No. _____

In The

Supreme Court of the United States

ANTHONY THOMAS GRIMES,
Petitioner,

v.

KENTUCKY,
Respondent.

On Petition for Writ of Certiorari
To The Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Kentucky Court of Appeals held that Petitioner's criminal defense attorney provided effective assistance of counsel with regard to his actions, omissions and deficient advice pertaining to a plea offer as well as the accused's decision to enter a plea of guilty or go to trial where Petitioner faced an eighteen count indictment with a maximum sentence of seventy years and no parole eligibility for twenty years. Petitioner's attorney admittedly provided his client with a generic form for calculating the possible maximum sentence and a number of reproductions of Kentucky statutes to be read, failed to advise Petitioner as to such matters as the maximum sentence upon conviction of all charges, sexual offender registration, and the impact of being a violent offender on parole eligibility. Additionally, Petitioner's counsel admittedly did not understand how the brief oral plea offer, "just a simple ten years, serve fifty percent," would work in view of the eighteen count indictment, believed the judge would never accept the prosecution's recommendation, declined to clarify with the prosecutor the details of the oral offer, presented the offer to Petitioner in the words used by the prosecutor, provided no explanation of what charges Petitioner would have to plead to and when Petitioner would be eligible for parole, the minimum and maximum amount of imprisonment to be served, and how this plea offer compared to the risks and benefits of a jury trial. Petitioner rejected the plea offer and at a jury trial was convicted of multiple felonies and was sentenced to fifty-nine years of confinement.

Accordingly, the question presented is:

Whether the Kentucky Court of Appeals has diminished and violated the federal constitutional guarantee of effective assistance of counsel in the pretrial negotiation phase of a criminal trial mandated by *Strickland v. Washington*, 466 U.S. 668 (1984),

Hill v. Lockhart, 474 U.S. 52 (1985) *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), by sanctioning as effective assistance of counsel the conduct of a criminal defense attorney who admittedly was ignorant of and failed to advise his client of the sentencing aspects of the case and instead relied upon the client to read criminal statutes and a generic sentencing form provided by counsel and who deliberately declined to seek clarification from the prosecution of the one-sentence oral plea offer counsel admittedly did not understand or believe would be acceptable to the court before simply conveying the one-sentence offer to his client with no explanation and no advice.

The Kentucky Court of Appeals found that Petitioner had not demonstrated prejudice because he had not shown how his trial counsel's performance impacted Petitioner's decision to reject the plea offer, emphasizing that trial counsel and the prosecutor testified that Petitioner had an unwavering stance that he would not accept any plea offers.

Accordingly, the second question presented is:

Whether the Kentucky Court of Appeals misinterpreted and misapplied the prejudice standard of *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), by finding Petitioner failed to demonstrate how Petitioner's trial counsel's performance impacted Petitioner's decision to reject the plea offer, even though Petitioner showed that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court, as Petitioner testified he would have accepted the plea, the prosecution acknowledged the offer would not have been

withdrawn in light of intervening circumstances, the trial court would have accepted its terms, and that the conviction or sentence, or both, under the plea offer's terms would have been substantially less severe than the conviction and sentence actually imposed following Petitioner's jury trial.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Kentucky Court of Appeals rendered April 26, 2019.

OPINIONS BELOW

The Kentucky Court of Appeals' opinion is unpublished and is reproduced at Appendix ("App.") A, 1-13. The order the Daviess Circuit Court is unpublished and is reproduced at App. C, 15-22.

STATEMENT OF RELATED PROCEEDINGS

- *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2019-SC-000470-DR. Judgment entered February 12, 2020.
- *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2017-CA-000988-MR. Judgment entered April 26, 2019.
- *Commonwealth v. Grimes*, Daviess Circuit Court, Division No. II, No. 03-CR-00078. Judgment entered May 8, 2017.
- *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2016-SC-000447-DR. Judgment entered February 9, 2017.
- *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2014-CA-000547-MR. Judgment entered July 22, 2016.
- *Commonwealth v. Grimes*, Daviess Circuit Court, Division No. II, No. 03-CR-00078. Judgment entered February 24, 2014.

- *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2012-SC-000016-DR. Judgment entered August 15, 2012.
- *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2008-CA-000518-MR. Judgment entered December 9, 2011.
- *Grimes v. Commonwealth*, Kentucky Supreme Court, Nos. 2009-SC-000703 & 000740-DG. Judgment entered August 18, 2010.
- *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2008-CA-000518-MR. Judgment entered July 24, 2009.
- *Commonwealth v. Grimes*, Daviess Circuit Court, Division No. 1, No. 03-CR-00078. Judgment entered November 20, 2006.
- *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2003-SC-1062-MR. Judgment entered May 19, 2005.
- *Commonwealth v. Grimes*, Daviess Circuit Court, Division No. 1, No. 03-CR-00078, November 25, 2003.

JURISDICTION

The date on which the Court of Appeals of Kentucky decided Petitioner's case was April 26, 2019. *Anthony Thomas Grimes v. Commonwealth of Kentucky*, Kentucky Court of Appeals, No. 2017-CA-000988-MR; App. A, 1-13. A timely motion for discretionary review was denied by the Supreme Court of Kentucky on February 12, 2020. *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2019-SC-000470; App. B, 14.

This Court by Order entered March 19, 2020 extended the deadline to file petitions for writ of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower

court's order denying discretionary review.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen of the United States Constitution provides in pertinent part:

> Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Anthony Thomas Grimes, Petitioner, was indicted in the Daviess Circuit Court on February 4, 2003 for eighteen (18) counts of sexual offenses against his two stepdaughters. Transcript of Record ("TR"), Volume 1, 1-4. Thirteen (13) of those counts related to the older child and included two counts of first degree rape, six counts of first degree sodomy, four counts of first degree sexual abuse and one count of second degree sexual abuse. The other five (5) charges related to the younger child and involved first degree sexual abuse. One of those charges was dismissed at trial.

A jury on September 26, 2003 convicted Petitioner of two counts of first degree rape, six counts of first degree sodomy, eight counts of first degree sexual abuse, and one count of second

degree sexual abuse and recommended that Petitioner be sentenced to confinement in the penitentiary for fifty-nine (59) years. TR1, 84-100. The Daviess Circuit Court sentenced Petitioner accordingly. TR1, 128-134.

Petitioner was represented at trial and in all the relevant pretrial matters by his retained counsel, Hon. Joseph R. Flaherty ("Flaherty"), Flaherty Law Office, Owensboro, Kentucky.

The Kentucky Supreme Court on direct appeal affirmed Petitioner's judgment of conviction in an unpublished memorandum opinion on May 19, 2005, that was final on July 22, 2005. *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2003-SC-1062-MR, May 19, 2005; TR2, 3-12; App. D, 23-32.

On August 17, 2006, Petitioner filed in the Daviess Circuit Court a Kentucky Rule of Criminal Procedure ("RCr") 11.42 motion, alleging some fifteen specific claims of ineffective assistance of counsel. TR2, 14-32. That 11.42 motion contained, *inter alia*, the following claim:

> Movant's trial counsel failed to render effective assistance of counsel by failing to communicate to movant prior to trial that the prosecutor had offered to settle the case on a five-year plea agreement. . . . After final sentencing, trial counsel came to the county jail to advise movant about post-conviction remedies. At that time trial counsel claimed that movant had been offered a five-year plea by the prosecution and movant had rejected it. This was the first time that movant had ever heard of this offer.

TR2, 14-15.

Petitioner's RCr 11.42 motion was denied, without an evidentiary hearing, on November 20, 2006. TR2, 85-87. Petitioner appealed.

In its December 9, 2011 opinion, the Kentucky Court of Appeals noted that "Grimes contends that his trial counsel failed to inform him of a plea offer from the Commonwealth." *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2008-CA-000518-MR, December 9, 2011.

"According to Grimes, but for trial counsel's failure to communicate this alleged offer, he would have entered a guilty plea and received a significantly lighter sentence." *Id.*, 22. The Kentucky Court of Appeals held "that Grimes is entitled to a hearing on this aspect of his RCr 11.42 motion" and "vacate[d] the judgment and remand[ed] for proceedings by the circuit court on this single issue." *Id.* at 23.

Prior to the May 6, 2013 evidentiary hearing, Flaherty, Petitioner's trial counsel, filed a document entitled "Flaherty's Statement of the Case," which had several exhibits attached to it. NTR1, 125-151. There were two copies of the February 4, 2003 indictment, one of which was virtually unmarked except for the signature "Anthony T. Grimes" and the date "7-4-03." Flaherty had replaced Petitioner's prior attorney on March 6, 2003. [05/06/2013; 12:02:34-03:18.][1] Flaherty stated he gave Petitioner a copy of the indictment on July 4, 2003 and had Petitioner sign it to show that he received a copy of the indictment on that date. [12:05:08-08:11.] Petitioner's jury trial began on September 24 and concluded on September 26, 2003.

Also attached was a document entitled "Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility," bearing the words "received copy," the signature "T. Grimes" and the date "9-3-03." NTR1, 125-151. The form, a generic four page, single-spaced document, requires an accused to identify his or her charges, determine what class of felony each charge is and the minimum and maximum range of punishment for each charge. This document did not provide a specific breakdown of the charges against Petitioner or the range of punishment for each offense. The application of this generic document to the eighteen charges Petitioner faced would require considerable work by a non-lawyer. Apparently Flaherty did not know or present

[1] All citations to video recordings are from the May 6, 2013 evidentiary hearing.

Petitioner with a specific breakdown of the sentences he faced if convicted at trial of all or some of these charges. Additionally, Flaherty provided Petitioner this document on September 3, 2003, some three weeks before his trial began. By his own admission, Flaherty had never told Petitioner what the maximum sentence would be should Petitioner be convicted at trial of all the charges, receive the maximum sentence on each, and have all sentences run consecutively to each other. [05/06/2013; 12:41:57.]

Also attached was an annotated copy of Kentucky Revised Statute ("KRS") 439.3401, the violent offender statute, and copies of various KRS statutes, such as the sex offender registry requirement and the presentence procedure for felony convictions, apparently copied from West's Criminal Law of Kentucky, with annotations on three of the pages stating "received copy," the signature "T. Grimes," and the date "9-3-03." NTR1, 125-151.

Flaherty testified that he did not provide Petitioner "with any written explanations of these statutes or this Department of Corrections document certification on the calculation of parole eligibility" that "broke this down for his individual case." [12:13:02-56.] Flaherty asked "why would [he] do that" when Petitioner "had the statutes, he had the certifications, the general statements of the certification." [*Id.*] By having Petitioner sign these documents, Flaherty "recorded for [his] file that Grimes was given" that specific information. [12:13:56-14:51.]

According to Petitioner, Flaherty "never told [him] a maximum sentence," and "never had a conversation about" his "parole eligibility if [he] were convicted of all these offenses." Petitioner did not know before he went to trial what a "violent offender" was. Petitioner could not say whether Flaherty told him to read the statutes and other papers he had Petitioner sign, date and acknowledge receipt. [02:48:05-49:00.] Petitioner did know the sentencing ranges for Class B and C felonies.

When Petitioner added up all the charges, he thought his maximum sentence would be "over 200 years" and Flaherty never told him that was "wrong." [02:48:05-51:48.] Petitioner explained he did not read those various statutes and the parole eligibility document because he had hired Flaherty, a lawyer with forty years experience, to be his attorney – to have his back. [03:33:34-34:51.]

Initially, when the prosecutor, Van Meter, told Flaherty that the Commonwealth was offering Petitioner "just a simple ten years, serve fifty percent (50%)," Flaherty did not ask Van Meter how this would work in view of the eighteen counts of the indictment. [11:47:54-48:55.] Flaherty testified that "when Mr. Van Meter communicated this plea offer to [him] orally," Flaherty did not ask" Van Meter "how this plea offer would be carried out so [h]e could pass that on to [his] client." [01:00:00-02:15.] Yet Flaherty testified that he could "not see how the attorney, the Commonwealth Attorney, could get the judge to approve that kind of punishment," *e.g.*, "five years to serve." That was the feeling Flaherty had. [12:18:52-21:21:01.] Flaherty also testified that he "had a question of how a judge would approve five years based on the number of charges, based on the number of people and based on the duration that this thing went on." [12:45:05-46:00.]

Despite these doubts, Flaherty admittedly never went back to the prosecutor to ask how would this plea offer work with regards to the charges to be dismissed or amended, the charges Petitioner would have to plead guilty to, and the sentences Petitioner would receive. By his own admission, Flaherty knew none of this information when he allegedly informed Petitioner of the plea offer. Flaherty provided no advice to Petitioner concerning the offer, either orally or in writing. Flaherty did not explain whether "five years to serve" was a guarantee or simply five years to be eligible for parole.

On February 24, 2014 the circuit court denied the RCr 11.42 motion. On March 5, 2014,

Petitioner filed a motion, pursuant to CR 52.02 and RCr 11.42(6), for findings of fact on the following issue: *By his own testimony, Flaherty denied Grimes the effective assistance of counsel in communicating the Commonwealth's plea offer to Grimes.* NTR2, 302-309. The circuit court denied that motion. NTR2, 310.

