APPENDICES

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 18-5380
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JOHN WAYNE COLLINS,
Petitioner-Appellant,

v.

JAMES DAVID GREEN, Warden,
Respondent-Appellee.

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

Before: MERRITT, MOORE, and GIBBONS, Circuit Judges.

MERRITT, Circuit Judge. The sole issue in this appeal from the denial of a habeas petition is defendant's challenge to the Kentucky Supreme Court's holding that the state trial court violated his constitutional rights when it joined two counts of murder, and denied his motion to sever. There is no dispute that defendant was involved in the killing of Stevie Collins, a shooting witnessed by defendant's girlfriend Christa Wilson and others. Defendant claims "justification" for the killing

based on his emotional state at the time, stemming from his previous violent interactions with Stevie Collins. Forty days after Stevie's murder, defendant's girlfriend Christa was also murdered. The government contends that Christa was murdered by defendant to silence her so she could not testify against him for the murder of Stevie Collins. Defendant denied the charge, and the evidence of his involvement in Christa's murder is circumstantial.

Over defendant's objection, the two murder charges were joined for trial and defendant was convicted of both murders. A closely divided Kentucky Supreme Court upheld his conviction 4-3, with the dissent arguing that the joinder was error because the two murders were not sufficiently related to be properly joined, thereby causing prejudice to defendant. In its ruling denying defendant's federal habeas petition, the district court agreed with the dissent that the joinder of the two murder charges was error, but it found that Collins could not demonstrate that he was prejudiced by any misjoinder. For the following reasons, we affirm the judgment of the district court.

I. Facts and Procedural History

The Kentucky Supreme Court summarized the events leading to the conviction of defendant John Collins on two counts of murder as follows:

> On October 10, 2004, Appellant and his girlfriend, Christa Wilson, were visiting Appellant's father, Harold Wayne Collins, and then-stepmother, April Sizemore Collins. Another friend, Natasha Saylor, was also present. Everyone was on the porch of the home, visiting and drinking, when Stevie Collins pulled into the

driveway, exited his vehicle and approached the porch. Stevie Collins extended an invitation for them to accompany him to church, and Appellant's father invited Stevie into the house. Appellant's father then shot Stevie in the face, whereupon Stevie fell to the floor and began pleading for his life. Appellant told his father that they could not let Stevie leave there. Appellant's father agreed and instructed Appellant to finish the job. Appellant retrieved his own gun and shot Stevie seven or eight times more, killing Stevie. A possible explanation for Stevie Collins's murder was revealed at trial when witnesses, including Appellant's uncle, Joe B. Collins, testified that his brother, Appellant's developmentally disabled uncle, had been murdered and dismembered in 1997, and that it was believed that Stevie Collins was responsible for the uncle's murder. After the shooting, the group left in three different vehicles and met up again at a relative's house in Henry County, where they continued to drink and sleep.

Meanwhile, police were dispatched to the murder scene. Kentucky State Police Sergeant, John Yates, one of the investigating officers, testified that one 9mm round was discovered on the front porch and eight SKS rounds were found in the yard on either side of the porch. Later, when Appellant's father was arrested, a 9mm handgun was retrieved from his vehicle. Ammunition fitting the description of the ammunition retrieved from Stevie Collins's body was found in Appellant's vehicle. However, lab results on the weapons were inconclusive.

Although Appellant's girlfriend, Christa Wilson, Appellant's stepmother, April Sizemore Collins, and Natasha Saylor all repeatedly denied any knowledge of Stevie Collins's murder during the initial police investigation, both Natasha and April testified at trial to a substantially similar version of events, consistent with the factual summary set out hereinabove. Both also testified that they initially lied to the police because they had been threatened not to speak of Stevie Collins's shooting. April had been threatened by her then-husband, Appellant's father, while Natasha had been threatened by both Appellant and his father.

Forty days after Stevie Collins was murdered, the body of Christa Wilson was found face down in a creek. She died from a gunshot wound to the head. Christa had last been seen with Appellant. Paint that was discovered on a rock near Christa's body appeared to have been the result of a vehicle scraping the rock, and Appellant's vehicle appeared to have been damaged in the rear bumper area. A sample of the paint was compared with a paint sample taken from Appellant's vehicle, the one he was driving when Christa was last seen with him. At trial, a forensic science specialist for the Kentucky State Police … and a defense expert witness testified concerning the results. The [Kentucky State Police] specialist testified that the paint layer from the rock sample was identical to the paint layer from Appellant's vehicle in all areas, i.e., color, type, structure, texture, and elemental composition. The defense expert testified that the substrata of the paint samples

differed in thickness and that the bottom layer did not match. For this reason, the defense expert disagreed that the paint samples were identical, but he did admit that the paint samples were extremely similar. Further, the defense expert explained that paint layer thickness varies across each vehicle and, in fact, two samples taken from Appellant's vehicle varied in thickness. He also testified that the difference in substrates could be the result of previous repairs made to the vehicle.

Ultimately, Appellant was tried and convicted for both the murder of Stevie Collins and the murder of Christa Wilson. Appellant had, initially, been indicted for Stevie Collins's murder. While Appellant was awaiting trial on that charge, he was indicted for the kidnapping and murder of Christa Wilson. As a jury was being selected for the Stevie Collins's murder, the Commonwealth moved to consolidate the two cases.[1] Over Appellant's objection, the trial court granted consolidation, but gave Appellant a continuance. The Commonwealth filed a notice of intent to seek the death penalty based

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[1] The Commonwealth filed a motion to consolidate the two indictments, arguing that the offenses in both indictments were the same in character and based upon the same acts, thereby constituting a common scheme or plan. The Commonwealth also argued that Christa Wilson had been murdered because she was a witness to the murder of Stevie Collins, and that her murder had been committed in an attempt to cover up defendant's role in Stevie Collins' murder. Over defendant's objection, the trial court ordered the two indictments consolidated for trial, finding that the offenses in both indictments "could have been joined in a single indictment," and that the charges involved in Christa Wilson's murder were directly related to Stevie Collins' murder.

> upon intentional killing and multiple deaths. Subsequently, Appellant moved to sever the offenses, arguing that his option to testify at trial was compromised by joinder given his conflicting theories of defense. The trial court denied the motion, concluding that evidence in each case would presumably be admissible in the other. As stated above, when an impartial jury could not be seated in Clay County, the case was transferred to the Warren Circuit Court. Appellant renewed his motion to sever after transfer, but the Warren Circuit Court also concluded that joinder was appropriate, and denied the motion to sever.

Collins v. Commonwealth, No. 2008-SC-000107, 2010 WL 2471839, *1-*2 (Ky. June 17, 2010) (as modified Nov. 18, 2010). Because this habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, the facts receive a presumption of correctness. 28 U.S.C. § 2254(e)(1).

The trial court sentenced defendant to life without parole for a minimum of twenty-five years on each of the two counts, to run concurrently. Defendant appealed directly to the Kentucky Supreme Court as a matter of right, bypassing the Kentucky Court of Appeals. In his direct appeal to the Kentucky Supreme Court, defendant raised four issues, including the issue before the panel in this appeal: whether the trial court denied defendant his constitutional rights through the prejudicial joinder of the two murder charges. A divided Kentucky Supreme Court denied all of defendant's claims, narrowly upholding his conviction and sentence by a margin of 4–3. *Collins*, 2010 WL 2471839, at *7. The sole issue of disagreement between the majority and the dissent concerned whether the joinder had

been proper, with the dissent concluding that the government had not adequately demonstrated that the two murders were sufficiently related to be joined for trial, resulting in reversible error. *Id.* at *9.

Defendant then attacked his conviction collaterally in state post-conviction proceedings. The trial court denied his petition, and the Kentucky Court of Appeals affirmed the trial court. *Collins v. Commonwealth*, No. 2011-CA-002105, 2013 WL 2257673 (Ky. Ct. App. May 24, 2013) (as modified July 26, 2013). The Supreme Court of Kentucky denied discretionary review.

Defendant filed a habeas petition in federal court pursuant to 28 U.S.C. § 2254, raising six claims, including the issue before us: whether defendant's rights under the Fifth, Sixth, and Fourteenth Amendments were violated when the trial court joined the two murder counts for trial. A magistrate judge issued a Report and Recommendation recommending that the petition be denied, but recommending that the misjoinder issue be certified for appeal. *Collins v. White*, No. 1:15-cv-00026, 2017 WL 8293274 (W.D. Ky. Nov. 14, 2017). The government filed an objection to the Report and Recommendation, arguing that a certificate of appealability should not be issued because there is no clearly established Supreme Court precedent regarding denial of a severance motion, and AEDPA therefore bars any relief. Defendant also filed objections to the Report and Recommendation, including an objection that the Report and Recommendation failed to consider his joinder claim under the proper federal standard. Defendant argued that the Report and Recommendation's reliance on *United States v. Lane*, 474 U.S. 438 (1986), for its severance analysis was an error of law because the Kentucky Supreme Court's ruling relied not on *Lane*, but solely on federal circuit court precedent. The

district court overruled both parties' objections to the Report and Recommendation, and denied defendant's habeas petition, largely adopting the reasoning in the Report and Recommendation. *Collins v. Litteral*, No. 1:15-cv-00026, 2018 WL 1440605 (W.D. Ky. Mar. 22, 2018). Only the joinder issue was certified for appeal.

II. Discussion

The sole issue on appeal is defendant's challenge to the Kentucky Supreme Court's holding that the trial court did not violate his constitutional rights under the Fifth and Sixth Amendments when it denied his motion to sever the two murder charges. Like the corresponding federal rule, the Kentucky rules governing joinder of multiple offenses allow a single indictment if the offenses charged "are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Ky. R. Crim. P. 6.18, 9.14; *see also* Fed. R. Crim. P. 8(a). Misjoinder under these rules rises to the level of a constitutional violation "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Lane*, 474 U.S. at 446 n.8. The federal magistrate judge and the district court judge both concluded that the initial decision by the Kentucky trial court to join the two murder counts for a single trial was error, but determined that defendant did not show the necessary prejudice to warrant relief.

On appeal, defendant contends that his constitutional rights were violated because the alleged misjoinder prejudiced him in two substantial ways: (1) by forcing him to choose between his right to testify in his own defense at trial on the Stevie Collins murder count about his fear of, and history of violence with Collins, and his constitutional right to remain silent concerning

the murder of Christa Wilson, a case based on circumstantial evidence; and (2) causing a prejudicial "spillover" effect by combining the two murder counts for trial, with the jury concluding that guilt in one count inferred guilt as to the other, even in the absence of clear and convincing evidence. Defendant argues that detached from the evidence of his involvement in the murder of Stevie Collins, the jury would have been more likely to see the weakness in the circumstantial case against him for the murder of Christa Wilson. Defendant argues, therefore, that a reasonable probability exists that the outcome would have been different if he had received a separate trial for each count.

A. Review Under the Antiterrorism and Effective Death Penalty Act

AEDPA requires the habeas court to first determine whether the defendant has alleged a violation of a federal constitutional right, and, if so, whether a state court has adjudicated that claim on the merits. If both requirements are met, then the federal courts must employ the deferential standard of review set forth in 28 U.S.C. § 2254(d)[2] to determine whether to grant the

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[2] Section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> > (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

petition. *Williams v. Taylor*, 529 U.S. 362, 367, 402-03, 412-13 (2000). Defendant argues that the Kentucky Supreme Court did not adjudicate the denial of the severance motion on the merits because it failed to apply the proper federal constitutional standard, and its decision, therefore, is not entitled to any deference under AEDPA. Specifically, defendant contends that federal law required the Kentucky Supreme Court to decide "whether there was a reasonable probability that the outcome of [defendant's] trial would have been different but for the misjoinder … ." Reply Br. at 4. Defendant contends that the Kentucky Supreme Court failed to undertake this required prejudice analysis. We agree that the Kentucky Supreme Court's analysis was not conducted deliberately as a federal constitutional claim, but the Court nonetheless identified the required prejudice standard when it said: "We review the denial of a motion to sever for abuse of discretion, and we will not grant relief unless the refusal to sever prejudiced the defendant." 2010 WL 2471839, at *3 (citations omitted). Citing to a mix of Kentucky and federal law, the Kentucky Supreme Court adequately analyzed the "actual prejudice" to defendant. The prejudice analysis was intertwined with language reviewing the denial of the motion to sever pursuant to Kentucky criminal procedure rules, which do not generally implicate federal constitutional issues, but the Kentucky Supreme Court recited and applied the prejudice standard under federal law sufficiently to warrant labeling it an "adjudication on the merits" for purposes of AEDPA. While the Kentucky Supreme Court did not cite to a United States Supreme Court case, the district court

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(2) Resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

correctly noted that defendant's objection that the Kentucky Supreme Court relied on federal circuit court precedent rather than *Lane* is unavailing. The "failure to cite specific Supreme Court precedent does not itself render an opinion contrary to or an unreasonable application of clearly established federal law[,]" and the Kentucky Supreme Court's reasoning was consistent with *Lane*'s prejudice standard. 2018 WL 1440608, at *6 (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (a decision may well comport with clearly established law while demonstrating no awareness of the relevant federal standard, so long as neither the state court's reasoning nor its result contradicts federal law)). The prejudice analysis done by the Kentucky Supreme Court was consistent with *Lane*'s prejudice standard, and sufficiently constituted an "adjudication on the merits" under federal law, so its holding is entitled to AEDPA deference on our review.

B. Prejudice

Turning to our review of the merits, we first note that the United States Supreme Court has held that misjoinder of offenses can cause prejudice amounting to a violation of a defendant's right to a fair trial under the Fifth Amendment, but that "[i]mproper joinder does not, in itself, violate the Constitution." *Lane*, 474 U.S. at 446 n.8, 449.[3] The Court also recognized that joinder

[3] The parties debate whether *Lane* is clearly established law for purposes of AEDPA. *Lane* resolved a circuit split within the courts of appeal as to whether misjoinder under the Federal Rules of Criminal Procedure is "inherently prejudicial" or subject to harmless error analysis. The Supreme Court concluded that misjoinder is subject to harmless error unless it results in actual prejudice; that is, whether a misjoinder "had substantial or injurious effect or influence in determining the jury's verdict." *Lane*, 474 U.S. at 449 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776

of offenses serves to "'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'" *Id.* at 449 (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)). The Court concluded, therefore, that improper joinder only violates the Constitution "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Lane*, 474 U.S. at 446 n.8.

Defendant's claim has two potential constitutional implications based on actual prejudice affecting the outcome of trial: (1) the failure to sever the charges put in conflict defendant's Sixth Amendment right to testify on his own behalf with his Fifth Amendment right to remain silent; and (2) the joinder of the two charges created prejudice so substantial as to deny him a fair

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(1946)). The Court said in a footnote that "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny defendant his Fifth Amendment right to a fair trial." 474 U.S. at 446 n.8. That any discussion of this issue is even necessary seems based on two unpublished Sixth Circuit opinions holding that the constitutional argument in *Lane* was dicta. *Tighe v. Berghuis*, No. 16-2435, 2017 WL 4899833, at *2 (6th Cir. Apr. 21, 2017); *Mayfield v. Morrow*, 528 F. App'x 538, 542 (6th Cir. 2013). We have applied *Lane* in several published cases to determine whether a habeas petitioner demonstrated that misjoinder resulted in prejudice so great as to deny the defendant a fair trial. *LaMar v. Houk*, 798 F.3d 405, 428 (6th Cir. 2015); *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013); *Davis v. Coyle*, 475 F.3d 761, 777 (6th Cir. 2007). Any suggestion that *Lane* does not provide the clearly established law necessary to analyze whether the defendant suffered prejudice sufficient to violate his Fifth Amendment due process right to a fair trial is without foundation. Without discussion, both the magistrate judge and the district court judge relied on *Lane* as the relevant clearly established law, and, like them, we follow the published opinions of this circuit.

trial under the Fifth Amendment due to the "bad-acts spillover" effect of combining two unrelated murder charges, resulting in the likelihood that the jury would fail to consider the evidence of defendant's involvement in each murder separately.

