been drinking. After a short time the two left to get the boat license. Later that same day, Glodo called Capps. Capps said that Phillips was blaming him for stealing $50.00, and that he was going to "kick [Phillip's] ass." After Capps returned home, he received another phone call from Glodo in which Glodo threatened to sic his two Great Danes on Phillips. Glodo also made several calls to Phillips that day.
>
> Later that evening, Phillips returned to the Capps residence. A few minutes before 10:00 p.m., Glodo arrived at the residence and began to argue with Phillips. Because Capps's children were home, Phillips suggested that they take their argument elsewhere.
>
> Phillips and Glodo both got into their trucks to leave. As Phillips prepared to pull away Glodo yelled "I'll ram your ass." The two then drove off in the direction of Phillips's residence.
>
> As Phillips drove down the narrow road he came upon a truck pulling a horse trailer coming in the opposite direction. In order to let the truck by, Phillips pulled over into a church parking lot. Glodo pulled in behind him. The two men got out of their vehicles, and, ultimately, Phillips shot Glodo in the back of the head with a twelve-gauge shotgun.

> As further discussed below, following the shooting Phillips gave a statement to the police in which he claimed, inconsistently, that the shooting was both accidental and done in self-defense.
>
> On November 16, 2007, Phillips was indicted for Glodo's murder. Following a jury trial, Phillips was convicted of wanton murder, and the jury recommended a sentence of thirty years' imprisonment. On September 28, 2009, the trial court entered final judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

Phillips v. Commonwealth, No. 2009-SC-633-MR, 2010 WL 2471669, at *1 (Ky. June 17, 2010).

In his appeal, Phillips argued: (1) that the trial court erred by instructing the jury on wanton murder, when the evidence as a whole only supported the theory that the shooting was intentional, and in self-defense; (2) that the trial court erred by denying his motion for a directed verdict on the murder charge; (3) that the trial court erred by admitting into evidence graphic postmortem photographs of the victim; and (4) that error occurred during the sentencing phase when the probation officer incorrectly stated Phillips' parole eligibility under the violent offender statute. Upon consideration of these arguments, the Kentucky Supreme Court affirmed his conviction.

He then filed a motion for post-conviction relief under RCr 11.42, raising various claims of ineffective assistance of counsel, including: (1) failure to file a motion to suppress incriminating statements Phillips made when Detective Charlie Loomis continued to question him after invoking his right to remain silent; (2) failure to present testimony of exculpatory witnesses; (3) failure to retain a DNA expert; (4) failing to retain a ballistics expert to clarify the distance and angle of the shot that killed the victim; (5) failure to object during the Commonwealth's closing argument; (6) failure to tender an appropriate jury instruction; and (7) failure to present mitigating evidence. His motion was denied without an evidentiary hearing,

and the circuit court's ruling was affirmed on his subsequent appeal to the Kentucky Court of Appeals. Phillips v. Commonwealth, No. 2011-CA-002169-MR, 2012 WL 5457645, at *3-6, (Ky. App. Nov. 9, 2012).

On January 23, 2013, Phillips filed the instant action under 28 U.S.C. § 2254, asserting that his due process rights were violated when the trial court instructed the jury on the charge of wanton murder. [R.1]. Phillips also claims that his right to effective assistance of counsel was violated when counsel failed to seek suppression of statements he made in response to police interrogation without first being advised of his rights under Miranda. He argues that this violation was compounded when Detective Loomis took statements from him after invoking his right to counsel. He brings additional claims of ineffectiveness, including: that trial counsel was ineffective for failing to retain a DNA expert to assist in examining available evidence and to properly cross examination the state's expert; that counsel failed to submit proper jury instructions and failed to object to improper instructions submitted to the jury by the Court; and, that counsel failed to investigate, prepare, and present evidence in mitigation of his conviction. Finally, Phillips contends that the prosecution failed to produce exculpatory evidence in the form of x-rays of the victim taken during the autopsy. The Commonwealth has responded by arguing that the petition should be denied because Phillips' claim that the prosecution withheld Brady material has been procedurally defaulted, and that he cannot show that the state courts' rulings regarding the remaining claims were contrary to, or an unreasonable application of controlling law. [R. 30].

III. STANDARD OF REVIEW

Petitioner filed his habeas petition on January 23, 2013. [R. 1]. Thus, it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"),

Pub. L. No. 104-132, Tit. I, § 101 (1996) (effective April 1996). *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997). In relevant part, the AEDPA (amended 28 U.S.C. § 2254(d)) directs that an application for a writ of habeas corpus shall not be granted with respect to any claim "unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

To clarify the standard, the United States Supreme Court has held that, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, *that application* must also be *unreasonable*." Williams v. Taylor, 529 U.S. 362, 411 (2000) (emphasis added). The AEDPA imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333, n.7, which effectively "demands that state-court decisions be given the benefit of the doubt." Woodford v. Viscotti, 537 U.S. 19, 24 (2002). It is not the role of the reviewing court "to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 68 (1991). Rather, "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. A federal habeas court must give complete deference to evidentiary-supported state court findings of fact pursuant to the presumption of correctness now found in 28 U.S.C. § 2254(e)(1). Sumner v. Mata, 455 U.S. 591, 597 (1982). All factual findings made by a state court are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Post v. Bradshaw, 621 F.3d 406, 413 (6th Cir. 2010). Likewise, this being a *pro se*

petition, the undersigned is mindful that it is held to a less stringent standard than those drafted by legal counsel. *See* Cruz v. Beto, 405 U.S. 319 (1972).

JURY INSTRUCTION ON WANTON MURDER

In his petition for relief, Phillips claims that the trial court violated his due process rights, as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution when it instructed the jury on wanton murder. [R. 1 at 5]. Beyond merely alleging a due process violation, Phillips presents nothing to show a valid claim arising under the United States Constitution. He argues that because the trial court gave the jury a self-defense instruction it was improper for the court to also give the jury a wanton murder instruction, because if he acted in self-defense then he could not have acted with the "extreme indifference to human life" that is required for a wanton murder conviction. Therefore, he contends, it was error to instruct the jury on both standards. [R. 1 at 5]. These arguments were previously addressed by the Kentucky Supreme Court on his direct appeal from the judgment of conviction. In its decision denying Phillips' appeal on this issue, the Kentucky Supreme Court conducted the following analysis:

> As noted, following the shooting, Phillips gave a statement to police in which, among other things, he claimed that the shooting was an accident. For example, in the statement Phillips said:
>
> > "It was an accident.... It really was an accident. The gun went off prematurely.
> >
> > I used it [the shotgun] to push him away from me and it went off.... He was standing like this at me and had something in this hand.... When he come at me.... He rushed my truck, he rushed to the side of my truck, I pushed him away from the truck with my truck door, know what I mean.... He come up to my truck. I was watching him in the mirror and they weren't moving quick enough for me to go on the horses and stuff coming down that hill.... I pushed him off, basically used my door to get some room to get out of the truck, and as I come out of the truck I come with the gun, I pulled a

> shotgun out beside me. I was trying to scream at him get back in your damn truck, get the hell away from me and leave me alone and he was coming like this and his hand was at his side. In this hand right here is the one he had had the knife in, all I could see was shiny chrome and he carries a .44 that long .... in that hand cause he was coming at me like this, know what I mean, with this arm extended, with his forearm like extended....
>
> That's when he come at me with his forearm, I didn't know if he was going to try and push me.... I raised that gun up cause he had that thing in his left hand when I raised the gun up. He was coming at me and I took the gun and give it that and he didn't move four inches and the gun went off.
>
> I swear on my mother's grave I didn't mean to shoot that man."

As reflected by his statement, Phillips straightforwardly claimed that the shooting was an accident. An accidental act is the opposite of an intentional act. Thus, contrary to Phillips's argument, the evidence as a whole supports not only the theory that his shooting of Glodo was intentional and was done so in self-defense, but also that the shooting was not intentional, but, rather, was an "accident." The question then becomes if the jury believed the shooting was unintentional, whether Phillips's conduct satisfies the elements of wanton murder.

The evidence presented regarding the unintentional shooting theory is that Phillips pointed a loaded shotgun at Glodo, and pushed him away with the weapon while, it may be inferred (the shotgun fired), his finger was on the trigger. Unquestionably the foregoing conduct could be found by a jury to be wanton because of the high likelihood the shotgun could fire under the circumstances described. Moreover, we believe it is self-evident that a reasonable jury could conclude that pointing a loaded shotgun at a person and prodding him with it with a finger on the trigger manifests an extreme indifference to human life and creates a grave risk of death.

Thus, sufficient evidence was presented for a reasonable jury to conclude that the elements of wanton murder were satisfied. Harris v. Commonwealth, 793 S.W.2d 802, 804 (Ky.1990) (A trial judge properly instructs the jury on wanton murder where the evidence shows that the defendant was carrying a loaded, cocked pistol and he admits an intent to point it at the victim but not an intent to cause her death.) "The decision as to whether the aggravating circumstances (extreme indifference to human life and grave risk of death to another) were present is best left to the jury to decide." Cook v. Commonwealth, 129 S.W.3d 351, 363 (Ky.2004). (citations omitted.)"

Thus, since the evidence supported a wanton murder instruction, the trial court did not err by presenting the question to the jury. RCr 9.54(1).

[R. 30-4 at 6-7].

A federal court may not grant relief on any claim, unless the state court decision on the law controlling that claim was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Williams v. Taylor, 529 U.S. 363 (2000). Furthermore, "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle, 502 U.S. 62 at 68. A federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). In this case, Phillips merely raises general allegations that his constitutional rights were violated when the trial court gave an instruction on the crime of wanton murder. In doing so, he cites numerous Kentucky cases dealing with the interpretation and application of state laws. [R. 1-3]. This, however, is insufficient to raise a constitutional challenge to his conviction.

The issue that Phillips raises is whether it was correct under Kentucky law to give jury instructions on both self-defense and wanton murder. These are state law issues, presented as state law issues and analyzed as state law issues. As previously stated, under the AEDPA, the Court must give complete deference to evidentiary-supported state court findings of fact pursuant to the presumption of correctness now found in 28 U.S.C. § 2254(e)(1). Sumner, 455 U.S. 591 at 597. In the instant case, the Kentucky Supreme Court reviewed the case and, based upon state law, determined that both self-defense and wanton murder instructions were supported by the evidence at trial. These issues are not for review by the Court. See Taylor v. Morgan, 2006 WL

2475349 (W.D.K.Y. 2006). Accordingly, petitioner is not entitled to habeas relief based on claims arising from the trial court's decision to allow a wanton murder instruction.

INEFFECTIVE ASSISTANCE OF COUNEL CLAIMS

In his petition for habeas relief, Phillips claims that he was denied effective assistance of counsel when his attorney failed seek the suppression of statements he made to the police during interrogation and after invoking his right to counsel. [R. 1 at 3]. Phillips also claims that his counsel was ineffective by failing to retain an expert witness. [R. 1 at 3]. He also claims counsel was ineffective for failing to tender appropriate jury instructions and for failing to object to improper jury instructions given by the court. [R.1 at 3]. Finally, Phillips claims counsel was ineffective when his attorney failed to investigate, and/or present mitigating evidence during the sentencing phase of trial. [R. 1 at 3]. Phillips asserted all of these claims in his RCr 11.42 motion and the appeal of the denial of that motion to the Kentucky Court of Appeals. [R. 1, 1-3]. The state circuit court found that Phillips failed to show that counsel made errors so serious that counsel was not functioning as 'counsel' nor that he suffered any prejudice by the allegations of errors. [R. 1-3 at 14]. The Kentucky Court of Appeals affirmed each of those holdings. [R. 30-8].

For purposes of this Section 2254 proceeding, the Court must analyze whether the Kentucky Court of Appeals reasonably applied clearly established federal law in denying Phillips' claims. The Supreme Court of the United States presently holds that in order for a defendant to have his or her conviction overturned based upon ineffective assistance of counsel, two elements must be satisfied: (1) the defendant must show that counsel's performance was so defective that he/she was not functioning as counsel as guaranteed under the Sixth Amendment;

and (2) the defendant must show that prejudice resulted from the defective performance. Strickland v. Washington, 466 U.S. 668, 688 (1984). Under the Strickland analysis, the performance inquiry focuses on whether counsel's assistance was reasonable considering the totality of the circumstances. Id. at 688. The prejudice inquiry focuses on whether the defendant is able to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694. Thus an error by counsel, even if professionally unreasonable, does not warrant setting aside the conviction if the error did not affect the outcome. Id. at 691.

Significantly, both prongs of the Strickland test must be met for a finding of ineffective assistance, but courts are not required to conduct an analysis under both; thus, a court need not address the question of competence if it is easier to dispose of the claim due to the lack of prejudice. Strickland, 466 U.S. at 697; Baze v. Parker, 371 F.3d 310, 321 (6th Cir. 2004). In addition, the reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "Defendants alleging the ineffective assistance of counsel bear 'a heavy burden of proof.'" Pough v. United States, 442 F.3d 959, 966 (6th Cir. 2006) (*citing* Whiting v Burt, 395 F.3d 602, 617 (6th Cir. 2005)). And, under AEDPA, a state court's ruling on an ineffective assistance of counsel claim presented below must be an unreasonable application of the Strickland standard in order to justify federal habeas relief. Bell v. Cone, 535 U.S. 685, 693-94 (2002); Scott v. Elo, 302 F.3d 598, 606-07 (6th Cir. 2002); Mongo v. Edwards, 281 F.3d 568, 582-83 (6th Cir. 2002). Furthermore, a determination of a factual issue made by a state court shall be presumed correct and the applicant shall have the burden of rebutting the presumption by clear and convincing evidence. McAdoo v. Elo, 365 F.3d 487, 493-94 (6th Cir.

2004. This presumption of correctness also applies to the factual findings of a state appellate court made on its review of the state trial record. Mitchell v. Mason, 320 F.3d 604, 614 (6th Cir. 2003).

Phillip's first claim is that counsel was ineffective by failing to file a motion to suppress statements he made to Detective Charlie Loomis. Phillips claims that he asserted his right to remain silent and right to counsel during preliminary questioning; however, Loomis continued the interrogation in violation of Phillip's constitutional rights. [R. 30-8 at 6]. Detective Loomis testified at trial that Phillips was given his *Miranda* warnings both at the scene of the incident and again at the sheriff's office, and that Phillips never invoked his rights. [R. 30-8 at 6]. Counsel at trial specifically questioned Loomis about whether Loomis had advised Phillips of his right to remain silent and his right to counsel. The Kentucky Court of Appeals found that the record refutes Phillips' claim regarding this issue. Upon review, the court did not find that Phillip's counsel was deficient, and found that no evidentiary hearing on the issue was warranted. [R. 30-8 at 6]. Furthermore, the state court made a factual finding that Phillips was read his Miranda rights at the scene prior to making any statements and never invoked his right to counsel. [R.30-8 at 6]. As previously stated, there is a presumption of correctness with regard to the state court's finding of fact and the record supports such finding. McAdoo, 365 F.3d 487 at 493-94. Phillips has failed to rebut this presumption by clear and convincing evidence and this claim should be denied.

Phillips next claims counsel was ineffective "when he failed to retain the assistance of a DNA expert to assist him in examining the available evidence, and to prepare his cross examination of the state's expert." [R. 1 at 11]. The Kentucky Court of Appeals found that Phillips failed to establish prejudice based on the failure of counsel to hire a DNA expert.

> Every criminal case does not require defense counsel to retain a rebuttal expert witness. Thompson v. Commonwealth, 177 S.W.3d 782, 786 (Ky. 2005). Here, counsel thoroughly cross-examined Tunstill [the Commonwealth's DNA expert] on her findings, emphasizing that her tests clearly established that Phillips did not possess the knife. Further, Tunstill explained that the results for the victim were "inconclusive" because there was not enough DNA on the knife to conclusively determine whether the victim handled the knife. Based on Tunstill's testimony the jury could have inferred that the victim possessed the knife, which defense counsel vigorously argued to the jury. Under the totality of the circumstances, counsel performed reasonably, and Phillips failed to establish that he was prejudiced by counsel's decision.

[R. 30-8 at 9].