On appeal from both orders, the Kentucky Court of Appeals in its opinion affirmed both orders of the Daviess Circuit Court on remand denying the claim in question. *Grimes v. Commonwealth,* Kentucky Court of Appeals, No. 2014-CA-000547-MR, July 22, 2016; App. E, 33-42.[2] The Kentucky Court of Appeals also found that '[w]hether or not trial counsel's advice" regarding the plea offer he allegedly communicated to Petitioner constituted ineffective assistance of counsel, that claim could not be considered because it was not alleged in the original RCr 11.42 motion. *Id.*, 9; A41. On February 9, 2017, the Kentucky Supreme Court denied Petitioner's discretionary review motion.

On February 17, 2017, Petitioner filed a Kentucky Rule of Civil Procedure ('CR") 60.02[3] motion in Daviess Circuit Court to vacate judgment and sentence and/or to provide appropriate relief. NTR2, 319-340. The motion alleged that Flaherty, by his own testimony at the May 6, 2013 evidentiary hearing, established he denied Petitioner the effective assistance of counsel with regard to his deficient advice regarding the plea bargain and Petitioner's exposure in violation of Petitioner's federal and state constitutional rights. On March 9, 2017, without receiving a response from the prosecutor's office, the circuit court denied Petitioner's CR 60.02 motion. NTR2, 341-340.

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[2] *Grimes v. Commonwealth*, 2016 WL 3962309 (July 22, 2016).

[3] CR 60.02 is a procedural version of the common law writ of coram nobis and is made applicable to criminal cases by RCr 13.04.

Upon learning that "the parties had an agreement to allow the Commonwealth until April 18, 2017 to respond to the Defendant's Motion," the circuit court "set aside" the March 9, 2017 order. NTR2, 346.

Following the filing of both a response and reply, the circuit court on May 8, 2017 again denied Petitioner's CR 60.02 motion. *Commonwealth v. Grimes*, Daviess Circuit Court, May 8, 2017; App. C, 15-22. The circuit court faulted Petitioner for not amending his 11.42 motion following the May 6, 2013 evidentiary hearing "to allege inadequate assistance." Id., 4; App. C, 18. The circuit court "believe[d] that amending the RCr 11.42 motion to include a new claim that Flaherty provided inadequate advice regarding the plea is the correct procedure." *Id.*, 4 n.5; 18 n.5.

The circuit court found that Petitioner "has failed to show that Flaherty was ineffective in advising [him] as to the plea" as it "would not fault Flaherty for the Defendant's own failure to read information [Corrections' generic calculation of parole eligibility, the indictment, and criminal law statutes] provided him by his attorney." *Id.*, 7; 21. Petitioner filed a timely notice of appeal.

On appeal the Kentucky Court of Appeals rejected the circuit court's determination that Grimes' CR 60.02 motion was procedurally barred, but held that Petitioner had not established Flaherty provided ineffective assistance of counsel with regard to the plea negotiations. The opinion concluded Petitioner "has not shown how Flaherty's performance ... impacted Grimes' decision to reject the plea offer." *Grimes* Opinion (April 26, 2019), 12; App. A, 12.

Petitioner filed a timely rehearing petition alleging, *inter alia*, that, with the procedural bar set aside, he was entitled to an evidentiary hearing on his claim. The Kentucky Court of Appeals denied the rehearing petition.

On February 12, 2020 the Kentucky Supreme Court denied Petitioner's timely filed motion

for discretionary review. Order Denying Discretionary Review, *Grimes v. Commonwealth*, Kentucky Supreme Court, No. 2019-SC-000470, February 12, 2020; App. B, 14.]

The federal constitutional question of whether Petitioner's trial attorney's pretrial actions and omissions pertaining to his communication, discussion and advice as to both the prosecution's plea offer and Petitioner's decision to plead guilty or go to trial constituted ineffective assistance of counsel was first raised in Petitioner's post-conviction motion pursuant to CR 60.02, timely filed on February 17, 2017 in Daviess Circuit Court. The claim made in that CR 60.02 motion was captioned:

> ASSUMING, AS THIS COURT FOUND, THAT DEFENSE COUNSEL COMMUNICATED THE PLEA OFFER TO MOVANT, DEFENSE COUNSEL, BY HIS OWN TESTIMONY AT THE EVIDENTIARY HEARING, DENIED MOVANT THE EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO HIS DEFICIENT ADVICE WITH REGARD TO THE PLEA BARGAIN IN VIOLATION OF MOVANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND SECTION ELEVEN OF THE KENTUCKY CONSTITUTION, AN ISSUE THAT WAS NOT BEFORE THIS COURT AT THAT TIME.

CR 60.02 Motion, *Commonwealth v. Grimes*, Daviess Circuit Court, February 17,2017, 7-8; NTR2, 319-340. This claim is also preserved by Petitioner filing in the Daviess Circuit Court his reply to the Commonwealth's response to that CR 60.02 motion. [NTR, 352-365.]

The Daviess Circuit Court in denying the CR 60.02 motion found that Petitioner "has failed to show that Flaherty [Petitioner's trial counsel] was ineffective in advising [him] as to the plea" as it "would not fault Flaherty for the Defendant's own failure to read information [Kentucky Department of Corrections' generic calculation of parole eligibility, the indictment, and criminal law statutes] provided him by his attorney." Order Denying, *Commonwealth v. Grimes*, Daviess Circuit Court, May 8, 2017, 6-7; App. C, 20-21.

This same claim was raised in the Kentucky Court of Appeals on Petitioner's appeal of the Daviess Circuit Court's denial of his CR 60.02 motion. That claim on appeal was captioned:

> THE COURT BELOW ERRED TO GRIMES' SUBSTANTIAL PREJUDICE BY DENYING HIS CR 60.02 MOTION, ASSUMING, AS THIS COURT AND THE COURT BELOW PREVIOUSLY FOUND, DEFENSE COUNSEL COMMUNICATED THE PLEA OFFER TO GRIMES, DEFENSE COUNSEL, BY HIS OWN TESTIMONY AT THE EVIDENTIARY HEARING, DENIED GRIMES THE EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO HIS DEFICIENT ADVICE AS TO THE PLEA BARGAIN AND PLEADING GUILTY, AN ISSUE THAT WAS NOT BEFORE THE COURT BELOW AT THE TIME OF THIS COURT'S REMAND, IN VIOLATION OF GRIMES' FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND SECTION ELEVEN OF THE KENTUCKY CONSTITUTION.

Brief for Appellant, *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2017-CA-000988.

In affirming the Daviess Circuit Court's denial of the CR 60.02 motion, the Kentucky Court of Appeals "agree[d] with the trial court's conclusion that Grimes has not shown Flaherty's performance was actionably deficient" and concluded Petitioner "has not shown how Flaherty's performance ... impacted Grimes' decision to reject the plea offer." Opinion Affirming, *Grimes v. Commonwealth*, Kentucky Court of Appeals, No. 2017-CA-000988, April 26, 2019, 12,; App. A, 12.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Finding That the Failure of a Criminal Defense Attorney to Provide the Accused With Such Sentencing Information as the Maximum Sentence if Convicted of All Charged Offenses, the Parole Eligibility for a Violent Offender, and Sexual Offender Registration, While Expecting the Accused to Read Statutes and a Generic Sentencing Form Provided by Counsel as Well as Defense Counsel's Admitted Inability to Understand How the Oral Plea Offer Would be Implemented, Deliberate Decision to Decline to Ask the Prosecutor for Clarification of the Offer, and Conveying to the Accused the Prosecution's Offer in a Single Sentence with Neither Explanation nor Advice Was Not Deficient Performance Raises an Important Issue in the Administration of Criminal Justice Regarding the Minimum Level of Reasonable Professional Assistance the Sixth Amendment Will Tolerate in the Pretrial and Negotiation Stages of a Criminal Proceeding.

> Petitioner in his first post-conviction motion, a verified RCr 11.42 motion, alleged:
>
> After final sentencing, trial counsel came to the county jail to advise movant about post-conviction remedies. At that time trial counsel claimed that movant had been offered a five-year plea by the prosecution and movant had rejected it. This was the first time that movant had ever heard of this offer. At no time prior to that post-judgment meeting did trial counsel inform movant of any such plea agreement.

RCr 11.42 Motion, 08/17/2006, p. 2,¶ 7.

Petitioner had "verified" that he had never been told by Flaherty or anyone else about any prosecution plea offer until his meeting with Flaherty after final judgment had been entered. An RCr 11.42 "motion shall be signed and *verified* by the movant." RCr 11.42(2). An 11.42 motion "shall state specifically the grounds on which the sentence is being challenged and *the facts on which the movant relies* in support of such grounds." RCr 11.42(2). Petitioner could not have "verified" that Flaherty was deficient in his advice regarding the prosecution's guilty plea offer while simultaneously "verifying" that Flaherty never communicated the plea offer to him. The issue of whether Flaherty was deficient in his advice regarding the guilty plea offer only arose after Flaherty testified that he had communicated the plea offer to Petitioner and testified how and what he had told

Petitioner regarding the offer. And then only because the trial and appellate courts found Flaherty's testimony credible that he communicated the plea offer in one brief sentence as Flaherty testified under oath.

On February 17, 2017, Petitioner filed in the Daviess Circuit Court a motion, pursuant to CR 60.02, claiming:

> ASSUMING, AS THIS COURT FOUND, THAT DEFENSE COUNSEL COMMUNICATED THE PLEA OFFER TO MOVANT, DEFENSE COUNSEL, BY HIS OWN TESTIMONY AT THE EVIDENTIARY HEARING, DENIED MOVANT THE EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO HIS DEFICIENT ADVICE WITH REGARD TO THE PLEA BARGAIN IN VIOLATION OF MOVANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND SECTION ELEVEN OF THE KENTUCKY CONSTITUTION, AN ISSUE THAT WAS NOT BEFORE THIS COURT AT THAT TIME.

NTR2, 319-340.

By his own testimony, Flaherty denied Petitioner the effective assistance of counsel in communicating the prosecution's plea offer to Petitioner. Assuming, as the state courts found, that Flaherty did communicate to Petitioner the prosecution's oral plea offer, Flaherty's testimony of how he communicated this plea agreement to Petitioner established ineffective assistance of counsel on Flaherty's part.

"Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Strickland v. Washington*, 466 U.S. 668, 686. (1984).

The claim is that trial counsel's lack of explanation of the plea offer and its risks and advantages compared to going to trial constituted deficient performance. "The American Bar Association recommends defense counsel 'promptly communicate *and explain to the defendant all*

plea offers made by the prosecuting attorney,' ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years." *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012); (emphasis added). "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). See also *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Padilla v. Kentucky*, *supra*, 130 S. Ct. at 1482.

Defense counsel's failure to provide professional guidance to his client regarding the client's sentence exposure prior to the consideration of any plea offer may constitute deficient performance. A criminal defendant has the right to expect at least that his attorney will review the charges with him, explain the elements necessary for the prosecution to obtain a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of accepting a plea offer or going to trial.

Communicating a plea offer without explaining its terms and conditions to the accused does not constitute effective assistance of counsel in plea negotiations. Flaherty admitted he had no idea how the plea offer would work, did not inquire of the prosecutor how the plea offer would work, and made no attempt to explain the plea offer to Petitioner.

When the prosecutor orally told Flaherty the Commonwealth was offering Petitioner "just a simple ten years, serve fifty percent (50%)," Flaherty did not ask how this would work in the context of the eighteen count indictment. [11:47:54-48:55.] Flaherty testified that "when Mr. Van Meter communicated this plea offer to [him] orally," Flaherty did not ask" Van Meter "how this plea offer would be carried out so [h]e could pass that on to [his] client." [01:00:00-02:15.] Flaherty

testified that he could "not see how the attorney, the Commonwealth Attorney, could get the judge to approve that kind of punishment," *e.g.*, "five years to serve." That was the feeling Flaherty had. [12:18:52-21:21:01.] Flaherty also admitted that he "had a question of how a judge would approve five years based on the number of charges, based on the number of people and based on the duration that this thing went on." [12:45:05-46:00.]

Yet Flaherty with all his doubts about how the prosecution could get the judge to approve the recommended punishment, *e.g.*, "five years to serve," never engaged in any discussion with the prosecutor to determine how this bare-boned plea offer would work, such as, what charges would be dismissed with prejudice, which charges would be amended, and what charges Petitioner would have to plead to, so Flaherty himself would understand the offer and be able to explain it to Petitioner. [12:18:52-21:21:01; 12:45:05-46:00.]

If, as he testified, Flaherty communicated the prosecutor's plea offer to Petitioner, what could Flaherty have told Petitioner as to what charges would be dismissed and what sentences would be recommended, except at best that the recommended sentence would be ten (10) years with five (5) years to serve before becoming parole eligible. This does not constitute explaining the terms and conditions of the plea offer to Petitioner.