1. Prejudicial effect of forcing defendant to choose between testifying or remaining silent

Defendant claims he was prejudiced by the joinder when he was forced to choose between exercising his Sixth Amendment right to testify in his own defense regarding the Stevie Collins murder count, and his Fifth Amendment right to remain silent on the Christa Wilson murder count. Defendants are entitled to severance of charges where they can convincingly demonstrate they have both important testimony to offer on one count and a strong need to refrain from testifying on the other count. *United States v. Bowker*, 372 F.3d 365, 383-85 (6th Cir. 2004), *as modified on other grounds by* 125 F. App'x 701 (6th Cir. 2005). Defendant claims that he would have testified about his state of mind, and that he wished to testify to support what he calls a "justification" defense that included testimony

> regarding whether Stevie Collins approached Harold Collins's home with a gun, whether threats were made by Stevie Collins against [defendant] in the weeks before the incident, whether both Harold Collins and Stevie Collins had fired shots prior to [defendant's] involvement in the incident, and whether Stevie Collins had come to Harold Collins's home with what [defendant] believed to be an intent to do harm. But [defendant] chose not to testify because he did not wish to be questioned on the Christa Wilson charge.

Defendant's Opening Br. at 12. Defendant argues that he had important testimony to give in the Stevie Collins charge because while other witnesses could testify as to the events they saw unfold in front of them, only defendant could provide testimony as to his state of mind. Defendant contends that only he could explain fully to the jury his state of mind regarding his knowledge of Stevie's violent reputation, including the killing and dismembering of his uncle years before, and then seeing Stevie arrive at the house with a gun and a liquor bottle. Defendant says only he could explain the fear for his own life and for the others on the premises. Defendant also argues that at the very least, his testimony might have persuaded the jury that he lacked the requisite mental state for first-degree murder and it might have settled on conviction of a lesser-included charge.

The Kentucky Supreme Court majority concluded that defendant was not prejudiced by the joinder of the two murder charges and the denial of defendant's motion to sever, writing:

> Throughout these proceedings, Appellant has argued a particular manner in which he was prejudiced by joinder of the charges; namely, that his right to testify in his own defense was compromised. While Appellant wished to testify in support of his claim of justification for Stevie Collins's murder, he wanted to invoke his privilege not to testify in Christa Wilson's murder. This issue has not been much addressed in our cases. The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant's Fifth Amendment right not to testify at all, "the case law is less protective of a defendant's right to testify se-

lectively." *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004). A defendant who argues for severance on the basis of selective testimony "must make a 'persuasive and detailed showing regarding the testimony he would give on the one count he wishes severed and the reason he cannot testify on the other counts.'" *United States v. McCarther*, 596 F.3d 438, 443 (8th Cir. 2010) (quoting *United States v. Possick*, 849 F.2d 332, 338 (8th Cir. 1988)). The United States Circuit Court for the Sixth Circuit has held that severance is not required unless the defendant "'makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.'" *United States v. Bowker*, 372 F.3d 365, 385 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005) (quoting *United States v. Martin*, 18 F.3d 1515, 1518-19 (10th Cir. 1994)). Otherwise, "severance would be available to a defendant virtually on demand." *Fenton*, 367 F.3d at 23.

. . .

Here, [defendant] has not made a persuasive and detailed showing of "compelling factors" that would justify his selective testimony. He has not shown that his testimony regarding Stevie Collins's murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim's alleged involvement in the murder of [defendant's] uncle. And he has made no showing of a strong need to refrain from testifying with respect to Christa's murder. *See, e.g.*, *Bowker*, *supra*, and *McCarther*, *supra*. The trial court

> did not abuse its discretion, therefore, by denying Appellant's severance motion on the ground of selective testimony.

2010 WL 2471839, at *3-*4. The district court agreed with the Kentucky Supreme Court that defendant failed to make the particularized showing of prejudice required because he failed to demonstrate that he would have provided critical testimony with respect to his justification defense in the Stevie Collins murder count. 2018 WL 1440605, at *6.

The question we face is how to arrive at the proper balance between these two competing constitutional rights. Case law addressing this issue is sparse. *Cross v. United States* summarized the factors to be weighed by a defendant forced to choose:

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express

> denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

335 F.2d 987, 989 (D.C. Cir. 1964) (footnotes omitted). Applying the factors from *Cross*, there is no indication in the instant case that defendant would have provided testimony regarding Stevie Collins' murder that could not have been provided by other witnesses, including testimony relating to Stevie's violent reputation in the community, and the killing of defendant's uncle. Defendant's theory was that he had nothing to do with Christa Wilson's murder, and he did not wish to testify, which is what he opted to do. Because other witnesses could have provided ample testimony on Stevie Collins' reputation for violence and his past interactions with defendant, we are not persuaded that the lack of defendant's testimony about his state of mind at the time of Stevie's murder caused defendant prejudice. Defendant therefore has failed to show that his inability to testify regarding his state of mind when he shot Stevie Collins resulted in "prejudice so great as to deny [him] his Fifth Amendment right to a fair trial." *Lane*, 474 U.S. at 446 n.8.

2. Prejudicial effect of combining the direct evidence of defendant's involvement in the murder of Stevie Collins with the circumstantial case of his involvement in the Christa Wilson murder

Defendant also claims he was prejudiced because the largely uncontested facts regarding his substantial involvement in Stevie Collins' murder negatively influenced the jury in its assessment of the circumstantial case supporting his involvement in Christa Wilson's murder. He makes the argument in the context of ar-

guing that the joinder combined a "weak" case regarding his involvement in the murder of Christa with the "stronger" case against him for the murder of Stevie Collins. Defendant argues that detached from the strong evidence that defendant was involved in the murder of Stevie Collins, the jury would have had been more likely to discern the weaknesses of the circumstantial evidence that the government put forth to connect defendant to Christa's murder. In sum, defendant maintains that the evidence against him for Christa's murder, presented in a separate trial, would have left the jury with reasonable doubt of his guilt, and he likely would have been acquitted of Christa's murder.

The "sources of prejudice" in joinder arise because the "jury may conclude that the defendant is guilty of one crime and then finds him guilty of the other because of his criminal disposition." *Corbett v. Bordenkircher*, 615 F.2d 722, 725 (6th Cir. 1980) (quoting *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976)). As we stated in *Davis v. Coyle*:

> Without question, a risk of undue prejudice exists whenever joinder of counts permits introduction of evidence of other crimes that would otherwise be inadmissible. By allowing joinder of offenses, the possibility exists that a jury may use the evidence of one of the charged crimes to infer a general criminal disposition by the defendant; the jury also may confuse or cumulate the evidence of the various crimes charges. The prejudice that [defendant] must demonstrate, however, in order to justify a grant of a writ of habeas corpus is actual prejudice, not merely the potential for prejudice.

475 F.3d at 777 (citations omitted).

The Commonwealth claims that it sought to join the two murder charges because "the offenses in both indictments were the same in character and based upon the same acts, constituting a common scheme or plan." The Commonwealth also stated that it believed that Christa had been murdered because she was a witness to the murder of Stevie Collins. Based on this representation, the trial court ordered the two indictments to be consolidated for trial, stating that it believed that the offenses in both indictments "could have been joined in a single indictment" and that the charges involved in Christa's murder were directly related to Steve Collins's murder.

In reviewing the trial court's ruling, the Kentucky Supreme Court majority assumed that the evidence of defendant's role in Stevie's murder would have been admissible in a separate trial for Christa and that the circumstances of Christa's murder would have been admissible in a separate trial for Stevie's murder:

> Clearly, evidence of Stevie Collins's murder would have been admissible in a separate trial of Christa Wilson's murder, since the alleged motive for the second murder was Appellant's desire to cover up the first murder by eliminating one who had witnessed it. KRE 404(b) (evidence of other bad acts is admissible to prove motive.); *Tucker v. Commonwealth*, 916 S.W.2d 181 (Ky. 1996) (evidence that defendant had shot a witness of a prior crime was admissible to show that charged shooting was similarly motivated.). Similarly, evidence of Christa's murder would have been admissible in a separate trial of Stevie Collins's murder, since evidence that one has attempted to cover up a crime is circumstantial proof of one's conscious-

> ness of guilt regarding that crime. KRE 404(b) (evidence of other bad acts is admissible to prove intent.); *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005) (evidence that defendant beat a potential witness was admissible as proof of consciousness of guilt.); *Foley v. Commonwealth*, 942 S.W.2d 876, 887 (Ky. 1996) ("Any attempt to suppress a witness' testimony … is evidence tending to show [a consciousness of] guilt."). The trial court did not abuse its discretion, therefore, by deeming the two murders sufficiently related to be tried together.

Collins, 2010 WL 2471839, at *4.

The Kentucky Supreme Court acknowledged the potential for undue prejudice where it wrote "[a] primary test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense." *Id.* Despite acknowledging the standard, the admissibility analysis undertaken by the Kentucky Supreme Court assumed that the evidence of each murder would have been admissible in the other without undertaking a thorough analysis of the basis for the trial court's finding. In addition, the trial court judge did not give any limiting instruction advising the jury to analyze the evidence regarding each murder count separately to reduce the danger of unfair prejudice.

The Kentucky Supreme Court dissent focused on the lack of evidence supporting the government's theory that defendant's motivation for murdering Christa was to silence her, and concluded that the two charges should not have been joined. The dissent wrote, "The Commonwealth's theory is a mere possible explanation

with no evidentiary link that connects together the two murders. The murder of a young woman at the hands of her boyfriend is, unfortunately, an all too common occurrence and the proof that [defendant] did it is hardly dependant [sic] upon the motivation theorized by the Commonwealth." *Id.* at *8. The dissent concluded that the logical extension of such reasoning would result in the propriety of joinder hinging solely on whatever theory the prosecution might cobble together before trial to connect multiple offenses. The dissent concluded that defendant was deprived a fair trial as a result. *Id.* at *8-*9.

Agreeing with the Kentucky Supreme Court dissent, the federal magistrate judge wrote, "[s]omething obvious is missing from the Commonwealth's statement. Proof." 2017 WL 8293274, at *7. The magistrate judge continued, "What is more disturbing, the Commonwealth never sought to prove these allegations at trial, despite the fact that the only evidence linking [defendant] to the death of Christa Wilson was the paint scraping found on a rock near the victim's body that closely matched the paint from [defendant's] car and circumstantial evidence involving [defendant's] father threatening witnesses of the Stevie Collins murder." *Id.* The magistrate judge concluded that the joinder was "baseless" and may have deprived defendant of a fair trial. *Id.* Despite this conclusion, the magistrate judge found that defendant failed to make the particularized showing of prejudice required to succeed on this claim, relying on Sixth Circuit precedent rejecting the claim that the cumulative effect of multiple charges may have led to his guilty verdict as to Christa Wilson's murder. *Id.* at *8. The magistrate judge stated that although the Kentucky trial court may have erred in joining the two indictments for trial, it is "not review-

ing the trial court for the correctness of its decision, but is instead concerned only with whether the failure to sever amounted to an unreasonable application of clearly established federal law," and concluded it did not. *Id.* at *7. The district court agreed, and also noted that the dissenting justices in the Kentucky Supreme Court found the evidence sufficient to support defendant's conviction for Christa Wilson's murder. 2018 WL 1440605, at *6.

Defendant's argument that he was prejudiced when the jury heard the incriminating evidence surrounding defendant's involvement in the murder of Stevie Collins and considered it together with the arguably weaker, circumstantial case against him for the murder of Christa is compelling. The fact that a curative instruction was not given to the jury compounds the error. If this were a case on direct appeal, it would present a very close question. But, AEDPA compels us to give substantial deference to the Kentucky Supreme Court's decision, and defendant has not surmounted that hurdle.

Conclusion

The Supreme Court has concluded that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 569 U.S. 505, 508-09 (2013) (per curiam) (internal quotation marks omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). Applying AEDPA deference, the Kentucky Supreme Court's decision must be more than "simply erroneous or incorrect," it must be "objectively unreasonable." Defendant has not met that standard, and for that reason we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

JOHN WAYNE COLLINS,
Petitioner,

v.

KATHY LITTERAL, Warden,
Respondent.

CIVIL ACTION NO. 1:15-CV-00026-GNS-HBB
Filed March 22, 2018

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the objections of both Petitioner (DN 37) and Respondent (DN 34) to the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation ("R. & R.") (DN 33). For the following reasons, the R. & R. is **ADOPTED** to the extent not inconsistent with this opinion, and all objections are **OVERRULED**. Petitioner's Petition for Writ of Habeas Corpus (DN 1) is **DISMISSED**. A limited Certificate of Appealability is **GRANTED** as to Ground One, but **DENIED** as to Petitioner's remaining claims.

I. BACKGROUND

The Kentucky Supreme Court summarized the events leading to Petitioner John Wayne Collins' ("Petitioner" or "Appellant") conviction and subsequent pending petition for habeas corpus as follows:

On October 10, 2004, Appellant and his girlfriend, Christa Wilson, were visiting Appellant's father, Harold Wayne Collins, and then-stepmother, April Sizemore Collins. Another friend, Natasha Saylor, was also present. Everyone was on the porch of the home, visiting and drinking, when Stevie Collins pulled into the driveway, exited his vehicle and approached the porch. Stevie Collins extended an invitation for them to accompany him to church, and Appellant's father invited Stevie into the house. Appellant's father then shot Stevie in the face, whereupon Stevie fell to the floor and began pleading for his life. Appellant told his father that they could not let Stevie leave there. Appellant's father agreed and instructed Appellant to finish the job. Appellant retrieved his own gun and shot Stevie seven or eight times more, killing Stevie. A possible explanation for Stevie Collins's murder was revealed at trial when witnesses, including Appellant's uncle, Joe B. Collins, testified that his brother, Appellant's developmentally disabled uncle, had been murdered and dismembered in 1997, and that it was believed that Stevie Collins was responsible for the uncle's murder. After the shooting, the group left in three different vehicles and met up again at a relative's house in Henry County, where they continued to drink and sleep.

Meanwhile, police were dispatched to the murder scene. Kentucky State Police Sergeant, John Yates, one of the investigating officers, testified that one 9mm round was discovered on the front porch and eight SKS rounds were

found in the yard on either side of the porch. Later, when Appellant's father was arrested, a 9mm handgun was retrieved from his vehicle. Ammunition fitting the description of the ammunition retrieved from Stevie Collins's body was found in Appellant's vehicle. However, lab results on the weapons were inconclusive.