Phillips argues that counsel's failure to obtain an independent DNA expert denied him "the right of effective cross-examination which is constitutional error of the first magnitude." Davis v. Alaska, 415 U.S. 308, 316 (1974). While Phillips is correct in that the right to effectively cross-examine a witness is a constitutional right, he is incorrect that this right extends to the right to call an independent expert witness. The Supreme Court has held that "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Harrington v. Richter, 131 S.Ct. 770, 791 (2011) (holding that the failure of trial counsel to consult blood evidence experts to offer their expert testimony did not warrant federal habeas relief). Phillips further argues that a jury would have believed any potential testimony the Defense's DNA expert might have given more than the Commonwealth's DNA expert who actually did testify at trial. [R. 1-3]. This type of speculative argument does not demonstrate the required prejudice under Strickland. *See* Hodge v. Haeberlin, 579 F.3d 627, 640 (6th Cir. 2009); Clark v. Waller, 490 F.3d 551, 558 (6th Cir. 2007 (holding that a petitioner failed to demonstrate prejudice by asserting that an uncalled witness would have aided his defense). Based on this analysis, the Kentucky Court of Appeals' decision on this issue was not contrary to or an unreasonable application of federal law and

Phillips has failed to show that he was prejudiced by trial counsel's decision not to call its own expert DNA witness and therefore this claim for habeas relief should be denied.

Phillips next argues that "[c]ounsel rendered constitutionally ineffective assistance when he failed to submit proper jury instructions to the court, and when he failed to object to the improper instructions submitted to the jury by the court." [R. 1-3 at 31]. Phillips states that counsel should have requested a more specific self-defense jury instruction that included a provision regarding the use of force against someone who was in the process of forcibly entering an occupied vehicle. The Kentucky Court of Appeals denied this claim when raised on appeal. The Court stated:

> [a] defendant is entitled to jury instructions that are "applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). In this case Phillips gave conflicting statements to the police regarding how the shooting occurred. Although one of his statements indicated he saw the victim in the rearview mirror, there was never an allegation that the victim attempted to forcibly enter the vehicle. As the evidence did not support an occupied vehicle instruction we conclude counsel was not deficient on this issue, and an evidentiary hearing was not warranted. Commonwealth v. Davis, 14 S.W.3d, 11 (Ky. 1999).

[R. 30-8 at 12].

As previously stated, whether a jury instruction is supported by the evidence pursuant to state law is not an issue that is cognizable on federal habeas review. *See* Estelle, 502 U.S. 62 at 68. On a federal habeas review the Court is bound to accept the state supreme court's decision as to the validity of the jury instructions given at trial. Davis v. Morgan, 89 Fed.Appx. 932, 937 (6th Cir. 2003). "If the jury instructions were proper, as we must assume, then [Defendant's] counsel could not have rendered ineffective assistance by failing to object to them." Id. Based on this analysis, Phillips' claim that his trial counsel was ineffective by failing to object to or tender proper jury instructions is without merit and should be denied.

Phillips next argues that "[c]ounsel provided constitutionally ineffective assistance when he failed to investigate, prepare, and present evidence in mitigation of Petitioner's conviction." [R.1 at 14]. Phillips argues that if counsel had not failed to investigate, document or present Petitioner's extensive history of physical abuse and exposure to violence during his childhood and adolescence, he would have received a lesser sentence. The Kentucky Court of Appeals disagreed with this claim and concluded the following:

> The record indicates that Phillips's best friend testified during the guilt phase, and Phillips's wife, Angie, testified during both phases of the trial. Counsel elicited testimony regarding Phillips's positive attributes, including owning a business, being an avid hunter, and spending time with his two children. Angie also explained that Phillips lived with a serious back ailment. In the penalty phase closing argument, defense counsel implored the jury to give Phillips the minimum twenty-year sentence. It is clear that Phillips's post-conviction argument regarding potential mitigation evidence relies on conclusory allegations; consequently, an evidentiary hearing was not warranted on this issue. Sanders, 89 S.W.3d at 385.

[R. 30-8 at 13].

The Sixth Circuit has held that when counsel puts on a reasonable mitigation case there has not been deficient performance. Hodges v. Colson, 727 F.3d 517, 545 (6th Cir. 2013). The record is clear that Phillips' defense counsel introduced evidence of employment history, hobbies, family interaction and physical ailments. [R. 30-8 at 13]. "The [federal court's] role on habeas review is not to nitpick gratuitously counsel's performance. After all, the constitutional right at issue here is ultimately the right to a fair trial, not to prefect representation." Smith v. Mitchell, 348 F.3d 177, 206 (6th Cir. 2003) (*citing* Strickland, 466 U.S. at 684). Here, the Kentucky Court of Appeals' finding that Phillips' was not prejudiced by his counsel's failure to present more mitigating evidence at sentencing is not contrary to or an unreasonable application of federal law and therefore this ground for relief is without merit.

As previously stated, the AEDPA imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333, n.7, which effectively "demands that state-court decisions be given the benefit of the doubt." Woodford, 537 U.S. 19 at 24. The Kentucky Court of Appeals decision was not contrary to or an unreasonable application of clearly established federal law and therefore Phillips claims that he received ineffective assistance of counsel are without merit and should be dismissed.

EXCULPATORY EVIDENCE

In his final ground for relief, Phillips claims the prosecution violated his Brady rights when it failed, and/or refused to produce exculpatory evidence. [R. 1]. In his instant 2254 motion, Phillips lists the following evidence: pictures of the victim's truck, a second knife found in the victim's truck, a second 'swab' taken from the victim's knife which might possibly have been tested for DNA; and finally, post-mortem x-rays of the victim's skull. [R. 1]. While Phillips mentions all of these items as exculpatory evidence in his 2254 motion, he fails to discuss them further in his memorandum of support. The only item which Phillips' discusses in greater detail and gives an explanation for are the post-mortem x-rays. The Commonwealth told Phillips that no x-rays of Glodo's skull were ever taken. In its response to Phillips' RCr 11.42 appeal, dated May 7, 2012, the Commonwealth stated:

> "[N]o X-Rays were taken during the autopsy of the victim and none were introduced at trial. The trial court also concluded that the appellant's assertion that X-Rays were taken was without any factual basis and denied him relief on this issue. The court based this conclusion on the appellant's own motion which contained a letter from Larry Dehus of Law-Science Technologies, in which Mr. Dehus reviewed the autopsy and wrote that there was no indication that an X-Ray was taken of the deceased's head. Based upon the appellant's own motion, the appellant's allegation that the Commonwealth failed to turn over X-Rays is without merit."

[R. 30-7].

On December 3, 2013, an Open Records Act request was made to the Justice and Public Safety Cabinet of Kentucky for "the radiology reports and films that resulted from the October 19, 2007, autopsy of Phil Glodo that was performed by the Kentucky Medical Examiner." [R. 42-1 at 51]. This request was originally denied. However, in a letter dated April 22, 2014, the Kentucky Attorney General's Office stated that the denial of the request was a violation of the Open Records Act. [R. 42-1 at 51]. In that letter, the Attorney General's Office granted the request for the x-ray and also stated that there was never any radiology report generated after Mr. Glodo's head was x-rayed. [R. 42-1 at 52]. Following this ruling, in a letter dated April 28, 2014, the State Medical Examiner's Office explained how a photographic copy of the x-ray could be purchased, or that the actual x-ray film could be made available by appointment at the Medical Examiner's Office. [R. 42-1 at 48]. Phillips has filed a picture of what appears to be the x-ray at issue in his Motion to Expand the Record. [R. 42-1 at 49].

Specifically, Phillips argues that there is a reasonable probability that had the evidence been disclosed to him, the result of the trial would have been different. The Commonwealth, in its response, argues that this claim should have been raised on direct appeal and therefore it is procedurally defaulted. [R. 30]. Phillips argues that he should be allowed to bring this claim because he was not aware of the existence of the evidence at issue, post-mortem x-rays of the victim's skull, until after his direct appeal had been filed. [Record No. 1-3].

As previously discussed, under the doctrine of procedural default; "a federal court will not review the merits of a claim, including constitutional claims that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez, 132 S.Ct. 1309 at 1316. The Sixth Circuit Court of Appeals has articulated a four-part test to determine whether a

habeas claim has been procedurally defaulted: "(1) whether there is a state procedural rule that is applicable to the petitioner's claim; (2) whether the petitioner failed to comply with that rule; (3) whether the procedural rule was actually enforced in the petitioner's case; and (4) whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim." Howard, 405 F.3d 459 at 477. Under the first three prongs, "a procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a reasoned opinion in the case 'clearly and expressly states that its judgment rests on a state procedural bar.'" Thompson, 580 F.3d 423 at 437. As to the fourth prong, a state procedural rule is "adequate" if it's "firmly established and regularly followed." Wilson v. Mitchell, 479 F.3d 491, 499 (6th Cir. 2007) (citations omitted). A state procedural rule is considered "independent" when it does not rely on federal law. Id.

In its decision denying Phillips' RCr 11.42 motion, the Kentucky Court of Appeals declined to address Phillips' argument related to an alleged Brady violation by the Commonwealth. The court held that the issue should have been raised on his direct appeal. [R. 30-8 at 9]. In its holding the court cited Martin v. Commonwealth, 203 S.W.3d 173 (Ky. App. 2006). In that case, the court held, "it is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." Id. (citing Thacker v. Commonwealth, 476 S.W. 2d 838, 839 (Ky. 1972)). Therefore, the Commonwealth now contends that Phillips' arguments regarding Brady violations are procedurally defaulted and provide him with no relief in this action.

However, the "failure to raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Murray v. Carrier, 477 U.S. 478 492 (1986). Procedural default of Phillips' claims can be "excused by an adequate showing of cause and prejudice." Strickler v. Greene, 527 U.S. 263, 282 (1999). Therefore, a determination must be made as to whether Phillips claim can survive a cause and prejudice analysis. As explained below, assuming that Phillips has made a showing of cause, he has failed to show prejudice and therefore this claim should be denied.

The 'cause' analysis is used to determine why a Defendant failed to raise a Brady claim at an earlier proceeding. Strickler, 527 U.S. 263 at 283. "A state's suppression of Brady evidence constitutes cause under the procedural-default doctrine." Brooks v. Tennessee, 626 F.3d 878, 890 (6th Cir. 2010). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray, 477 U.S. 478 at 488. Here, Phillips along with his counsel was told multiple times that the x-rays did not exist, when in fact they did. This denial by the Commonwealth and later determination that the x-rays did exist is an objective external factor as to why Phillips did not raise this claim earlier. Thus, Phillips has shown that this claim must be considered based on adequate cause. The next step is to determine whether Phillips was prejudiced by the failure of the Commonwealth to disclose the post-mortem x-rays.

"The suppression of evidence by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 88 (1963). To demonstrate that the withholding of the x-rays was a Brady violation, Phillips must prove that "(1) the evidence at issue is favorable to him; (2) the State, either willfully or inadvertently, suppressed that evidence; and (3) prejudice ensued." Harbison v. Bell, 408 F.3d 823, 830 (6th Cir. 2005); *quoting* Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

In the case at hand, it is apparent the Commonwealth failed to disclose the x-rays and therefore cause has been established. Therefore, the inquiry is now whether the x-rays are favorable to Phillips, and whether he was prejudiced by their suppression. "There is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. 263 at 281. "To determine whether there is such probability, the withheld evidence must be considered collectively." Harbison, 408 F.3d 823 at 830 (*citing* Castleberry v. Brigano, 349 F.3d 286, 291 (6th Cir. 2003). The degree of prejudice should be evaluated using the total context of the events at trial and not by simply viewing the evidence at issue alone. U.S. v. Frady, 456 U.S. 152, 169 (1982). "For purposes of determining reasonable probability, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial.'" Castleberry, 349 F.3d 286 at 291 (*quoting* Kyles v. Whitney, 514 U.S. 419, 434 (1995).

Phillips claims the inclusion of the post-mortem x-rays of the skull would likely have resulted in a not-guilty verdict because they show the victim was not shot straight-on in the back of the head, but rather shot from the side of the head as a result of a struggle for the shotgun. [R. 1]. Phillips is incorrect in this argument. Due to the amount of other evidence presented, the failure of the Commonwealth to deliver the post-mortem x-rays did not result in an unfair trial.

"Evidence that is 'merely cumulative' to evidence presented at trial is 'not material' for purposes of Brady analysis." Brooks, 626 F.3d at 893 (*quoting* Carter v. Mitchell, 443 F.3d 517, 533 (6th Cir. 2006)).

At Phillips' trial, the Commonwealth presented a variety of evidence and expert witnesses that is cumulative to the issue Phillips claims the x-rays prove; how and where Glodo was shot. At trial, the Commonwealth presented the testimony of G. Dwight Deskins, a forensic scientist with the Eastern Regional Forensic Laboratory who specializes in firearms, and Dr. Jennifer Schott, the State Medical Examiner for the Department of Justice of the Commonwealth of Kentucky. [R. 30-7]. Mr. Deskins testified that the shotgun which Phillips shot Glodo had no malfunctions and had a common trigger weight. [R. 30-7]. In her testimony, Dr. Schott explained that the pellets from the shotgun shell traveled from the back of Glodo's head toward the front. [R. 30-7]. Dr. Schott also testified that the spread pattern of satellite lesions on Glodo's skull indicated that the gunshot wound was not a contact wound and that Glodo was shot from a distance of at least three (3) feet. [R. 30-7]. During Dr. Schott's testimony, the Commonwealth introduced two photos of the wound to the back of Glodo's head. [R. 30-7]. In one of these photos the back of Glodo's head was shaved, making it easier to see the details of the wound. [R. 30-7].

Looking at all of the evidence presented at trial, the jury heard evidence related to how Glodo was shot and the specific type of gunshot wound he suffered. Defense counsel had ample opportunity to cross-examine these witnesses and to call its own experts to refute the evidence. Because so much evidence was presented at trial on this issue, Phillips was not prejudiced by not having access to the x-ray of Glodo's skull. Furthermore, it is uncertain whether presenting the x-ray at trial would even have been beneficial to Phillips' case. Phillips argues that the x-rays

would "totally refute the Commonwealth's theory of the case." [R. 1-3]. This assertion is simply not true. In his memorandum of support, Phillips claims that Dr. Schott's testimony was inconsistent with what the photographs of Glodo's skull show [R. 1-3] but he fails to definitively explain why the exclusion of the x-rays resulted in an unfair trial. Based on all of this evidence, Phillips has not demonstrated that the post-mortem x-rays would have been beneficial to his case nor has he proven that he was prejudiced by their suppression. Accordingly, it is recommended that Phillips' claim that the prosecution violated his due process rights when it failed to produce exculpatory evidence should be denied.

IV. OTHER MOTIONS

Phillips has also filed into the record motions for an evidentiary hearing [R. 14, 39], motions to appoint counsel [R. 15, 38], motions to amend his 2254 petition and expand the record [R. 40, 42], motion for discovery [R. 47], and motion to proceed in forma pauperis [R. 44]. For the reasons stated below, these motions should be denied.

At issue first are Phillips' motions for an evidentiary hearing. [R. 14, 40]. The AEDPA limits the ability of federal courts to grant an evidentiary hearing. In pertinent part, the statute provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law ...; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

In Williams v. Taylor, 529 U.S. 420 (2000) the Supreme Court held that, "[u]nder the opening clause of 28 U.S.C. § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend… upon whether those efforts could have been successful." Furthermore, "in determining whether to grant an evidentiary hearing, a habeas court must 'consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'" Muniz v. Smith, 647 F.3d 619, 625 (6th Cir. 2011); *quoting* Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

Here, Phillips passes the "due diligence" requirement because, as previously discussed, he could not have known about the post-mortem x-rays. However, Phillips fails the second part of the analysis, in that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). In this matter, the inclusion of the post-mortem x-rays would not have been beneficial to Phillips' defense and would simply have been cumulative to the other evidence that was presented by the prosecution at trial. There is nothing to indicate that had the x-rays been disclosed then no reasonable fact

finder would have found Phillips guilty of murder. Also, if such a hearing were held, Phillips would not be able to prove entitlement to the relief he claims. Accordingly, Phillips' motions for an evidentiary hearing [R. 14, 39] will be denied.