If Flaherty could not comprehend how this oral offer would work and had such doubts about it, how could Petitioner, a non-lawyer, understand this plea offer when Flaherty merely repeated it to him apparently verbatim. Without understanding how the plea offer would work and merely repeating the bare-boned offer to Petitioner, as he testified, what could Flaherty have told Petitioner as to what charges would be dismissed, what crimes would he have to plead to and what sentences would be recommended, except that the recommended sentence would be ten years with five years

to serve. Flaherty did not even explain what "five years to serve" meant in pragmatic terms. Would the plea offer guarantee Petitioner would serve only five years or simply guarantee he would be eligible to see the Parole Board after serving five years? Flaherty admittedly provided no advice to Petitioner concerning the offer, either orally or in writing.

By his own admission, Flaherty had never told Petitioner what the maximum sentence would be should Petitioner be convicted at trial of all the charges, receive the maximum sentence on each, and have all sentences run consecutively to each other. If a person knew the maximum sentence for each charge in the 18-count indictment and simply added those years together, as Petitioner did, the total maximum sentence would appear to be 200 years of confinement. However, Flaherty never told Petitioner that there was a statutory limitation on the maximum sentence of seventy (70) years even if Petitioner was found guilty of all the charges. KRS 532.110(1)(c), *Concurrent and consecutive terms of imprisonment*. Perhaps Flaherty was unaware of that sentence cap.

Flaherty also failed to advise Petitioner of the onerous limitation on parole eligibility should he be convicted of the rape and sodomy charges. Although Flaherty gave Grimes a copy of Kentucky's violent offender statute, KRS 439.3401, he failed to explain to Grimes the controlling case law, *Hughes v. Commonwealth*, 87 S.W.3d 850, 854-856 (Ky. 2002), that clearly limited the maximum amount of time Grimes would have to serve before being eligible for parole if convicted to one or more of the Class B felonies, first degree rape and sodomy, to either eight-five percent (85%) of the sentence imposed for those offenses or twenty (20) years, whichever is less.[1]

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[1] *Hughes v. Commonwealth*, 87 S.W.3d 850, 854-856 (Ky. 2002), became final on November 21, 2002, some ten (10) months before Petitioner's jury trial commenced on September 24, 2003. See *Troy DeWayne Hughes v. Commonwealth*, Kentucky Supreme Court,

The Daviess Circuit Court found it effective assistance of counsel and adequate advice to Petitioner that the Corrections' generic Certification on the Calculation of Parole Eligibility had on its fourth and final page an explanation with regard to *Hughes v. Commonwealth*, *supra*. Order Denying, *Commonwealth v. Grimes*, Daviess Circuit Court, May 8, 2017, 6 n.10; App. C, 20 n.10. It is inconceivable that giving generic documents and statutes to a criminal defendant to read and figure out for himself can constitute effective assistance of counsel under the federal constitution.

Petitioner never requested to proceed pro se or to be co-counsel with Flaherty in hybrid representation. He retained Flaherty to represent him. Petitioner did not agree to research the statutory laws pertaining to his case and calculate his own potential sentences under various scenarios when he retained Flaherty.

Flaherty, when discussing the documents he had Petitioner sign, stated, "I'm not saying he has privy to all these documents but the thing itself gives you various situations and we wanted him to be, to have that information that's the reason we gave him a copy and have him sign it so he could go home and look at it." [12:11:35.] When asked if he told Petitioner the total maximum sentence he faced, Flaherty responded, "I didn't tell him what a total was." [12:41:57.] When asked if he ever provided Petitioner with information on concurrent and consecutive sentences, Flaherty answered, "We provide all the information for him to look at probation and parole what they wanted they classified these documents according to the crimes and so forth and they can add it up. To answer your question directly, no, I didn't, but he knew that it was a ton." [12:43:15.] When he talked with Petitioner about the plea offer, Flaherty "didn't discuss" sex offender registration with him. [12:59:12.]

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Flaherty testified that he did not provide Petitioner "with any written explanations of these statutes or this Department of Corrections' Certification on the Calculation of Parole Eligibility" that "broke this down for his individual case." [12:13:02-56.] Flaherty asked "why would [he] do that" when Petitioner "had the statutes, he had the certifications, the general statements of the certification." [*Id.*]

Petitioner was not a lawyer. The circuit court emphasized that Flaherty "testified that [Petitioner] was very smart and attentive" and concluded that, "[f]rom the indictment, statutes, and parole eligibility, [Petitioner] would be aware of the nature of the charges against him, and the penalties." [Order Denying, Daviess Circuit Court, May 8, 2017, 6; App. A, 20.] The Kentucky Court of Appeals echoed this noting, "[a]s to deficient performance, Flaherty provided Grimes with copies of many relevant documents, such [as] an official parole eligibility calculation sheet, the violent offender statute, the sex offender statute, the sex offender registry requirement statute and the indictment. *Grimes* Opinion (2019), 10; App. A, 10. How does this demonstrate effective assistance of counsel? "'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence.'" *Faretta v. California*, 422 U.S. 806, 833 n. 43 (1975), quoting *Powell v. Alabama*, 287 U. S. 45, 69 (1932). Flaherty did not provide Petitioner with the effective assistance of counsel by giving him various legal documents and state statutes to read and try to comprehend. A criminal defense attorney cannot meet his professional obligations by simply handing his client copies of statutes and generic documents and telling the client to read and apply them to his situation.

Flaherty's deficient performance continued with regard to the prosecutor's plea offer.

Apparently, from his testimony, Flaherty did not appreciate that the offer of a ten year sentence with five years to serve before being eligible for parole could require the Commonwealth to dismiss all of the eight (8) counts of Class B felonies, first degree rape and sodomy, and have Petitioner at best plead guilty to the lesser offenses contained in those charges. And, even assuming *arguendo* that Flaherty had calculated that Petitioner would not have to plead guilty to any Class B felonies, but only Class C or D felonies, he did not, by his own admission, explain that to Petitioner. Even assuming that the prosecutor had devised an approach to obtaining a ten-year maximum sentence while still requiring Petitioner to plead guilty to the Class B felonies, Flaherty did not know that. Flaherty did not know what, if any, charges would be dismissed or amended as he deliberately declined to question the prosecutor about the terms of the plea offer.

An important aspect of the plea agreement could have been that Petitioner would not have to plead guilty to any counts of first degree rape or sodomy, both Class B felonies. It is clear from Flaherty's testimony that he never discussed this with the prosecutor and never discussed or explained this aspect to Petitioner when he allegedly communicated the plea offer to Petitioner.

For example, under the plea offer, Petitioner could have been required to plead guilty to all nine counts of first degree sexual abuse, each with a maximum sentence of five years, running five counts concurrent with each other and the other four counts concurrent with each other, with both sets of five year sentences to run consecutively for a total of ten (10) years.

Flaherty admitted that he could not see how the prosecutor could get the court to approve an offer that would allow Petitioner to be released after serving only five years of confinement in view of the number of charges, the number of victims and the duration of these criminal offenses. This is further evidence that Flaherty had no idea of how the plea offer would work and, as a result, could

not have explained it to Grimes. Despite these doubts, Flaherty admittedly never went back to the prosecutor to ask how would this plea offer work with regards to the charges to be dismissed or amended, the charges Petitioner would have to plead guilty to, and the sentences Petitioner would receive. By his own admission, Flaherty knew none of this information when he allegedly informed Petitioner of the plea offer. Flaherty provided no advice to Petitioner concerning the offer, either orally or in writing.

Flaherty's own testimony at the evidentiary hearing, previously accepted by the state courts as credible, established deficient performance in explaining to Petitioner the plea offer of the prosecution and the exposure Petitioner faced depending on the option he chose, going to trial or accepting the plea agreement. Without explaining the prosecution's plea offer and comparing it to the risks of going to trial, Flaherty, assuming he actually communicated the bare bones plea offer, denied Petitioner his right to the effective assistance of counsel in the context of plea negotiations.

Flaherty manifested a shocking lack of comprehension regarding the pertinent sentencing law in Petitioner's case and how the plea offer would work . This ignorance, coupled with Flaherty's deliberate refusal to seek clarification from the prosecutor about the important details of the plea offer so he could explain the offer to Petitioner and advise Petitioner regarding his sentencing exposure depending on whether he took the offer or went to trial, is sufficient to deem Flaherty's performance constitutionally inadequate. That inadequacy is magnified by Flaherty's communicating the plea offer to Petitioner in a single sentence with no explanation of what Petitioner would have to plead to and what "serve fifty percent" actually meant.

Yet the Kentucky Court of Appeals "agree[d] with the trial court's conclusion that Grimes has not shown Flaherty's performance was actionably deficient." *Grimes* Opinion (2019), 12; App.

A, 12.

This Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2012). In *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012), the defendant "went to trial rather than accept a plea deal," and "this was the result of ineffective assistance during the plea negotiation process." In *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), "the claim was that the prisoner's plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea." *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012).

Alleging deficient advice in plea negotiations is a completely different constitutional claim from alleging "defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it," which also denies an accused the effective assistance the United States Constitution requires. *Frye*, 1408. The Kentucky Court of Appeals specifically found that Petitioner could not have raised the deficient advice in plea negotiations claim in his initial RCr 11.42 motion in which he alleged the failure of Flaherty to communicate the prosecution's plea offer to Petitioner. *Grimes* Opinion (2019), 8-10; App. A, 8-10.

"It is [this Court's] responsibility under the Constitution to ensure that no criminal defendant — whether a citizen or not — is left to the 'mercies of incompetent counsel.'" *Padilla v. Kentucky*, 130 S.Ct. at1486, quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a

more severe sentence." *Lafler v. Cooper*, 132 S. Ct. at 1387.

Yet the Kentucky Court of Appeals, when addressing "deficient performance," noted that not only did "Flaherty provide[] Grimes with copies of many relevant documents, such an official parole eligibility calculation sheet, the violent offender statute, the sex offender registry requirement statute and the indictment," but emphasized that Flaherty "testified that he orally 'went through' them with Grimes." *Grimes* Opinion (2019), 10-11; App. A, 10-11. But to what extent could Flaherty have "gone through" those documents with Petitioner? Flaherty admittedly did not discuss with Petitioner: the maximum sentence Petitioner could receive, as Flaherty admitted not knowing it; concurrent and consecutive sentences in an 18 count indictment; sexual offender registration; and parole eligibility as a violent offender. If Flaherty had competently and thoroughly gone through those documents with Petitioner, why did Flaherty provide those documents to Petitioner and expect Petitioner to read them and figure out how to apply them to Petitioner's case? If Flaherty went over those documents with Petitioner, why did Flaherty and the state courts fault Petitioner for not reading the statutes, the indictment and the generic form provided by Corrections? Flaherty's "going through" the statutes and documents he gave Petitioner did not constitute explaining and advising Petitioner about their contents and applying them to Petitioner's case.

The Kentucky Court of Appeals noted that "Flaherty also testified that he told Grimes there were 'big problems' in the case, such as the damning testimony his children and wife would give." *Grimes* Opinion (2019), 11; App. A, 11. It is unlikely that Petitioner or any non-lawyer, for that matter, would need a lawyer to provide them with that information. Flaherty did not testify that he explained any strategy he would pursue to challenge that "damning testimony."

The Kentucky Court of Appeals stated, "[a]rguably, Flaherty should have explained the

seventy-year [sentencing] cap to Grimes," but added, "[h]owever, Flaherty did provide written documentation about possible sentences to Grimes." *Id.* The Kentucky Court of Appeals endorsed the principle that a criminal defense attorney provides effective assistance of counsel by providing a client with an 18-count indictment, a number of statutes, and a generic sentencing calculation form for the client to read and figure out the charges and potential sentences he or she faces. This reasoning undermines the federal constitutional guarantee of effective assistance of counsel.

The Kentucky Court of Appeals acknowledged that "[p]erhaps Flaherty should have asked the Commonwealth to flesh out the offer, such as by requesting a detailed explanation of which charges would be amended or dismissed," but diminished that deficiency of performance by contending that "Grimes has not shown how acquiring that information would have impacted his decision." *Grimes* Opinion (2019), 12; App. A, 12.

The Kentucky Court of Appeals emphasized, "as the trial court noted , both the assistant Commonwealth Attorney and Flaherty consistently testified multiple times that Grimes' unwavering stance was that he would not accept any plea offers." *Grimes* Opinion (2019), 12; App. A, 12. Actually, the trial court found that the prosecutor only testified "he was told more than once by defense counsel that Grimes was not taking any offers." *Id.*, 4; App. A, 4. The prosecutor apparently never heard Petitioner say he was not taking any plea offers, but only heard this from Flaherty. A defense attorney's pretrial assertions of the client's innocence and the client's lack of interest in pleading guilty cannot be attributed to the client as it may only be defense counsel's posturing. "Bargaining is, by its nature, defined to a substantial degree by personal style," noting that "[t]he alternative courses and tactics in negotiation are so individual." *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). Besides, attorney-client communications even on the subject of whether to plead guilty

are confidential unless the client has authorized the disclosure. Kentucky Rule of Professional Conduct 1.6, *Confidentiality of information*; Kentucky Supreme Court Rule 3.130. Flaherty's pretrial comments to the prosecutor about Grimes' lack of interest in pleading guilty may only be attributed to Flaherty and not to Grimes.