Although Appellant's girlfriend, Christa Wilson, Appellant's stepmother, April Sizemore Collins, and Natasha Saylor all repeatedly denied any knowledge of Stevie Collins's murder during the initial police investigation, both Natasha and April testified at trial to a substantially similar version of events, consistent with the factual summary set out hereinabove. Both also testified that they initially lied to the police because they had been threatened not to speak of Stevie Collins's shooting. April had been threatened by her then-husband, Appellant's father, while Natasha had been threatened by both Appellant and his father.

Forty days after Stevie Collins was murdered, the body of Christa Wilson was found face down in a creek. She died from a gunshot wound to the head. Christa had last been seen with Appellant. Paint that was discovered on a rock near Christa's body appeared to have been the result of a vehicle scraping the rock, and Appellant's vehicle appeared to have been damaged in the rear bumper area. A sample of the paint was compared with a paint sample taken from Appellant's vehicle, the one he was driving when Christa was last seen with him. At trial, a forensic science specialist for the Kentucky State Police (KSP) and a defense ex-

pert witness testified concerning the results. The KSP specialist testified that the paint layer from the rock sample was identical to the paint layer from Appellant's vehicle in all areas, i.e., color, type, structure, texture, and elemental composition. The defense expert testified that the substrata of the paint samples differed in thickness and that the bottom layer did not match. For this reason, the defense expert disagreed that the paint samples were identical, but he did admit that the paint samples were extremely similar. Further, the defense expert explained that paint layer thickness varies across each vehicle and, in fact, two samples taken from Appellant's vehicle varied in thickness. He also testified that the difference in substrates could be the result of previous repairs made to the vehicle.

Ultimately, Appellant was tried and convicted for both the murder of Stevie Collins and the murder of Christa Wilson. Appellant had, initially, been indicted for Stevie Collins's murder. While Appellant was awaiting trial on that charge, he was indicted for the kidnapping and murder of Christa Wilson. As a jury was being selected for the Stevie Collins's murder, the Commonwealth moved to consolidate the two cases. Over Appellant's objection, the trial court granted consolidation, but gave Appellant a continuance. The Commonwealth filed a notice of intent to seek the death penalty based upon intentional killing and multiple deaths. Subsequently, Appellant moved to sever the offenses, arguing that his option to testify at trial was compromised by joinder given his conflict-

> ing theories of defense. The trial court denied the motion, concluding that evidence in each case would presumably be admissible in the other. As stated above, when an impartial jury could not be seated in Clay County, the case was transferred to the Warren Circuit Court. Appellant renewed his motion to sever after transfer, but the Warren Circuit Court also concluded that joinder was appropriate, and denied the motion to sever.

Collins v. Commonwealth, No. 2008-SC-000107-MR, 2010 WL 2471839, at *1-2 (Ky. Nov. 18, 2010).[1] Petitioner was convicted at trial and sentenced to life without parole for a minimum of twenty-five years on each of the two counts. (Resp't's Answer Attach. 3, at 25-28, DN 26-3). The Kentucky Supreme Court affirmed on direct appeal by a 4-3 margin. *Collins*, 2010 WL 2471839, at *1, *7. After he sought relief under Ky. R. Crim. P. 11.42, the Kentucky Court of Appeals affirmed the Warren Circuit Court's decision. *Collins v. Commonwealth*, No. 2011-CA-002105-MR, 2013 WL 2257673 (Ky. App. May 24, 2013). The Kentucky Supreme Court denied Petitioner's motion for discretionary review. (Resp't's Answer Attach. 6, at 138, DN 26-6).

Petitioner filed a Petition for Habeas Corpus in this Court on six grounds. (Pet. Writ Habeas Corpus, DN 1 [hereinafter Pet.]). First, Petitioner argued that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the trial court's joinder of the two murder counts and denial of his subsequent motions to sever. (Pet. 5). Second, Petitioner alleged his Fourteenth Amendment rights were violated when the trial court

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[1] These facts receive a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

refused to grant a mistrial following testimony from Commonwealth witness Natasha Saylor ("Saylor") regarding her assault. (Pet. 6). Third, Petitioner claimed he was denied his Fourteenth Amendment right to due process when the trial court allowed the Commonwealth to elicit prejudicial hearsay statements during the testimony of April Collins. (Pet. 6). Fourth, Petitioner argued that his Fourteenth Amendment due process rights were violated when the trial court permitted a testifying witness for the Commonwealth to remain in the courtroom during all testimony, "permitting her to clean up the Commonwealth's case by refuting the defense theory of justification/defense." (Pet. 7). Fifth, Petitioner alleged he was denied his Sixth Amendment rights because the Commonwealth's opening statement included reference to Harold Collins' statements regarding his invocation of the right to remain silent and request for an attorney, and Petitioner's counsel's failure to object further denied Petitioner his Sixth Amendment rights. (Pet. 7). Sixth and finally, Petitioner claimed that his Sixth and Fourteenth Amendment rights were violated when the Commonwealth introduced hearsay statements of Harold Collins through the testimony of Detective Yates, and Petitioner's counsel's failure to object further denied Petitioner his Sixth Amendment rights. (Pet. 9). On November 14, 2017, Magistrate Judge Brennenstuhl issued an R. & R. recommending dismissal of Petitioner's Petition on the merits of each of Petitioner's claims, and recommending the issuance of a limited certificate of appealability as to Ground One, but denying the same as to the remaining five claims. (R. & R. 27, DN 33).

II. JURISDICTION

This Court has jurisdiction to "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court" pursuant to 28 U.S.C. § 2254(a).

III. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), applies to all habeas corpus petitions filed after April 24, 1996, and requires "heightened respect" for legal and factual determinations made by state courts. *See Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). Section 2254(d), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

28 U.S.C. § 2254(d).

This is a "difficult to meet and highly deferential standard … ." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks omitted) (internal citation omitted) (citation omitted). Legal conclusions

made by state courts are also given substantial deference under AEDPA. The Supreme Court has concluded that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (per curiam) (internal quotation marks omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

When reviewing a magistrate judge's report and recommendation regarding a prisoner's petition for a writ of habeas corpus, "[a] judge … shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). A reexamination of the exact same argument that was presented to the Magistrate Judge without specific objections "wastes judicial resources rather than saving them, and runs contrary to the purpose of the Magistrates Act." *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991); *see also Manigaulte v. C.W. Post of Long Island Univ.*, 659 F. Supp. 2d 367, 372 (E.D.N.Y. 2009) ("[W]hen a party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error." (internal quotation marks omitted) (citation omitted)). New arguments raised for the first time in a petitioner's objection to a magistrate judge's report and recommendation are considered waived. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). Courts have applied this general rule in the habeas corpus context. *See Brewer v. Bottom*, No. 10-26-KSF, 2012 WL 404878, at *8 (E.D. Ky. Feb. 8, 2012) (rejecting petitioner's

claim in habeas petition raised for the first time in objections to the report and recommendation and noting that "[t]hese reasons alone are sufficient grounds to reject [the petitioner's] objection.").

IV. DISCUSSION

Petitioner and Respondent have both filed objections to the R. & R. (Resp't's Obj., DN 34; Pet'r's Obj., DN 37). Each is addressed below.

A. Respondent's Objection

The substituted Respondent, Kathy Litteral ("Respondent"), objects to the R. & R.'s recommendation that a certificate of appealability issue as to Ground One of the Petition. (Resp't's Obj. 1-7). The Respondent argues that the issue is not addressed by clearly established Supreme Court precedent applicable to state court trials, and Petitioner's habeas petition must therefore fail. (Resp't's Obj. 2-3). This attempt at a merits argument as to Ground One misunderstands the standard for the issuance of a certificate of appealability, which is simply whether reasonable jurists could find the Court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As discussed in the R. & R., the fact that the Kentucky Supreme Court was narrowly split on this issue demonstrates that reasonable jurists can and did disagree, and that a limited certificate of appealability should thus issue. Respondent's objection is therefore overruled.

B. Petitioner's Objection

Petitioner objects on a number of grounds, each of which is addressed in turn.

1. Simmons *and* Lane

First, Petitioner objects that the Kentucky Supreme Court opinion and R. & R. failed to consider his joinder claim under *Simmons v. United States*, 390 U.S. 377 (1968). (Pet'r's Obj. 1-6). Petitioner argues that the R. & R.'s use of *United States v. Lane*, 474 U.S. 438 (1986), for its analysis was an error of law, given that the Kentucky Supreme Court's ruling relied not on *Lane*, but on circuit court precedent which he contends is "contrary to and involving an unreasonable application of clearly established federal law" under *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017). (Pet'r's Obj. 3).

As the R. & R. quoted, the Kentucky Supreme Court's opinion addressed Petitioner's related joinder and severance arguments as follows:

> Throughout these proceedings, Appellant has argued a particular manner in which he was prejudiced by joinder of the charges; namely, that his right to testify in his own defense was compromised. While Appellant wished to testify in support of his claim of justification for Stevie Collins's murder, he wanted to invoke his privilege not to testify in Christa Wilson's murder. This issue has not been much addressed in our cases. The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant's Fifth Amendment right not to testify at all, "the case law is less protective of a defendant's right to testify selectively." *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004). A defendant who argues for severance on the basis of selective testimony "must make a 'persuasive and detailed

showing regarding the testimony he would give on the one count he wishes severed and the reason he cannot testify on the other counts.'" *United States v. McCarther*, 596 F.3d 438, 443 (8th Cir. 2010) (quoting *United States v. Possick*, 849 F.2d 332, 338 (8th Cir. 1988)). The United States Circuit Court for the Sixth Circuit has held that severance is not required unless the defendant "'makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.'" *United States v. Bowker*, 372 F.3d 365, 385 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1182, 125 S. Ct. 1420, 161 L.Ed.2d 181 (2005) (quoting *United States v. Martin*, 18 F.3d 1515, 1518-19 (10th Cir. 1994)). Otherwise, "severance would be available to a defendant virtually on demand." *Fenton*, 367 F.3d at 23.

This Court reached a similar conclusion in *Owens v. Commonwealth*, 572 S.W.2d 415, 416 (Ky. 1977):

> [Defendant] argues that he was confounded in his defense for the reason he wished to testify as to one charge, but not the others. … This argument in the absence of other compelling factors ordinarily is not sufficient to warrant a severance. Otherwise, it would have the effect of nullifying the provisions of RCr 9.12, consolidation of offenses for trial.

Here, Appellant has not made a persuasive and detailed showing of "compelling factors" that

would justify his selective testimony. He has not shown that his testimony regarding Stevie Collins's murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim's alleged involvement in the murder of Appellant's uncle. And he has made no showing of a strong need to refrain from testifying with respect to Christa's murder. *See, e.g.*, *Bowker*, *supra*, and *McCarther*, *supra*. The trial court did not abuse its discretion, therefore, by denying Appellant's severance motion on the ground of selective testimony.

Nor was severance required on the ground that the two murders were not sufficiently related. A primary test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense. *Roark v. Commonwealth*, [90 S.W.3d 24 (Ky. 2002)]. As noted, a trial court's decision to join offenses related in this way will not be disturbed absent an abuse of discretion. *Debruler v. Commonwealth*, [231 S.W.3d 752 (Ky. 2007)]; *Roark*, *supra*. We agree with the Commonwealth that there was no abuse of discretion here, because the two murders were based on "transactions connected together." RCr 6.18.1. Clearly, evidence of Stevie Collins's murder would have been admissible in a separate trial of Christa Wilson's murder, since the alleged motive for the second murder was Appellant's desire to cover up the first murder by eliminating one who had witnessed it. KRE 404(b) (evidence of other bad acts is admissible

> to prove motive); *Tucker v. Commonwealth*, 916 S.W.2d 181 (Ky. 1996) (evidence that defendant had shot a witness of a prior crime was admissible to show that charged shooting was similarly motivated.). Similarly, evidence of Christa's murder would have been admissible in a separate trial of Stevie Collins's murder, since evidence that one has attempted to cover up a crime is circumstantial proof of one's consciousness of guilt regarding that crime. KRE 404(b) (evidence of other bad acts is admissible to prove intent.); *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005) (evidence that defendant beat a potential witness was admissible as proof of consciousness of guilt.); *Foley v. Commonwealth*, 942 S.W.2d 876, 887 (Ky. 1996) ("Any attempt to suppress a witness' testimony … is evidence tending to show [a consciousness of] guilt."). The trial court did not abuse its discretion, therefore, by deeming the two murders sufficiently related to be tried together.

Collins, 2010 WL 2471839, at *3-4.

The R. & R. used *Lane* to analyze whether the joinder of Petitioner's two charges created prejudice so substantial as to deny Petitioner a fair trial under the Fifth Amendment. (R. & R. 9-14). The Magistrate Judge concluded that Petitioner "failed to make the particularized showing of prejudice required to succeed on this claim[,]" and recommended denying the claim, but to issue a limited certificate of appealability on the issue, given the divided Kentucky Supreme Court opinion on the matter. (R. & R. 13-14).

Petitioner's argument that *Simmons* was the correct standard rather than *Lane* is unfounded. *Lane* represents the proper Supreme Court precedent under which to analyze the precise joinder question presented in Petitioner's case, and the Magistrate Judge correctly undertook the harmless error analysis provided in *Lane* to determine whether any reversible error took place. (R. & R. 10-13). Petitioner's remaining objection that the Kentucky Supreme Court relied on circuit court precedent rather than *Lane* is likewise unavailing because the "failure to cite specific Supreme Court precedent does not itself render an opinion contrary to or an unreasonable application of clearly established federal law[,]" and the Kentucky Supreme Court's reasoning was consistent with *Lane*'s harmless error standard. (R. & R. 10-11 (citing *Early v. Packer*, 537 U.S. 3, 8 (2002))). The Court agrees that Petitioner failed to make the particularized showing of prejudice required to succeed on this claim, as the Sixth Circuit has rejected the claim that the cumulative effect of multiple charges may have led to his guilty verdict as to Christa Wilson's murder, and even the dissenting justices in Petitioner's appeal found the evidence sufficient to support Petitioner's conviction. (R. & R. 13 (citing *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005))). Petitioner's first objection is therefore overruled.

2. Maricle *Detention Hearing*

Petitioner next objects that the Magistrate Judge made an error of law by refusing to take judicial notice of a detention hearing transcript ("DHT") relating to a conspiracy he alleges occurred involving the judge who

granted joinder of his trials. (Pet'r's Obj. 6-10).[2] The Court has reviewed the statements in the DHT cited by Petitioner, but does not agree that an evidentiary hearing is necessary under 28 U.S.C. § 2254(e)(2). Tr. Detention Hr'g, *United States v. Maricle*, No. 6:09-CR-00016-KKC-REW-1, DN 170. Even given the statements made and assuming the truth of the conclusions Petitioner has drawn, the Magistrate Judge made a full merits analysis of the interrelated constitutional questions Petitioner raised regarding joinder and severance, and found no objectively unreasonable application of clearly established federal law. (R. & R. 7-14). Petitioner's assertions regarding the alleged corruption of Judge Maricle—who ordered joinder of Petitioner's cases, but was replaced by the time Petitioner's motions for severance were considered—do not impact the validity of that analysis.