Phillips has also filed a motion for discovery [R. 47]. In his motion Phillips requests an order requiring the Kentucky State Police Crime Lab to provide the parties with copies of all original, unredacted copies of reports and data compiled in connection with Petitioner's prosecution in state court. "For good cause shown, the district court has the discretion to permit discovery in a habeas proceeding, see 28 U.S.C. § 2254 Rule 6(a), 'provided that the habeas petitioner presents specific allegations showing reason to believe that the facts, if fully developed, may lead the district court to believe that federal habeas relief is appropriate.'" Post v. Bradshaw, 621 F.3d 406, 425 (6th Cir. 2010); *quoting* Lott v. Coyle, 261 F.3d 594, 602 (6th Cir. 2001). In this case, as previously discussed, there has been no showing of good cause that further discovery would lead this Court to believe that federal habeas relief is appropriate and therefore Phillips' Motion for Discovery [R. 47] will be denied.

Phillips has also filed motions to amend his 2254 petition and expand the record. [R. 40, 42]. In his motions, Phillips requests that the Court expand the record to include his RCr 11.42 motion and the post-mortem x-ray evidence. In writing this Report and Recommendations, the undersigned took into consideration all evidence filed into the record, including the RCr 11.42 motion and the post-mortem x-rays. Because this evidence has already been filed into the record and considered while making this recommendation, Phillips' motions [R. 40, 42] will be denied as moot.

Phillips has also made two motions for the appointment of counsel [R. 15, 38], and a renewed motion to proceed in forma pauperis [R. 44]. In his motions, Phillips requests the

appointment of counsel due to the complexity of the issues in his case, his limited access to legal research and due to the fact that he is taking bi-weekly injections of the arthritis drug Humira. A petitioner does not have a constitutional right to habeas counsel. Post v. Bradshaw, 422 F.3d 419, 423 (6th Cir. 2005). A federal court has the discretion to appoint counsel for any petitioner seeking habeas relief, if the petitioner is proceeding as a pauper and the interests of justice so require. *See* U.S.C. § 2254(h); 18 U.S.C. § 3006A(a)(2)(B). In exercising its discretion, the court should consider the legal and factual complexity of the case, petitioner's ability to investigate and present his claims, and any other factors relevant to the given case. Hoggard v. Purkett, 29 F.3d 469, 417 (8th Cir. 1994). Here, Phillips has demonstrated his ability to investigate and present his claims to the court as demonstrated by his thoroughly researched motions and memoranda presented to the court. The issues Phillips has presented to the court, while numerous, are not so complex that the appointment of counsel is necessary in the interests of justice and therefore Phillips's motions to appoint counsel [R. 15, 38] will be denied. Furthermore, because there is no need for a hearing, to appoint counsel or further discovery in this matter there is no need to proceed as a pauper and therefore Phillips' motion to proceed in forma pauperis [R. 44] will be denied as moot.

V. CONCLUSION

Therefore, for the reasons stated within, **IT IS ORDERED** that Phillips' Motions for an evidentiary hearing [R. 14, 39], motions to appoint counsel [R. 15, 38], motions to amend his 2254 petition and expand the record [R. 40, 42], motion for discovery [R. 47], and motion to proceed in forma pauperis [R. 44], are DENIED.

In addition, this Court does not find that the state courts' rulings represent an unreasonable application of clearly established federal law. The Kentucky courts reasonably applied the correct federal equivalents to all of Phillips' claims, and found no grounds for relief. This Court agrees with the Kentucky courts' findings and Phillips has been unable to meet his burdens of proving otherwise. Therefore, for the reasons set forth above, the undersigned RECOMMENDS that Phillips' Petition for Writ of Habeas Corpus [R. 1] be DENIED.

The parties are directed to 28 U.S.C. § 636(b)(1) for a review of appeal rights governing this Report and Recommendation. Specific objections to this Report and Recommendation must be filed within fourteen (14) days from the date of service thereof or further appeal is waived. United States v. Campbell, 261 F.3d 628, 632 (6th Cir. 2001); Thomas v. Ann, 728 F.2d 813, 815 (6th Cir. 1984). General objections or objections that require a judge's interpretation are insufficient to preserve the right to appeal. Cowherd v. Million, 380 F.3d 909, 912 (6th Cir. 2004); Miller v. Currie, 50 F.3d 373, 380 (6th Cir. 1995).

Signed December 9, 2014.

Signed By:
Edward B. Atkins *EBA*
United States Magistrate Judge

RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000633-MR

JOHNNY PHILLIPS — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
NO. 07-CR-00266

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Johnny Phillips, appeals as a matter of right[1] from a judgment of the Laurel Circuit Court convicting him of wanton murder. Pursuant to the jury's recommendation, he was sentenced to thirty years' imprisonment.

On appeal, Phillips raises the following claims: (1) that the trial court erred by instructing the jury on wanton murder; (2) that the trial court erred by denying his motion for a directed verdict on the murder charge; (3) that the trial court erred by admitting into evidence graphic postmortem photographs of the victim; and (4) that error occurred during the sentencing phase when the probation officer incorrectly stated Phillips's parole eligibility under the violent offender statute. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] Ky. Const. § 110(2)(b).

Phillips and victim Phillip Glodo were friends. On October 18, 2007, they traveled together to Tennessee to get a boat license. Afterward, they returned to Phillips's home. At some point Phillips made a comment which Glodo construed as accusing him of stealing $50.00 from Phillips. Glodo became upset at Phillips because of the comment, and remained so until the shooting later that evening.

Phillips and Glodo had a mutual friend, Randy Capps, who testified at trial. Capps testified that when he first saw Phillips and Glodo at his residence on October 18, 2007, it appeared to him that both men had been drinking. After a short time the two left to get the boat license. Later that same day, Glodo called Capps. Capps said that Phillips was blaming him for stealing $50.00, and that he was going to "kick [Phillip's] ass." After Capps returned home, he received another phone call from Glodo in which Glodo threatened to sic his two Great Danes on Phillips. Glodo also made several calls to Phillips that day.

Later that evening, Phillips returned to the Capps residence. A few minutes before 10:00 p.m., Glodo arrived at the residence and began to argue with Phillips. Because Capps's children were home, Phillips suggested that they take their argument elsewhere.

Phillips and Glodo both got into their trucks to leave. As Phillips prepared to pull away Glodo yelled "I'll ram your ass." The two then drove off in the direction of Phillips's residence.

As Phillips drove down the narrow road he came upon a truck pulling a horse trailer coming in the opposite direction. In order to let the truck by, Phillips pulled over into a church parking lot. Glodo pulled in behind him. The two men got out of their vehicles, and, ultimately, Phillips shot Glodo in the back of the head with a twelve-gauge shotgun.

As further discussed below, following the shooting Phillips gave a statement to the police in which he claimed, inconsistently, that the shooting was both accidental and done in self-defense.

On November 16, 2007, Phillips was indicted for Glodo's murder. Following a jury trial, Phillips was convicted of wanton murder, and the jury recommended a sentence of thirty years' imprisonment. On September 28, 2009, the trial court entered final judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. THE TRIAL COURT PROPERLY GAVE A WANTON MURDER INSTRUCTION

Phillips first contends that the trial court erred by instructing the jury on wanton murder. He argues that the evidence as a whole only supports the theory that the shooting was intentional – and was done so in self-defense. Because, following the shooting, Phillips claimed in his statement to police that the shooting was accidental, we disagree.

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the

testimony." RCr 9.54(1); *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Further, intentional murder and wanton murder are the same offense under Kentucky law and, if supported by the evidence, it is proper to instruct the jury on both alternate theories of liability. *Evans v. Commonwealth*, 45 S.W.3d 445, 447 (Ky. 2001) (citing *Ice v. Commonwealth*, 667 S.W.2d 671, 677 (Ky. 1984)); KRS 507.020.

The wanton murder provisions contained in KRS 507.020(1)(b) provide as follows:

> (1) A person is guilty of murder when:
>
> . . . .
>
> (b) Including, but not limited to, the operation of a motor vehicle under circumstances *manifesting extreme indifference to human life*, he wantonly engages in conduct which creates a *grave risk of death to another person* and thereby causes the death of another person.

(emphasis added).

Thus, the culpable mental state for wanton murder is wantonness, except that to fall under the wanton murder statute the wanton conduct must also involve the statutory aggravating factors of (1) manifesting extreme indifference to human life, and (2) the creation of grave risk of death to another

person.[2] KRS 501.020(3) defines "wantonly" as follows:

> "Wantonly" - A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

The term "wantonly" as used in KRS 507.020(b) was clarified in *Elliott v. Commonwealth*, 976 S.W.2d 416 (Ky. 1998). "The definition[ ] of 'wantonly' ... make[s] no reference to the defendant's state of mind with respect to his conduct, but refer[s] only to his state of mind with respect to the result of that conduct or to the circumstance which prompted the conduct." *Id.* at 419. So,

> [e]ven though he did not intend to kill, if he was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct would result in the death of another person, he is guilty of second-degree manslaughter or, if accompanied by the statutory aggravating circumstances, wanton murder.

Id.

As noted, following the shooting, Phillips gave a statement to police in which, among other things, he claimed that the shooting was an accident. For example, in the statement Phillips said:

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[2] Causing the death of another with a wanton mental state without the aggravating factors contained in the wanton murder statute is second-degree manslaughter. KRS 507.040 provides, in relevant part, as follows: "(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's: (a) Operation of a motor vehicle; or (b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child." In this proceeding, the jury was also instructed on second-degree manslaughter and reckless homicide.

It was an accident . . . . It really was an accident. The gun went off prematurely.

I used it [the shotgun] to push him away from me and it went off. . . . He was standing like this at me and had something in this hand . . . . When he come at me . . . . He rushed my truck, he rushed to the side of my truck, I pushed him away from the truck with my truck door, know what I mean . . . . He come up to my truck. I was watching him in the mirror and they weren't moving quick enough for me to go on the horses and stuff coming down that hill . . . . I pushed him off, basically used my door to get some room to get out of the truck, and as I come out of the truck I come with the gun, I pulled a shotgun out beside me. I was trying to scream at him get back in your damn truck, get the hell away from me and leave me alone and he was coming like this and his hand was at his side. In this hand right here is the one he had had the knife in, all I could see was shiny chrome and he carries a .44 that long . . . . in that hand cause he was coming at me like this, know what I mean, with this arm extended, with his forearm like extended . . . .

That's when he come at me with his forearm, I didn't know if he was going to try and push me . . . . I raised that gun up cause he had that thing in his left hand when I raised the gun up. He was coming at me and I took the gun and give it that and he didn't move four inches and the gun went off.

. . .

I swear on my mother's grave I didn't mean to shoot that man.

As reflected by his statement, Phillips straightforwardly claimed that the shooting was an accident. An accidental act is the opposite of an intentional act. Thus, contrary to Phillips's argument, the evidence as a whole supports not only the theory that his shooting of Glodo was intentional and was done so in self-defense, but also that the shooting was not intentional, but, rather, was an "accident." The question then becomes if the jury believed the shooting was

unintentional, whether Phillips's conduct satisfies the elements of wanton murder.

The evidence presented regarding the unintentional shooting theory is that Phillips pointed a loaded shotgun at Glodo, and pushed him away with the weapon while, it may be inferred (the shotgun fired), his finger was on the trigger. Unquestionably the foregoing conduct could be found by a jury to be wanton because of the high likelihood the shotgun could fire under the circumstances described. Moreover, we believe it is self-evident that a reasonable jury could conclude that pointing a loaded shotgun at a person and prodding him with it with a finger on the trigger manifests an extreme indifference to human life and creates a grave risk of death.

Thus, sufficient evidence was presented for a reasonable jury to conclude that the elements of wanton murder were satisfied. *Harris v. Commonwealth*, 793 S.W.2d 802, 804 (Ky. 1990) (A trial judge properly instructs the jury on wanton murder where the evidence shows that the defendant was carrying a loaded, cocked pistol and he admits an intent to point it at the victim but not an intent to cause her death.) "The decision as to whether the aggravating circumstances (extreme indifference to human life and grave risk of death to another) were present is best left to the jury to decide." *Cook v. Commonwealth*, 129 S.W.3d 351, 363 (Ky. 2004). (citations omitted.)

Thus, since the evidence supported a wanton murder instruction, the trial court did not err by presenting the question to the jury. RCr 9.54(1).

III. PHILLIPS WAS NOT ENTITLED TO A DIRECTED VERDICT

Phillips next contends that he was entitled to a directed verdict of acquittal on the murder charge because, based upon the evidence presented at trial, "the prosecution failed to meet their burden of proof that [he] did not act in self-defense." Phillips alleges that it would be clearly unreasonable for a jury to conclude that he did not act in self-defense. As explained above, sufficient evidence was presented to support a jury verdict that Phillips engaged in wanton murder. Moreover, because Glodo was shot from behind, a jury issue was presented upon the issue of self-defense.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-188 (Ky. 1991) (citations omitted).

It is uncontroverted that Glodo was shot in the back of the head. While not determinative, a shot from behind, for obvious reasons, raises a jury

question concerning whether Phillips, in fact, was acting in self-defense. The difficulties of an attack by a victim while faced away from the defendant are clear. *Commonwealth v. Yanoff*, 690 A.2d 260, 265 (Pa.Super. 1997) ("The fact that Appellant shot the victim in the back clearly undermines his claim of self-defense.") Thus, a jury question was presented upon the issue of whether Phillips shot Glodo in self-defense.

> 'Rarely is a defendant relying upon self-defense entitled to a directed verdict.' Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper for the trial court to direct a verdict of not guilty. Similarly, in *Taul v. Commonwealth*, 249 S.W.2d 45 (Ky. 1952), it was held that a defendant's statement that he acted in self-defense or his description of events which show such to be the case need not be accepted at face value where the jury may reasonably infer from his incredibility or the improbability of the circumstances that one or more of the elements necessary to qualify for self-defense is missing. In *Townsend v. Commonwealth*, 474 S.W.2d 352 (Ky. 1971), we held that if the evidence relied upon to establish self-defense is contradicted or if there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given.
>
> While the Commonwealth always bears the burden of proving every element of the crime charged, a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts. *Collins v. Commonwealth*, 309 Ky. 572, 218 S.W.2d 393 (1949).

West v. Commonwealth, 780 S.W.2d 600, 601 (Ky. 1989).

While much of the evidence presented in this case was circumstantial, we have no reluctance in holding that sufficient evidence was presented to justify submitting the issue of whether Phillips acted in self-defense to the jury. *Wills v. Commonwealth*, 502 S.W.2d 60 (Ky. 1973); *Pruitt v. Commonwealth*,

490 S.W.2d 486 (Ky. 1972); *West,* 780 S.W.2d at 601. Thus, Phillips was not entitled to a directed verdict because there was sufficient evidence to support a jury verdict of guilt on either of the Commonwealth's theories regarding the murder charge. *Benham,* 816 S.W.2d at 187-188.

IV. THE POSTMORTEM PHOTOGRAPHS WERE PROPERLY ADMITTED

Phillips next argues that the trial court erred by permitting the Commonwealth to introduce autopsy photographs depicting the wound to the back of Glodo's head. He contends that the photographs should not have been admitted because the fact that the victim was shot in the back of the head was uncontested, and therefore the photographs were not necessary to prove any element of the prosecution's case. He also alleges that evidence concerning the wound could have been presented without the use of the photographs, and that the overly graphic nature of the photographs prejudicially inflamed the passions of the jury.

In determining admissibility of the photographs, we must first consider whether the photographs are relevant. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The autopsy photographs of Glodo's fatal injuries were relevant to demonstrate that he was, indeed, killed by gunshot wounds as stated in the indictment. *Hunt v. Commonwealth,* 304 S.W.3d 15, 40-41 (Ky. 2009). Moreover, the position of the wound in the back

of Glodo's head was relevant to refute Phillips's claim of self-defense.

Next, the admissibility of photos must be examined under KRE 403, which states: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *undue* prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403 (emphasis added). Thus, we must discern whether the photographs were sufficiently gruesome so as to find the probative value "substantially outweighed" by the prejudicial effect.