Under the circumstances at bar, the Kentucky Court of Appeals finding that Petitioner repeatedly stated he would accept no plea offer is without any weight when his defense attorney admittedly never explained the plea offer or Petitioner's exposure from going to trial or taking the plea offer. "Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives." *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013). A client's protestations of innocence do not relieve counsel of his responsibility to explain to a client matters such as the potential maximum sentence, parole eligibility, concurrent and consecutive sentences and sexual offender registration. Protestations of innocence do not relieve counsel of his responsibility to determine the terms and conditions of a plea offer before conveying the offer to the accused nor to discuss with the accused the terms of the offer and provide advise regarding the plea.

"A defendant possesses '"the ultimate authority"' to determine her plea." *Burt v. Titlow*, 134 S. Ct. 10, 19 (2013), J. Sotomayor, concurring, quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004). "But a lawyer must abide by his client's decision in this respect only after having provided the client with competent and fully informed advice, including an analysis of the risks that the client would face in proceeding to trial. Given [the Supreme Court's] recognition that 'a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities,'" the Supreme Court's "further observation that such a proclamation 'may affect the advice counsel gives,' [citation omitted], states

only the obvious: that a lawyer's advice will always reflect the objectives of the representation, as determined by the adequately informed client." *Burt v. Titlow, supra*, 134 S. Ct. at 19, J. Sotomayor, concurring.

Defense counsel's "silence" in this situation is "fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla v. Kentucky, supra*, 1484 (2010), quoting *Libretti v. United States*, 516 U.S. 29, 50-51(1995).

The Kentucky Court of Appeals also found that because Grimes did not read the statutes and correction form, he is "at least partially responsible for his own lack of knowledge." *Grimes* Opinion (2019), 11 n.1; App. A, 11n.1. Under this rationale, a criminal defense attorney can now provide effective assistance of counsel when the client is deciding whether to plead guilty or go to trial by handing copies of statutes and generic calculation forms to the client with the instructions to read and apply those documents to his own case. May such a low bar be tolerated when evaluating the constitutional guarantee of effective assistance of counsel?

"A defendant without any viable defense will be highly likely to lose at trial." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). The circuit court seemed to suggest that Petitioner had no viable defense due to "big problems" in his case. "Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one" "because defendants obviously weigh their prospects at trial in deciding whether to accept a plea." *Id.* Petitioner did not have the opportunity to *weigh his prospects* at trial due to the deficient advice his counsel gave him about plea negotiations, the plea offer and any defense strategy for trial.

For a criminal defendant, "there is more to consider than simply the likelihood of success at trial." *Lee*, 1966. "The decision whether to plead guilty also involves assessing the respective

consequences of a conviction after trial and by plea." *Id.* Petitioner needed to be advised as to the aftermath of being convicted both by going to trial and by taking the prosecution's plea offer. "When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* "For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Id.*, 1966-67. But in Petitioner's case, if convicted, he faced an actual maximum sentence of seventy (70) years of confinement, should his sentences run consecutively. KRS 532.110(1)(c). The plea offer apparently was at the most a maximum sentence of ten (10) years. Petitioner's consequences of conviction by trial or by taking the plea offer were dramatically different.

The Kentucky Court of Appeals endorsed as effective assistance of counsel a criminal defense attorney who apparently knew little or nothing about the sentencing laws pertinent to his client's case, failed to advise his client of sentencing matters pertinent to the case, and dumped statutes and a generic sentence calculation form on his client requiring the client to figure out what his lawyer had neglected to explain. Similarly, the Kentucky Court of Appeals endorsed as effective assistance of counsel a criminal defense attorney who admittedly did not comprehend how the prosecution's oral plea offer of "ten years, serve fifty percent" would be doable, deliberately declined to ask the prosecutor what charges, if any, would be amended or dismissed to determine what his client would have to plead to, and believed that there was no way the trial court would have agreed to the offer, and admittedly relayed the prosecutor's one-sentence offer to his client with no explanation or advice.

Flaherty's own testimony at the evidentiary hearing establishes deficient performance in

failing to explain to Grimes the plea offer of the prosecution and the exposure Grimes faced depending on the option he chose, going to trial or accepting the plea agreement. Without knowing or explaining how the plea offer would work and without comparing it to the risks of going to trial, Flaherty denied Grimes his right to the effective assistance of counsel in the context of plea negotiations. *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017); *Lafler v. Cooper*, 132 S.Ct. 1378, 1384 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010). This case is an excellent vehicle to dismantle the idea that the deficiencies in a criminal defense attorney's advice can be overlooked if counsel dumps a barrage of criminal statutes and a do-it-yourself generic calculating form on the client to figure out on his own what he is facing if he elects to go to trial. It offers an opportunity to reject the idea that a client who declines to read and review statutes and other documents foisted on him by his counsel has somehow contributed to the deficiency of his lawyer's advice and undermined his claim of ineffective representation. It provides an avenue to squelch the idea that a defense attorney who admittedly does not understand the proffered plea offer may deliberately elect to remain in ignorance by declining to seek clarification from the prosecutor and simply convey to the client the unadorned offer without explanation or advice. This case presents a chance to exile these unconstitutional principles from the lexicon of ineffective assistance of counsel in pretrial proceedings and plea negotiations.

This certiorari petition should be granted.

II. The Decision Below Finding That Petitioner Failed to Demonstrate Prejudice From Trial Defense Counsel's Failure to Understand the Prosecution's Oral One Sentence Plea Offer, Deliberate Decision Not to Seek Clarification of the Offer's Terms, Relay of the One-Sentence Plea Offer to Petitioner Without Explanation or Advice, and Failure to Explain Petitioner's Sentencing Exposure, Particularly as to Accepting the Plea Offer or Going to Trial, Despite Petitioner's Testimony that He Would Have Taken the Pretrial Plea Offer, the Prosecutor's Testimony that the Plea Offer, if

Accepted, Would Have been Honored and Accepted by the Trial Court, and the Extreme Disparity Between the Maximum Sentence Under the Plea Agreement and the Maximum Sentence at Trial Raises an Important Issue in the Administration of Criminal Justice Regarding the Evaluation and Application of the Prejudice Component of Ineffective Assistance of Counsel in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), Situations.

The Kentucky Court of Appeals held that Grimes "has not shown prejudice because he has not shown how Flaherty's performance (i.e., failure to obtain from the Commonwealth, then relate to Grimes, the precise details about the plea as well as not orally discussing Grimes's maximum sentence and parole eligibility, etc.) impacted Grimes's decision to reject the plea offer." *Grimes* Opinion (2019), 12; App. A, 12.

In *Lafler v. Cooper*, 132 S.Ct. 1378, 1386 (2012), the defendant "went to trial rather than accept a plea deal, and it [was] conceded this was the result of ineffective assistance during the plea negotiation process." The defendant "received a more severe sentence at trial, one 3 ½ times more severe than he would have likely received by pleading guilty." *Id.* As the *Lafler* court explained, "[f]ar from curing the error, the trial caused the injury from the error." *Id.* "[E]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id.* "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 1387. "If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Id.* On the basis of the sentencing disparity alone between the plea offer and the actual jury sentence, Petitioner demonstrated a reasonable probability of prejudice.

Petitioner following his jury trial was sentenced to confinement in the penitentiary for fifty-nine (59) years. TR 84-100. That sentence was virtually six times greater than the plea offer of ten (10) years. Petitioner suffered prejudice as a result of the defective representation in that the maximum sentence he could possibly receive under the plea offer was significantly less than that imposed through trial. Prejudice is manifest and undeniable.

"To establish *Strickland* prejudice a 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.'" *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012), quoting *Strickland v. Washington*, 694. "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler, supra*, 1384.

"In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 1385.

Petitioner presented significant, persuasive evidence demonstrating that (a) a plea offer was available to him; (b) Petitioner would have accepted the offer; (c) the prosecution would have not rescinded the offer; (d) the trial court would have approved the finalized plea agreement; and (e) the conviction and sentence under the plea offer would have been substantially less severe than the conviction and sentence imposed at his jury trial.

The prosecutor at the evidentiary hearing conceded that he orally communicated the plea

offer to Flaherty, that he would not have reneged on the plea offer had Petitioner accepted, and that the trial court would have accepted the plea offer because the prosecution and the victims' mother wanted it and it would save the victims from having to testify in court about the charges.

The prosecution would not have cancelled the plea offer and no basis exists to indicate judicial rejection of the plea bargain. "Defendants must also demonstrate a reasonable probability the plea offer would have been entered without the prosecution cancelling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012). The testimony of the prosecutor, Van Meter, established that had the plea offer been accepted by Petitioner, the Commonwealth would not have cancelled the offer or otherwise reneged on the offer.

Van Meter testified that he would not have communicated to Flaherty this plea offer that would require Petitioner to serve at least five (5) years before being eligible for release unless he "believed" this plea offer "was an appropriate resolution of this case for the Commonwealth." [11:51:53-53:31.] Van Meter's "main concern" in offering this plea agreement "was what was in the best interest of the children and having victim approval." [11:51:00-53.] Van Meter does not "like to make children testify and if there is a way" to avoid that, he tries "to do what is in the best interest of the kids." [11:51:53-53:31.] Van Meter explained that he would not have offered the plea agreement of a ten (10) year sentence with five (5) years to serve before becoming parole eligible unless the mother of the two alleged victims felt this was an appropriate resolution and plea offer.[2]

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[2] According to KRS 421.500(6), "[t]he victim shall be consulted by the attorney for the Commonwealth on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, *a negotiated plea*, and entry into a pretrial diversion program" (emphasis added).

[*Id.*] Van Meter acknowledged that if Petitioner had agreed to take the plea offer, he would not have reneged on the offer. [11:53:31- 54:49.]

Van Meter's testimony at the evidentiary hearing also established the reasonable probability that the trial court would have accepted the plea agreement. First, the Commonwealth believed this plea offer "was an appropriate resolution of this case for the Commonwealth." Second, the mother of the victims approved this plea offer. Third, the plea offer would spare the victims from having to testify in court as to these numerous charges of sexual offenses committed against them, which would have been "in the best interest of the children." Under these circumstances, it would be very difficult for a trial judge to reject this plea offer, despite the approval of the victims' mother, and run the risk of forcing a trial at which these two young girls would have to testify about the alleged sexual abuse they suffered and be subject to cross-examination.

This is particularly true because in this case "no particular fact or intervening circumstance" has been established that would have caused either the prosecutor to withdraw the offer or for a trial judge to reject the plea bargain. "So in most instances it should be not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Frye* at 1410.

There is no evidence of record that would establish that had Petitioner accepted the plea offer, the prosecutor would have cancelled the plea offer or the judge would have reject the plea bargain. However, there is compelling evidence that the Commonwealth would not have reneged on the plea offer and that a judge would have approved this plea bargain under the specific circumstances of this case.

The Kentucky Court of Appeals held that Petitioner "has not shown prejudice because he has not shown how Flaherty's performance (*i.e.*, failure to obtain from the Commonwealth, and then relate to Grimes, the precise details about the plea, as well as not orally discussing Grimes's maximum sentence and parole eligibility, etc.) impacted Grimes's decision to reject the plea offer." *Grimes* Opinion (2019), 12; App. A, 12.

Flaherty's own testimony established that he did not understand how the one-sentence oral plea offer would work and deliberately declined to seek clarification of the offer from the prosecutor. As a result, Flaherty did not and could not tell Petitioner: which of the eighteen separate charges, if any, would be dismissed with prejudice or amended to a lesser included offense; whether Petitioner would have to plead guilty to all eighteen separate charges or only some of the charges; which charges Petitioner would have to plead guilty to; whether Petitioner would have to plead guilty to first degree rape and sodomy or only some lesser included offenses; that the sexual offenses Petitioner would have to plead guilty to would make him a violent offender (KRS 439.3401); whether Petitioner would be pleading guilty to charges of sexual offenses against both the victims; that the sexual offenses he would have to plead to would require him to register as a sexual offender for his lifetime or twenty years (KRS 17.510) ; and that the charges he would plea to would require him to undergo a sexual offender treatment program (KRS 197.400).

These are some of "the precise details about the plea" offer that the Kentucky Court of Appeals apparently dismissed as insignificant omissions from Flaherty's explanation of the plea offer that would have had no impact on Petitioner's decision to reject the unexplained plea offer. *Grimes* Opinion (2019), 12; App. A, 12.

Importantly, Flaherty, even before the plea offer, had not even explained such sentencing

matters as the violent offender statute, the sexual offender registration law, and the sexual offender treatment program to Petitioner with regard to the charges in the indictment. According to Petitioner, Flaherty "never told [him] a maximum sentence," and "never had a conversation about" his "parole eligibility if [he] were convicted of all these offenses." Petitioner did not know before he went to trial what a "violent offender" was. [02:48:05-49:00.] Petitioner did know the sentencing ranges for Class B and C felonies. When he added up all the charges, he thought his maximum sentence would be "over 200 years" and Flaherty never told him that was "wrong." [02:48:05-51:48.]