3. *Limited Certificate of Appealability*

Petitioner further objects that the Magistrate Judge recommended that only a *limited* certificate of appealability issue. (Pet'r's Obj. 10-12). He argues that his earlier argument as to *Simmons* and *Lane* mandates a broader certificate of appealability which encompasses:

1. Whether the Supreme Court decision is contrary to *Simmons* regarding Collins' being forced to make a Hobson's Choice between his Fifth and Sixth Amendment

[2] Petitioner failed to include such a transcript in the record before the Court. Petitioner stated that he "cannot attach a complete copy … of the DHT in *U.S. v. Miracle* [sic], [but] he cordially invites this Court, as he did the Sixth Circuit to read the entire DHT … ." (Pet'r's Reply Resp't's Answer 35, DN 31). The reason for his failure to attach the transcript is unclear.

rights by the improper joinder of the two cases.

2. Whether the Supreme Court decision is owed any deference in light of the fact that it stands in contrary to the clearly established law of *Kernan*/*Glebe* regarding the impermissible use of circuit court precedent.

3. Whether the Supreme Court decision is owed any deference in light of Collins' presentation of [detention hearing transcript] facts from *U.S. v. Miracle* [sic] pursuant to his demand under FRE 201 for those facts to be judicially noticed.

4. Whether in light of the presentation of the facts from the [detention hearing transcript] was Collins entitled to an evidentiary hearing under *Schiro*/*Paprocki*.

(Pet'r's Obj. 12).

As explained above, each of Petitioner's contentions is unpersuasive, and does not meet the threshold required for a certificate of appealability to issue. *Slack*, 529 U.S. at 484. Petitioner's objection is therefore overruled.

4. *Saylor Testimony*

Petitioner again objects to the R. & R.'s use of circuit court precedent, this time as the basis for a merits ruling as to the admission of the Saylor testimony on cross-examination by Petitioner's counsel regarding her assault. (Pet'r's Obj. 13-18). He argues that the Kentucky Supreme Court's decision and R. & R. made light of Saylor's testimony by "dismissing it without consideration of the prejudicial impact it likely had up-

on the jury as a whole, despite *Chapman* requiring a determination … 'whether the error was harmless beyond a reasonable doubt,'" which he contends was not conducted. (Pet'r's Obj. 16 (citing *Chapman v. California*, 386 U.S. 18, 24 (1962))).

Petitioner's argument is unsound, as the alternative to not applying circuit court precedent in this case would be that there is no clearly established federal law under which Petitioner could bring a habeas claim. The R. & R.'s use of Sixth Circuit precedent, including *Zuern v. Tate*, 336 F.3d 478, 485 (6th Cir. 2003), and *United States v. Forrest*, 17 F.3d 916, 921 (6th Cir. 1994), represented a generous interpretation of Petitioner's claim. The Court agrees with the Magistrate Judge's analysis under *Zuern* and *Forest* that Saylor's testimony was unsolicited and took place on defense's cross-examination, that defense counsel declined a limiting instruction, that Petitioner has not presented any evidence of bath faith by the prosecution, and that the testimony was only a small portion of the evidence against Petitioner. (R. & R. 15-16). Petitioner's objection is therefore overruled.

5. *April Collins' Testimony*

Petitioner next objects to "any mischaracterization" on page 18 of the R. & R. that April Collins' "testimony was to explain only her initial denials that she had been a witness to the murder." (Pet'r's Obj. 18-19). He argues that her testimony was "directly calculated" to give "'circumstantial support' to the Commonwealth's theory that [Petitioner] had killed Wilson to silence her about the murder," and should have been reviewed under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Chapman* as the applicable clearly established law. (Pet'r's Obj. 19).

In fact, the R. & R. did utilize *Crawford* to analyze this issue, and *Chapman*'s "harmless beyond a reasonable doubt" language is inapplicable, as explained above. (R. & R. 17). Again, the Magistrate Judge's use of Sixth Circuit precedent was undertaken to liberally construe Petitioner's claim, and operated to allow an analysis on the merits rather than foreclosing the claim entirely under AEDPA. The Court agrees with the analysis in the R. & R. under *Anthony v. Dewitt*, 295 F.3d 554, 563 (6th Cir. 2002), that April Collins' testimony was properly admitted and was not an unreasonable application of clearly established federal law. (R. & R. 17-19). Petitioner's objection is thus overruled.

6. *Withdrawal of Ground Four*

Petitioner objects that the R. & R. improperly undertook a merits analysis of Ground Four, given that he withdrew the claim in an earlier filing. (Pet'r's Obj. 19-20; Pet'r's Reply 52, DN 31). He argues that this "clearly demonstrates that the Magistrate did not even look at Collins' Reply … but elected instead to cut and paste the portion from the Supreme Court decision and add his own inconsequential remarks." (Pet'r's Obj. 19-20). Petitioner asks on this basis that the entire R. & R. be rejected, because the Magistrate Judge "clearly failed to give due consideration to Collins' Reply … ." (Pet'r's Obj. 20).

Notwithstanding that the Magistrate Judge liberally construed all of Petitioner's claims to ensure an analysis on the merits of all grounds, the Court also notes that the Magistrate Judge did not elect to strike Petitioner's 69-page reply and order a reply within the limits to be refiled. LR 7.1 ("Replies may not exceed 15 pages without leave of Court."). Although the R. & R.'s analysis of Ground Four was superfluous in light of Pe-

titioner's withdrawal of that claim in his Reply, the Court finds this to have been a mere oversight which does require the remainder of the R. & R. be rejected. The Court acknowledges Petitioner's withdrawal of his fourth ground in his Petition, but otherwise overrules his objection.

7. Crawford *and* Strickland

Petitioner next objects that the fifth and sixth grounds from his Petition were improperly considered under *Griffin v. California*, 380 U.S. 609 (1965), rather than *Crawford*, and argues that because the Kentucky Court of Appeals never addressed his *Crawford* claim, the R. & R.'s conclusion that Petitioner failed to establish a *Strickland* violation is erroneous. (Pet'r's Obj. 20-29). Petitioner, however, acknowledged the applicability of *Griffin* in his Reply, and cannot alter his position at this stage. (Pet'r's Reply 55, 58); *See Murr*, 200 F.3d at 902 n.1. The Court agrees with the analysis conducted by the Magistrate Judge, and overrules Petitioner's objection.

8. *Certificate of Appealability as to Grounds Two, Three, Five, and Six*

Finally, Petitioner requests that a certificate of appealability issue as to his remaining grounds. (Pet'r's Obj. 29-30). The Court, however, agrees with the Magistrate Judge that Petitioner has failed to demonstrate debatable or incorrect conclusions on the merits of Petitioner's claims apart from the limited question in Ground One discussed above. The Court thus overrules Petitioner's objection and denies a certificate of appealability as to Grounds Two, Three, Five, and Six of the Petition.

V. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** as follows:

1. Respondent's Objection to the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation (DN 34) is **OVERRULED**;

2. Petitioner's Objection to the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation (DN 37) is **OVERRULED**;

2. The Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation (DN 33) are **ADOPTED** to the extent not inconsistent with this opinion;

3. Petitioner's Petition for Habeas Relief (DN 1) is **DISMISSED**;

4. The issuance of a limited certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is **GRANTED** as to Petitioner's first ground, to allow Petitioner to appeal the issue of whether the trial court's refusal to sever the two charged offenses had a "substantial and injurious effect or influence in determining the jury's verdict" under *Lane*, 474 U.S. at 449. A certificate of appealability is **DENIED** as to Petitioner's remaining arguments.

[Seal/electronic signature]
Greg N. Stivers, Judge
United States District Court
March 22, 2018

cc: counsel of record
John Wayne Collins, *pro se*

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

JOHN WAYNE COLLINS,
Petitioner,

v.

RANDY WHITE, Warden,
Respondent.

CIVIL ACTION NO. 1:15-CV-00026-GNS
Filed November 14, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

This matter is before the Court on the *pro se* petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by John Wayne Collins ("Petitioner") (DN 1). The Respondent, Warden Randy White, filed a response (DN 26). Petitioner replied (DN 31). The District Judge referred this case to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(l)(A) and (B) for rulings on all non-dispositive motions, for appropriate hearings, if necessary, and for findings of fact and recommendation on any dispositive matters (DN 24). Collins' petition is now ripe for recommendation. For the reasons set forth below, it is recommended that the petition be denied.

FINDINGS OF FACT

The Kentucky Supreme Court summarized the events leading to Petitioner's conviction and ultimately to this petition as follows:

> On October 10, 2004, Appellant and his girlfriend, Christa Wilson, were visiting Appellant's father, Harold Wayne Collins, and then-stepmother, April Sizemore Collins. Another friend, Natasha Saylor, was also present. Everyone was on the porch of the home, visiting and drinking, when Stevie Collins pulled into the driveway, exited his vehicle and approached the porch. Stevie Collins extended an invitation for them to accompany him to church, and Appellant's father invited Stevie into the house. Appellant's father then shot Stevie in the face, whereupon Stevie fell to the floor and began pleading for his life. Appellant told his father that they could not let Stevie leave there. Appellant's father agreed and instructed Appellant to finish the job. Appellant retrieved his own gun and shot Stevie seven or eight times more, killing Stevie. A possible explanation for Stevie Collins's murder was revealed at trial when witnesses, including Appellant's uncle, Joe B. Collins, testified that his brother, Appellant's developmentally disabled uncle, had been murdered and dismembered in 1997, and that it was believed that Stevie Collins was responsible for the uncle's murder. After the shooting, the group left in three different vehicles and met up again at a relative's house in Henry County, where they continued to drink and sleep.

Meanwhile, police were dispatched to the murder scene. Kentucky State Police Sergeant, John Yates, one of the investigating officers, testified that one 9mm round was discovered on the front porch and eight SKS rounds were found in the yard on either side of the porch. Later, when Appellant's father was arrested, a 9mm handgun was retrieved from his vehicle. Ammunition fitting the description of the ammunition retrieved from Stevie Collins's body was found in Appellant's vehicle. However, lab results on the weapons were inconclusive.

Although Appellant's girlfriend, Christa Wilson, Appellant's stepmother, April Sizemore Collins, and Natasha Saylor all repeatedly denied any knowledge of Stevie Collins's murder during the initial police investigation, both Natasha and April testified at trial to a substantially similar version of events, consistent with the factual summary set out hereinabove. Both also testified that they initially lied to the police because they had been threatened not to speak of Stevie Collins's shooting. April had been threatened by her then-husband, Appellant's father, while Natasha had been threatened by both Appellant and his father.

Forty days after Stevie Collins was murdered, the body of Christa Wilson was found face down in a creek. She died from a gunshot wound to the head. Christa had last been seen with Appellant. Paint that was discovered on a rock near Christa's body appeared to have been the result of a vehicle scraping the rock, and Appellant's vehicle appeared to have been damaged in the rear bumper area. A sample of

the paint was compared with a paint sample taken from Appellant's vehicle, the one he was driving when Christa was last seen with him. At trial, a forensic science specialist for the Kentucky State Police (KSP) and a defense expert witness testified concerning the results. The KSP specialist testified that the paint layer from the rock sample was identical to the paint layer from Appellant's vehicle in all areas, i.e., color, type, structure, texture, and elemental composition. The defense expert testified that the substrata of the paint samples differed in thickness and that the bottom layer did not match. For this reason, the defense expert disagreed that the paint samples were identical, but he did admit that the paint samples were extremely similar. Further, the defense expert explained that paint layer thickness varies across each vehicle and, in fact, two samples taken from Appellant's vehicle varied in thickness. He also testified that the difference in substrates could be the result of previous repairs made to the vehicle.

Ultimately, Appellant was tried and convicted for both the murder of Stevie Collins and the murder of Christa Wilson. Appellant had, initially, been indicted for Stevie Collins's murder. While Appellant was awaiting trial on that charge, he was indicted for the kidnapping and murder of Christa Wilson. As a jury was being selected for the Stevie Collins's murder, the Commonwealth moved to consolidate the two cases. Over Appellant's objection, the trial court granted consolidation, but gave Appellant a continuance. The Commonwealth filed a

> notice of intent to seek the death penalty based upon intentional killing and multiple deaths. Subsequently, Appellant moved to sever the offenses, arguing that his option to testify at trial was compromised by joinder given his conflicting theories of defense. The trial court denied the motion, concluding that evidence in each case would presumably be admissible in the other. As stated above, when an impartial jury could not be seated in Clay County, the case was transferred to the Warren Circuit Court. Appellant renewed his motion to sever after transfer, but the Warren Circuit Court also concluded that joinder was appropriate, and denied the motion to sever.

Collins v. Commonwealth, No. 2008-SC-000107-MR, 2010 WL 2471839, *1-*2 (Ky. Nov. 18, 2010).[1]

The trial court entered judgment and sentence on Collins' plea of not guilty, sentencing him to life without parole for a minimum of twenty-five years on each of the two counts (DN 26-3 at PageID # 250-53). Collins appealed to the Kentucky Supreme Court as a matter of right. *Collins*, 2010 WL 2471839, at *l. On appeal, Collins raised four issues: the trial court denied Petitioner due process through the prejudicial joinder of offenses (DN 2604 at PageID # 255); the trial court denied Petitioner due process when the trial judge failed to declare a mistrial following a statement by witness Natasha Saylor that she had previously been assaulted (DN 26-4 at PageID # 257); the trial court committed reversible error by allowing into evidence certain hear-

[1] These facts receive a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

say statements by Harold Wayne Collins Sr. (DN 26-4 at PageID # 258); and the trial court denied Petitioner due process when Stevie Collins' wife, Donna Collins, was allowed to stay in the courtroom as a victim's advocate during the trial despite Petitioner's objections (*Id.*). The Kentucky Supreme Court denied all of these claims and upheld Petitioner's sentences by a four-to-three margin. *Collins*, 2010 WL 2471839, at *7.

Collins next attacked his conviction collaterally through a Kentucky RCr 11.42 motion, which the trial court denied (DN 26-5 at PageID # 482-85). The Kentucky Court of Appeals affirmed the trial court. *Collins v. Commonwealth*, No. 2011-CA-002105-MR, 2013 WL 2257673 (Ky. Ct. App. May 24, 2013) (as modified July 26, 2013). The Supreme Court of Kentucky denied discretionary review on December 11, 2013 (DN 26-6 at PageID # 625).

Now, Petitioner has presented six claims alleging constitutional violations. First, Petitioner alleges violations of his Fifth, Sixth, and Fourteenth Amendment rights where the trial court refused to sever the two murder counts (DN 1 at PageID # 5). Second, Petitioner argues his Fourteenth Amendment rights were violated where the trial court refused to grant a mistrial following Commonwealth witness Natasha Saylor's testimony that she had been previously assaulted (DN 1 at PageID # 6). Petitioner argues the Commonwealth improperly used this to bolster its theory that Petitioner killed Christa Wilson to silence her regarding the murder of Stevie Collins (DN 1 at PageID # 6). Third, Petitioner argues his Fourteenth Amendment rights were violated when the trial court allowed the introduction of the hearsay statements of Harold Collins, through April Collins, that Harold and Petitioner were working in concert to ensure the silence of the witnesses of Ste-

vie Collins' murder (DN 1 at PageID # 6). Fourth, Petitioner argues his Fourteenth Amendment rights were violated where the trial court refused to sequester a witness before she testified (DN 1 at PageID # 7). Fifth, Petitioner argues his Sixth and Fourteenth Amendment rights were violated when trial counsel failed to object during the prosecution's opening statement when the Commonwealth mentioned that Harold Collins had invoked his right to remain silent and requested an attorney (DN 1 at PageID # 7). And finally, Petitioner argues his Sixth and Fourteenth Amendment rights were violated when trial counsel failed to object to the prosecution's questioning of Detective Yates regarding Harold Collins' decision to stay silent (DN 1 at PageID # 9).