As a general rule, photographs do not become inadmissible simply because they are gruesome. *Foley v. Commonwealth*, 953 S.W.2d 924, 935 (Ky. 1997). Such evidence loses its admissibility when the photographs depict a body that has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer." *Clark v. Commonwealth*, 833 S.W.2d 793, 794 (Ky. 1991).

While the autopsy photographs in this case may have been gruesome, the threshold is much higher than mere gruesomeness for a photo to be inadmissible. For example, a photograph of a young child victim, where his scalp was pulled back to show there was an intent to kill, was not gruesome enough to preclude the photo evidence from the jury. *Quarels v. Commonwealth*, 142 S.W.3d 73, 85 (Ky. 2004). In another case, a videotape of

the murder scene showing burned bodies of victims, as well as numerous photographs depicting the same, were an accurate description of the crime scene and were properly admissible. *McKinney v. Commonwealth*, 60 S.W.3d 499, 509 (Ky. 2001).

Thus, the autopsy photographs were properly admitted because they were relevant to show Glodo's injuries and were not so gruesome as to create undue prejudice. *Hunt*, 304 S.W.3d at 41.

V. THE PROBATION OFFICER'S MISSTATEMENT OF PAROLE ELIGIBILITY WAS TIMELY CORRECTED BY THE TRIAL COURT

Phillips next argues that error occurred during the sentencing phase as a result of misstatements made concerning Phillips's parole eligibility. The Commonwealth concedes that the applicable rule was misstated. While the probation and parole officer, Pam Handy, did indeed, misstate the applicable parole eligibility rules for a violent offender, the trial court timely corrected the misstatement and admonished the jury concerning the correct principle of law, thereby negating the error.

Pursuant to the violent offender statute, KRS 439.3401,[3] a violent offender, under all circumstances, must serve eighty-five percent of his

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[3] KRS 439.3401(3) provides "(3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." KRS 439.3401(4) provides "(4) A violent offender may not be awarded any credit on his sentence authorized by KRS 197.045(1), except the educational credit. A violent offender may, at the discretion of the commissioner, receive credit on his sentence authorized by KRS 197.045(3). *In no event shall a violent offender be given credit on his sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence.*" (emphasis added).

sentence before he is eligible for parole. During her testimony, Handy incorrectly indicated that there may be factors which may reduce parole eligibility period to below eighty-five percent. She was under the impression that various credits may produce this result, but was unable to explain how this would occur in practice. We are cited to no authority in support of Handy's theory.

After an unsuccessful attempt to have Handy correct herself, trial counsel approached the bench and asked the trial court to take judicial notice of the statute regarding the rigid eighty-five per cent requirement and instruct the jury accordingly. The trial court agreed, and addressed the jury as follows:

> Members of the jury, the Court has taken judicial notice and you will accept as evidence in your deliberations of the sentence that the statute would require the defendant to take or to serve eight-five percent of any sentence you may, at least eighty-five percent of any sentence you would impose.

"The trial court's admonition put this issue to rest. A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). As such, we must presume that the jury followed the trial court's admonition concerning the correct parole rule under the violent offender statute, thereby negating Handy's misstatement. Moreover, Phillips received all the relief that he requested. If a party fails to move for a mistrial after objecting and receiving an admonition from the trial court, such failure indicates that party's satisfaction with the admonition. *West*, 780 S.W.2d at 602. As Phillips took

no further action after the trial court's admonition, he is presumed to be satisfied with the remedy. Thus, no error occurred.

VI. CONCLUSION

For the foregoing reasons the judgment and sentence of the Laurel Circuit Court is affirmed.

All sitting. All concur.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at LONDON

\- - -

JOHNNY R. PHILLIPS,	.	Case No. 6:13-CV-0022
Plaintiff,	.	**Lexington, Kentucky**
- v -	.	Monday, April 30, 2018
SCOTT JORDAN,	.	3:57 p.m.
Defendant.	.	

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TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS
BEFORE THE HONORABLE KAREN K. CALDWELL
UNITED STATES DISTRICT COURT JUDGE

\- - -

For the Plaintiff: GREGORY A. OUSLEY, ESQ.
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Somerset, Kentucky 42501

For the Defendant: COURTNEY JONES HIGHTOWER, ESQ.
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Court Reporter: Linda S. Mullen, RDR, CRR
Official Court Reporter
101 Barr Street
Lexington, Kentucky 40507

Proceedings recorded by mechanical stenography, transcript produced by computer.

1 (Proceedings in open court, April 30, 2018, 3:57 p.m.)
2 THE COURT: Would the clerk please call the matter to
3 come before the Court.
4 THE CLERK: Yes, Your Honor. London Civil Action
5 Number 13-22, Johnny R. Phillips versus Scott Jordan, called
6 for evidentiary hearing.
7 THE COURT: Would counsel for the plaintiff, Johnny
8 Phillips, please make his appearance for the record.
9 MR. OUSLEY: Yes, Your Honor. Greg Ousley on behalf
10 of Johnny Phillips.
11 THE COURT: Mr. Ousley. Mr. Phillips.
12 And for the defense.
13 MS. HIGHTOWER: Courtney Hightower with the Attorney
14 General's Office on behalf of the warden.
15 THE COURT: Ms. Hightower. Thank you very much.
16 This matter is before the Court for an evidentiary
17 hearing. In this case, the defendant has persisted in terms of
18 a habeas corpus petition in actual innocence, in that the
19 defendant was denied access to an x-ray that would have
20 exonerated him if presented to the jury.
21 In this instance, I believe it would be up to the
22 petitioner to come forward with the evidence. Mr. Ousley, are
23 you prepared to do so?
24 MR. OUSLEY: Yes, Your Honor.
25 THE COURT: You may proceed.

1 MR. OUSLEY: Your Honor, may I make a brief
2 statement --
3 THE COURT: You may.
4 MR. OUSLEY: -- before I call the witness?
5 THE COURT: You may.
6 MR. OUSLEY: Your Honor, I went off of Judge Thapar's
7 order.
8 THE COURT: Yes.
9 MR. OUSLEY: And tried to pinpoint exactly what the
10 issue is so I don't waste everyone's time here. Specifically,
11 and the parties can disagree with me if I'm incorrect, but
12 we're here today and we're prepared to show that an x-ray,
13 which was not turned over to the defendant, and the government
14 concedes that it was not turned over, now has been found. And
15 the issue that Judge Thapar presented in his opinion was the
16 simple legal question, is this x-ray material? And he said I
17 need help in deciding whether or not that is material or not.
18 Well, the first thing that I want to do is to ascertain
19 what is material. And there's two cases that -- they are
20 recent cases, *Turner v. United States*, 137 Supreme Court 1885,
21 and *Wearry v. Cain*, 136 Supreme Court 1002.
22 In those, and I believe Judge Thapar mentions this, that
23 evidence is material within the meaning of *Brady* when there is
24 a reasonable probability that, had the evidence been disclosed,
25 the result of the proceeding would be different. A reasonable

1 probability of a different result is one in which the
2 suppressed evidence undermines the confidence in the outcome of
3 the trial.
4 Here, Your Honor, the petitioner is prepared to show that,
5 as acknowledged in the court order by Judge Thapar, the
6 government's argument, their cornerstone, if you will, is that
7 the petitioner shot the alleged victim in the back of the head
8 taking away his so-called self-defense.
9 Now that we have this x-ray, the petitioner is prepared to
10 call an expert to lay the foundation that not only is this
11 x-ray beneficial, that's not the test, is it material in
12 nature. And we're prepared to bring a ballistic forensic
13 individual expert, I'm prepared to call him now, to talk about
14 the x-ray as well as the other things that he's looked at in
15 this case.
16 THE COURT: Very well. Has this report been
17 disclosed to the opposition?
18 MR. OUSLEY: There was no report.
19 THE COURT: All right.
20 MR. OUSLEY: There was reports done in 2011. There
21 was a report done which I believe is part of the record.
22 THE COURT: All right.
23 MR. OUSLEY: But I do have copies here and I'll walk
24 over to the --
25 THE COURT: Yes, you may.

1 MS. HIGHTOWER: Thank you.
2 MR. OUSLEY: And the petitioner at the time would
3 call Larry Dehus.
4 THE COURT: You may.
5 **LARRY DEHUS, PLAINTIFF WITNESS, SWORN**
6 THE COURT: You may proceed, Mr. Ousley.
7 MR. OUSLEY: Thank you, Your Honor.
8 LARRY DEHUS
9 DIRECT EXAMINATION
10 BY MR. OUSLEY:
11 Q. Sir, state your name for the Court.
12 A. Yes, Larry M. Dehus. Last name is spelled D-e-h-u-s.
13 Q. And how are you employed, sir?
14 A. I'm a forensic scientist, I own and operate an independent
15 testing and consulting laboratory called Law-Science
16 Technologies.
17 Q. How long have you operated that?
18 A. Since 1981.
19 Q. Tell the judge specifically what -- what kind of things
20 that Law-Science Technologies, what service they provide.
21 A. Well, there's three other technical persons in addition to
22 myself. I have two people that do vehicle accident
23 reconstruction, both criminal and civil. And an individual
24 that does fire origin and cause investigations for both
25 criminal and civil cases. And I do the evaluation of evidence

1 in criminal cases, as well as some other types of forensic
2 examinations.
3 Q. And how long have you done that?
4 A. I began my career in forensic science in 1973. I worked
5 for a police crime laboratory for ten years before leaving that
6 organization and starting my own business.
7 Q. And the types of things -- would it be fair to say that
8 you would look at photographs or look at different pieces of
9 evidence and try to determine -- in regards to the ballistics,
10 try to determine basically what happened in a case?
11 A. Yes. Basically reconstruct -- reconstruction of a
12 shooting, and that may -- it depends on what's available. I
13 may have the evidence to examine and test myself or I may only
14 have photographs and reports to review and evaluate.
15 Q. Specifically, have you testified in Kentucky, in the
16 courts in Kentucky as an expert?
17 A. I have many times. And I was looking, just before the
18 court convened, looking to see the number of actual firearms
19 cases that I've testified on in Kentucky, and it looks like
20 it's seven.
21 Q. Have you testified in federal court?
22 A. I have. Yes.
23 Q. Do you know if it was in the Western or Eastern District
24 in federal court?
25 A. Well, I believe -- I believe I've testified actually in

1 this courtroom many years ago. And I've also testified over in
2 the Eastern District as well.
3 Q. Okay. Thank you.
4 I want to talk specifically about a case regarding Johnny
5 Phillips. Do you recall at some point in April of 2011 being
6 contacted by Mr. Phillips or someone from his defense team?
7 A. Yes. Actually, I had conversations, I think, earlier than
8 that with an attorney by the name of Brenda Popplewell, and she
9 had, you know, given me some information about the case and
10 asked if I might be of assistance.
11 And then my follow-up communications was with Mr. Phillips
12 by letter.
13 Q. I want to hand you what's marked Petitioner's Exhibit A.
14 THE COURT: Is this the report?
15 MR. OUSLEY: It is, Your Honor.
16 THE COURT: Okay.
17 BY MR. OUSLEY:
18 Q. I handed to you what's been marked Petitioner's Exhibit A.
19 If you would, tell the Judge what that exhibit is.
20 A. That's a report that's dated April 7th, 2011 that was
21 prepared by myself. And it indicates the materials I had
22 received from Mr. Phillips and some preliminary thoughts, I
23 should say.
24 Q. And would it be fair to say that you were being solicited
25 regarding your opinion on whether or not Mr. Johnny Phillips,

1 looking at the evidence that's listed here, you have listed
2 what you've reviewed, you give an opinion basically regarding
3 if he was shot in the back of the head or not, or directly in
4 the back of the head?
5 A. Yes.
6 Q. And if you would, can you read your results to the Court,
7 the A and B there on the second page?
8 A. Sure. There is no indication that an x-ray was taken of
9 the deceased's head to determine the direction -- the
10 distribution, direction and number of pellets that entered the
11 head. The autopsy report noted that 19 representative pellets
12 were removed from the victim, but there was no count as to the
13 actual number of pellets that entered the head.
14 And then B, he reported that the prosecutor in this case
15 argued that the victim had been shot from behind at a distance
16 of three feet. There is no mention of the recovery of the
17 plastic shotgun wadding from the wound or any mention of it
18 being found in the area of the scene.
19 If a -- in a direct shot to the back of a head at a
20 distance of three feet, a wound would be expected -- it would
21 be expected that the plastic shotgun wadding would travel with
22 the shot and enter the wound in the head.
23 Q. Go on and read the next paragraph.
24 A. With this limited information available, it is impossible
25 for this examiner to determine the direction of the shot with

1 respect to the plane of the body. The fact that the shotgun
2 wadding did not enter the wound with the shot is an indication
3 that this was not a direct shot to the back of the head, but
4 was more likely at an angle. An x-ray of the head should have
5 been taken to show the location and distribution of the shot.
6 This would have permitted a more definitive determination as to
7 the direction of the shot.
8 Q. At some point are you contacted on or about April 2013
9 with a request from Brandy Cobb?
10 A. Yes.
11 Q. I'm going to show you what's been marked Petitioner's
12 Exhibit B. If you would look at that and identify it for the
13 Court?
14 A. Yes, Exhibit B is a letter I prepared dated April 9th,
15 2013.
16 Q. What was the nature of the question? And tell the Court
17 what was your response.
18 A. Well, it's probably easier if I just read it.
19 Q. That's fine.
20 A. This office received a request from Brandy Cobb requesting
21 this examiner to prepare a report with respect to a specific
22 question. That specific question was as follows: What would
23 happen to the human skull if there was a direct shot to the
24 back of a head at less than four feet with Remington number 5
25 shot, Franchi 12 gauge shotgun.

1 And then my response is: Number 5 shot is approximately
2 .12 inches in diameter. And there would be approximately 170
3 to 220 pellets in a single shotgun shell, depending on the size
4 of the load. At a distance of less than four feet, the pellets
5 would be traveling as a mass and would enter the skin of the
6 scalp and the skull producing an entrance wound of one to one
7 and a half inches in diameter. These pellets would then enter
8 the brain causing massive destruction to the brain.
9 Q. At some point did you review the autopsy report?
10 A. Yes, I did.
11 Q. Did you notice in there that the doctor who did that said
12 that the brain was unremarkable?
13 A. Yes.
14 Q. Did you also look at the autopsy photos?
15 A. I did.
16 Q. And when you looked at those, did they indicate anything
17 to you?
18 A. Well, it shows a gaping wound across the back of the head
19 that has -- appears to have horizontal directionality to it
20 from left to right.
21 Q. I'm going to hand you what's been marked Petitioner's
22 Exhibit C. Can you identify that exhibit, please?
23 A. Yes, Exhibit C is a photograph of an x-ray of the skull.
24 It appears to be taken from the rear.
25 Q. And is that a photograph that you received from me?

1 A. I think I received it first from Mr. Phillips and also
2 from you as well.
3 Q. And did you receive correspondence from me asking your
4 opinion regarding that x-ray?
5 A. Yes.
6 MS. HIGHTOWER: Your Honor, I'm going to object. I
7 don't think he's qualified to testify regarding the x-ray.
8 He's a ballistic expert and not a medical examiner or a medical
9 doctor.
10 THE COURT: Mr. Ousley, would you like to lay some
11 additional foundation?
12 MR. OUSLEY: Yes.
13 BY MR. OUSLEY:
14 Q. Sir, you're not a medical doctor, are you?
15 A. I am not.
16 Q. Are you aware of the damage that a projectile from a
17 firearm does to the human body?
18 A. Yes.
19 Q. And can you tell the Judge specifically your training and
20 experience in regards to looking at photographs, x-rays, dead
21 bodies and being able to look at and ascertain how a weapon or
22 what type of weapon was used to create damage to the body?
23 A. Sure. Well, my experience involves, as you kind of
24 outlined, looking at bodies, bodies of shooting victims to
25 observe the type of damage that occurs from different types of

1 shots, from different types of guns, as well as reviewing
2 photographs in hundreds of cases. And performing tests on pig
3 skulls in a couple of different cases to test the effects of a
4 shot with a specific type of weapon.
5 MR. OUSLEY: And specifically, Your Honor, we've had
6 the government's expert actually testify at the underlying
7 trial, and she went on to opine that she's not qualified to
8 talk about the ballistic side of what a round or a projectile
9 might -- what effect it has on the body. And how to ascertain
10 information from a wound that's been caused by a firearm.
11 Specifically, what he can add to this x-ray is what the
12 x-ray shows. Specifically, it shows fragments in the head.
13 THE COURT: But ordinarily this witness would be
14 called to testify in order to identify the kind of gun that was
15 used to commit the crime.
16 MR. OUSLEY: No.
17 THE COURT: Is that ordinarily what you testify to?
18 THE WITNESS: That's correct. But also I've been
19 asked on many occasions to opine as to direction of shot.
20 MR. OUSLEY: And that's where we're at here, Your
21 Honor, the direction.
22 THE COURT: All right. I'm going to hear the
23 testimony and then we can talk about whether I ought to hear
24 about it later. This is a bench hearing, so let's get all the
25 evidence onto the record and then we'll talk about the rest of

1 it. Go ahead.