The Kentucky Court of Appeals emphasized that "both the assistant Commonwealth Attorney and Flaherty consistently testified multiple times that Grimes's unwavering stance was that he would not accept any plea offers." *Grimes* Opinion (2019), 12; App. A, 12. As explained above, the trial court found that the prosecutor only testified "he was told more than once by defense counsel that Grimes was not taking any offers." *Id.*, 4; App. A, 4. The prosecutor apparently never heard Petitioner say he was not taking any plea offers, but only heard this from Flaherty. A defense attorney's pretrial assertions of his client's innocence and lack of interest in pleading guilty should not be attributed to the client as counsel's statements to the prosecutor may only be a defense counsel's routine posturing during the pretrial stage of the proceedings.

"Flaherty repeatedly emphasized that throughout the process leading up to trial, Grimes was adamant that he was not going to take a plea to anything because he did not want to go to jail." *Grimes* Opinion (2019), 4; App. A, 4. It is common that a defendant in the pretrial stage will express his innocence and his wish to avoid prison before ultimately agreeing to the prosecutor's offer and pleading guilty. It is entirely consistent with an accused's initial plea of not guilty to have hope for

acquittal to avoid imprisonment. But a hope for an acquittal is not synonymous with a steadfast commitment to accept only an acquittal.

Petitioner's protestations of his innocence and his wish to avoid prison by an acquittal must also be viewed in the context of Flaherty's deficient advice about the punishments Petitioner faced upon conviction from length of sentence to lifetime registration as a sexual offender.

At the May 6, 2013 evidentiary hearing, when Petitioner testified that the plea offer had never been communicated to him, he described his mind set prior to trial. Petitioner acknowledged that "before trial" he maintained that he was not guilty of these charges and that at trial he testified that he did not commit these offenses. Despite maintaining his innocence, Petitioner explained he would have taken the plea offer of a ten year sentence, with five years to serve before being eligible for parole. Petitioner admitted he "was scared to death to go to trial and scared to get up and testify." Flaherty repeatedly would ask him "how we going to get around your wife saying that you allegedly confessed to her." Petitioner knew that "the Commonwealth was flying" his stepdaughters and their mother "back from California to testify against" him and he "knew what they were going to say through their discovery." Petitioner added, as he mistakenly believed, that he "was facing over 200 years." Petitioner felt that "the only evidence on [his] side was [his] testimony saying that [he] did not do this." Petitioner explained that, "on a scale of this is against me and this is for me, it was pretty easy, me against all the other, it was five years was a whole lot better than 200." [02:50:52-54:47.]

Petitioner testified that in a casual conversation Flaherty told him that Petitioner's wife wanted him "to serve five years," but Flaherty said that Petitioner "was not eligible to serve five years." According to Petitioner, Flaherty "laughed it off," saying Petitioner's wife "doesn't know

the law." Flaherty did not explain to Petitioner why five years to serve was not a sentence he could receive. Additionally, Flaherty did not tell Petitioner that he was going to talk to the prosecutor to see if he "would agree in a plea bargain" to what Petitioner's wife, the mother of the two alleged victims, "was proposing as" a sentence for Petitioner to serve. [02:41:51-43:58.] Petitioner testified that the only time that Flaherty mentioned a plea offer from the prosecution to him "was after trial" when Petitioner was confined in the Daviess County Detention Center. [02:43:12-47:00.] This discussion was clearly not about an offer proposed by the prosecution, but a suggestion to Flaherty from the mother of the two victims as to what she viewed as an appropriate sentence.

Petitioner testified that in all the meetings he had with Flaherty they never discussed guilty pleas and Flaherty never said that he was going to talk to the prosecutor to see what the prosecution might offer for a guilty plea. Petitioner never told Flaherty not to go to the prosecutor to see what he might offer in return for a guilty plea, because he did not know that was an option. [02:58:11-03:00:24.]

According to the Kentucky Court of Appeals, "other than his own self-serving allegations, Grimes's contention that he would have accepted the plea if he had been fully informed of its terms is unsupported by—indeed is contrary to—the record." On that basis, the Kentucky Court of Appeals found "Grimes has not met his burden to show prejudice."

As explained above, a multitude of factors coalesced to establish that Petitioner would have accepted the plea offer had Flaherty fully informed Petitioner of the sentencing exposure he faced if convicted of all charges and sentenced to the maximum authorized punishments in comparison with the sentence he would receive if he agreed to the prosecution's plea offer. Petitioner's pretrial expressions of his innocence and his desire to avoid prison made solely to his counsel do not

establish Petitioner would have rejected the plea offer had he been properly advised by his counsel regarding his sentencing exposure and what the plea agreement required of both the prosecution and him.

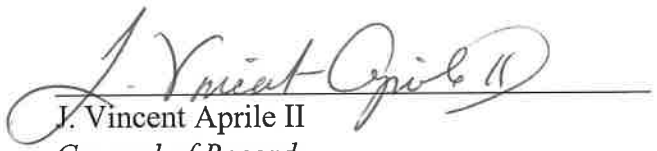
In this case, the prosecutor acknowledged the plea offer was made and that neither he nor the trial court would have reneged on the offer if accepted and the defense attorney admitted not understanding the proffered plea offer and declining to seek clarification of it before passing it on to the client without explanation or advice. Within this context, on the issue of whether the client has sufficiently established he would have accepted the plea offer but for his counsel's ineffective assistance of counsel, this Court has the opportunity to address the impact to be given to a client's mere pretrial protestations of innocence and his wish to avoid prison made only to his counsel coupled with his lawyer's pretrial posturing with the prosecutor regarding the possibility of a plea to settle the case.

This Court should grant this petition to address this question.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari.

Respectfully submitted,



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July 13, 2020

APPENDIX

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RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000988-MR

ANTHONY THOMAS GRIMES — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: After Anthony Thomas Grimes's motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 was denied, he sought relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 based upon alleged ineffective assistance of trial counsel. Cognizant that CR 60.02 relief is only available for claims that could not have been raised in a prior RCr

11.42 motion, Grimes contends he first learned of his trial counsel's ineffectiveness (alleged insufficient explanation of a plea offer) when counsel testified at a hearing held on Grimes's RCr 11.42 motion. We agree with Grimes that his CR 60.02 motion was not procedurally barred but also agree with the trial court that Grimes has not shown his trial counsel was ineffective. Consequently, we affirm.

In its opinion affirming Grimes's convictions on direct appeal, the Kentucky Supreme Court summarized the underlying facts and trial as follows:

> Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, ages 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October 2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the allegations came to light. Grimes testified in his own defense and completely denied the charges.
>
> The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each) and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison.

Grimes v. Commonwealth, No. 2003-SC-1062-MR, 2005 WL 1185609, at *1 (Ky. May 19, 2005) (unpublished) (*Grimes I*).

Grimes then sought RCr 11.42 relief, alleging ineffective assistance by Joseph Flaherty, his trial counsel. The circuit court denied the motion without a hearing and Grimes appealed to this Court.

In 2009, we vacated in part and remanded the case to the trial court with instructions to conduct a hearing *only* on the claim that Flaherty failed to communicate a plea offer to Grimes. *Grimes v. Commonwealth*, No. 2008-CA-000519-MR, 2009 WL 2192626 (Ky.App. July 24, 2009) (unpublished) (*Grimes II*). The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review but only issued a one-page order remanding the matter to us to consider the then-recent precedent of *James v. James*, 313 S.W.3d 17 (Ky. 2010), which discusses the timeliness of appeals. On remand, we distinguished *James* and again remanded the matter to the trial court to conduct a hearing on the "single issue" of whether Flaherty failed to apprise Grimes of a plea offer. *Grimes v. Commonwealth*, No. 2008-CA-000518-MR, 2011 WL 6108510 (Ky.App. Dec. 9, 2011) (unpublished) (*Grimes III*).

The trial court held an evidentiary hearing on that claim in May 2013. At that hearing:

Commonwealth Attorney Van Meter testified that prior to Grimes's jury trial, he orally communicated a plea offer to Flaherty. In exchange for a plea of guilty, the Commonwealth would recommend that Grimes receive a ten-year minimum sentence, with five years to serve before being eligible for parole. Van Meter stated that while he could not specifically recall, he assumed that he received an oral response from Flaherty. He further stated that he was told more than once by defense counsel that Grimes was not taking any offers.

Flaherty testified that after the passage of ten years, he had no specific memory of receiving the plea offer from the Commonwealth, relaying the offer to Grimes, or explaining how the offer would work. However, he repeatedly emphasized that throughout the process leading up to trial, Grimes was adamant that he was not going to take a plea to anything because he did not want to go to jail. Flaherty was cross-examined regarding a document which he filed prior to the evidentiary hearing to which several exhibits were attached, all containing Grimes's signature and the date on which he received each document. Attached to the document were a copy of: the indictment; the Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility; the violent offender statute; and various relevant sections of the Kentucky Revised Statutes relating to Grimes's charges. Flaherty testified that as a matter of routine, he would send a copy of everything to the client in order to keep him fully informed. When asked as to why he did not commit the plea offer to writing and present it to Grimes for his signature, Flaherty stated that if an offer is made by the Commonwealth in writing, a written offer is given to the defendant; if an offer is communicated verbally, it is communicated to the client verbally. While Flaherty admitted that he did not tell Grimes the maximum sentence that he was facing, he stated that he believed Grimes to be an intelligent client who understood the information he received.

> Grimes testified that he received discovery from Flaherty and met with Flaherty frequently before trial. He stated that he and Flaherty once had a conversation during which Flaherty informed Grimes that Grimes's wife wanted him to serve five years. However, he is adamant that during his many conversations and meetings with Flaherty, a plea offer was *never* discussed.
>
> Grimes claims that he had never even heard of plea bargaining until after the trial and that he did not know that it was an option. Grimes contends that the first time he heard of the plea offer was after trial while Flaherty was introducing Grimes to his direct-appeal attorney. Grimes explained that based on the documents that he received from Flaherty, he knew the ranges of penalties for the crimes for which he was charged. After he added them up, he believed that he was facing over 200 years in prison. He stated that despite being innocent of the charges, he would have taken the Commonwealth's offer had he known about it—even without knowing any details of the plea agreement.

Grimes v. Commonwealth, No. 2014-CA-000547-MR, 2016 WL 3962309, at *1-2 (Ky.App. July 22, 2016) (unpublished) (*Grimes IV*). In February 2014, the trial court denied the RCr 11.42 motion, finding Grimes to not be credible. Grimes appealed.

In July 2016, we affirmed via *Grimes IV*. Though we acknowledged the existence of contrary testimony, we concluded substantial evidence supported the trial court's conclusion that "the Commonwealth's offer was communicated to Grimes and . . . he chose to reject the offer." *Id.* at *3. We declined to address Grimes's argument that Flaherty's "advice regarding the specificity of the

communication was deficient" because that issue was not presented in Grimes's RCr 11.42 motion. *Id.* at *4. The Kentucky Supreme Court denied discretionary review, soon after which Grimes filed a CR 60.02 motion.

In his CR 60.02 motion, Grimes contended Flaherty was ineffective for failing to communicate the terms of the plea offer—the same issue we declined to address in *Grimes IV*. After the trial court denied the CR 60.02 motion on both procedural and substantive grounds, Grimes filed this appeal.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008). "The test for abuse of discretion is 'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

The structure of Kentucky's post-conviction proceedings is not haphazard. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). RCr 11.42 and CR 60.02 are "separate and distinct." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *Id.* (quoting RCr 11.42(3)). Instead, "[a] defendant who is in custody under sentence or on probation, parole or conditional discharge, is [first] required to avail himself of

RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *Id.* CR 60.02 relief is thereafter available "only to raise issues which cannot be raised in other proceedings." *Id.* Grimes, as the movant, bears the burden to "demonstrate why he is entitled to this special, extraordinary relief." *Id.*

Grimes claims Flaherty rendered ineffective assistance by not adequately explaining various matters, such as the exact terms of the plea offer and the maximum possible sentence Grimes could receive if he were convicted on all charges at trial. According to Grimes, he could not have raised this issue sooner because he did not know it existed until Flaherty testified at the RCr 11.42 hearing. Although the issue is not dispositive given our conclusion that Grimes has not shown Flaherty was ineffective, for the edification of the bench and bar we will address the procedural propriety of the motion.

We begin by stressing that the law of this case requires a conclusion that Flaherty did tell Grimes about the plea offer, but Grimes swiftly rejected it. The issue now is whether Grimes could have also argued, either on remand or initially, that Flaherty failed to explain adequately the plea offer's terms. This issue is potentially dispositive because CR 60.02 relief is only available for claims which could not have been raised in an RCr11.42 motion.