DISCUSSION

A. Standard of Review

Because Collins filed his petition for writ of habeas corpus on February 27, 2015, review of the State court decisions is governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, as to each asserted claim, the Court must first determine whether a federal Constitutional right has been violated. *Williams v. Taylor*, 529 U.S. 362, 367 (2000). If the answer is in the affirmative, and the State court adjudicated the federal Constitutional claim on its merits, then this Court must employ the standard of review set forth in 28 U.S.C. § 2254(d) to determine whether to grant the petition. *Williams*, 529 U.S. at 367, 402-403, 412-13. As amended, by Chapter 153 of AEDPA, § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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 facts in light of the evidence presented in the State court proceeding.

The phrase "contrary to" means "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (quoting Webster's Third New International Dictionary 495 (1976)). Thus, under the "contrary to" clause of§ 2254(d)(l), the Court may grant the petition if (a) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; **or** (b) the state court decides a case differently than the Supreme Court "has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-413.

Under the "unreasonable application" clause of § 2254(d)(l), the Court may grant the petition if the State court identifies the correct governing legal rule from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 407-08, 413. When the Court makes the "unreasonable application" inquiry it "should ask whether the state court's application of clearly established federal

law was objectively unreasonable." *Id.* at 409. Thus, the State court's application of clearly established federal law must be more than simply erroneous or incorrect, it must be objectively unreasonable. *Id.* at 409-11; *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002).

B. Ground One

Petitioner challenges the Kentucky Supreme Court's holding that the trial court did not abuse its discretion when it refused to sever the two murder charges. In the interest of developing a convenient record for review, the undersigned will begin by quoting the portion of the Kentucky Supreme Court's opinion dealing with this claim.

> Throughout these proceedings, Appellant has argued a particular manner in which he was prejudiced by joinder of the charges; namely, that his right to testify in his own defense was compromised. While Appellant wished to testify in support of his claim of justification for Stevie Collins's murder, he wanted to invoke his privilege not to testify in Christa Wilson's murder. This issue has not been much addressed in our cases. The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant's Fifth Amendment right not to testify at all, "the case law is less protective of a defendant's right to testify selectively." *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004). A defendant who argues for severance on the basis of selective testimony "must make a 'persuasive and detailed showing regarding the testimony he would give on the one count he wishes severed and the

reason he cannot testify on the other counts.'" *United States v. McCarther*, 596 F.3d 438, 443 (8th Cir. 2010) (quoting *United States v. Possick*, 849 F.2d 332, 338 (8th Cir. 1988)). The United States Circuit Court for the Sixth Circuit has held that severance is not required unless the defendant '"makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other."' *United States v. Bowker*, 372 F.3d 365, 385 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1182, 125 S.Ct. 1420, 161 L.Ed.2d 181 (2005) (quoting *United States v. Martin*, 18 F.3d 1515, 1518-19 (10th Cir. 1994)). Otherwise, "severance would be available to a defendant virtually on demand." Fenton, 367 F.3d at 23.

This Court reached a similar conclusion in *Owens v. Commonwealth*, 572 S.W.2d 415,416 (Ky. 1977):

> [Defendant] argues that he was confounded in his defense for the reason he wished to testify as to one charge, but not the others. … This argument in the absence of other compelling factors ordinarily is not sufficient to warrant a severance. Otherwise, it would have the effect of nullifying the provisions of RCr 9 .12, consolidation of offenses for trial.

Here, Appellant has not made a persuasive and detailed showing of "compelling factors" that would justify his selective testimony. He has not shown that his testimony regarding Stevie

Collins's murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim's alleged involvement in the murder of Appellant's uncle. And he has made no showing of a strong need to refrain from testifying with respect to Christa's murder. *See, e.g., Bowker*, *supra*, and *McCarther*, *supra.* The trial court did not abuse its discretion, therefore, by denying Appellant's severance motion on the ground of selective testimony.

Nor was severance required on the ground that the two murders were not sufficiently related. A primary test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense. *Roark v. Commonwealth*, *supra.* As noted, a trial court's decision to join offenses related in this way will not be disturbed absent an abuse of discretion. *Debruler v. Commonwealth*, *supra; Roark*, *supra.* We agree with the Commonwealth that there was no abuse of discretion here, because the two murders were based on "transactions connected together." RCr 6.18.1 Clearly, evidence of Stevie Collins's murder would have been admissible in a separate trial of Christa Wilson's murder, since the alleged motive for the second murder was Appellant's desire to cover up the first murder by eliminating one who had witnessed it. KRE 404(b) (evidence of other bad acts is admissible to prove motive.); *Tucker v. Commonwealth*, 916 S.W.2d 181 (Ky. 1996) (evidence that defendant had shot a witness of a prior crime was

> admissible to show that charged shooting was similarly motivated.). Similarly, evidence of Christa's murder would have been admissible in a separate trial of Stevie Collins's murder, since evidence that one has attempted to cover up a crime is circumstantial proof of one's consciousness of guilt regarding that crime. KRE 404(b) (evidence of other bad acts is admissible to prove intent.); *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005) (evidence that defendant beat a potential witness was admissible as proof of consciousness of guilt.); *Foley v. Commonwealth*, 942 S.W.2d 876, 887 (Ky. 1996) ("Any attempt to suppress a witness' testimony … is evidence tending to show [a consciousness of] guilt."). The trial court did not abuse its discretion, therefore, by deeming the two murders sufficiently related to be tried together.

Collins, 2010 WL 2471839 at *3-4.

The issue now is whether this holding represents an objectively unreasonable application of clearly established federal law. Answering this question requires the undersigned to identify the relevant standard and assess the extent (or not) to which the Kentucky Supreme Court's holding comports with that standard.

Petitioner's claim has two potential constitutional implications. The first is the possibility that failure to sever the charges deprived Petitioner of his right to testify or remain silent on his own behalf. *See United States v. Bowker*, 372 F.3d 265, 383-84 (6th Cir. 2004). The second is the possibility that joinder of the two charges created prejudice so substantial as to deny Pe-

titioner a fair trial under the Fifth Amendment. *See United States v. Lane*, 474 U.S. 438, 449 (1986). The undersigned will address each issue in turn.

As for a defendant's need to testify selectively, the Kentucky Supreme Court identified the proper standard on Collins' direct appeal. Defendants are entitled to severance of charges where they can convincingly demonstrate they have both important testimony to off er on one count and a strong need to refrain from testifying on the other count. *Collins*, 2010 WL 2471839 at *3 (citing *Bowker*, 372 F.3d at 385. Nor was the court's application objectively unreasonable. Even in his present motion, Petitioner has failed to offer evidence of critical testimony that he was unable to present with respect to his justification defense in the Stevie Collins murder. Petitioner does not refute the Kentucky Supreme Court's finding that other witnesses testified as to the defense theory that Petitioner's actions may have been justified because Stevie Collins may have murdered Petitioner's developmentally disabled uncle some years before. The undersigned therefore concludes that, while Petitioner has satisfactorily demonstrated his need to stay silent with respect to the Christa Wilson murder, he has failed to demonstrate a strong need to testify on his own behalf with respect to the Collins murder. Therefore, the Kentucky Supreme Court's analysis was not an unreasonable application of clearly established federal law, and it is recommended that this portion of Ground One be denied.

The undersigned will next address prejudice. The U.S. Supreme Court has held that misjoinder of offenses can cause prejudice amounting to a violation of a defendant's right to a fair trial under the Fifth Amendment. *Lane*, 474 U.S. at 449. But the Court also recognized that joinder of offenses serves to "'conserve state

funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."' *Id.* (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968). The Court concluded that improper joinder should be subject to a harmless error analysis, and an error in joinder only affects a defendant's substantive rights requiring reversal where misjoinder resulted in a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (internal quotations and citations omitted).

Returning to the Kentucky Supreme Court's analysis of prejudice against Petitioner, the undersigned notes that the court did not cite to *Lane* in its opinion, but failure to cite specific Supreme Court precedent does not itself render an opinion contrary to or an unreasonable application of clearly established federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002). A decision may well comport with clearly established law while demonstrating no awareness of the relevant federal standard, so long as neither the state court's reasoning nor its result contradicts federal law. *Id.* Therefore, this Court must compare the Kentucky Supreme Court's reasoning to the standard from *Lane*, articulated above.

The Kentucky Supreme Court acknowledged the potential for undue prejudice where it wrote "[a] primary test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense." *Collins*, 2010 WL 2471839, at *4. This statement is in keeping with the majority's rationale in *Lane*. There, the Court found the misjoinder of offenses to be harmless error, and one justification was that evidence from the first offense would likely be admissible in the second trial "to show

[the defendant's] intent under Federal Rule of Evidence 404(b)." *Lane*, 474 U.S. at 450. Thus, the Kentucky Supreme Court operated under the proper standard.[2]

The majority's application of the standard, however, raises serious constitutional questions. As previously mentioned, this opinion split the court four-three, and the joinder issue is the dissent's sole focus. Writing for the dissent, Justice Venters notes that he is convinced that enough circumstantial evidence exists for a jury to find that Collins killed Christa Wilson. *Collins*, 2010 WL 2471839 at *8 (Venters, J., dissenting). However, the dissent further points out that the majority opinion concludes that the two crimes bear an evidentiary connection, but in so doing, the majority elides a crucial fact—the only support for this conclusion is the prosecution's subjective theory. *Id.* "The Commonwealth's theory is a mere possible explanation with no evidentiary link that connects together the two murders. The murder of a young woman at the hands of her boyfriend is, unfortunately, an all too common occurrence and the proof that Appellant did it is hardly dependant *[sic]* upon the motivation theorized by the Commonwealth." *Id.* The dissent concludes that the logical extension of such reasoning would result in the propriety of joinder hinging solely on whatever theory the prosecution might cobble together before trial to connect multiple offenses, and in this instance, Collins was deprived a fair trial as a result. *Id.* at *8-9.

The dissent's argument is well-taken, and a review of the record reveals how illusory the evidence was that

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[2] Indeed, even the three dissenting justices acknowledged that the majority opinion had correctly presented the relevant standard. *Collins*, at *8.

the trial court relied on and the Kentucky Supreme Court upheld in denying Petitioner's motion to sever. In its brief to the Kentucky Supreme Court, the Commonwealth described the severance hearing as follows:

> The Commonwealth filed a motion to consolidate these two indictments on January 19, 2006, stating that the offenses in both indictments were the same in character and based upon the same acts, constituting a common scheme or plan. The Commonwealth also stated that they believed that Christa Gail Wilson had been murdered because she was a witness to the murder of Steve Collins, and that her murder had been committed in an attempt to cover up Steve Collins' murder. The trial court ordered these two indictments to be consolidated for trial on February 28, 2006, stating that it believed that the offenses in both indictments "could have been joined in a single indictment" and that the charges involved in Christa Gail Wilson's murder were directly related to Steve Collins' murder.

(DN 26-4 at PageID # 307)

Something obvious is missing from the Commonwealth's statement. Proof. If the Commonwealth had supported its theory with testimony and proven it to any extent, then denial of the motion to sever would have been academic. What is more disturbing, the Commonwealth never sought to prove these allegations at trial, despite the fact that the only evidence linking Petitioner to the death of Christa Wilson was the paint scraping found on a rock near the victim's body that closely matched the paint from Petitioner's car and circumstantial evidence involving Petitioner's father

threatening witnesses of the Stevie Collins murder. Why, then, would the prosecution choose not to bolster its case against Petitioner in the second murder with evidence that Petitioner had threatened Christa Wilson and demanded her silence? What could explain the decision not to connect the two murders, allegedly part of a common scheme, after telling the judge before trial that Petitioner murdered Christa Wilson to silence her? The explanation for the omission may range from unintentional neglect to something more sinister, but the result is the same: a baseless joinder of charges that may have deprived Petitioner of a fair trial.

However, this Court is not reviewing the trial court for the correctness of its decision, but is instead concerned only with whether the failure to sever amounted to an unreasonable application of clearly established federal law. "In order to prevail on a motion for severance, a defendant must show compelling, specific, and actual prejudice from a court's refusal to grant the motion to sever." *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005). Here, as in *Saadey*, Petitioner has suggested that the cumulative effect of multiple charges may have led the jury to find him guilty of the second crime because multiple charges suggest a criminal disposition. *Id.* at 678-79. The Sixth Circuit rejected this reasoning, and the undersigned is bound by that holding. Granted, the evidence against Petitioner in the Christa Wilson murder was circumstantial, but as previously mentioned, even the dissenting justices in Petitioner's appeal believed the evidence was sufficient to support a conviction. *Collins*, at *8. Petitioner has failed to make the particularized showing of prejudice required to succeed on this claim. It is therefore recommended that this claim be denied.

When the Court rejects a claim on the merits, a Petitioner must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, while the undersigned is confident that Petitioner has failed to demonstrate the specific and particularized prejudice required under federal law, there is certainly room for disagreement. The fact that this case narrowly split the Kentucky Supreme Court provides further evidence that reasonable jurists can (and did) disagree on this issue. Therefore, it is recommended that a limited Certificate of Appealability issue as to Ground One. Specifically, Petitioner should be allowed to appeal on the issue of whether the trial court's refusal to sever the two charged offenses had a "substantial and injurious effect or influence in determining the jury's verdict." *See Lane*, 474 U.S. at 449.

C. Ground Two

As previously mentioned, Collins argues in Ground Two that he was denied due process when the trial judge refused to order a mistrial after witness Natasha Saylor testified that someone slit her throat (DN 1 at PageID # 6). Collins did not commit the assault, but he alleges that the trial judge had previously ruled that such evidence would be inadmissible, and Saylor's unsolicited testimony about the incident allowed the prosecution to support its theory that Collins had killed Christa Wilson to silence her. The Kentucky Supreme Court addressed the issue as follows:

> Prior to trial, Appellant filed a motion to exclude evidence of Natasha Saylor's assault. Four male relatives of Appellant had attacked Ms. Saylor and slashed her throat. Three of

her attackers were convicted and the fourth negotiated a plea. Although Appellant and his father were referenced throughout the assault trial, neither was charged for the offense. Accordingly, Appellant's motion sought to "exclude any mention of or evidence associated with the Natasha Saylor assault trial, as well as the mention of [the four individuals charged with the assault] and their respective convictions."

At a hearing on the motion, the prosecutor stated that he did not have a problem with the request "unless they [defense counsel] were to open a door through their cross-examination … we'll stay away from that, we don't have any problem with it." Defense counsel responded that she intended to probe Saylor's mental and physical state and that what she was asking the court to preclude was "her explaining how she got that way ... I mean I don't know that I can keep her from expressing her opinion as to why she thinks that happened." The Commonwealth responded that if defense counsel's questions resulted in mention of the assault and resulting injuries, he should be able to follow up by asking Saylor how she sustained those injuries. Recognizing that the primary concern was that defense counsel's question would open the door to the testimony and that the Commonwealth otherwise agreed to the exclusion of the evidence, the trial court denied the motion and cautioned defense counsel not to open the door to the very evidence she wished to exclude.