2 MR. OUSLEY: Thank you, Your Honor.

3 BY MR. OUSLEY:

4 Q. Given your training and experience, and given the question

5 that you were asked back in 2011, was this individual -- does

6 the forensic science, does the evidence, physical evidence

7 support that this individual was shot in the back of the head

8 with a shotgun, bird shot? And in 2011, you opine on that, but

9 you even mention, in 2011, that you would like to have an x-ray

10 that we didn't think exists. Now you have that x-ray.

11 Does it help you in your determination on deciding whether

12 or not the defendant shot the victim in the back of the head

13 with a shotgun?

14 A. Well, I mean let's be clear, the victim was shot in the

15 back of the head with a shotgun. But he wasn't shot in the

16 back of the head at close range straight on.

17 Q. How do you know that?

18 A. Well, for several reasons. Number one, the entrance wound

19 would have been, at less than four feet, would have been much

20 smaller, would have been like an inch to an inch and a half.

21 And the shotgun wadding would have entered the wound and there

22 would likely have been destructive damage to the face, if it

23 had been a direct wound, a direct shot from the back.

24 And obviously the victim was shot in the back of the head,

25 but all the evidence indicates that it was at an angle,

1 significant angle from left to right.
2 Q. Would that support a theory that there was a struggle and
3 during the struggle the shotgun went off? Would that support
4 that theory?
5 MS. HIGHTOWER: Your Honor, I'm going to object
6 again. That's speculation. I don't think he can testify as to
7 whether there was a struggle.
8 THE COURT: You want to lay some --
9 MS. HIGHTOWER: The x-ray is not going to be
10 indicative of whether there was a struggle or not.
11 THE COURT: Yes, whether there was a struggle, I
12 think we can argue that. But what angle was he shot at is what
13 I'm interested in.
14 BY MR. OUSLEY:
15 Q. So could you answer that?
16 A. Well, yeah. I mean, as the Judge has said, I can't opine
17 was there a struggle or exactly how it occurred. All I can say
18 is it was from a side angle. It wasn't just execution style,
19 walking up behind the individual and shooting squarely in the
20 back of the head.
21 Q. So with the x-ray, with the benefit of the x-ray, is it
22 more conclusive, your opinion?
23 A. Yes, most definitely.
24 Q. And does the x-ray, does it show a wadding in the skull?
25 A. It does not.

1 Q. Is that significant to you, there's no shotgun wadding in
2 the skull?
3 A. Yes. Because a close-range shot with that type of
4 ammunition, the wadding would have entered the wound behind the
5 shot.
6 Q. Also, from looking at the wound, there appears to be metal
7 fragments. Do you know what those would be?
8 A. You're referring to the x-ray?
9 Q. Yes.
10 A. Yes. Well, yeah. The opaque particles are pieces of
11 shot.
12 Q. And are you familiar with the type of projectile that was
13 used in this case?
14 A. It was birdshot ammunition, yes.
15 Q. Explain to the Court what birdshot is.
16 A. Well, it's a large number of small BBs. And I think
17 indicated, when I read the report, about .12 inches in
18 diameter. And depending on the size of the load, there could
19 be anywhere from 170 to 220 pellets in that type of birdshot.
20 Q. And it would be fair to say that the x-ray that we have,
21 there's not 200 birdshot in the skull, is there?
22 A. It certainly doesn't appear to be that number. It's not
23 possible from the x-ray to individually count each pellet. But
24 it doesn't seem -- it doesn't appear to be anywhere near that
25 number.

1 Q. And the autopsy photo or the autopsy report which you
2 reviewed, it actually says that 19 different metal fragments
3 were taken from the head.
4 A. Yes.
5 Q. So that begs the question, what happened to the other 200
6 or so birdshot if it's not in the skull?
7 A. That's correct.
8 Q. If an individual was shot from the back with a shotgun,
9 shot in the back of the head, would all those pellets go into
10 the skull normally?
11 A. Yes.
12 Q. And would they exit?
13 A. It's possible. They could exit from the front or they
14 could simply stay within the skull. But there would be severe
15 bruising and damage to the front, to the face.
16 Q. But you know from this x-ray that that's not the case in
17 this situation, correct?
18 A. That's correct.
19 Q. The x-ray shows a very small amount of projectiles or
20 birdshot in the skull?
21 A. That's correct.
22 MR. OUSLEY: May I have just a second, Your Honor?
23 THE COURT: You may. Do you have a copy of the x-ray
24 or a photo of the x-ray?
25 MR. OUSLEY: Yes, Your Honor.

1 BY MR. OUSLEY:

2 Q. I'm going to show you Exhibits D, E, F, G. I believe

3 you've reviewed these before. They are autopsy photos of the

4 decedent in this case.

5 A. Yes, I have.

6 Q. Something that struck me when I first read this case, I

7 guess I didn't understand, is that this individual has a face.

8 A. His face looks relatively normal and without trauma and

9 damage.

10 Q. How could a person be shot in the back of the head with a

11 shotgun and still have a face?

12 A. At a straight-on angle, there would be damage to the face.

13 Q. Does the x-ray indicate that a straight-on angle occurred?

14 A. No.

15 Q. At a jury trial where the issue may be self-defense, would

16 you testify that looking at this x-ray, coupled with all the

17 other evidence that you have looked at, would you give an

18 opinion that this individual could have been shot during a

19 struggle?

20 MS. HIGHTOWER: Your Honor, I'm going to object

21 again. I think that's outside his expertise.

22 THE COURT: Mr. Ousley.

23 MR. OUSLEY: Your Honor, I'll rephrase it.

24 THE COURT: All right.

25 BY MR. OUSLEY:

1 Q. Let me ask you this. More importantly, at trial the
2 Commonwealth argued that he was shot in the back of the head
3 execution style. Does this x-ray, coupled with all the other
4 evidence, support that claim?
5 A. It would be my conclusive opinion that it does not support
6 that and that did not occur.
7 Q. The Judge asked you a minute ago about some of the things
8 that you decide or you help the trier of fact with as an
9 expert. Things such as: Would you have any idea of what
10 distance you're looking at from the muzzle to the head,
11 distance of a weapon that is used or the different type of
12 direction or the projectile that is used. Are those the types
13 of questions that you help with?
14 A. Yeah. That's probably -- in shooting cases, that's
15 probably the most common analysis that I do, is muzzle to
16 target distance. And then second-most common, I guess is
17 trajectory or angle.
18 Q. I think we mentioned this, you looked over the autopsy
19 photo. And even with having this x-ray, coupled with the
20 autopsy, the autopsy says that the brain is unremarkable. And
21 then we have this x-ray that you can see metal projectiles.
22 What does that tell you, if the brain is unremarkable but we
23 see the projectile?
24 A. I can't opine on that because I don't know what the
25 medical examiner was trying to relay when he said it was

1 unremarkable. I mean, to me, it means there was no damage.
2 But I -- that just doesn't make sense.
3 MR. OUSLEY: Pass the witness, Your Honor.
4 THE COURT: I have just a couple of questions.
5 Now, you said that if it had been a close-range shot,
6 there would have been damage to the face; is that correct?
7 THE WITNESS: I'm sorry, damage to --
8 THE COURT: That if there had been a close-range
9 shot, that there would have been likely damage to the face.
10 THE WITNESS: Yes, ma'am.
11 THE COURT: You can tell that from the photographs
12 then?
13 THE WITNESS: Yes, Your Honor.
14 THE COURT: What does the presence of this x-ray tell
15 you that you could not already tell from the photographs and
16 the examination of the other evidence?
17 THE WITNESS: It tells me the direction of the shot
18 and the relative quantity of the shot.
19 THE COURT: What angle is this x-ray taken from?
20 THE WITNESS: As best I can tell, it's taken from the
21 rear.
22 THE COURT: It looks like I see a shadow of a jaw
23 there. Was it taken straight on from the rear or is it taken
24 at an angle?
25 THE WITNESS: It may be slightly at an angle, like

1 this. It's always best for whoever is taking the x-ray to
2 clearly explain, delineate the plane on which it was taken.
3 THE COURT: Thank you, I'll let you cross-examine.
4 Thank you. Ms. Hightower.
5 CROSS-EXAMINATION
6 BY MS. HIGHTOWER:
7 Q. It's Mr. -- is it Mr. -- could you pronounce your last
8 name?
9 A. Dehus.
10 Q. Dehus. Is it mister or doctor?
11 A. Mister.
12 Q. So Mr. Dehus, you're not a medical doctor?
13 A. Correct.
14 Q. You were not present at the autopsy when Dr. Schott
15 performed her examination on the victim?
16 A. Correct.
17 Q. The only thing that you reviewed in this case were some
18 photos that you were given, the photos from the autopsy,
19 correct?
20 A. That's correct.
21 Q. Were you -- and -- when was the first time that you saw
22 the x-ray we're talking about today?
23 A. I believe it was in late 2014.
24 Q. Okay. And you -- your testimony here today is that it's
25 from the back to the front, the x-ray view.

1 A. Or at a --
2 Q. Or a slight angle?
3 A. Yeah. Yes.
4 Q. Are you aware that the testimony at trial from Dr. Schott
5 was that the shot, the fatal shot to the victim in this case
6 was from three feet or more?
7 A. No, I'm not.
8 Q. And your testimony here today is that the victim was
9 indeed shot in the back of the head?
10 A. Yes.
11 Q. I would like to -- do you have a copy of the medical
12 examiner's report, autopsy report?
13 A. I do.
14 Q. Can you go to page number 4 where she talks about the site
15 of the lodgement. I'll give you a minute to find it.
16 A. And referring to what now?
17 Q. Can you go to page number 4 under -- it's subsection
18 number 3 under shotgun wound to the head. Site of lodgement.
19 A. Yes.
20 Q. I would like to direct your attention, it says here that
21 multiple pellets and pellet fragments are recovered from the
22 cranial cavity and brain. So it doesn't say that 19 fragments
23 were recovered from the brain, does it?
24 A. No, it does say that. It says 19 representative pellet
25 and pellets fragments are submitted to Detective Charles

1 Loomis.

2 Q. It doesn't say those 19 -- I mean, it says -- before that,

3 though, it says multiple pellet and pellet fragments were

4 recovered from the cranial cavity. And then it says 19

5 representative pellets and pellet fragments were submitted. So

6 it seems like it's a little bit inconsistent. It says multiple

7 fragments were recovered from the brain, but then it says 19

8 representative. Do you know what that means?

9 A. I assume it means that not all of the pellets were

10 recovered from the brain. That just 19 were recovered and

11 submitted.

12 Q. Are you aware of the purpose that the medical -- of taking

13 an x-ray during autopsy?

14 A. Well, it can be for various reasons. But for gunshot

15 wounds, it's to show the location where the bullet or the shot

16 ends up.

17 Q. Okay.

18 MS. HIGHTOWER: No further questions.

19 THE COURT: All right. Any redirect?

20 MR. OUSLEY: No, Your Honor.

21 THE COURT: All right. And let me just ask another

22 question.

23 This x-ray, its origin, where did it come from? Did the

24 medical examiner take this x-ray?

25 MR. OUSLEY: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. OUSLEY: My understanding, it came from an open
3 records request, which I will address more in my closing
4 remarks.

5 THE COURT: All right.

6 Sir, you may step down. Thank you very much.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Mr. Ousley, you may call your next
9 witness.

10 MR. OUSLEY: Your Honor, I don't have any other
11 witnesses. I would like to submit, for what it's worth, an
12 affidavit of the underlying trial attorney, Mr. David Hoskins,
13 who I have spoke with about this case. He tried this case in
14 London in state court.

15 And after speaking with him, he's signed an affidavit
16 regarding this x-ray and that if the x-ray did exist, he feels
17 that it would rebut the Commonwealth's argument that he was
18 shot execution style in the back of the head.

19 THE COURT: Objection or --

20 MS. HIGHTOWER: No.

21 THE COURT: All right. You may place it in. Is that
22 Exhibit F?

23 MR. OUSLEY: Yes, Your Honor, at this time I would
24 make all exhibits -- move them into evidence.

25 THE COURT: You may.

1 (Petitioner's Exhibits A-H were admitted.)
2 THE COURT: For the Commonwealth.
3 MS. HIGHTOWER: I'm sorry, Your Honor?
4 THE COURT: Do you have any witnesses you would like
5 to offer?
6 MS. HIGHTOWER: Yes, ma'am. We would like to call
7 Dr. Jennifer Schott, the medical examiner in this case.
8 THE COURT: You may.
9 MR. OUSLEY: Your Honor, I would object for the
10 record. She testified at trial, we have her transcript here.
11 I would agree to let the transcript come in as evidence. I
12 don't know why -- I mean, she's already testified and had her
13 bite at the apple at the jury trial.
14 THE COURT: Ms. Hightower.
15 MS. HIGHTOWER: Well, it's our position that it's her
16 testimony, given the testimony of Mr. Dehus, that the medical
17 examiner who actually performed the autopsy and did the
18 interior exam of the victim's brain in this case would be the
19 best evidence as to actually, like, what the -- and she's also
20 the person who took the x-ray, what the purpose of the x-ray
21 was in this case. So her testimony is vital for us rebutting
22 their position.
23 THE COURT: I am going to allow her to testify. I
24 think it's critical. I can't tell from looking at this what
25 angle it was taken at, so I would like to hear about the x-ray,

1 what it shows and why it wasn't made a part of her original
2 report.
3 So I'll permit you to examine her. To the extent you
4 covered a lot of this with her in the original testimony, let's
5 try not to be too repetitive.
6 MS. HIGHTOWER: Okay. Yes, Your Honor.
7 THE COURT: You may call her.
8 MS. HIGHTOWER: She's actually waiting outside.
9 Dr. Jennifer Schott.
10 Your Honor, do you have any objection from me questioning
11 her from counsel table?
12 THE COURT: No, not at all, as long as I can hear
13 you.
14 **JENNIFER SCHOTT, M.D., DEFENDANT WITNESS, SWORN**
15 THE COURT: Ms. Hightower.
16 MS. HIGHTOWER: Thank you, Your Honor.
17 JENNIFER SCHOTT, M.D.
18 DIRECT EXAMINATION
19 BY MS. HIGHTOWER:
20 Q. Would you introduce yourself to the Court today, please.
21 A. Yes. Excuse me, my name is Dr. Jennifer Schott.
22 Q. And what is your current position?
23 A. I am a deputy coroner and forensic pathologist employed at
24 the Hamilton County Coroner's Office in Cincinnati.
25 Q. Where did you work in October 2007, 2008?

1 A. I worked at the State Medical Examiner's Office in
2 Frankfort, Kentucky.
3 Q. How long did you work there?
4 A. I was there for four years.
5 Q. Can you explain your involvement in this case,
6 Commonwealth versus Phillips?
7 A. Yes, I autopsied the body of Mr. Glodo.
8 Q. In preparation for the hearing today, did you receive --
9 request and receive the medical examiner's file from that
10 autopsy?
11 A. Yes, I did.
12 Q. And have you had a chance to refresh your memory as far as
13 reports, diagrams, photos that were taken during the course of
14 the autopsy?
15 A. Yes.
16 Q. Okay. With regard to your report of autopsy, when we go
17 to the section of injuries, external and internal, can you
18 explain the wound, the injury to Mr. Glodo's head?
19 A. Yes. There was a penetrating shotgun wound of the head.
20 Q. Can you tell the Court where that wound was?
21 A. Sure. The wound was located centered five inches below
22 the midline, which is the center of the head -- excuse me --
23 five inches below the top of the head at the midline, at the
24 occiput of the head, which occiput is the back of the head.
25 Q. Can you just point to your head and show where that is?