The scope of our remand in *Grimes III* was intentionally narrow: we vacated and remanded the matter to the trial court to hold a hearing on the "single issue" of whether Flaherty informed Grimes of the Commonwealth's plea offer. *Grimes III*, 2011 WL 6108510, at *11. "[O]n remand, a trial court must strictly follow the mandate given by an appellate court in that case." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005). When an appellate court gives a trial court a specific mandate, as we did in *Grimes III*, "the trial court's authority is only broad enough to carry out that specific direction." *Hutson v. Commonwealth*, 215 S.W.3d 708, 714 (Ky.App. 2006). Thus, the trial court lacked the ability to permit Grimes to broaden his motion to include the somewhat related, but separate, argument that Flaherty inadequately explained the plea offer. Indeed, we refused to consider the inadequate explanation issue in *Grimes IV* because it "was not [properly] before the court during the evidentiary hearing." *Grimes IV*, 2016 WL 3962309, at *4. Determining that Grimes could not have raised the issue post-remand, however, does not end our inquiry because we must now determine if Grimes could have raised the issue pre-remand in his RCr 11.42 motion.

Motions under RCr 11.42 must be "signed and verified by the movant . . . ." RCr 11.42(2). Our Supreme Court has adopted the definition of "verification" found in BLACK'S LAW DICTIONARY—"a formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears

to the truth of the statements in the document." *Taylor v. Kentucky Unemployment Ins. Comm'n*, 382 S.W.3d 826, 834 (Ky. 2012) (quoting BLACK'S LAW DICTIONARY, 1556 (7th ed. 1999)).

Alternative pleading is permissible in criminal post-conviction proceedings, but only if it does not require a movant to assert wholly incompatible factual scenarios. *Johnson v. Commonwealth*, 412 S.W.3d 157, 170 (Ky. 2013). Grimes swore under oath in his RCr 11.42 motion that Flaherty did not tell him until after trial of the plea offer's existence. To raise the inadequate explanation argument would have required him to simultaneously have argued under oath that Flaherty timely told him of the offer but failed to explain it sufficiently. Both of those scenarios could not have occurred. Therefore, Grimes could not have verified each scenario was true under the alternative pleading doctrine.

The entire purpose of our Rules of Criminal and Civil Procedure, including RCr 11.42 and CR 60.02, is to ensure fairness and justice. It would be neither fair nor just to rigidly interpret RCr 11.42 and/or CR 60.02 to require Grimes to have raised factually incompatible arguments under oath. Grimes consistently argued Flaherty failed to tell him of the plea timely until that claim was finally rejected. He then swiftly sought CR 60.02 relief based on Flaherty's testimony at the RCr 11.42 hearing. Nothing in that sequence of events was

improper or unethical. Consequently, we find Grimes's CR 60.02 motion is not procedurally barred.

Turning to the merits of Grimes's arguments, criminal defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). To demonstrate ineffective counsel under these circumstances, a petitioner must first demonstrate deficient performance by showing "counsel's representation fell below an objective standard of reasonableness." *Id.*, 566 U.S. at 163, 132 S.Ct. at 1384 (quotation marks and citation omitted). Second, a defendant must show prejudice. To wit:

> that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id., 566 U.S. at 164, 132 S.Ct. at 1385.

As to deficient performance, Flaherty provided Grimes with copies of many relevant documents, such an official parole eligibility calculation sheet, the violent offender statute, the sex offender registry requirement statute and the indictment. Flaherty did not provide written explanations of the documents but

testified that he orally "went through" them with Grimes. Flaherty also testified that he told Grimes there were "big problems" in the case, such as the damning testimony his children and wife would give. In short, Grimes has not shown that Flaherty failed to provide Grimes with necessary information from which he could have made a reasoned, informed decision about whether to accept the Commonwealth's plea offer.[1] Other than ascertaining his correct maximum sentence, Grimes has not shown what specific additional information he wanted or needed from Flaherty (especially since we have previously concluded Grimes instantly rejected the offer).

Grimes makes much of the fact that Flaherty did not expressly tell him that his maximum sentence was seventy years, which allegedly led Grimes to proceed under the misapprehension that his maximum sentence was 200+ years. Arguably, Flaherty should have explained the seventy-year cap to Grimes. However, Flaherty did provide written documentation about possible sentences to Grimes. Moreover, Grimes's belief that his maximum sentence was nearly triple what it actually was would logically have made him more amenable to accepting a plea offer—yet he still rejected the Commonwealth's facially generous offer offhand. In other words, the fact that Flaherty did not orally explain to Grimes the

[1] Grimes testified that he did not read the documents provided by Flaherty. Thus, Grimes is at least partially responsible for his own alleged lack of knowledge.

correct maximum sentence he faced was not a true factor in Grimes's decision to reject the plea.

Perhaps Flaherty should have asked the Commonwealth to flesh out the offer, such as by requesting a detailed explanation of which charges would be amended or dismissed. But even now Grimes has not shown how acquiring that information would have impacted his decision. For example, Grimes has not said that he was willing to plead to sexual abuse but not sodomy. "Although criminal defendants are entitled to effective representation, there is no right to perfect representation." *Schell v. Commonwealth*, 322 S.W.3d 519, 521 (Ky.App. 2010). We agree with the trial court's conclusion that Grimes has not shown Flaherty's performance was actionably deficient.

Grimes also has not shown prejudice because he has not shown how Flaherty's performance (i.e., failure to obtain from the Commonwealth, and then relate to Grimes, the precise details about the plea, as well as not orally discussing Grimes's maximum sentence and parole eligibility, etc.) impacted Grimes's decision to reject the plea offer. To the contrary, as the trial court noted, both the assistant Commonwealth Attorney and Flaherty consistently testified multiple times that Grimes's unwavering stance was that he would not accept any plea offers.

Accepting the plea offer would have resulted in Grimes receiving a significantly lower sentence. However, other than his own self-serving allegations, Grimes's contention that he would have accepted the plea if he had been fully informed of its terms is unsupported by—indeed is contrary to—the record. Grimes has not met his burden to show prejudice.

For the foregoing reasons, the Daviess Circuit Court's denial of Grimes's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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Frankfort, Kentucky

Supreme Court of Kentucky

2019-SC-000470-D
(2017-CA-000988)

ANTHONY THOMAS GRIMES — MOVANT

V.

DAVIESS CIRCUIT COURT
2003-CR-00078

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Keller, J., not sitting.

ENTERED: February 12, 2020.

CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT – Div. II
CASE NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

ANTHONY THOMAS GRIMES — DEFENDANT

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND SETNENCE

This matter is before the Court on "Movant/Defednant Grimes' Motion Pursuant to CR 60.02, Made Applicable to Criminal Cases By RCr 13.04, to Vacate Judgment and Sentence And/Or to Provide Other Appropriate Relief."

The underlying facts of this case, as set forth by the Kentucky Supreme Court[1] below, are adopted in this case.

> Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, ages 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October 2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the allegations came to light. Grimes testified in his own defense and completely denied the charges.
>
> The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each) and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison.

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[1] *Grimes v. Commonwealth*, 2005 WL 1185609 (Ky. May 19, 2005) at *1 (*Grimes I)*

The Kentucky Supreme Court affirmed the Defendant's conviction on direct appeal. *Id.* On August 27, 2006, the Defendant filed a motion to vacate the judgement and sentence under RCr 11.42, alleging numerous instances of ineffective assistance of counsel[2]. On November 20, 2006, the Court overruled the Defendant's RCr 11.42 motion on all grounds. The Court of Appeals reversed this Court on the singular issue of whether Mr. Flaherty failed to advise him of a plea offer extended by the Commonwealth.[3]

An evidentiary hearing was held on May 6, 2013. The Defendant was present, represented by the Hon. J. Vincent Aprile II. The Commonwealth was represented by the Hon. J. Michael Van Meter. The Court heard testimony from Mr. Van Meter, Mr. Flaherty, and the Defendant. Following voluminous post-hearing briefs, the Court denied the Defendant's RCr 11.42 motion on February 24, 2014. On March 5, 2014, the Defendant filed a motion pursuant to CR 52.02 and RCr 11.42(6) for Findings of Fact on whether Mr. Flaherty denied the Defendant effective assistance of counsel in communicating the plea offer[4]. The Court denied Defendant's CR 52.02 motion, finding that the Court had made sufficient findings of fact to support its ruling on the RCR 11.42 motion.

On July 22, 2016, the Court of Appeals affirmed this Court's denial of Defendant's RCr 11.42 motion. *Grimes v. Commonwealth*, 2016 WL 39623209 (Ky. App. July 22, 2016)(*Grimes IV*). The Court of Appeals found that there was substantial evidence to support this Court's

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[2] The Defendant was represented at trial by the Hon. Joseph R. Flaherty.

[3] *Grimes v. Commonwealth*, 2009 WL 2182626 (Ky. App. July 24, 2009) (*Grimes II*). Discretionary review was granted by the Supreme Court in 2009-SC-740-DG, and remanded back to the Court of Appeals on a separate issue. *Grimes v. Commonwealth*, 2011 WL 6108510 (Ky. App. Dec. 9, 2011)(*Grimes III*). Upon remand, the Court of Appeals again reversed and remanded the case back to this Court on the single issue of whether Mr. Flaherty advised the Defendant about a plea deal offered by the Commonwealth.

[4] That motion also requested findings of fact on whether the Commonwealth's cross-examination regarding whether the Defendant was guilty of the charges and whether he would have entered a non-*Alford* guilty plea were outside the scope of the hearing and would violate the Defendant's Fifth Amendment Rights. This issue is not presented in Defendant's present motion and will not be addressed now.

finding that Mr. Flaherty communicated the Commonwealth's offer and the Defendant rejected that offer. *Id.* at *3. Furthermore, the Court of Appeals affirmed this Court's denial of Defendant's CR 52.02 motion, finding that "[w]hether or not trial counsel's advice regarding the specificity of the communication was deficient" was not essential to determine Defendant's RCr 11.42 motion as the specificity of the communication of the plea offer was not presented in the Defendant's RCr 11.42 motion and thus not before this Court during the evidentiary hearing. *Id.* at *4. The Kentucky Supreme Court denied discretionary review on February 9, 2017, and the Court of Appeals decision became final on the same day. The instant motion was filed shortly thereafter, on February 17, 2017. The Commonwealth filed its Response on April 6, 2017, and the Defendant filed its Reply on April 20, 207.

The Defendant seeks relief under CR 60.02(f), claiming that Mr. Flaherty provided ineffective assistance of counsel in advising the Defendant of the Commonwealth's plea offer, that as a result of any alleged deficient advice the Defendant would have taken that plea offer (i.e. ten years in the penitentiary with the possibility of parole after five years), and that the Commonwealth should be required to re-extend the plea offer to the Defendant, and that he should be resentenced in accordance with that plea offer should he accept.

CR 60.02 is "an extraordinary remedy and is available only when a substantial miscarriage of justice will result from the effect of the final judgment." *Wilson v. Commonwealth*, 403 S.W. 2d 710, 712 (Ky. 1966). CR 60.02 supplements RCr 11.42 instead of supplanting it. *Perkins v. Commonwealth*, 282 S.W. 2d 393, 394 (Ky. 1964). A defendant may not use CR 60.02 to raise "issues that could reasonably have been presented" via RCr 11.42. *Gross v. Commonwealth*, 648 S. W. 2d 853, 857 (Ky. 1983).

Relief under CR 60.02 is discretionary. *Id.* It is available "to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief." *Id.* at 856 (citing *Harris v. Commonwealth*, 296 S.W. 2d 700 (Ky. 1956)). Such relief is not automatic, "but subject to the qualification that there must be circumstances of an extraordinary nature justifying relief." *Gross*, 648 S.W. 2d at 857. Before a defendant is entitled to an evidentiary hearing, "he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Id.* at 856.

In this instance, the Defendant appears to rely on the evidence already in the record and the evidence adduced at the evidentiary hearing on May 6, 2013. Indeed, the Defendant claims that he had no knowledge that Mr. Flaherty had informed him of the Commonwealth plea offer until the evidentiary hearing, and thus could not have presented a claim regarding possible inadequate advice regarding the plea when the original RCr 11.42 motion was filed in 2006 or at any time prior to the present CR 60.02 motion.

The Court disagrees. In his original RCr 11.42 motion, the Defendant acknowledged that there may have been an offer (albeit the RCr 11.42 motion stating the incorrect terms). At no time following the Commonwealth's response on September 8, 2006 clarifying the offer nor anytime thereafter, did the Defendant amend his RCr 11.42 motion to include a new inadequate advice claim. Indeed, following the May 6, 2013 evidentiary hearing, the Defendant did not seek to amend his RCr 11.42 motion[5] to allege inadequate assistance; instead he simply sought additional findings of fact.