> As anticipated, Saylor referenced the assault at trial in response to one of defense counsel's questions. Specifically, defense counsel asked Saylor, "You indicated that you were scared for your life. Who were you afraid of?" Saylor responded, "To be honest, I was afraid of the whole family. That's why I never told anyone until my throat got cut." Defense counsel immediately moved for a mistrial. The Commonwealth responded that defense counsel's question opened the door, while defense counsel contended that Saylor's answer was not responsive to her question. The trial court denied the request for a mistrial and defense counsel declined an admonition, opining that it would just draw more attention to the testimony. The trial court did rule, however, that Saylor's brief reference to the assault did not open the door for the Commonwealth to pursue the matter. The matter was not mentioned again and it was never revealed that the assault had been committed by relatives of Appellant.
>
> Under these circumstances, we cannot agree with Appellant's contention that Saylor's comment was grounds for a mistrial. "A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Graves*, 285 S.W.3d 734, 737 (Ky. 2009) (quoting *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005)). The trial court did not abuse its discretion in refusing to declare a mistrial.

Collins, at *5.

The issue is whether this represents an objectively unreasonable application of clearly established federal law. When a petitioner asserts a general challenge to due process that does not involve a specifically defined right, this Court is only concerned with whether the challenged action was so prejudicial as to deprive the petitioner of a fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974). In the 2254 context, the Sixth Circuit has applied its own standard to decisions not to declare a mistrial after such comments. *See Zuern v. Tate*, 336,478,475 (6th Cir. 2005). When determining whether a particular witness's comment was prejudicial, courts should consider whether the comment "was unsolicited; the government's line of questioning reasonable; the limiting instruction immediate, clear, and forceful; no bad faith evidenced by the government; and the reference itself only a small part of the evidence against defendant." *United States v. Forest*, 17 F.3d 916, 921 (6th Cir. 1994) (citing *United States v. Hernandez*, 873 F.2d 925, 928 (6th Cir. 1989)).

Here, Saylor made the statement while being cross-examined by defense counsel. Thus, the prosecution did not solicit the statement. Again, because the statement came out on cross-examination, there is no need to inquire into the government's line of questioning. Next, defense counsel declined a limiting instruction. And, finally, Petitioner has made an assertion but provided no evidence that the prosecution used the fact that someone else slashed Saylor's throat to convince the jury that Petitioner killed Christa Wilson. Rather, the lion's share of the evidence leading to Petitioner's conviction for the murder of Christa Wilson rested on the circumstantial forensic evidence discussed above. Therefore, while the Kentucky Supreme Court did not, for obvious reasons, identify and apply the Sixth Cir-

cuit's standard in reviewing this issue, an application of the relevant federal law reveals that its holding is in no way an unreasonable application of clearly established federal law, and it is recommended this claim be denied.

D. Ground Three

As previously mentioned, Petitioner argues another Fourteenth Amendment violation in Ground Three where the trial court allowed the introduction of the hearsay statements of Harold Collins, through April Collins, that Harold and Petitioner were working in concert to ensure the silence of the witnesses of Stevie Collins' murder (DN 1 at PageID # 6). On review, the Kentucky Supreme Court examined the record and noted some critical differences in Petitioner's account.

> During direct examination, April Sizemore Collins referenced a message that Appellant's father, Harold Wayne Collins, had left on her cell phone voicemail. When she began to repeat the message, "They've already found one body," defense counsel objected on hearsay grounds. Although the trial court overruled the objection, the Commonwealth instructed April to refrain from repeating the contents of any threats and to merely answer whether she had been threatened. On cross-examination, however, defense counsel elicited the content of the voicemail. Specifically, defense counsel asked April, "Harold Wayne told you that they'd already found one body up on Hector, and asked you if you wanted to be next, didn't he?" April responded affirmatively and defense counsel continued, "And that's where Christa Gail Wilson's body was found wasn't it?" Again, April answered affirmatively.

> Under these circumstances, we must agree with the Commonwealth that defense counsel on cross-examination opened a door that had been willingly closed by the Commonwealth. Appellant may not argue error in admission of testimony that he intentionally elicited.

Collins, at *6.

The Confrontation Clause precludes the introduction of statements from unavailable declarants when those statements are offered to prove the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 53 (2004); *Berry v. Capello*, 576 F. App'x 579, 585 (6th Cir. 2014) (unpublished). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). Testimonial evidence is evidence given in support of facts at issue with the purpose of convicting the accused. *Id.* at 826. Evidence not offered for the truth of the matter asserted is not hearsay. *Anthony v. Dewitt*, 295 F.3d 554, 563 (6th Cir. 2002).

Anthony concerned a 2254 petitioner who had been convicted of aggravated murder. *Id.* at 557. Several months before the murder, the victim, Patricia Smith, had filed felony theft charges against Anthony's friend, Rommell Knox, after he stole a ring from her apartment when performing a routine pest extermination. *Id.* Knox, fearful of going to prison, drove to Smith's apartment with Knox's brother, John Knox, and Rommell's girlfriend, Mary Payne. *Id.* Rommell asked Payne to knock on Smith's door because he believed Smith would open the door for Payne, a white woman, but not for him, a black man. *Id.* at 558-59. Payne

agreed. Smith indeed opened the door, and Anthony shot and killed her. *Id.* at 559. Anthony grabbed Payne and said "Move, bitch." *Id.* Payne and Anthony returned to the car and fled the scene. *Id.* As the car drove off, Payne opened her door and vomited. *Id.* When Rommell saw Payne's reaction, he twisted Payne's arm and threatened to kill her if she told anyone what she'd seen that evening. *Id.*

At issue before the Sixth Circuit were two out of court statements: Rommell's alleged request that Payne knock on Smith's door, and Rommell's threat to kill Payne if she told anyone what she had witnessed. *Id.* It is the Court's treatment of the latter statement that settles Petitioner's claim. The Sixth Circuit held that Payne's testimony about Rommell's threat was not offered for the truth of the matter asserted, but rather as an explanation for Payne's failure to contact authorities following the murder. *Id.* at 563.

The same can be said in Petitioner's case. As the Kentucky Supreme Court noted, April Sizemore Collins, and other witnesses, initially denied having any knowledge of the events leading to Petitioner's conviction. *Collins*, at *1. Thus, April Sizemore Collins' testimony may have been admitted to explain her initial denials that she had witnessed the murder. Therefore, the admission of this testimony was not an unreasonable application of clearly established federal law, and it is recommended that this claim be denied.[3]

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[3] The undersigned also notes that, while not a constitutional issue, the Kentucky Supreme Court's refusal to allow Petitioner to challenge hearsay elicited by his own counsel is also in keeping with Sixth Circuit interpretation. *United States v. Goins*, 186 F. App'x 586, 589 (6th Cir. 2006) (unpublished) ("We will not allow

E. Ground Four

As previously mentioned, Petitioner argues in Ground Four that his Fourteenth Amendment rights were violated where the trial court did not sequester the victim's wife, Donna Collins, before she testified, which Petitioner asserts allowed her to shape her testimony in a manner that damaged Petitioner's justification defense (DN 1 at PageID # 7.

Again, the Kentucky Supreme Court addressed this issue on Petitioner's direct appeal and wrote as follows:

> Upon the request of a party, KRE 615 mandates that the trial court exclude witnesses from the courtroom except when they are testifying. However, the Rule does not authorize the exclusion of 1) a party; 2) "[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney;" or 3) "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause." KRE 615. Commonly, a lead detective or investigator is allowed to remain in the courtroomunder the second exception. *Justice v. Commonwealth*, 987 S.W.2d 306 (Ky. 1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999). In this case, two primary detectives remained in the courtroom without objection. The Commonwealth also requested that Stevie Collins's widow, Donna Collins, be allowed to remain in the courtroom as a "victim's representative."

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appellant to now criticize the district court for hearsay generated by his own counsel.").

Although Appellant initially objected, both parties expressed satisfaction when the trial court ruled that Donna Collins could remain in the courtroom only on the condition that the Commonwealth minimize her exposure to other witnesses' testimony by calling her promptly. Although the Commonwealth did not want to call the victim's widow as his first witness, he did agree that she would be his second or third witness. At this point, the record reveals that Appellant waived any objection to Donna Collins remaining in the courtroom.

Subsequently, however, the Commonwealth informed the court that because it did not want to subject Donna Collins to the stress of testifying, it had decided not to call her at all, but offered for the defense to go ahead and do so, in keeping with the previous agreement and ruling that she could remain in the courtroom so long as she testified promptly. Appellant declined to call her "outof-order," and instead renewed his objection to Donna Collins's remaining in the courtroom, reiterating that KRE 615 provided no exemption for a "victim's representative." While Appellant's counsel expressed a personal understanding of Donna Collins's desire to remain in the courtroom, she unequivocally objected on the record. Thus, the Commonwealth's contention that Appellant waived any objection is unsupported by the record.

This Court addressed a similar factual scenario in *Hatfield v. Commonwealth, supra,* wherein the victim's grandfather was permitted to remain in the courtroom even though he was a

witness for the Commonwealth and did not testify until the end of the Commonwealth's case-in-chief. The Court held that a "victim's representative" may fall within the third exception to KRE 615 in certain circumstances, but there must be a showing that the witness is "essential to the presentation of the party's cause." KRE 615(3). The Hatfield Court reasoned that failure to exclude the victim's grandfather from the courtroom was error because the required showing had not been made. Likewise, no such showing was made to justify Donna Collins's presence in the court. However, the Hatfield Court proceeded to deem the error harmless. In so doing, the Court distinguished *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003), the case upon which Appellant relies. Mills held that permitting a robbery witness to remain in the courtroom constituted reversible error. However, the witness in Mills was the sole witness to the robbery, rendering his credibility of critical importance. In contrast, the testimony of the victim's grandfather in Hatfield was largely duplicative and was not "of an indispensable nature to the outcome of the trial." Hatfield, 250 S.W.3d at 595. Because the circumstances here are more akin to those in Hatfield, Appellant's reliance on Mills is unpersuasive.

Donna Collins remained in the courtroom for the entire proceeding and was called as Appellant's first defense witness. She testified that her deceased husband did not carry guns regularly, that she had never heard that Appellant's father blamed Stevie for Appellant's uncle's murder, and that Stevie was right-handed.

> Before this Court, Appellant argues that allowing Donna Collins to remain in the courtroom enabled her to conform or adjust her testimony based on the testimony she had heard during the Commonwealth's case-in-chief. Most damning, he argues, was Donna Collins's testimony that Stevie was right-handed, given the prior testimony that gunshot residue was detected on Stevie's left hand. Nevertheless, we are persuaded that any error was harmless. Donna Collins did not witness the murder and her testimony was merely to offer background information on the victim. As the Commonwealth points out, it is highly unlikely that she would have testified differently had she not heard the other witnesses, particularly with regard to her testimony that the victim was right-handed.

Collins, at *6-7.

While the Sixth Circuit has not addressed the issue directly, there is a consensus among the district courts of this circuit that a trial court possesses broad authority in decisions relating to the sequestration of witnesses, and the decision to allow a witness in the courtroom does not implicate clearly established federal law and cannot form the basis of a claim for habeas relief. *See, e.g. Lemaster v. Ohio*, 119 F.Supp.2d 754, 776 (S.D. Ohio 2000); *Lester v. Phillips*, No. 08-13053, 2010 WL 2613082 (E.D. Mich. Jun. 28, 2010) (collecting cases). The undersigned agrees with this assessment and further notes that, to the extent the trial court should have excluded Donna Collins pursuant to KRE 615, the Kentucky Supreme Court correctly concluded that any error resulting from the decision to allow her in the courtroom was harmless. She was not a witness to the murder, and the information she provided was more

akin to general background than anything vital to conviction. It is therefore recommended that this claim be denied.

F. Grounds Five and Six

As previously mentioned, in Ground Five, Petitioner argues ineffective assistance of counsel violated his Sixth and Fourteenth Amendment rights where trial counsel failed to object during the prosecution's opening statement when the Commonwealth mentioned that Harold Collins had invoked his right to remain silent and requested an attorney (DN 1 at PageID # 7). Related, in Ground Six, Petitioner argues ineffective assistance of counsel where counsel failed to object to the prosecution's question posed to witness Detective Yates about the same incident, Harold Collins' decision to remain silent and request counsel.

Collins presented these arguments to the Kentucky Court of Appeals in his RCr 11.42 motion for collateral relief. The Court of Appeals discussed the testimony at issue as follows:

> At the beginning of trial, the Commonwealth made a twenty-minute opening statement in which it recounted for the jury the following:
>
> > [During their initial investigation,] police officers did not arrest Harold Collins or John Wayne Collins at that time for this murder. However, they began to ask questions and they immediately knew, because the detective had had the conversation with Harold Collins there and Harold Collins immediately asked for his lawyer ... and we immediately had reason to know these were

> the ones involved but no arrests were made ....

Later, during Detective Yates's testimony, the Commonwealth asked him what events occurred during his initial investigation of the murder. Detective Yates recalled, among other events, that he encountered Harold Collins at his home and briefly spoke to him. The following testimony ensued:

> Det. Yates: [Harold Collins] advised me that he had been out visiting and had returned to his residence and had seen the police and the ambulance and not knowing what was going on had pulled into his son's residence. … Later in the evening, Harold Collins came to his own residence ....
>
> Commonwealth: And in fact you-did he tell you that if you wanted to talk to him or his son any more you would have to talk to his lawyer first?
>
> Det. Yates: Yes, sir, that's what he advised me.

Collins v. Commonwealth, No. 2011-CA-002105-MR, 2013 WL 2257673, at *2 (Ky. Ct. App. May 24, 2013)

Next, in ruling that defense counsel's failure to object did not represent ineffective assistance of counsel, the Court of Appeals wrote:

> Appellant correctly states that trial courts may not permit punishment for the exercise of a constitutional right such as the exercise of the rights to silence and to an attorney. *See Griffin*

v. California, 380 U.S. 609, 613-14, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Mention of a defendant's invocation of these rights is forbidden, *Williams v. Commonwealth*, 287 Ky. 596, 154 S.W.2d 724 (1941), and violates a defendant's rights when it was "manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to [speak], or invited the jury to draw an adverse inference of guilt from that failure." *Ragland v. Commonwealth*, 191 S.W.3d 569, 589-90 (Ky. 2006) (citing to *Byrd v. Commonwealth*, 825 S.W.2d 272, 275 (Ky. 1992) (overruled on other grounds)). In looking first to the Commonwealth's mention of Harold Collins in its opening statement, we are required to view the statement in context, and "if there is another, equally plausible explanation for a statement, malice will not be presumed and the statement will not be construed as comment on the defendant's [invocation of his rights]." *Ragland*, 191 S.W.3d at 589-90.