1 A. Right. So the back of the head, I'll turn around, on the
2 back of the head (indicating).
3 Q. During the course of the autopsy, did you make a diagram
4 of the injuries to the victim that you found?
5 A. Yes, I did.
6 Q. Did you bring that with you today?
7 A. I did. I brought several diagrams --
8 Q. Okay.
9 A. -- from the file.
10 MS. HIGHTOWER: Your Honor, may I approach the
11 witness?
12 THE COURT: You may. If you all want to put some of
13 this on the ELMO, so counsel and I can see them, it might be
14 helpful. And the witness can see it all too.
15 MR. OUSLEY: Your Honor, in talking with my client,
16 we don't have any diagrams, they weren't used at trial. I
17 mean, it sounds like more *Brady* material that showed up today.
18 THE COURT: Do you want to take a recess and let them
19 look at them?
20 MS. HIGHTOWER: Sure. I mean, it's in the medical
21 examiner's file. And he did an open records request and got an
22 x-ray, so he could have gotten it.
23 THE COURT: It should have been in the medical -- it
24 should have been in the file.
25 MS. HIGHTOWER: I mean, it is contained in the file.

1 MR. OUSLEY: Well, I don't have it. I mean, it's --
2 THE COURT: All right. Let's take a recess and let
3 you look at it for now. And I'll see you back here in about 15
4 minutes or whenever you're ready.
5 Counsel, why don't you all get together with the expert so
6 you can look and be sure that you got everything.
7 MS. HIGHTOWER: Okay.
8 THE COURT: Okay. Thank you.
9 (A recess was taken from 4:48 p.m. to 4:59 p.m.)
10 THE COURT: Let the record reflect that parties and
11 counsel are present in the courtroom, the witnesses is seated
12 on the stand, having previously been sworn.
13 Mr. Ousley, did you get a chance to look at the report?
14 MR. OUSLEY: I have a copy of the chart that was
15 mentioned. I will say this is -- my client says he never got
16 this in any of the criminal discovery nor the open records
17 request, which the Attorney General found that the open records
18 requests were violated. And then ultimately the AG's office or
19 the medical examiner's office gave what we thought was the
20 entire file. But today the medical examiner shows up with
21 things in her file that have never been given to the defendant.
22 THE COURT: I'm going to ask the medical examiner's
23 file be made a part of this record. An open records request
24 should produce all of the documents that are available in any
25 file. This open records request was made when?

1 MR. OUSLEY: One was made in 2014, and they were
2 within six months of each other.
3 THE COURT: All right. So three years ago?
4 MR. OUSLEY: Yes, Your Honor.
5 THE COURT: So a lot can happen in three years to a
6 record, isn't that correct, in the possession of a prisoner?
7 MR. OUSLEY: Yes, Your Honor.
8 MS. HIGHTOWER: Your Honor, I don't -- I'm not sure
9 where -- it's my understanding that the open records request
10 was specific for the x-ray.
11 THE COURT: So they may not have provided the whole
12 file.
13 MS. HIGHTOWER: So it may not have been -- they may
14 not have provided the rest of the file. I'm not going to swear
15 to that. But that's -- because I think what happened was
16 Mr. Phillips said there was an x-ray; and then the Commonwealth
17 attorney said no, there wasn't an x-ray; and then he ended up
18 doing an open -- and then somebody found the x-ray and so he
19 did an open records request. I think that's my memory of it.
20 THE COURT: Okay. So here's what we're going to do,
21 because the defendant or -- it's hard in these cases because
22 we're talking about the criminal defendant, now the petitioner,
23 would not have requested this information, and I don't know
24 what the testimony was at trial about this particular
25 information.

1 What I'm interested in learning is, how does this x-ray
2 change anything? Why is it or is it not material to the
3 medical examiner's determination? So what I want to do is have
4 her rely on her prior testimony. And let's talk about where
5 this x-ray came from, why it was taken, what it shows and
6 whether or not that even differs with her original testimony.
7 MS. HIGHTOWER: Okay. So you want me to proceed just
8 directly and talk about the x-ray?
9 THE COURT: Yes.
10 MS. HIGHTOWER: All right. Your Honor, I printed a
11 color copy of the x-ray for Dr. Schott for her to use. Would
12 you like -- how would you like me -- would you like a copy of
13 one of these? I have two copies.
14 THE COURT: I would, yes. I would like one.
15 MS. HIGHTOWER: Would you like me to mark one as our
16 exhibit as well?
17 THE COURT: Please. Yes.
18 MS. HIGHTOWER: So here, let me get mine.
19 BY MS. HIGHTOWER:
20 Q. Okay. Dr. Schott, let's talk specifically about the
21 x-ray. First of all, just as a foundation -- why do you,
22 during an autopsy, why do you take an x-ray at all?
23 A. An x-ray is taken in the case of a gunshot wound case so
24 that I can see if there are any projectiles in the head. It
25 tells me if there is a bullet or if there are pellets or if

1 there are fragments of a bullet or multiple bullets. It gives
2 me a general idea of distribution of pellets or of the bullet.
3 That's pretty much about it.
4 Q. So in looking at that particular x-ray, can you tell the
5 Court what view is that?
6 A. This is what's called an AP view. It's a little bit off.
7 It's not -- most of our x-rays in the medical examiner's office
8 aren't perfectly straight on like they should be. Our x-rays
9 are done by our autopsy technicians. So they try to get them
10 AP, so anterior to posterior, front to back.
11 Q. So it's front to back?
12 A. Yes. This is mostly front to back. But the chin is
13 turned slightly.
14 THE COURT: So this is the front of the decedent's
15 face?
16 THE WITNESS: Yes.
17 THE COURT: This is the same x-ray, just in color?
18 THE WITNESS: Yes, Your Honor.
19 MS. HIGHTOWER: Yes.
20 BY MS. HIGHTOWER:
21 Q. So do you use the x-ray in determining the location of the
22 injury or the path of the bullet or anything like that?
23 A. No, none of those things. I use the x-ray to guide my
24 recovery of projectiles. So in this case, if I look at this
25 x-ray, when I initially see the injury itself on the back of

1 the head, then I don't know exactly what that came from, it
2 could be from a gunshot wound, or it could be from a shotgun
3 wound. And then I can look at the x-ray and I see oh, there
4 are shot pellets, so this is a shotgun wound.
5 Q. So can you tell from the x-ray how many pellets are in --
6 in the head?
7 A. No.
8 Q. In looking at that x-ray, does anything that you see in
9 that x-ray contradict or change your determination from your
10 autopsy or your exam of the victim that the victim was shot in
11 the back of the head?
12 A. No. This x-ray was available to me prior to the autopsy.
13 Q. Okay. So it -- but it doesn't -- and then after you have
14 the x-ray, then you do the internal exam of the victim's brain
15 to find the injury?
16 A. That's right.
17 Q. But nothing -- in looking at the x-ray, it would never --
18 it would not change what you put in your autopsy report, that
19 the victim was shot in the back of the head, there were
20 multiple pellets and it was back to front?
21 A. Right. No, this has no bearing on direction of the
22 injury. X-rays are a 2D film, you have to keep in mind. So it
23 may look like it's in the front on the picture but you don't
24 have what's called a lateral film. Unless you have an AP and a
25 lateral, then you can't pinpoint exactly where something is.

1 And the only thing this tells me is that this is a shotgun
2 wound and that I can expect to be recovering shot pellets and
3 not a bullet or a slug.
4 Q. In your autopsy report, it says that there were 19 -- do
5 you remember how many pellets you recovered from --
6 A. No -- well, actually, yes. I read that it was 19.
7 Q. Okay.
8 A. But I don't make any attempt to recover all pellets. I
9 try to recover somewhere between close to 20, if I can, for the
10 purpose of them being examined. But it's not an attempt to
11 recover all pellets at all.
12 Q. So there could have been more pellets?
13 A. I'm sure there were.
14 Q. Okay. And, lastly, with regard to the brain injury, could
15 you tell the Court the extent of the brain injury in this case
16 upon performing the autopsy?
17 A. Yes. There were perforations. In other words, injuries
18 of the bilateral, so both sides, parietal and occipital lobes.
19 The occipital lobes are the lobes of the brain in the back of
20 the brain. The parietal lobes are kind of in the middle of the
21 brain and on the top.
22 Also injuries of basal ganglia, thalamus, corpus callosum,
23 these are structures that are in the center of the brain.
24 And also the bilateral cerebella, which is kind of in the
25 bottom of the brain and also in the back.

1 Q. So he had injuries, if I'm -- I'm not a medical person, so
2 he has injuries on the outside and then in the middle, like
3 towards --
4 A. Right. So I should have mentioned there were multiple
5 skull fractures of the bilateral parietal and occipital bones.
6 So these are the bones that cover the back of the head.
7 And I'm going to demonstrate. So the occipital bones are
8 at the very back of the head here. Parietal bones are going to
9 be kind of on the top of the head and the sides.
10 And there were what I would call comminuted fractures; in
11 other words, lots of intersecting fractures of all four of
12 those -- all three of those bones.
13 MS. HIGHTOWER: Your Honor, I think that's all I
14 have.
15 THE COURT: Okay. Mr. Ousley.
16 CROSS-EXAMINATION
17 BY MR. OUSLEY:
18 Q. Doctor, you testified before the jury, correct?
19 A. Yes.
20 Q. And you were asked specifically, weren't you, to give your
21 opinion on perhaps the distance of the shooter to the deceased?
22 A. I haven't reviewed my testimony, but I wouldn't be
23 surprised if that would have been one of the questions.
24 Q. Typically, if you're asked a question, more of a firearm's
25 examiner question, if you will -- and at trial you were asked:

1 Do you have any idea as to what the distance we're looking at
2 when Mr. Glodo was shot with a shotgun?
3 And you said: I believe for a more definite answer, you
4 would need a firearm's examiner.
5 So it's fair to say that a medical examiner, unless you're
6 specifically trained on the ballistics and the pathology of
7 ballistics, you can't really ascertain distance and perhaps the
8 direction, if you will, of the shot? Would that be correct?
9 A. No, I'm sorry, that would be incorrect. Would you like
10 for me to explain?
11 Q. Well, let me ask you this. When you were asked to give
12 your opinion about the distance, you couldn't do it, could you?
13 A. Did I offer -- was that the only answer that I gave? Like
14 I said, I didn't review my testimony.
15 Q. Well, let me ask you this. The deputy sheriff, who also
16 came to Frankfort, and he asked the two medical examiners if
17 they could determine the angle of the wound; in other words,
18 the angle of the shot, how it was fired, and you and
19 Dr. Hunsaker said no, that's out of our realm or we can't tell
20 you that with any certainty.
21 A. The only thing I can -- I'm sorry, were you asking me a
22 question?
23 Q. Yes. Do you agree with that?
24 A. The only thing that I can answer to that would be the
25 injuries were consistent with an injury from going from back to

1 front. Now, in terms of the direction of a wound, that's
2 exactly what a forensic pathologist is trained to do.
3 Q. Let me ask you that --
4 A. Not a firearms examiner. If you would like for me to
5 explain the rest of it, I can.
6 Q. No, that's fine. Let me ask you this, in this case, the
7 prosecution used your testimony and they told the jury that
8 this man was shot point blank, point blank in the back of the
9 head with a shotgun within three feet.
10 Looking at the autopsy photos, they are exhibits --
11 MR. OUSLEY: Your Honor, can the witness see the last
12 few exhibits, the autopsy photos?
13 THE COURT: She could.
14 BY MR. OUSLEY:
15 Q. What type of round was used in the shotgun in this case?
16 A. I'm sorry, what type of round?
17 Q. Yes. Shotgun shell?
18 A. That would be a firearms question. It would be
19 inappropriate for me to answer that.
20 Q. So you wouldn't know if it's a projectile from, let's say,
21 a .38 or a rifle or a shotgun?
22 A. So it's a shotgun injury, that's as specific as I can get.
23 Q. So as specific as we can get, like in this case, we know
24 it's a shotgun. And we know that because of the x-ray that
25 shows birdshot, correct?

1 A. We know that because I recovered shot from the head.
2 Q. And that x-ray helped you recover it, correct?
3 A. Yes.
4 Q. And you take x-rays, it's standard operating procedure, to
5 take an x-ray in every autopsy, correct?
6 A. No.
7 Q. It's not?
8 A. No.
9 Q. In this case, did you take more than one x-ray of the
10 head?
11 A. Again, it was a long time ago. Generally there would have
12 been one x-ray from anterior to posterior. The medical
13 examiner's office in Frankfort doesn't have the capability to
14 do a lateral x-ray, so they can't shoot the x-ray from side to
15 side.
16 MR. OUSLEY: May I see those exhibits, Your Honor?
17 THE COURT: Which ones, the photographs of the body?
18 MR. OUSLEY: Yes, the photographs.
19 BY MR. OUSLEY:
20 Q. In your testimony at the trial, I believe you testified
21 that this appeared to be the entrance wound; is that correct?
22 A. That's correct.
23 Q. Where is the exit wound?
24 A. There is no exit wound in this case.
25 Q. There's not?

1 A. No.

2 Q. And so he was shot in the back of the head three feet with

3 a shotgun, and he has a face?

4 A. I'm not sure where the three feet came from.

5 Q. Uh-huh.

6 A. Is that something that I testified earlier, did I say it

7 was within three feet?

8 Q. Yes.

9 A. Okay.

10 Q. You said it was close proximity.

11 A. I said it was within three feet?

12 Q. Yes.

13 MS. HIGHTOWER: Your Honor --

14 THE COURT: There's an objection. Why don't we let

15 her look at what the testimony was? This isn't a trick

16 question. Whatever she testified to, she testified to.

17 MS. HIGHTOWER: Well, Your Honor, in the Magistrate's

18 report, his original report, I don't have the -- I mean, we

19 don't have the record of the trial -- I don't have it right

20 here. But in the Magistrate's report, it says specifically,

21 "During Dr. Schott's testimony, the Commonwealth introduced two

22 photos of the wound to the back of Glodo's head. Record 30-37.

23 In one of these photos the back of Glodo's head was shaved,

24 making it easier to see the details of the wound. Record

25 30-37. 37. Based on these photos, Dr. Schott testified that

1 the spread patterns" --

2 THE COURT: Can you slow down a little bit? Our

3 court reporter's machine is burning up.

4 MS. HIGHTOWER: Oh, sorry. "Based" upon -- "Based on

5 these photos, Dr. Schott testified that the spread pattern of

6 the satellite lesions on Glodo's skull indicated that the

7 gunshot wound was not a contact wound, that Glodo was shot from

8 a distance of at least three feet, and that the pellets from

9 the shotgun shell traveled from the back of Glodo's head toward

10 the front. Record 30 to 37."

11 So there's been no testimony that it was three feet. She

12 said three feet or more, so it could have been a greater

13 distance than three feet.

14 THE COURT: Mr. Ousley.

15 MR. OUSLEY: Your Honor, at this time I have the

16 transcript of the trial on June 2, 2009, of her testimony. I

17 would like to make it part of the record.

18 THE COURT: You can make it part of the record, but

19 please show it to her. We're making a record about what other

20 people said she said. I would like to know what she actually

21 said.

22 (Petitioner's Exhibit I was admitted.)