[5] The Court believes that amending the RCr 11.42 motion to include a new claim that Mr. Flaherty provided inadequate advice regarding the plea is the correct procedure. *See e.g. Commonwealth v. McGorman*, 849 S.W. 3d 731, 745 (Ky. 2016):

In his Reply Brief, the Defendant claims that amending his RCr 11.42 motion was impossible as the three year filing period had long since passed before the evidentiary hearing, and that any amended motion would be untimely unless his insufficient advice claim arose from the same "conduct, transaction, or occurrence" in the original motion[6]. Specifically, the Defendant believes that "[a] claim of giving deficient advice when communicating a plea offer is based on facts of an entirely different type than a claim of failure to communicate a plea offer." Again, the Court disagrees. Both claims touch the same subject matter; Flaherty's representation as it applied to a plea offer. Furthermore, unlike *Roach*, there was an evidentiary hearing in this case and thus the Defendant could have moved to amend the original motion to conform with the evidence adduced at the evidentiary hearing under CR 15.02.[7]

As stated *Gross*, CR 60.02 is not a proper vehicle to litigate claims that should have been brought under the original RCr 11.42 motion. Thus, the Defendant missed his opportunity to

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> Following the evidentiary hearing, McGorman and his parents executed affidavits denying knowledge of the Commonwealth's offer and McGorman *amended his RCr 11.42 motion* to include failure to convey the plea offer. The trial court summarily denied relief on this specific issue. The Court of Appeals held that, irrespective of the other ineffective assistance claims, an evidentiary hearing should be held on remand to address this alleged plea offer. We agree.

(emphasis added).

[6] Citing *Roach v. Commonwealth*, 384 S.W. 3d 131 (Ky. 2012), holding that CR 15 applies to amendments of RCr 11.42 Motions. In that case, the Kentucky Supreme Court that amendments to RCr 11.42 motions that fall outside the three year window can relate back to the original motion if they are "amplifying and clarifying the original claims, and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by shared facts such that the claims can genuinely be said to have arisen from the same conduct, transaction or occurrence." *Id.* at 136-137.

[7] CR 15.02 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

claim ineffective assistance as to advice regarding the plea agreement when he failed to raise it in his original RCr 11.42 motion or by amendment to that motion[8].

Even had the Defendant's claim been properly submitted, he still has failed to show that Flaherty was ineffective in advising the Defendant as to the plea. During the hearing, Flaherty testified that the Defendant was very smart and attentive but had unrealistic expectations and that he was adamant that he would not take a plea offer. Flaherty also testified that he went through the indictment (indicating penalties for the offenses), the Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility[9], and a number of statutes. (KRS 439.3401 (parole eligibility for violent offenders)[10], KRS 532.045, (persons ineligible for probation), KRS 532.047 (probation and shock probation ineligibility for violent offenders), KRS 532.050 (presentence procedure for felony convictions), KRS 17.510 et. seq. (sex offender registration))[11]. These documents were dated and signed received by the Defendant. From the indictment, statutes, and parole eligibility, he would be aware of the nature of the charges against him, and the penalties.

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[8] In light of the Defendant's Reply brief, the Court wishes to make clear that it does not cite *McGorman* as controlling precedent, but finds the quoted language persuasive in its conclusion that the correct procedure would be to amend the original RCr 11.42 motion in cases like the instant case. The Commonwealth's Response correctly notes that the Kentucky Supreme Court has said "[b]oth the patience and resources of this Court are stretched by repeated motions for post-conviction relief. . ." *Baze v. Commonwealth*, 276 S.W. 3d 761 (Ky. 2008). The Defendant in this case was either (1) aware of such a plea deal prior to the evidentiary hearing, (2) the purported inadequate advice is part of the same subject matter as the purported lack to communicate a plea offer, or (3) the original RCr 11.42 motion could have been amended to conform with the evidence adduced at the evidentiary hearing. If any of those three are true, then the purported inadequate advice claim should have been presented by amendment to the RCr 11.42 motion.

[10] The Defendant complains that Flaherty did not also provide a copy of *Hughes v. Commonwealth*, 87 S.W. 850 (Ky. 2002) that limited the amount of time to serve before parole eligibility for violent offenders to either 85% of the sentence imposed or twenty years, whichever was less. The Certification on the Calculation of Parole Eligibility provided to the Defendant actually summarizes *Hughes* saying just that.

[11] The above documents were attached to Flaherty's Index of Statement of Case filed on May 1, 2013, R. 128-145 of *Grimes IV*.

The Defendant testified that he did not recall reading those documents. He also testified that he did not read those documents because he had hired Flaherty "to have his back." The Defendant faults Flaherty for not providing the information in those documents in a more digestible form. The Defendant is intelligent and does not suffer from any mental impairments. The Court will not fault Flaherty for the Defendant's own failure to read information provided to him by his attorney.

Flaherty also testified that while he did not specifically tell the Defendant he was likely to lose, he did talk with him about "big problems" in the case, such as the fact that two children were making accusations against him and that his wife would testify that he had confessed committing the crimes to her. Thus the Defendant should have been aware of the likelihood of success at trial. Flaherty testified, however (and the court agrees) that the Defendant had unrealistic expectations about the outcome of his case, and that with all of the relevant information, he would not be taking any plea offer.

The decision to take a plea offer or go to trial belongs to the defendant. In this case, the Defendant was aware he faced many years in prison, he was aware of the difficulties of overcoming testimony from children and his wife, and yet was still convinced that he would come out on top. It is only after he received a 59-year sentence did a plea appeal to him.

Having considered the arguments of the Defendant and the Commonwealth, the Court believes that the Defendant should have presented his ineffective assistance claim as to the advice regarding the plea offer by amendment to his RCr 11.42 motion. In any event, the Court does not believe that the Defendant received ineffective assistance regarding the plea offer.

For the foregoing reasons it is **ORDERED** that the Defendant's Motion to Vacate Judgment and Sentence under CR 60.02 is **DENIED**.

This is a final, appealable order.

This, the _____ day of May , 2017.

Hon. Joe Castlen, Judge, Div. II
Daviess Circuit Court

cc: Commonwealth's Attorney
Hon. J. Vincent Aprile II

RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-22-05 E.L.A. Graham D.C.

2003-SC-1062-MR

ANTHONY THOMAS GRIMES — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
2003-CR-0078

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Grimes of two counts of first-degree rape, six counts of first-degree sodomy, eight counts of first-degree sexual abuse and one count of second-degree sexual abuse. He was sentenced to a total of fifty-nine years in prison.

The questions presented are whether Grimes was entitled to instructions on lesser-included offenses to first-degree rape; whether he was entitled to instructions on lesser-included offenses to other charges contained in the indictment; whether the prosecutor's arguing of facts not in the record was palpable error; whether an *ex parte* communication between the prosecutor and the trial judge prejudiced the defendant;

whether the prosecutor misstated the in-court identification of the defendant by the victims; whether the reference to the defendant as a salesman and to his appearance resulted in a manifest injustice; whether the defendant was required to characterize a prosecution witness as a liar; and whether an alleged unsolicited response by a witness was palpable error.

Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, ages 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October 2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the allegations came to light. Grimes testified in his own defense and completely denied the charges.

The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each) and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison. This appeal followed.

I. Instructions on Lesser-Included Offenses to Rape

Grimes argues that the trial judge erred by not giving lesser-included offense instructions to the two counts of first-degree rape. He claims that the mother's

testimony concerning a conversation she had with him after the sexual misconduct came to light supports his position. That testimony was as follows:

> . . . I asked him if, first I asked him if [the oldest victim] could be pregnant and he said he never touched them with his penis. He said that the only thing he did is he used his fingers on them and he never put them in them no deeper than fingernail depth. . .

Defense counsel did seek instructions on lesser-included offenses to the two counts of first-degree rape, but that was not predicated on the testimony of the mother. Instead, he indicated that Grimes was entitled to the instructions based on his testimony that he did not have sexual intercourse with the victims. Defense counsel cited the commentary to 1 Cooper, Kentucky Instructions to Juries (Criminal) §4.23, at 201 (4th ed. Anderson 1999), particularly, this sentence: "If there is evidence that sexual intercourse did not occur, an instruction on First-Degree Sexual Abuse should be given as a lesser included offense." He did not tender any instructions.

A party may preserve an error in the giving or failure to give an instruction by stating specifically the matter to which he objects and the ground or grounds of his objection. RCr 9.54(2). He is not permitted to argue different grounds on appeal than were raised below. Commonwealth v. Duke, 750 S.W.2d 432 (Ky. 1988). Because this issue was not fairly and adequately presented to the trial judge, Grimes did not properly preserve this issue for appellate review.

In any event, there was no factual basis to support an instruction on lesser-included offenses to first-degree rape. That is only required if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Clifford v. Commonwealth, 7 S.W.3d 371 (Ky. 1999).

The entire import of the defense evidence here was that the events alleged had not in fact occurred. This does not entitle Grimes to instructions on lesser-included offenses. Trial defense counsel misinterpreted the commentary from Cooper, supra, § 4.23. Additionally, rape and sexual abuse are two different crimes. Evidence was introduced that both acts of sexual misconduct occurred over a number of years and once on the same date. Under these circumstances, Grimes' statement to his wife can only be interpreted as a complete denial that the rapes occurred, but an admission that he did sexually abuse the victims. The instructions given by the trial judge were correct.

II. Instructions on Lesser-Included Offenses to Other Charges

Grimes also contends that he was entitled to lesser-included offense instructions on counts four through eleven of the indictment. Those counts allege first-degree rape, first-degree sodomy and first-degree sexual abuse against the oldest victim. We disagree with this argument.

At the instruction conference, defense counsel claimed that there was evidence that forcible compulsion did not occur because Grimes denied the allegations. Thus, he asserted that the victim's age could be a factor that would support the lesser crimes. He again relied on the commentary to Cooper, supra, §§ 4.23, 4.35 and 4.47. On appeal, Grimes directs our attention to a comment made by the prosecution in closing argument that he says would raise a factual issue concerning the victim's consent. That comment regarding a statement attributed to Grimes by the mother was as follows: "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

This issue is not properly preserved for appellate review for the same reasons we gave in the first issue addressed in this opinion. Moreover, it is completely without merit. Having carefully reviewed the entire record, it is clear that the alleged statement

was never introduced into evidence. Statements made by the prosecution in the closing argument are not evidence. The trial judge correctly concluded that there was no factual basis to give instructions on lesser crimes.

III. Arguing of Facts Not in Evidence

Predictably, Grimes next alleges that he suffered manifest injustice when the prosecutor during closing argument of the guilt phase argued facts neither in evidence nor reasonably inferable from the evidence. This of course being when the prosecutor told the jury that Grimes had said to the mother on the telephone that "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

The comment by the prosecutor was apparently taken from a memorandum prepared by the Commonwealth summarizing a pretrial interview with the mother. The statement at issue was never introduced into evidence and there was no objection when the prosecutor mentioned it during his closing argument.

When reviewing claims of error in closing argument, our analysis must focus on the overall fairness of the trial and not the culpability of the prosecutor. Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987). Reversal is only justified when the alleged prosecutorial misconduct is so serious as to render the trial fundamentally unfair. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir.1979); Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). In this case, the isolated misstatement by the prosecutor did not prejudice Grimes in any manner. There was no manifest injustice.

IV. *Ex Parte* Communication

Grimes complains that an *ex parte* contact by the prosecutor with the trial judge denied him a fair trial. We disagree.

When the youngest victim began to cry during her direct testimony, defense counsel asked to take a break. The trial judge declared a five-minute recess and then went off the record. Twenty-five seconds later, the trial judge went back on the record, and the trial videotape shows the prosecutor at the bench and the jury still in the jury box. Defense counsel is not present at the bench, but the videotape record does not show whether he or the defendant are outside the courtroom. The prosecutor advised the trial judge that the youngest victim needed her mother. The trial judge indicated that she could see her mother, but that they were not to talk about her testimony. The prosecutor agreed and the trial judge went off the record again until the testimony of the youngest victim resumed. The entire exchange between the prosecutor and the trial judge lasted approximately twenty seconds.

A defendant has a right to be present at all critical stages of his prosecution. RCr 8.28(1). The test with respect to whether an *ex parte* communication violates that right is whether the presence of counsel was necessary to insure fundamental fairness or whether the defendant was deprived of a "reasonably substantial ... opportunity to defend against the charge." Gabow v. Commonwealth, 34 S.W.3d 63, 74 (Ky. 2000), *quoting*, United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

Here, Grimes has not been denied any fundamental rights. His claim that the mother could have coached the victim is highly speculative. The youngest victim had already testified to a number of sexual improprieties committed by Grimes before the recess was called. She did not testify to anything more than what she had told the police initially. When the mother testified later in the trial, she did not recount any acts of abuse that her daughter had related. The trial judge permitted the mother to be with

her then twelve-year-old daughter who was visibly upset. He admonished the prosecutor that mother and child were not to discuss their testimony and the prosecutor acknowledged that he understood that condition. Although the better practice could have been for defense counsel to be present at the bench during the exchange, we find no prejudice to Grimes.

V. Phrasing of In-Court Identification

Grimes argues that he suffered manifest injustice when the prosecutor stated during his direct examination of each of the two alleged victims that the record should reflect the witness had "correctly identified" him as the perpetrator. He admits that this issue is unpreserved, but seeks review pursuant to RCr 10.26.

Near the end of his direct examination of the two victims, the prosecutor asked each of them if the person who had sexually abused them was present in the courtroom, and if so, to point him out to the jury. Each victim pointed to Grimes and identified him by the color of his shirt. In each instance, the prosecutor asked the trial judge to let the record reflect that the victim "correctly identified the defendant." The trial judge responded that the record reflected that the witness pointed toward the defendant.