Appellant cites to the [Kentucky] Supreme Court's very recent decision in *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013), to support his argument that "silence cannot be used to show that a defendant did not act in self-defense." While *Ordway* indeed stands for this proposition, *Ordway* is factually and legally distinguishable, and therefore inapplicable, to the present case. In *Ordway*, the Supreme Court reversed the defendant's conviction after a police detective was permitted to testify regarding the defendant's post-arrest, pre-Miranda invocation of silence and that it indi-

cated a motive other than self-defense. The Court found this testimony "highly prejudicial," not on grounds related to constitutionality, as Appellant seems to imply, but because the testimony was irrelevant. In fact, the Court ruled that because the defendant made his statement before he had been told of his right to silence, it was otherwise constitutionally admissible. Harold Collins was not in custody when he made his statement and his statement has not been challenged for its relevancy. Therefore, we derive little assistance from *Ordway* and elect as our guide the above-cited rule found in *Ragland.*

Taken in the context of the surrounding statements and the Commonwealth's opening statement as a whole, another "equally plausible explanation for the statement" emerges. The Commonwealth was describing to the jury the chronology of events surrounding Stevie Collins's death and the investigation that followed. The Commonwealth's mention of Harold Collins's brief encounter with Detective Yates was accurate and was not repeatedly or emphatically stated to the jury. Nothing in this brief and benign statement showed malice on the part of the Commonwealth and nothing in the statement invited the jury to infer Appellant's guilt from that statement. The Commonwealth was simply introducing the facts of the case to the jury and nothing more. For these reasons, the Commonwealth's mention of Harold Collins's statement during its opening statement was not malicious and was therefore not constitutionally forbidden.

> For this reason, it cannot be said that trial counsel's failure to object to use of Harold Collins's statement or her failure to seek exclusion of the statement through motions in limine was deficient. Furthermore, even if counsel's performance was somehow deficient, given the wealth of evidence provided at trial from other sources and not subject to such objections, such deficiency did not change the outcome of Appellant's trial. Appellant's claim for ineffective assistance of counsel based on the Commonwealth's mention of his father's statement to Detective Yates fails at least one crucial factor of the *Strickland* analysis, if not both. Therefore, we agree with the trial court that, not only is there an insufficient legal basis for Appellant's RCr 11.42 claims, but also that those claims are adequately refuted by the video record which demonstrates the Commonwealth's benign use of Harold Collins's statement.

Id. at *4-5.

The issue is whether this holding represents an unreasonable application of clearly established federal law. Again, the first step is ensuring that the Kentucky Court of Appeals identified the proper standard. The portion of the opinion quoted above references *Strickland*. Earlier in the opinion, the Court of Appeals set forth the standard by quoting directly from *Strickland*.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction … has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious

> that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at *3 (quoting *Strickland v. Washington*, 466 U.S. 668,687 (1984).

This is the precise standard, as set forth by the Supreme Court of the United States. Now the issue becomes whether the Court of Appeals unreasonably applied the standard. First, the Court of Appeals recognized that the prosecution may not use a criminal defendant's invocation of his right to remain silent as evidence of the defendant's guilt, but where the invocation of a right is mentioned in the presence of the jury, malice is not presumed where there is an equally plausible explanation. In doing so, the court recognized both the federal constitutional issue as well as the relevant state law. The Court of Appeals concluded that alternate explanations existed for the prosecution's comment, and the analysis suggests that counsel's decision not to object during the opening statement was tactical rather than deficient performance. The undersigned agrees. Moreover, the undersigned notes that it was not even Petitioner's invocation of the right to remain silent that the prosecution mentioned, but that of Harold Collins. Finally, the Court of Appeals reasonably concluded that Petitioner had not demonstrated that the comment prejudiced him. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, there was circumstantial evidence that provided

a sufficient basis for a jury to conclude beyond a reasonable doubt that Petitioner killed Christa Wilson. Therefore, Collins cannot demonstrate prejudice.

The Court of Appeals did not specifically reference the examination of Detective Yates beyond acknowledging Petitioner's ineffective assistance of counsel claim relating to counsel's failure to object to Yates' testimony. However, the undersigned concludes it is implicit in the court's analysis that the same standard and same conclusion apply. Moreover, the undersigned notes that, having concluded that there was no prejudice in the first instance, there could be no prejudice in the second instance because the jury had already learned the information from the prosecution's opening argument. Therefore, the undersigned recommends that Grounds Five and Six be denied.

G. Certificates of Appealability for Grounds Two Through Six

When the Court rejects a claim on the merits, a Petitioner must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As explained above, none of Petitioner grounds for relief, save Ground One, would cause disagreement among reasonable jurists. Therefore, it is recommended that Certificates of Appealability be denied as to Ground Two, Three, Four, Five, and Six.

RECOMMENDATION

Therefore, it is recommended that all of Petitioners claims be denied, that a Certificate of Appealability issue as to Ground One, and that no Certificate of Appealability issue as to the other claims.

[Seal/electronic signature]
H. Brent Brennenstuhl
United States Magistrate Judge
June 8, 2017

NOTICE

Therefore, under the provisions of 28 U.S.C. §§ 636(b)(l)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Am*, 728 F.2d 813 (6th Cir.), aff'd, 474 U.S. 140 (1984).

[Seal/electronic signature]
H. Brent Brennenstuhl
United States Magistrate Judge
June 8, 2017

Copies: John Wayne Collins, *pro se*
Counsel of Record

APPENDIX D

RENDERED: JUNE 17, 2010
NO TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
2008-SC-000107-MR

JOHN WAYNE COLLINS,
Appellant,

v.

COMMONWEALTH OF KENTUCKY,
Appellee.

[Filed July 10, 2017]
No. 1:15-cv-00026-GNS-HBB

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, SPECIAL JUDGE
NO. 2007-CR-00804

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Wayne Collins appeals as a matter of right from a judgment of the Warren Circuit Court convicting him of two counts of murder and imposing a sentence of life without the possibility of parole for a minimum of twenty-five years for each count. A kidnapping charge was dismissed by the trial court on Appellant's motion for directed verdict. The charges against Appellant alleged that he shot and killed Stevie Collins

and that, several days later, Appellant shot and killed Christa Wilson, who had been one of the witnesses to the murder of Stevie Collins. Although the crimes occurred in Clay County, the inability to seat an impartial jury there resulted in a transfer of the case to Warren Circuit Court.

On appeal, Appellant asserts 1) that he was prejudiced by joinder of the two murder charges; 2) that he should have been granted a mistrial after a witness improperly commented on a prior assault; 3) that the erroneous admission of hearsay statements attributed to Appellant's father constituted reversible error; and 4) that allowing the wife of one of the victims to remain in the courtroom as a "victim's representative" violated Appellant's due process rights. As Appellant's assertions of error do not merit relief, we affirm the trial court's judgment.

RELEVANT FACTS

On October 10, 2004, Appellant and his girlfriend, Christa Wilson, were visiting Appellant's father, Harold Wayne Collins, and then-stepmother, April Sizemore Collins. Another friend, Natasha Saylor, was also present. Everyone was on the porch of the home, visiting and drinking, when Stevie Collins pulled into the driveway, exited his vehicle and approached the porch. Stevie Collins extended an invitation for them to accompany him to church, and Appellant's father invited Stevie into the house. Appellant's father then shot Stevie in the face, whereupon Stevie fell to the floor and began pleading for his life. Appellant told his father that they could not let Stevie leave there. Appellant's father agreed and instructed Appellant to finish the job. Appellant retrieved his own gun and shot Stevie seven or eight times more, killing Stevie. A pos-

sible explanation for Stevie Collins's murder was revealed at trial when witnesses, including Appellant's uncle, Joe B. Collins, testified that his brother, Appellant's developmentally disabled uncle, had been murdered and dismembered in 1997, and that it was believed that Stevie Collins was responsible for the uncle's murder. After the shooting, the group left in three different vehicles and met up again at a relative's house in Henry County, where they continued to drink and sleep.

Meanwhile, police were dispatched to the murder scene. Kentucky State Police Sergeant, John Yates, one of the investigating officers, testified that one 9mm round was discovered on the front porch and eight SKS rounds were found in the yard on either side of the porch. Later, when Appellant's father was arrested, a 9mm handgun was retrieved from his vehicle. Ammunition fitting the description of the ammunition retrieved from Stevie Collins's body was found in Appellant's vehicle. However, lab results on the weapons were inconclusive.

Although Appellant's girlfriend, Christa Wilson, Appellant's stepmother, April Sizemore Collins, and Natasha Saylor all repeatedly denied any knowledge of Stevie Collins's murder during the initial police investigation, both Natasha and April testified at trial to a substantially similar version of events, consistent with the factual summary set out hereinabove. Both also testified that they initially lied to the police because they had been threatened not to speak of Stevie Collins's shooting. April had been threatened by her then-husband, Appellant's father, while Natasha had been threatened by both Appellant and his father.

Forty days after Stevie Collins was murdered, the body of Christa Wilson was found face down in a creek. She died from a gunshot wound to the head. Christa had last been seen with Appellant. Paint that was discovered on a rock near Christa's body appeared to have been the result of a vehicle scraping the rock, and Appellant's vehicle appeared to have been damaged in the rear bumper area. A sample of the paint was compared with a paint sample taken from Appellant's vehicle, the one he was driving when Christa was last seen with him. At trial, a forensic science specialist for the Kentucky State Police (KSP) and a defense expert witness testified concerning the results. The KSP specialist testified that the paint layer from the rock sample was identical to the paint layer from Appellant's vehicle in all areas, i.e., color, type, structure, texture, and elemental composition. The defense expert testified that the substrata of the paint samples differed in thickness and that the bottom layer did not match. For this reason, the defense expert disagreed that the paint samples were identical, but he did admit that the paint samples were extremely similar. Further, the defense expert explained that paint layer thickness varies across each vehicle and, in fact, two samples taken from Appellant's vehicle varied in thickness. He also testified that the difference in substrates could be the result of previous repairs made to the vehicle.

Ultimately, Appellant was tried and convicted for both the murder of Stevie Collins and the murder of Christa Wilson. Appellant had, initially, been indicted for Stevie Collins's murder. While Appellant was awaiting trial on that charge, he was indicted for the kidnapping and murder of Christa Wilson. As a jury was being selected for the Stevie Collins's murder, the Commonwealth moved to consolidate the two cases.

Over Appellant's objection, the trial court granted consolidation, but gave Appellant a continuance. The Commonwealth filed a notice of intent to seek the death penalty based upon intentional killing and multiple deaths. Subsequently, Appellant moved to sever the offenses, arguing that his option to testify at trial was compromised by joinder given his conflicting theories of defense. The trial court denied the motion, concluding that evidence in each case would presumably be admissible in the other. As stated above, when an impartial jury could not be seated in Clay County, the case was transferred to the Warren Circuit Court. Appellant renewed his motion to sever after transfer, but the Warren Circuit Court also concluded that joinder was appropriate, and denied the motion to sever.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion By Refusing to Sever the Two Murder Charges.

Appellant contends that the trial court committed reversible error by refusing to sever the two murder charges against him. This argument was properly preserved by Appellant's timely objection to consolidation of the charges and by his subsequent motions to sever. We review the denial of a motion to sever for abuse of discretion. *Debruler v. Commonwealth*, 231 S.W.3d 752 (Ky. 2007); *Roark v. Commonwealth*, 90 S.W.3d 24 (Ky. 2002), and we will not grant relief unless the refusal to sever prejudiced the defendant. *Parker v. Commonwealth*, 291 S.W.3d 647, 657 (Ky. 2009).

Kentucky Rule of Criminal Procedure RCr 9.12 permits two or more indictments to be consolidated for trial if joinder of the offenses in a single indictment would have been proper under RCr 6.18. That rule permits offenses to be joined where "the offenses are of

the same or similar character or are based on the same acts or transactions connected together or constituting part of a common scheme or plan." However, RCr 9 .16 requires a trial court to order separate trials "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses[.]" This Court has recognized that "'prejudice' is a relative term" and, in the context of a criminal proceeding, means only that which is unnecessary or unreasonably hurtful, given that having to stand trial is, itself, inherently prejudicial. *Ware v. Commonwealth,* 537 S.W.2d 174, 176 (Ky. 1976); *Romans v. Commonwealth,* 547 S .W.2d 128, 131 (Ky. 1977).

Throughout these proceedings, Appellant has argued a particular manner in which he was prejudiced by joinder of the charges; namely, that his right to testify in his own defense was compromised. While Appellant wished to testify in support of his claim of justification for Stevie Collins's murder, he wanted to invoke his privilege not to testify in Christa Wilson's murder. This issue has not been much addressed in our cases. The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant's Fifth Amendment right not to testify at all, "the case law is less protective of a defendant's right to testify selectively." *United States v. Fenton,* 367 F.3d 14, 22 (1 st Cir. 2004). A defendant who argues for severance on the basis of selective testimony "must make a 'persuasive and detailed showing regarding the testimony he would give on the one count he wishes severed and the reason he cannot testify on the other counts.'" *United States v. McCarther,* 596 F.3d 438, 443 (8th Cir. 2010) (quoting *United States v. Possick*, 849 F.2d 332, 338 (8th Cir. 1988)). The United States Circuit Court for the Sixth Circuit has held that

severance is not required unless the defendant "'makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.'" *United States v. Bowker*, 372 F.3d 365,385 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005) (quoting *United States v. Martin*, 18 F.3d 1515, 1518-19 (10th Cir. 1994)). Otherwise, "severance would be available to a defendant virtually on demand." *Fenton*, 367 F.3d at 23.

This Court reached a similar conclusion in *Owens v. Commonwealth*, 572 S.W.2d 415, 416 (Ky. 1977):

> [Defendant] argues that he was confounded in his defense for the reason he wished to testify as to one charge, but not the others … . This argument in the absence of other compelling factors ordinarily is not sufficient to warrant a severance. Otherwise, it would have the effect of nullifying the provisions of RCr 9.12, consolidation of offenses for trial.

Here, Appellant has not made a persuasive and detailed showing of "compelling factors" that would justify his selective testimony. He has not shown that his testimony regarding Stevie Collins's murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim's alleged involvement in the murder of Appellant's uncle. And he has made no showing of a strong need to refrain from testifying with respect to Christa's murder. *See, e.g., Bowker*, *supra*, and *McCarther*, *supra*. The trial court did not abuse its discretion, therefore, by denying Appellant's severance motion on the ground of selective testimony.