23 MS. HIGHTOWER: Your Honor, I'm going to have to -- I

24 have not seen that transcript, and I don't know that it's an

25 accurate depiction of the --

1 THE COURT: How come everybody came to this hearing
2 without having seen anything?
3 MS. HIGHTOWER: I'm sorry, Your Honor.
4 THE COURT: You know, the defendant doesn't have the
5 autopsy report. The government doesn't have the transcripts.
6 It seems to me that this is a pretty important hearing for
7 people not to know too much about it. The defendant hasn't
8 been provided with her testimony to -- excuse me, the witness
9 hasn't reviewed her testimony before she comes in. It seems to
10 me that people could be a little bit more prepared given the
11 importance of this proceeding.
12 So I'm going to give the witness a few minutes to look at
13 what she testified to. What we're trying to figure out, Madam
14 Witness, is what you said about the distance from which this
15 victim was shot, if you said anything.
16 Do you see it in that transcript?
17 THE WITNESS: I do, Your Honor.
18 THE COURT: All right. Take a look at it and see if
19 it refreshes your recollection.
20 THE WITNESS: It looks here like I was answering
21 questions about satellite injuries, satellite wounds which were
22 present in this case. There were five satellite wounds around
23 the injury.
24 And during that discussion, I was asked: Do you have any
25 idea as to what distance you're looking at from the muzzle?

1 And I said: I believe, for a definitive answer, you would
2 need a firearms examiner.
3 And then I said: In general, a rule of thumb would be
4 about three feet distance or more. Again, it depends on the
5 gun and other factors.
6 THE COURT: Three feet distance or more is what the
7 transcript says. And I think that's consistent with what the
8 Commonwealth has said. Let's put this transcript in the
9 record.
10 It is an official transcript of the trial, Mr. Ousley?
11 MR. OUSLEY: Your Honor, I received this transcript
12 from my client. It says it's a true and accurate transcript.
13 I can't -- I believe it is, Your Honor, I believe it is. I
14 would provide --
15 THE COURT: I'll put it in the record and I'll note
16 that it's not necessarily been authenticated.
17 But is that consistent with what you recall your testimony
18 to have been?
19 THE WITNESS: Your Honor, I don't recall my testimony
20 from the first trial.
21 THE COURT: All right. I'm going to put it in the
22 record and note that the Commonwealth objects to it.
23 Nevertheless, it's consistent with the Commonwealth's position,
24 so for what it's worth.
25 Okay. Mr. Ousley, you may continue.

1 BY MR. OUSLEY:
2 Q. At the jury trial, would it be fair to say that you were
3 brought in to testify about the location of the wound?
4 A. I'm not sure about the motives of the prosecution in
5 bringing me in. But generally, my -- I'm usually brought in to
6 describe and explain the autopsy findings.
7 Q. And I know you didn't have time to read the whole
8 transcript, but would it be fair to say that you were not
9 qualified, or at least in this case you weren't able to give
10 your opinion regarding the angle of the shot and how it was
11 fired?
12 A. I'm not sure what you mean by "angle."
13 Q. Well, I guess this. The prosecutor basically said, and
14 used your testimony to support that the defendant used a
15 shotgun and shot this individual in the back of the head. Our
16 contention is there was a struggle going on and the shotgun
17 went off and it grazed the back of his head causing this wound,
18 causing the projectiles, birdshot, to go -- some stay in the
19 head and some escaping.
20 You testified that you don't know how many birdshot was in
21 this round, do you?
22 A. No, no.
23 Q. So if I said there was over 200 birdshot, you couldn't
24 refute that, could you?
25 A. No. And generally that's a firearms question. So in

1 other words, I submit the pellets to the -- usually law
2 enforcement who are investigating the case. And they would
3 submit those pellets to the lab that they are using. And often
4 in Kentucky, it was the Kentucky State Lab. And then a
5 firearms examiner would determine what size pellets those are
6 and what those would be consistent with in terms of what type
7 of shotgun ammunition. So then they would determine generally
8 how many would be in that ammunition, in the shell. But that's
9 not something that I would be answering.
10 Q. So that person that would be answering that, would it help
11 them or aid them in creating their opinion to have your full
12 report?
13 A. I'm sorry, can you rephrase that?
14 Q. An expert, a firearms expert, would it help them in
15 forming an opinion to have your full report, including the
16 x-ray?
17 A. Are you asking me would it help a firearms expert to form
18 an opinion on what?
19 Q. On anything.
20 A. On anything?
21 Q. Yes. Maybe the trajectory or direction. Would it be
22 important to have your file?
23 A. I don't know what kind of information a firearms
24 examiner -- I guess you're asking me if I told them how many
25 pellets were in the head, would it help them determine how many

1 were in the shell?
2 Q. No. What I'm asking --
3 A. I'm misunderstanding.
4 Q. Today, when you came to testify, you brought your medical
5 examiner's report, correct?
6 A. Yes.
7 Q. And that report would be important to have, let's say, to
8 a defense attorney, to give to an expert to review it, correct?
9 A. I don't know if firearms experts review autopsy reports at
10 all.
11 Q. They don't?
12 MS. HIGHTOWER: Your Honor, I'm going to object.
13 A. I don't know.
14 MS. HIGHTOWER: We're getting far afield from the
15 x-ray.
16 THE COURT: She said she didn't know. Continue on.
17 BY MR. OUSLEY:
18 Q. So the x-ray was not important?
19 A. I'm sorry, that's not what I said. Would you like me to
20 explain again?
21 Q. Why did you take the x-ray?
22 A. So we take x-rays in every gunshot wound case. We don't
23 take x-rays on every single death. But if we see an injury
24 that looks like it might be a gunshot wound, we'll take an
25 x-ray.

1 The purpose in taking the x-ray is to help me in the
2 recovery process. So if I see shotgun pellets, shot pellets,
3 like in this case, I know that I'm recovering pellets and I'm
4 not recovering a slug or a bullet or a bullet with a jacket or
5 bullet fragments.
6 Q. Let me stop you there.
7 A. I know generally what I'm recovering.
8 Q. Wouldn't that be important? Don't you think that would be
9 important to a ballistics expert, that x-ray, to say oh, yeah,
10 that's birdshot, I've seen that a thousand times?
11 A. I'm sorry. I don't know why you want me to read the mind
12 of a ballistics expert. I don't know.
13 THE COURT: Okay, wait. She said she doesn't know.
14 The question has been asked and answered. Please move on.
15 BY MR. OUSLEY:
16 Q. Was the x-ray taken contemporaneously with your
17 examination?
18 A. The x-ray was taken prior to my examination.
19 Q. And is it all, the x-ray as well as your diagrams and
20 whatnot, all kept in one file?
21 A. Sorry. I'm no longer at the medical examiner's office.
22 At the time that I was at the ME's office, the x-ray films were
23 actual films. In the office that I'm in currently, the films
24 are digital. I don't know if they have gone digital. At the
25 time that I was there, all of the films were kept in a storage

1 area together. And they were just too big to be in the file.
2 And all of the file was kept in a file cabinet. But I don't
3 know if they've been moved or things have been shifted since
4 then.
5 MR. OUSLEY: That's all the questions, Your Honor.
6 THE COURT: Any redirect?
7 MS. HIGHTOWER: Yes, Your Honor.
8 REDIRECT EXAMINATION
9 BY MS. HIGHTOWER:
10 Q. So just to be clear, the purpose of the x-ray is only to
11 determine where bullet or bullet fragments are located in the
12 skull?
13 A. That's right.
14 Q. And then after that, after you located those pellets, then
15 you do your interior exam and whatever you do with the autopsy,
16 look at the brain, look at different parts of the brain to
17 determine a cause of death and, like, extent of the injuries
18 and the cause of death?
19 A. Actually, I said that's right. I should step back. It
20 doesn't tell me exactly where the pellets were. Again, because
21 I only have an AP x-ray, I don't have a lateral x-ray.
22 Q. Right.
23 A. In this case, it just tells me there are pellets and that
24 they are in both sides of the head and that there's not a
25 bullet.

1 Q. So you don't use the x-ray at all for like any sort of --
2 because -- like location of the wound, path of the bullet,
3 anything like that?
4 A. No. Those things wouldn't be visible on an x-ray, that's
5 the purpose of a forensic pathology examination.
6 Q. Right. So you could do an interior dissection or
7 examination of the injury to determine cause of death?
8 A. That's right.
9 MS. HIGHTOWER: No further questions.
10 THE COURT: All right. The witness may step down.
11 THE WITNESS: Thank you.
12 THE COURT: Does the Commonwealth have any additional
13 evidence?
14 MS. HIGHTOWER: We do not, Your Honor.
15 THE COURT: Very well. Mr. Ousley, I notice I didn't
16 ask for an introductory statement from you or you didn't really
17 offer one, but I assume you'd just make a summary statement.
18 Is that correct, Ms. Hightower?
19 MS. HIGHTOWER: Yes, Your Honor. Dr. Schott, is she
20 free to travel back to Cincinnati?
21 THE COURT: Yes. Thank you very much.
22 THE WITNESS: You're welcome.
23 THE COURT: All right. Is this your only witness?
24 MS. HIGHTOWER: Yes, ma'am.
25 THE COURT: Mr. Ousley, do you have any rebuttal

1 witnesses?

2 MR. OUSLEY: Your Honor, I guess I would recall our

3 expert.

4 THE COURT: I'll permit it. Sir, I'll remind you you

5 remain under oath.

6 REDIRECT EXAMINATION

7 BY MR. OUSLEY:

8 Q. So I guess you were in the courtroom, you heard the

9 testimony. My question to you, and as the Judge asked and why

10 we're here today, as a forensic gun ballistic person, does the

11 x-ray mean something to you, coupled with all of the other

12 evidence?

13 A. Absolutely.

14 THE COURT: I can't hear you, sir.

15 THE WITNESS: Absolutely.

16 THE COURT: Okay.

17 MS. HIGHTOWER: Your Honor, I'm going to object. He

18 didn't -- the expert didn't even know what angle the x-ray was

19 from. So I'm not -- I'm going to object to him being able to

20 testify to anything like that.

21 THE COURT: All right. You might want to lay some

22 foundation, because he did testify that it looked like the

23 x-ray was from back to front, not front to back.

24 BY MR. OUSLEY:

25 Q. What does -- I guess, number one, what does it show you?

1 And does it matter -- or what does it not show you? The x-ray.
2 Explain how the x-ray is helpful to you.
3 A. First of all, the doctor testified that a technician took
4 the x-ray. And if it's front to back, then the deceased is
5 laying on his back and the x-ray machine is taking it from
6 above.
7 Just as easily, and because the wound was there, the x-ray
8 could have been taken from back to front by simply turning the
9 body over. And she said they don't have the ability to take
10 lateral x-rays. Well, all you have to do is turn the
11 deceased's head to the side. So that makes no sense to me.
12 Q. What does the x-ray show you as a ballistics person?
13 A. If you know where the entrance wound is and you know where
14 the bullet or the majority of the shot ends up, then that can
15 give you an indication of the direction of travel of the bullet
16 or shot in the body.
17 Q. And in this case, did it show you that?
18 A. Yes.
19 Q. What direction did it show you?
20 A. In my opinion, it's -- the shot ended up in the right side
21 of the head, and the entrance was towards the left side of the
22 head.
23 MR. OUSLEY: That's all, Your Honor.
24 THE COURT: Thank you. Cross-examination.
25 RECROSS-EXAMINATION

1 BY MS. HIGHTOWER:
2 Q. When you reviewed this case -- so it's your contention
3 that you still believe that that x-ray is from the back?
4 A. That's correct.
5 Q. Even though a medical doctor has said that it's from the
6 front and that's the way they did it at the ME's office, so
7 you're still saying that it's from the back?
8 A. Well, she said she didn't take it and the technician took
9 it. And it wasn't labeled on the x-ray as to what direction it
10 was taken from. Judging by the wound to the back of the head
11 and that x-ray, it appears to me that it was taken from the
12 back.
13 Q. I mean, she testified that it was taken from the front.
14 So you're -- you disagree with that?
15 A. I -- yeah, I disagree with that. And it sounded like to
16 me she said it was taken from the front based upon what they
17 generally do and what the technicians do. But she didn't take
18 it. Nobody labeled it.
19 Q. I think -- I think she testified it was taken from the
20 front.
21 And but when you -- so you -- so your entire expert
22 opinion is based upon the fact that it's taken -- that that
23 x-ray is taken from the back with regard to, like, where you
24 think the angle of the shot was?
25 A. No, that's not the entire thing, but that adds to it.

1 Q. Okay.
2 MS. HIGHTOWER: No further questions.
3 THE COURT: All right. Mr. Ousley.
4 MR. OUSLEY: One thing.
5 FURTHER REDIRECT EXAMINATION
6 BY MR. OUSLEY:
7 Q. I think I asked you before, where is the wadding?
8 Wouldn't that be in the x-ray?
9 A. The wadding should show up in the x-ray. A shot at that
10 distance should have -- the pellets and the wadding would be
11 traveling together and enter the wound, and therefore enter the
12 head.
13 THE COURT: So the further away the shot was, the
14 less likely it is that wadding would be in the head; is that
15 correct? That's what you're saying?
16 THE WITNESS: Yes, Your Honor.
17 THE COURT: If the shot was right at point blank,
18 there would be some wadding there because it hadn't traveled;
19 is that correct?
20 THE WITNESS: Yeah. Or three feet, it would still be
21 traveling.
22 THE COURT: But at three feet or more, and we can't
23 say what distance, what would happen?
24 THE WITNESS: Well, at greater distance, it would
25 separate.

1 THE COURT: So the greater the distance, whatever
2 that is.
3 THE WITNESS: Right.
4 THE COURT: Okay. Thank you. That's helpful.
5 I just want to ask you something. You can't say that this
6 is front or back, can you?
7 THE WITNESS: It's not labeled.
8 THE COURT: But you don't know. Does anything in
9 your expertise qualify you to say whether this was from the
10 front or the back?
11 THE WITNESS: No. As I said, I'm not a medical
12 doctor.
13 THE COURT: All right. Thank you.
14 Anything else?
15 MS. HIGHTOWER: No, Your Honor.
16 THE COURT: All right. You may step down.
17 Any more evidence, Mr. Ousley?
18 MR. OUSLEY: No, Your Honor.
19 THE COURT: All right. Would you like to make a
20 summary statement?
21 MR. OUSLEY: Your Honor, this case has kept me up
22 night after night. I know I looked at it and said, wow, what a
23 prosecutor's worst nightmare. I know as a federal prosecutor
24 we would send *Brady* letters to ensure this never occurred.
25 State court, as a state prosecutor, I did not send those types

1 of letters.

2 This is a situation where discovery was not turned over.
3 Now, legally it might not matter if it was on purpose or not,
4 but reading through the record and knowing what I know about
5 this case, at some point the government knew that this x-ray
6 existed and they fought and they fought and they fought open
7 records requests to stop it from being given to the defendant.
8 Ultimately it was.

9 In 2011, Dehus has testified that he was given multiple
10 photos and all types of different things and he could not --
11 could not render an opinion that was dispositive. And he even
12 says in there, I wish we had an x-ray. Now, just because --
13 that x-ray, it matters not if it's from the front, back, side
14 or whatever. What's important is what you can see. Or what's
15 even more important is what you cannot see.

16 There were 11 women and one man on the jury. I talked to
17 David Hoskins. Anybody that -- you know what? I should have
18 asked Dr. Schott, has she ever shot a shotgun? That was one of
19 my questions. Because anybody that's ever shot a shotgun
20 knows, if you shot someone in the back of the head, they're not
21 even going to have a face at a close range.

22 What this does, what this x-ray shows, is what all the
23 rest of the evidence shows, and that is this. They got into a
24 scuffle, Johnny Phillips pulled out a shotgun, and the decedent
25 in this case followed him, he was the initial aggressor. He

1 came after Johnny. And he comes out of his vehicle and he
2 charges him with a knife. And Johnny had a shotgun at port
3 arms. Johnny is six-five. The decedent is 230, around six
4 foot himself. And he goes for Johnny's waist and there's a
5 struggle and the weapon goes off.
6 And I would tell the Court this. And when the Court looks
7 at all this, there's a struggle and the shotgun goes off and it
8 grazes, it doesn't go in, it grazes the back of his head and
9 enters and exits where it's described as the entrance wound.
10 But that birdshot, some of it goes in. There's 240-some odd
11 birdshot in this round that was used. How do we know that?
12 Because the other rounds were taken and birdshot were counted.
13 There's anywhere from 220 to 260 birdshot. 19 birdshot was
14 taken from the brain. We've heard testimony today that might
15 not have been all of it.
16 But what's important is with that birdshot is also
17 wadding, the packaging. That would be in that x-ray if it was
18 at close range and was point blank. This was at close range,
19 but it wasn't point blank. It was a grazing.
20 And you know what? He was alive for 20 to 30 minutes. If
21 you look at the 911 tape as well as the deputy that arrived on
22 scene, it says in his report, EMS, he got there about 15 to 18
23 minutes after the shooting and EMS was still working on this
24 man. The reason why, it was a grazing wound that went up the
25 back -- back, it came out here, midline. If he was shot at

1 point blank in the back of the head, he would be dead.