The use of the word "correctly" did not improperly bolster and vouch for the testimony of the victims. Even if it did, it could not have prejudiced Grimes because identify was never at issue in this case. No prosecutorial misconduct occurred. There was no error and certainly no palpable error.

IV. Comment on Defendant's Profession

Grimes contends that he suffered manifest injustice when the prosecutor in the guilt phase closing statements argued facts not reasonably inferable from the evidence,

telling the jury that, as a professional salesman, it was his [Grime's] "job as a salesman to try to sell to [the jury] that he is not guilty. He concedes that this issue is not preserved, but asks for review under the palpable error rule. RCr 10.26.

The defendant testified that he was a sales representative for a company that sold construction equipment. In his closing statement, the prosecutor addressed the defense theory that Grimes was telling the truth and that the victims and their mother were lying. He mentioned the possibility that some of the jurors might disbelieve the victims because they thought that when Grimes testified he didn't look like a child molester. The prosecutor then stated the following:

> . . . No, he looked well. He dressed well. He testified professionally. His chosen profession is a salesman. I'm not knocking salesman. But it's his job as a salesman to try and sell to you that he's not guilty. But the evidence, the proof and the details show otherwise. You know, he looks good. He's dressed up now, but how did he look to . . . [the two victims] when he was abusing them?

We have held it permissible to refer to a defendant as a "bit of evil," Slaughter, supra, as a "beast," Ferguson v. Commonwealth, 401 S.W.2d 225 (Ky. 1965) and as a "desperado," Holbrook v. Commonwealth, 249 Ky. 795, 61 S.W.2d 644 (1933). A defendant was not denied a fair trial even after being called worse than all the convicts and traitors in hell. Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979). The comments here about Grimes being a salesman and references to his appearances are certainly less offensive than the descriptive names in the above-cited cases. There was no error.

IV. Characterization of Witness Testimony

Grimes claims that he suffered manifest injustice when the prosecutor required him on cross-examination to characterize the testimony of his wife as "not true" and to

state whether there was anything in her testimony about his alleged telephone confession that she was "telling the truth about." This was proper cross-examination. The prosecutor was attempting to clarify the differences in their testimony, some of which Grimes admitted was accurate. Grimes was never asked whether his wife was lying and even if it could be interpreted in that manner, there was not palpable error. See Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997).

VIII. Unsolicited Response

Grimes asserts that he suffered manifest injustice when the mother volunteered during cross-examination by the defense that the early development of her daughters' breasts were physical evidence that both daughters had been sexually abused. We disagree.

Defense counsel asked the mother a series of questions regarding whether her daughters had reported any abuse to her in the last five years or whether she noticed any changes in their behavior. He then asked her whether there were any emotional indications of any kind, and she responded that the girls were developing early. Defense counsel did not object to the response and even commented that he thought the youngest victim looked more mature than she did a year ago. Grimes cannot reasonably claim any palpable error here.

Grimes received a fundamentally fair trial. He was not denied any due process under either the state or federal constitutions.

The judgment of conviction is affirmed.

All concur except Johnstone, J., who concurs in result only.

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000547-MR

ANTHONY THOMAS GRIMES — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Anthony Thomas Grimes appeals from an order of the Daviess Circuit Court denying his motion made pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 and from the order denying his motion made pursuant to Kentucky Rule[s] of Civil Procedure (CR) 52.02. The case was before the circuit

court on remand from this Court for an evidentiary hearing on whether trial counsel was ineffective for failing to communicate a plea offer. After our review, we affirm.

In 2003, Grimes was convicted of two counts of first-degree rape, six counts of first-degree sodomy, eight counts of first-degree sexual abuse, and one count of second-degree sexual abuse for offenses committed against his two minor stepdaughters. He was sentenced to a total of fifty-nine-years' imprisonment. In 2005, his conviction and sentence were affirmed on direct appeal to the Supreme Court of Kentucky in an opinion not to be published. *Grimes v. Commonwealth*, 2003-SC-1062-MR, 2005 WL 1185609 (Ky. 2005).

Grimes later filed his Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 motion raising several claims, including numerous claims of ineffective assistance of counsel. Without conducting an evidentiary hearing, the trial court summarily denied all of his claims. Grimes appealed to this Court, and we affirmed in part -- but reversed for an evidentiary hearing on the sole issue of whether trial counsel failed to communicate a plea offer.

An evidentiary hearing was held on May 6, 2013, at which the court heard testimony from Assistant Commonwealth's Attorney Michael Van Meter, the prosecutor who tried the case. The court also heard the testimony of defense counsel, Richard Flaherty, and appellant Grimes.

Commonwealth Attorney Van Meter testified that prior to Grimes's jury trial, he orally communicated a plea offer to Flaherty. In exchange for a plea of guilty, the Commonwealth would recommend that Grimes receive a ten-year minimum sentence, with five years to serve before being eligible for parole. Van Meter stated that while he could not specifically recall, he assumed that he received an oral response from Flaherty. He further stated that he was told more than once by defense counsel that Grimes was not taking any offers.

Flaherty testified that after the passage of ten years, he had no specific memory of receiving the plea offer from the Commonwealth, relaying the offer to Grimes, or explaining how the offer would work. However, he repeatedly emphasized that throughout the process leading up to trial, Grimes was adamant that he was not going to take a plea to anything because he did not want to go to jail. Flaherty was cross-examined regarding a document which he filed prior to the evidentiary hearing to which several exhibits were attached, all containing Grimes's signature and the date on which he received each document. Attached to the document were a copy of: the indictment; the Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility; the violent offender statute; and various relevant sections of the Kentucky Revised Statutes relating to Grimes's charges. Flaherty testified that as a matter of routine, he would send a copy of everything to the client in order to keep him fully informed.

When asked as to why he did not commit the plea offer to writing and present it to Grimes for his signature, Flaherty stated that if an offer is made by the Commonwealth in writing, a written offer is given to the defendant; if an offer is communicated verbally, it is communicated to the client verbally. While Flaherty admitted that he did not tell Grimes the maximum sentence that he was facing, he stated that he believed Grimes to be an intelligent client who understood the information he received.

Grimes testified that he received discovery from Flaherty and met with Flaherty frequently before trial. He stated that he and Flaherty once had a conversation during which Flaherty informed Grimes that Grimes's wife wanted him to serve five years. However, he is adamant that during his many conversations and meetings with Flaherty, a plea offer was *never* discussed.

Grimes claims that he had never even heard of plea bargaining until after the trial and that he did not know that it was an option. Grimes contends that the first time he heard of the plea offer was after trial while Flaherty was introducing Grimes to his direct-appeal attorney. Grimes explained that based on the documents that he received from Flaherty, he knew the ranges of penalties for the crimes for which he was charged. After he added them up, he believed that he was facing over 200 years in prison. He stated that despite being innocent of the

charges, he would have taken the Commonwealth's offer had he known about it -- even without knowing any details of the plea agreement.

Following the hearing, the circuit court issued a written order overruling Grimes's motion. In its order, the court made the following findings of fact: that Flaherty inquired of Van Meter if anything could be resolved by agreement; that the Commonwealth agreed to an offer whereby Grimes would plead guilty to some related offenses for which he would be sentenced to ten years and for which he would not be eligible for parole until after serving five years; that Van Meter orally communicated the offer to Flaherty; that the offer was instantaneously rejected by Grimes in the manner in which it was presented (*i.e.*, verbally); and that he rejected the notion of any plea offer on several subsequent occasions. The court also found that Flaherty was a more credible witness than Grimes.

On March 5, 2014, Grimes filed a motion pursuant to CR 52.02 and RCr 11.42(6) for findings of fact, which the circuit court denied. The court ruled that it had made sufficient findings of fact in its order overruling Grimes's RCr 11.42 motion to support its ruling. This appeal followed.

On appeal, Grimes alleges that the circuit court erred: (1) when it denied his claim that counsel rendered ineffective assistance by failing to communicate the Commonwealth's pretrial offer and (2) when, after deeming

defense counsel's testimony to be credible, it nonetheless declined to find that defense counsel had denied appellant effective assistance in advising him with regard to the plea bargain.

The burden of proof on an RCr 11.42 motion lies with the accused, who must demonstrate that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Commonwealth v. Campbell,* 415 S.W.2d 614 (Ky. 1967). On appeal, we must uphold the trial court's findings of fact "unless they are clearly erroneous, and due regard must be given to the opportunity of the trial judge to view the credibility of the witnesses." *Polley v. Allen,* 132 S.W.3d 223, 228 (Ky. App. 2004).

Under the Sixth Amendment to the Constitution of the United States, when a claim of ineffective assistance of counsel is made, the petitioner bears the burden to show: (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A mere showing that counsel's performance fell below a reasonable standard is not enough; rather, the petitioner must also show that but for counsel's deficient performance, "the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. at 2068. With these standards in mind, we turn to Grimes's arguments.

Grimes first claims that the circuit court erred when it found that his trial attorney did not fail to communicate a plea agreement offered by the Commonwealth. Grimes contends that the circuit court based its decision on findings that are not supported by the record. Of particular concern to Grimes is the court's finding that Flaherty was the more credible witness and the court's statement that "[t]he only evidence of note proffered by the Defendant is his testimony that Mr. Flaherty received an offer and did not relay it to him. There is no evidence of substance to consider." Grimes argues that there was substantial evidence presented at the evidentiary hearing to support a finding that he rather than Flaherty was the more credible witness.

It is well established that questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and that due regard must be given to the court's opportunity to judge the witness's credibility. CR 52.01; *Sherfey v. Sherfey,* 74 S.W.3d 777, 782 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth,* 253 S.W.3d 528 (Ky. 2008). A factual determination made by the circuit court cannot be disturbed on appeal unless it is clearly erroneous. CR 52.01. Findings of fact cannot be deemed to be clearly erroneous if they are supported by substantial evidence. *Sherfey,* 74 S.W.3d at 782. If -- as in this case -- the testimony before the trial court is

conflicting, we may not substitute our judgment for that of the trial court. *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 39 (Ky. App. 1998).

Grimes argues that the trial judge should have determined that he was the more credible witness. In support of that contention, Grimes points to Flaherty's failure to reduce the plea agreement to writing, Flaherty's admission that he did not believe that the circuit court would accept the offer, and Flaherty's alleged motive to lie in order to avoid being sued for damages. Grimes also notes the substantial disparity between the penalty offered by the Commonwealth and the maximum punishment possible under the terms of the indictment. While this evidence could arguably support a finding that Grimes was indeed credible, it is not of consequence to our inquiry. We must only determine if substantial evidence supported the circuit court's decision. And we are persuaded that it did.

Flaherty testified that Grimes repeatedly told him that he would not take a plea deal. While he could not remember the particular details of the offer, Flaherty testified that a verbal offer would have been met with a verbal response. Van Meter testified that he was told **more than once** that Grimes was not taking any offers. The sum of this testimony constitutes substantial evidence to support the circuit court's finding that the Commonwealth's offer was communicated to Grimes and that he chose to reject the offer. We hold that there was substantial evidence to support the circuit court's finding and that, therefore, it was not clearly

erroneous. Accordingly, Grimes has not met his burden of showing that the performance of his trial counsel was deficient.

Grimes next argues that the circuit court erred when it declined to make findings of fact pursuant to CR 52.02 on an issue that was not raised in Grimes's original RCr 11.42 motion: namely, the alleged deficiency of counsel's advice on the nature of the plea bargain itself. RCr 11.42(6) requires that at the conclusion of the evidentiary hearing, the court must make "findings determinative of the material issues of fact and enter a final order accordingly." If a movant believes the court failed to make a finding of fact on an ***issue essential to the order***, CR 52.02 allows an appellant to bring this alleged omission to the attention of the trial court so that the court "may amend its findings or make additional findings and may amend the judgment accordingly." CR 52.02. However, RCr 11.42(6) is not an avenue by which a movant can raise new issues and force the trial court to make findings on those issues.

The court's order denying RCr 11.42 relief made findings supporting its conclusion that trial counsel's performance was not deficient. The court believed that based on the testimony at the evidentiary hearing, trial counsel communicated the plea offer to Grimes. Whether or not trial counsel's advice regarding the specificity of the communication was deficient was not essential to the court's finding with respect to the issue under its consideration. Neither RCr

11.42(6) nor CR 52.02 requires the trial court to make additional findings on an issue that was not raised in Grimes's original RCr 11.42 motion and that was not before the court during the evidentiary hearing.

Grimes requests that this Court grant him relief based on this new issue of allegedly deficient communication. However, this issue was not in Grimes's RCr 11.42 motion, nor was it ruled upon by the circuit court. An appellant cannot pursue one strategy before the trial court and try out a new one before an appellate court. *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976) (*overruled on other grounds by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010)); see also *Brock v. Commonwealth*, 479 S.W.2d 644 (Ky. 1972) (an issue must be raised at the trial court level by way of an RCr 11.42 motion and denied before a court may hear it on appeal). Because this argument was never presented to the trial court in Grimes's RCr 11.42 motion, the issue was not preserved, and we cannot review it.

We affirm the order of the Daviess County Circuit Court.

ALL CONCUR.

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