Nor was severance required on the ground that the two murders were not sufficiently related. A primary

test for determining whether undue prejudice will result from a joinder of offenses is whether evidence necessary to prove one offense would be admissible in a trial of the other offense. *Roark v. Commonwealth*, *supra*. As noted, a trial court's decision to join offenses related in this way will not be disturbed absent an abuse of discretion. *Debruler v. Commonwealth*, *supra; Roark*, *supra*. We agree with the Commonwealth that there was no abuse of discretion here, because the two murders were based on "transactions connected together." RCr 6.18.[1] Clearly, evidence of Stevie Col-

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[1] The dissent focuses on the fact that RCr 6.18 authorizes joinder of two offenses only if "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan," but says nothing about the propriety of joinder hinging on whether it would be prejudicial or not. The dissent's emphasis on RCr 6.18 misconceives our standard of review. If we reviewed severance rulings de novo, then we would indeed begin where the trial court begins and ask anew whether RCr 6.18's conditions had been met. In fact, however, "we may only reverse a trial court's joinder decision upon 'a showing of prejudice and clear abuse of discretion.'" *Parker v. Commonwealth*, 291 S.W.3d 64 7, 657 (Ky. 2009) (*quoting from Jackson v. Commonwealth*, 20 S.W.3d 906,908 (Ky. 2000)). This is why our severance cases almost uniformly begin and end with an analysis of prejudice and is likely why the case upon which the dissent relies, *Sebastian v. Commonwealth*, 623 S.W.2d 880 (Ky. 1981), has not been cited a single time in this context in the nearly thirty years since it was decided. Under our standard of review, a trial court's misapplication of RCr 6.18 that did not result in prejudice to the defendant would amount at most to a harmless error. Moreover, when considering the trial court's application of RCr 6.18, the question on review is not whether we think the joined offenses "are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan," but rather whether a reasonable person could have so concluded. The dissent thinks not, apparently, but in arriving at that conclusion it errs in asserting that the evidence before the trial court contained nothing to sug-

lins's murder would have been admissible in a separate trial of Christa Wilson's murder, since the alleged motive for the second murder was Appellant's desire to cover up the first murder by eliminating one who had witnessed it. KRE 404(b) (evidence of other bad acts is admissible to prove motive.); *Tucker v. Commonwealth.*, 916 S .W.2d 181 (Ky. 1996) (evidence that defendant had shot a witness of a prior crime was admissible to show that charged shooting was similarly motivated.). Similarly, evidence of Christa's murder would have been admissible in a separate trial of Stevie Collins's murder, since evidence that one has attempted to cover up a crime is circumstantial proof of one's consciousness of guilt regarding that crime. KRE 404(b) (evidence of other bad acts is admissible to prove intent.); *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005) (evidence that defendant beat a potential witness was admissible as proof of consciousness of guilt.); *Foley v. Commonwealth*, 942 S.W.2d 876, 887 (Ky. 1996) ("Any attempt to suppress a witness' testimony ... is

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gest that Appellant's motivation "was in any way connected to the murder of Steve Collins." On the contrary, in making its ruling the trial court had before it the Commonwealth's representations, which the defense did not dispute, that Christa Wilson and two other women witnessed Appellant murder Steve Collins, which fact alone connects the two crimes and permits a reasonable inference of motive. The court also heard that shortly prior to her death Wilson confided to a friend that Appellant had threatened her and warned her not to divulge what she knew and that she was afraid of him. Further, the court heard that after Wilson's murder, another of the women who witnessed Steve Collins's murder was brutally assaulted and left for dead by Appellant's close relatives. The Commonwealth's theory of Christa's murder, therefore, was hardly spun out of whole cloth, as the dissent suggests, and the trial court's conclusion that the two murders were transactions sufficiently "connected together" to satisfy RCr 6.18 was not arbitrary or unreasonable.

evidence tending to show [a consciousness of] guilt"").
The trial court did not abuse its discretion, therefore, by deeming the two murders sufficiently related to be tried together.

II. Natasha Saylor's Statement Concerning a Prior Assault Against Her Did Not Warrant a Mistrial.

Prior to trial, Appellant filed a motion to exclude evidence of Natasha Saylor's assault. Four male relatives of Appellant had attacked Ms. Saylor and slashed her throat. Three of her attackers were convicted and the fourth negotiated a plea. Although Appellant and his father were referenced throughout the assault trial, neither was charged for the offense. Accordingly, Appellant's motion sought to "exclude any mention of or evidence associated with the Natasha Saylor assault trial, as well as the mention of [the four individuals charged with the assault] and their respective convictions."[2]

At a hearing on the motion, the prosecutor stated that he did not have a problem with the request "unless they [defense counsel] were to open a door through their cross-examination ... we'll stay away from that, we don't have any problem with it." Defense counsel responded that she intended to probe Saylor's mental and physical state and that what she was asking the court to preclude was "her explaining how she got that way ... I mean I don't know that I can keep her from expressing her opinion as to why she thinks that happened." The Commonwealth responded that if defense

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[2] Although the parties repeatedly referred to the case as an "assault trial" even though the discussions were outside the hearing of the jury, the charges and resulting convictions consisted of attempted murder and intimidating a witness. *See Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008).

counsel's questions resulted in mention of the assault and resulting injuries, he should be able to follow up by asking Saylor how she sustained those injuries. Recognizing that the primary concern was that defense counsel's question would open the door to the testimony and that the Commonwealth otherwise agreed to the exclusion of the evidence, the trial court denied the motion and cautioned defense counsel not to open the door to the very evidence she wished to exclude.

As anticipated, Saylor referenced the assault at trial in response to one of defense counsel's questions. Specifically, defense counsel asked Saylor, "You indicated that you were scared for your life. Who were you afraid of?" Saylor responded, "To be ,honest, I was afraid of the whole family. That's why I never told anyone until my throat got cut." Defense counsel immediately moved for a mistrial. The Commonwealth responded that defense counsel's question opened the door, while defense counsel contended that Saylor's answer was not responsive to her question. The trial court denied the request for a mistrial and defense counsel declined an admonition, opining that it would just draw more attention to the testimony. The trial court did rule, however, that Saylor's brief reference to the assault did not open the door for the Commonwealth to pursue the matter. The matter was not mentioned again and it was never revealed that the assault had been committed by relatives of Appellant.

Under these circumstances, we cannot agree with Appellant's contention that Saylor's comment was grounds for a mistrial. "A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Graves*, 285 S.W.3d 734, 737 (Ky. 2009) *(quoting Bray v. Commonwealth*, 177

S.W.3d 741, 752 (Ky. 2005)). The trial court did not abuse its discretion in refusing to declare a mistrial.

III. The Admission of Hearsay Statements Attributed to Harold Wayne Collins Did Not Constitute Reversible Error

During direct examination, April Sizemore Collins referenced a message that Appellant's father, Harold Wayne Collins, had left on her cell phone voicemail. When she began to repeat the message, "They've already found one body," defense counsel objected on hearsay grounds. Although the trial court overruled the objection, the Commonwealth instructed April to refrain from repeating the contents of any threats and to merely answer whether she had been threatened. On cross-examination, however, defense counsel elicited the content of the voicemail. Specifically, defense counsel asked April, "Harold Wayne told you that they'd already found one body up on Hector, and asked you if you wanted to be next, didn't he?" April responded affirmatively and defense counsel continued, "And that's where Christa Gail Wilson's body was found wasn't it?" Again, April answered affirmatively.

Under these circumstances, we must agree with the Commonwealth that defense counsel on cross-examination opened a door that had been willingly closed by the Commonwealth. Appellant may not argue error in admission of testimony that he intentionally elicited.

IV. Allowing the Victim's Wife to Remain in the Courtroom Did Not Constitute Reversible Error.

Upon the request of a party, KRE 615 mandates that the trial court exclude witnesses from the courtroom except when they are testifying. However, the

Rule does not authorize the exclusion of 1) a party; 2) "[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney;" or 3) "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause." KRE 615. Commonly, a lead detective or investigator is allowed to remain in the courtroom under the second exception. *Justice v. Commonwealth*, 987 S.W.2d 306 (Ky.1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999). In this case, two primary detectives remained in the courtroom without objection. The Commonwealth also requested that Stevie Collins's widow, Donna Collins, be allowed to remain in the courtroom as a "victim's representative." Although Appellant initially objected, both parties expressed satisfaction when the trial court ruled that Donna Collins could remain in the courtroom only on the condition that the Commonwealth minimize her exposure to other witnesses' testimony by calling her promptly. Although the Commonwealth did not want to call the victim's widow as his first witness, he did agree that she would be his second or third witness. At this point, the record reveals that Appellant waived any objection to Donna Collins remaining in the courtroom.

Subsequently, however, the Commonwealth informed the court that because it did not want to subject Donna Collins to the stress of testifying, it had decided not to call her at all, but offered for the defense to go ahead and do so, in keeping with the previous agreement and ruling that she could remain in the courtroom so long as she testified promptly. Appellant declined to call her "out-of-order," and instead renewed his objection to Donna Collins's remaining in the courtroom, reiterating that KRE 615 provided no exemption for a "victim's representative." While Appellant's counsel

expressed a personal understanding of Donna Collins's desire to remain in the courtroom, she unequivocally objected on the record. Thus, the Commonwealth's contention that Appellant waived any objection is unsupported by the record.

This Court addressed a similar factual scenario in *Hatfield v. Commonwealth*, *supra*, wherein the victim's grandfather was permitted to remain in the courtroom even though he was a witness for the Commonwealth and did not testify until the end of the Commonwealth's case-in-chief. The Court held that a "victim's representative" may fall within the third exception to KRE 615 in certain circumstances, but there must be a showing that the witness is "essential to the presentation of the party's cause." KRE 615(3). The *Hatfield* Court reasoned that failure to exclude the victim's grandfather from the courtroom was error because the required showing had not been made. Likewise, no such showing was made to justify Donna Collins's presence in the court. However, the *Hatfield* Court proceeded to deem the error harmless. In so doing, the Court distinguished *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003), the case upon which Appellant relies. *Mills* held that permitting a robbery witness to remain in the courtroom constituted reversible error. However, the witness in *Mills* was the sole witness to the robbery, rendering his credibility of critical importance. In contrast, the testimony of the victim's grandfather in *Hatfield* was largely duplicative and was not "of an indispensable nature to the outcome of the trial." *Hatfield*, 250 S.W.3d at 595. Because the circumstances here are more akin to those in *Hatfield*, Appellant's reliance on *Mills* is unpersuasive.

Donna Collins remained in the courtroom for the entire proceeding and was called as Appellant's first

defense witness. She testified that her deceased husband did not carry guns regularly, that she had never heard that Appellant's father blamed Stevie for Appellant's uncle's murder, and that Stevie was right-handed.

Before this Court, Appellant argues that allowing Donna Collins to remain in the courtroom enabled her to conform or adjust her testimony based on the testimony she had heard during the Commonwealth's case-in-chief. Most damning, he argues, was Donna Collins's testimony that Stevie was right-handed, given the prior testimony that gunshot residue was detected on Stevie's left hand. Nevertheless, we are persuaded that any error was harmless. Donna Collins did not witness the murder and her testimony was merely to offer background information on the victim. As the Commonwealth points out, it is highly unlikely that she would have testified differently had she not heard the other witnesses, particularly with regard to her testimony that the victim was right-handed.

CONCLUSION

Appellant has failed to show that he was unduly prejudiced by joinder of the two murder charges. Further, Appellant is not entitled to relief based on Natasha Saylor's brief and vague reference to a prior assault. Nor is he entitled to relief based on hearsay evidence that he elicited. Finally, although the required showing was not made to support the decision to allow Donna Collins to remain in the courtroom, the error was harmless. Accordingly, Appellant's convictions are affirmed.

Minton, C.J.; Abramson, Cunningham, and Scott, JJ., concur. Venters, J., dissents by separate opinion in which Noble and Schroder, JJ., join.

VENTERS, J., DISSENTING: I respectfully decline to join the Majority opinion because I disagree with its conclusion that Appellant's two murder charges were properly tried together, and therefore I dissent.

The Majority focuses on the question of whether the trial erred in "refusing to sever the two murder charges." In so doing, it fails to give appropriate consideration to the more fundamental issue of whether the two charges were properly joined in the first place. RCr 9.16 requires severance of the charges when a joint trial will be prejudicial. However, RCr 9.16's requirement for a finding of prejudice has no application whatsoever unless the requirements of RCr 6.18 have first been satisfied. Improperly joined charges cannot be consolidated for trial, notwithstanding the presence or absence of prejudice. *Sebastian v. Commonwealth*, 623 S.W. 2d 880, 881 (Ky. 1981).

The inquiry is controlled by RCr 6.18, which in conjunction with RCr 9.12, provides that two or more offenses may be joined for a common trial *only* if they are "of the same or similar character" or "are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." The Majority opinion brushes quickly past the issue, stating simply, "We agree with the Commonwealth that there was no abuse of discretion here *because the two murders were based on .'transactions connected together.*" (emphasis added).

There is no evidence that the Steve Collins' murder was in any way connected to the murder of Christa Wilson nearly six weeks later. Steve Collins arrived for an unexpected visit at Harold Collins' home and despite his apparently friendly approach, was spontane-

ously shot and wounded by Harold Collins, whose motivation was alleged to be revenge. Appellant, impelled simply by the desire to finish what Harold had started, obtained a gun and shot Collins several more times, killing him. Everyone present at the scene, including Harold and Appellant, promptly left the area, leaving the body where it fell at Harold's front porch. Christa, Appellant's girlfriend, who had been present when Collins was killed, left the scene with Appellant and continued her relationship with him until her death several weeks later.

While there is sufficient circumstantial evidence to conclude that Appellant killed Christa, the only thing that connects these two crimes is the Commonwealth's supposition, its theory, on why she was killed. There is absolutely no evidence that suggests his motivation was in any way connected to the murder of Steve Collins. The Commonwealth's theory is a mere possible explanation with no evidentiary link that connects together the two murders.

The murder of a young woman at the hands of her boyfriend is, unfortunately, an all too common occurrence and the proof that Appellant did it is hardly dependant upon the motivation theorized by the Commonwealth. I am aware of no authority in the form of appellate decisions or otherwise, that condones the joinder of dissimilar crimes for a common trial simply because it is the Commonwealth's theory, unsupported by any evidentiary link, that the two crimes are "transactions connected together." The only connection between them is that Appellant was charged with both. Thus, by the rationale of the majority opinion, two charges against a single defendant may always be consolidated for a joint trial so long as the Commonwealth's subjective theory, rather than its objective ev-

idence, supplies the connecting link. For the same reasons, the two murders cannot reasonably be seen as parts of "a common scheme or plan."

The Commonwealth's whole theory of the case precludes joinder on the grounds that the two murders were of the "same or similar character." The Steve Collins' murder was an unplanned spontaneous event, instigated by another (Harold) for revenge, in which Appellant subsequently took a subordinate but decisive role. According to the Commonwealth's theory, and not the Commonwealth's evidence, Christa's murder was premeditated to eliminate a witness. No one even suggests that two murders were the result of the "the same acts."

The most frequently stated interpretation of proper joinder under of RCr 6.18 is found in the cases cited in the Majority opinion[3], and it holds that joinder is proper when the two crimes are closely related in character, circumstance and time. The two murders involved here conform to none of those factors. Joining them for trial with no evidentiary connection between them was not authorized by the Rules of Criminal Procedure. Moreover, Appellant was deprived of a fair trial by the inherently prejudicial joinder of two crimes that were not closely related in character, circumstance or time.

The premise for the majority's conclusion that Appellant was not prejudiced by the last-minute decision to try him simultaneously for two murders instead of

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[3] *Debruler v. Commonwealth*, 231 S.W.3d 752, 760 (Ky. 2007) and *Tucker v. Commonwealth*, 916 S.W.2d 181, 184 (Ky. 1996) (reversed on other grounds in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky.2005)).

one rests upon its conception that "prejudice is a relative term." It completes the analysis with a circular argument and an illusory justification for the joinder. The majority reasons: Because it was proper to try Appellant for both murders simultaneously, he was not unnecessarily or unreasonably prejudiced; because he was not prejudiced by the trial, the two murder charges were properly consolidated.

Noble and Schroder, JJ., join.

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