2 The x-ray itself, I believe that the Commonwealth almost
3 proves our case that this is material because they brought in
4 their trial expert. We just had the battle of the experts
5 before the Court. This should be in front of a jury. Evidence
6 is material within the meaning of *Brady* when there is a
7 reasonable probability -- a reasonable probability, that's a
8 very low standard, Your Honor. That's not even -- in these
9 cases that I cited, that's not even a preponderance of the
10 evidence. It's a very low standard, very low burden that the
11 defendant has to show when there's a *Brady* violation -- that if
12 the evidence had been disclosed, the result of the proceeding
13 would be different. A reasonable probability of a different
14 result is one in which the suppressed evidence undermines the
15 confidence in the outcome of the trial.

16 It's legally a simple exercise, but factually, it's very
17 complex. We've got a doctor, we've got this forensic expert,
18 and now we've got testimony from each that conflicts with one
19 another. That, in itself, Your Honor, makes it material.

20 And keep in mind, Your Honor, not only does it have to --
21 it goes to guilt or innocence, but also to an aggravator or
22 mitigator. If this evidence -- let's say that it might
23 mitigate or show that this was some type of manslaughter, not
24 wanton murder. So it's important, and we point that out to the
25 Court, that when we talk about is it material or not, would it

1 have hung the jury, would one person, and that is something
2 that when we look at it, coupled with the other evidence.
3 Now, our expert is not coming in here just on the x-ray
4 alone. He's coming here looking, like in his 2011 letter, he
5 had reviewed all these different things. And then when he got
6 the x-ray, and he even said in his 2011 letter, it would be
7 nice to have the x-ray, perhaps it could help me. And now he
8 has the x-ray, he's come before this Court to offer an opinion,
9 right or wrong.
10 I believe he would be qualified as an expert in state
11 court, and I believe that he would be able to render an opinion
12 that would be favorable and that would frankly go with the
13 version of the events of the defendant.
14 I'm prepared today, I have no problem with putting this
15 defendant up on the stand. I would do it right now if I
16 thought it wouldn't be a waste of time for the Court.
17 And I'll say this. The fact that this is a *Brady*
18 violation, we know that it's a *Brady* violation. The fact we
19 get to, is it material? We are arguing that yes, it is. It's
20 material to his defense. It's material as a mitigator. And
21 that we've shown by bringing this expert in is that we could
22 perhaps put reasonable doubt in someone -- a reasonable juror's
23 mind.
24 It's a situation where the Commonwealth, when looking at
25 this case -- and this isn't directed to Ms. Hightower because I

1 know she's got this case, but having been a prosecutor in every
2 position in the Eastern District, I've worked for the AG's
3 office, I've worked as a Commonwealth attorney, worked as a
4 County attorney, worked as a federal prosecutor. Listen, it is
5 an adversarial system, but the United States and the
6 Commonwealth has the luxury of doing what's right.
7 And this man, going to trial without this x-ray, is
8 fundamentally wrong. And I would go to trial tomorrow. As a
9 matter of fact, I'd go to the grand jury first and have him
10 testify there. But it is fundamentally wrong to come back and
11 say look, we know we didn't give you this, but it doesn't help
12 your case, it's not material, after they fought for years to
13 try to say it didn't exist.
14 But, Your Honor, this is a case where, as Judge Thapar put
15 it in his order, it was a hiccup. It's much, much more serious
16 than a hiccup. It's a cardiac arrest. It's a prosecutor's
17 worst nightmare to go to trial and not have turned over
18 evidence that possibly could help the defendant. And that's
19 exactly what happened in this case.
20 Thank you, Your Honor.
21 THE COURT: Thank you. Ms. Hightower.
22 MS. HIGHTOWER: Your Honor, I'm going to take issue
23 with something that Mr. Ousley said. I don't think that the
24 Commonwealth ever fought to not give the x-ray over to
25 Mr. Phillips. I think what happened was, is that the

1 prosecutor thought there was no x-ray. And then they found out
2 that there was and then eventually it was turned over. I don't
3 think that they ever fought to keep it away from Mr. Phillips.
4 We are here about whether the x-ray was *Brady* material.
5 And there are three components to *Brady*. The evidence at issue
6 is favorable to the accused, it was suppressed, and prejudice
7 ensued.
8 The first component is that the evidence was favorable to
9 the accused. Our medical examiner came in here today and she
10 said -- she testified in Court that the purpose of the x-ray
11 was so that she could determine the location of the pellets and
12 the bullets in the victim's brain. That was the only purpose
13 of the x-ray.
14 So it's our contention that we don't even get past the
15 first component, that this evidence was even favorable to
16 Mr. Phillips.
17 We don't contest the fact that he was denied access -- or
18 that he didn't have access to the x-ray. So even if this Court
19 does find that it was favorable to him, there was no prejudice.
20 And the reason that there was no prejudice is because the
21 evidence at trial was very strong refuting Mr. Phillips'
22 contention that this was an accidental/self-defense situation.
23 Mr. Ousley has correctly stated the materiality, in
24 discussing prejudice, the question becomes was it material.
25 And the evidence is material when there is a reasonable

1 probability that the evidence -- had the evidence been
2 disclosed, the proceeding would have been different. A
3 reasonable probability of a different result is one in which
4 the suppressed evidence undermines confidence in the outcome of
5 the trial. And that is determined in the context of the entire
6 trial, not in a vacuum. So you have to look at all of the
7 evidence.
8 The Commonwealth put on the medical examiner, who
9 testified regarding the extensive nature of the wound or injury
10 to the back of the victim's head. She reiterated it today. It
11 was not unremarkable. She testified to the very extensive
12 nature of the wound, and it was inconsistent with a grazing
13 wound.
14 They had a firearms expert who came in and testified at
15 trial, who stated that the shotgun at issue was fully
16 functional, it did not malfunction. Or when he tested it, it
17 did not malfunction, which refuted Mr. Phillips' contention
18 that the gun went off accidentally.
19 So in looking at the medical examiner's testimony, which
20 refutes his contention that it was a self-defense situation,
21 and the firearms examiner at trial who testified that the
22 shotgun was fully functioning, properly functioning, which
23 refutes his accident claim at trial, it is our contention that
24 this evidence was not material and he was not prejudiced so
25 that the outcome of the trial would have been different had the

1 x-ray been turned over.

2 We would ask that you would affirm the Magistrate's

3 opinion below. Thank you.

4 THE COURT: Thank you. I want to be sure I've got

5 all the evidence that I need to look at here.

6 Mr. Ousley, we have Exhibits A through, was it F?

7 MR. OUSLEY: I believe so, Your Honor.

8 THE COURT: I want you to double-check with the clerk

9 here to be sure we got everything in. Why don't you let him

10 look at that.

11 MR. OUSLEY: May I approach?

12 THE COURT: You may. And, Ms. Hightower, did you add

13 any exhibits? You had one, I believe.

14 MS. HIGHTOWER: Well, I have the --

15 THE COURT: The diagram.

16 MS. HIGHTOWER: I have the diagram, but I never -- I

17 never used it, but it is demonstrative of what she -- because

18 you directed me to only talk about the x-ray, so I didn't talk

19 about it.

20 THE COURT: That's fine. But I'm going to put your

21 copy of the x-ray in as Defense A then.

22 (Defendant's Exhibit A was admitted.)

23 MS. HIGHTOWER: Okay.

24 THE COURT: I don't need the diagram.

25 MS. HIGHTOWER: Okay.

1 MR. OUSLEY: A through I, Your Honor.
2 THE COURT: A through I. All right.
3 Thank you all very much. I appreciate your attention to
4 this matter, this deserves the Court's careful attention, so
5 I'm going to take some time -- Mr. Ousley, I think your client
6 wants to say something.
7 MR. PHILLIPS: I've never had an opportunity in any
8 court of law to address any Court, Your Honor. I mean no
9 disrespect. If I could briefly, just briefly address the
10 Court.
11 THE COURT: Here's what I want you to understand, and
12 I'm going to let you do it. But it is not this Court's role to
13 determine your guilt or innocence --
14 THE DEFENDANT: I understand. I understand.
15 THE COURT: -- in this case. I have a very
16 specific -- and I certainly understand if I were in your shoes,
17 how you feel. But if you have something to add regarding the
18 materiality of this x-ray, I'll hear it.
19 But you know, I don't want to get into the facts of the
20 case. And you better talk with Mr. Ousley before you do that.
21 Because anything you say could be used against you in
22 another -- if you were to get another trial.
23 MR. PHILLIPS: That's the thing. There's never been
24 a lie told in my case. I never hid nothing, nothing's been
25 contradicted as far as my version of events. I've discussed it

1 at length with my counsel.
2 THE COURT: All right.
3 MR. PHILLIPS: If at all possible.
4 THE COURT: You may speak.
5 MR. PHILLIPS: May I address the Court, is it okay --
6 THE COURT: You can just sit still.
7 MR. PHILLIPS: Yes, ma'am.
8 The State's expert testified that there was no wadding
9 within the cavity of the brain. The autopsy report clearly
10 articulates she removed the brain that weighed 1420 grams and
11 was unremarkable.
12 Now she's provided testimony today, a decade later, that
13 contradicts that written record that was within the record of
14 this Court. All right?
15 My expert testified verbally and in written reports that a
16 12-gauge shotgun would produce an entrance wound of a little
17 over an inch. If you look at the depiction in the photographs
18 and the exploding view of the x-ray, regardless if it's taken
19 from the front or back, it shows fractures of the human skull
20 from one side of the skull to the other. That is in no form
21 cumulative of the evidence put forth at trial.
22 The Commonwealth's theory of this case, just about quoting
23 verbatim, was that he was prodded at three to four feet, which
24 is actually accurate of the distance this happened. A large
25 size male's arm, mine's 30-some inches long, and his hand

1 slipped off the barrel, pulling on it, trying to take the
2 weapon from me. That's how this happened, just like this.
3 Your Honor, just like this, from the side, pulling on that
4 barrel.
5 THE COURT: Now we're getting into what happened.
6 And I'm sorry, I don't want to cut you off, but I can't take
7 that into consideration.
8 MR. PHILLIPS: That's what the x-ray depicts. The
9 fractures in the x-rays, that's what they depict. She
10 testified clearly that she could not make those determinations
11 from the x-ray. That's the materiality of the x-ray, entirely
12 right there.
13 If I would have had the x-ray prior to trial -- there's an
14 affidavit now in the record from my trial counsel that says
15 absolutely, he would have brought this expert forth, who would
16 have investigated the record, just like he done post trial,
17 discovered there was no x-ray included, we would have had the
18 x-ray, he would have examined and testified before the Court at
19 trial for what he's testified here today, refuting the
20 assertion that this man was shot execution style.
21 With that being said, it would have changed the entire
22 tenor of the trial. My entire defense was based upon what has
23 never been refuted, the facts of this case.
24 As far as the standard, both my counsel and the
25 Commonwealth has articulated the standard precisely but they

1 stopped short. There's one other step in that standard,
2 whether or not I was denied a fair trial.
3 And if you look at the availability of science and what
4 could have been done pretrial in an investigation, as far as
5 retaining this expert, presenting this to the jury -- when you
6 think about the Commonwealth's theory of the case, prodding him
7 in the back of the head from behind, from back to front,
8 there's an additional expert's report attached to my amended
9 habeas claim -- habeas petition.
10 Brass Fletcher, he articulated clearly there's a photo of
11 him taking the same gun, the same kind of gun, the same kind of
12 ammunition and shooting ballistic gelatin at 12 feet. At
13 12 feet. And the wadding traveled with the shot and entered
14 the ballistic gelatin. It had to be in there for their theory
15 to be correct. That x-ray shows it's not in there. You're
16 talking about 12 feet. The Commonwealth's distance is correct,
17 I concede their distance, three to four feet is correct. Large
18 size male, 30-some inches. When it slips off the end of the
19 barrel, that's how it happened. So that's accurate.
20 But the science, the x-ray proves the scientific testimony
21 from Mr. Dehus. It's unrefutable. It had to be in there for
22 their theory to be correct. She said there was no exit wound.
23 If you count the projectiles located by the x-ray on the side,
24 that's what she retrieved. Now, the other 200, not shown.
25 Where did they go? You can see the ones she retrieved, you can

1 just count the ones on the x-ray, 19 to 20 fragments. They are
2 identified perfectly in the x-ray. There was no other 220.
3 If you look at this, the gaping skin on this side was
4 caused by pushing flesh to the side. It wasn't caused by --
5 these are exiting pellets on one side of the head. The x-ray
6 depicts that completely by the fractures her expert identified
7 during the testimony. She testified bones of the human skull
8 left, center and right. If an entrance wound is one inch, how
9 do you get a six-inch wound? For her own theory to be correct,
10 it refutes the entire theory. Do you see what I'm saying?
11 You can't have it both ways. She testified the x-rays
12 proved conclusively the fracture started on this side of the
13 human skull, stated the bones specifically, traveled across,
14 upward and to the right, fracturing the occiput, all the way
15 over to the right-hand side. Perfect match to what Mr. Dehus
16 conclusively stated it would have done up there.
17 You have got Brass Fetcher, the other expert's report
18 that's in there, the medical-legal examples that's out of that
19 forensic pathology college book that's attached to my amended
20 habeas, it's got other victims' examples, textbook examples
21 that match this talking about the materiality of this x-ray.
22 It don't just stop at whether or not it proves shot
23 direction. What the standard, as you are very -- nobody needs
24 to cite the standard to you, you know if it denies you a fair
25 trial, that's all I want. I've never told a lie in this case.

1 Not one person in this trial record -- you got the video
2 record, you got the transcripts -- have ever made a
3 contradictory statement about the facts of this case.
4 I left my own home. It's all within the record. My
5 affidavit's in the record that's attached to my original
6 habeas. They don't even dispute that. Nothing in this is
7 disputed.
8 As far as materiality, the difference in a juror's mind of
9 him being prodded at point black in the back of the head, or
10 whether this happened in a struggle and it fired from the side
11 is astronomical. One's capital murder, wanton murder, wanton
12 conduct, manifesting extreme indifference to the value of human
13 life by prodding an individual unprovoked in the back of head.
14 The other is my version of the events. It clearly proves I
15 told the truth.
16 I stood at the scene. Called 911, stood at the scene.
17 911 dispatch said almost 30 minutes later while I was screaming
18 for air med coordinates to get a chopper in there to get my
19 friend help. He was still alive. First officer on the scene,
20 Richard Sapcutt's police report articulates clearly he's got a
21 cannonball size hole in the side of his head, not in the back,
22 in the side of his head. The first and only man to see him at
23 the scene. You look at the transcript from the 911 dispatch,
24 he's in there. That officer depicted that wound precisely.
25 THE COURT: Thank you very much.

1 MR. PHILLIPS: I just want a fair day in court.
2 That's all I want.
3 THE COURT: I understand. Thank you for your
4 comments.
5 MR. PHILLIPS: Thank you for your time.
6 THE COURT: Mr. Ousley, anything else?
7 MR. OUSLEY: No, Your Honor. Thank you.
8 THE COURT: Anything else?
9 MS. HIGHTOWER: No, Your Honor.
10 THE COURT: Okay. Thank you all very much. That
11 concludes this hearing. We'll be in recess.
12 - - -
13 (Proceedings concluded at 6:00 p.m.)
14 - - -
15 C E R T I F I C A T E
16
17 I, Linda S. Mullen, RDR, CRR, do hereby certify that
18 the foregoing is a correct transcript from the record of
19 proceedings in this above-entitled matter.
20 /s/Linda S. Mullen June 7, 2018
Linda S. Mullen, RDR, CRR Date of Certification
21 Official Court Reporter
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