No. _______________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JASPER POLLINI, *Petitioner*

v.

AMY ROBEY, WARDEN,
LUTHER LUCKETT CORRECTIONAL COMPLEX, *Respondent*

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

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QUESTIONS PRESENTED

Pollini's appellate counsel failed to raise a claim that Pollini was entitled to participate in formulating the response to an important jury question. The Kentucky Supreme Court refused to determine whether Pollini would have prevailed in his appeal had appellate counsel raised the issue, finding only that in light of recent changes to the standard of harmless error, Pollini would not prevail in the appeal it it was heard at the time of the post-conviction decision.

The Sixth Circuit concluded that Pollini would have gotten a new trial had counsel raised the claim. However, ignoring the state court's actual reasoning, the Sixth Circuit nevertheless found that Pollini could not cross the § 2254 threshold. The basis for the Sixth Circuit's ruling was that *Lockhart v. Fretwell* – a case with no direct application to the instant case, and which this Court has held should be limited to its facts – made it possible for reasonable jurists to disagree about whether the outcome of the state post-conviction proceedings was incorrect.

The questions presented by this Petition are:

1. Whether *Lockhart v. Fretwell*'s suggestion that "mere outcome determination" is not sufficient to establish prejudice under S*trickland v. Washington* is part of the "clearly established law" governing the state court's ruling, in light of subsequent limiting decisions.

2. If not, whether a state court's denial of an ineffective assistance of appellate counsel claim based on the harmless error standard in effect at the time of the post-conviction action, rather than deciding whether the result of the appeal would be different, is contrary to or an unreasonable application of *Strickland v. Washington* and *Smith v. Robbins.*

LIST OF PARTIES

1. Jasper Pollini is represented by Hon. Timothy G. Arnold, Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.
2. Amy Robey, Warden, Luther Luckett Correctional Complex is represented by Hon. Daniel Cameron, Attorney General, and Hon. Jeffrey Cross, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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Jasper Pollini, Petitioner, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit, affirming a finding denying habeas corpus relief on his ineffective assistance of appellate counsel claim.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit in *Pollini v. Robey*, 981 F.3d 486 (6th Cir. 2020) is attached at Appendix ("Apx") A. The unpublished ruling of the United States District Court for the Western District of Kentucky in *Pollini v. Litteral*, 3:14-CV-689-DJH-RSE, 2019 WL 236721 (W.D. Ky. Jan. 15, 2019), is attached at Apx B. The published decision of the

Kentucky Supreme Court in *Commonwealth v. Pollini*, 437 S.W.3d 144 (Ky. 2014) is attached at Apx C. The unpublished Kentucky Court of Appeals opinion in *Pollini v. Commonwealth* is attached at Apx D. The unpublished opinion of the Jefferson (Ky.) Circuit Court is attached at Apx E.

JURISDICTION

It is undisputed that Petitioner timely and properly filed a habeas corpus action in the United States District Court for the Eastern District of Kentucky, and then timely and properly appealed the denial of relief in that action to the United States Court of Appeals for the Sixth Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final decision of a United States Circuit Court of Appeals.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established
> (2) Federal law, as determined by the Supreme Court of the United States; or
>
> (3) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. **Trial:** Mr. Pollini and his sister, Crystal Plank, were both arrested and

charged with murder in the death of Byron Pruitt in suburban Louisville. Prior to their arrest, both had given taped statements, which indicated that Mr. Pollini had shot Pruitt accidentally, and that he was only trying to scare him off.

Pollini and Plank were tried together. Plank testified and affirmed her prior statement to police. At the time of her testimony, Plank's counsel attempted to offer a transcript of her prior statement into evidence, but that motion was denied, due to Plank's attorney's failure to have the transcript certified prior to trial. Instead, a tape of the statement was played for the jury and then entered into evidence to go back to the jury room. Ironically, after objecting to the transcript going back to the jury, during closing arguments the Commonwealth blew up portions of the transcript prepared by Plank's counsel to use as a "demonstrative aid" in its argument.

The Commonwealth argued that Pollini had intentionally shot Pruitt, which Pollini disputed. In evaluating Pollini's defense, Plank's statement was critical, as it corroborated Pollini's in every respect, and clearly indicated that Pollini was not aiming for Pruitt at the time he fired. During deliberations, the jury sent the following question to the court: "Does there exist a transcript of the Plank conversation w/Police? Difficult to locate on tape. If so, can we pls request?"[1] Without consulting counsel or having a hearing in court as required by Ky.R.Cr. 9.74, the Court responded, "There's none available."[2] Neither party's counsel apparently learned of the note or the response until the case was on appeal.

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[1] Jury Note, Appendix, *supra*, PageID #380.

[2] *Id.*

2. **Direct Appeal:** Pollini was convicted of Murder and other offenses and sentenced to Life Without Parole for 25 Years (LWOP/25), while Plank was convicted of complicity to second degree manslaughter and sentenced to 10 years. Both Pollini and Plank appealed, with Pollini's appeal going to the Kentucky Supreme Court, and Plank's appeal going to the Kentucky Court of Appeals. In her appeal, Plank raised the ex parte jury issue. Though the court in her case reversed on other grounds, it also found the ex parte jury contact issue "very bothersome", stating:

> The Commonwealth's position on this issue is that the trial court correctly answered the jury's question (since the transcript of Crystal's statement was not admitted into evidence, it was not available) and thus no information was given to the jury such that the notice requirements of RCr 9.74 would have been invoked. We disagree that the notice requirements of RCr 9.74 were not applicable in this case. In our view, the court's answer, "There's None Available", was itself information given to the jury that required notice to the parties and to counsel. The trial court was most assuredly aware of the desire of Crystal's counsel to have this transcript before the jury and it is very bothersome to this Court that counsel was never even given notice that they had requested the transcript. This is especially true in light of the following: the Commonwealth used a selected portion of this very transcript in its closing argument; there were questions regarding the audibility of the audiotape of Crystal's statement; and dicta in *Perdue v. Commonwealth*, 916 S.W.2d 148, 155 (Ky.1996), regarding the jury's access to transcripts of tape recordings. Given our rulings above, however, we need not proceed to an analysis of whether this error warranted reversal in this case.[3]

By contrast, Pollini's appellate counsel did not raise the ex parte jury issue.

[3] *Plank v. Commonwealth*, 2005 WL 1313838, at *9 (Ky. App. June 3, 2005).

Rather, on appeal, Pollini's counsel raised nine claims of error, including some notable clunkers, including an unpreserved issue that would have required the Kentucky Supreme Court to overturn a decision that had become final months before the brief was filed. The Kentucky Supreme Court rejected all the arguments except the claim that the homicide did not occur in the course of the burglary, vacating the case for a new sentencing hearing.[4]

3. **State Post-Conviction Proceedings:** After Pollini was resentenced to a life sentence on the murder charge, and his appeal from that sentence was denied, Pollini filed post-conviction action in state court raising several claims, including that counsel was ineffective for failing to raise the ex parte jury contact claim. Eventually, the Kentucky Court of Appeals found that Pollini's conviction should be vacated on the basis of the ineffective assistance of appellate counsel due to appellate counsel's failure to raise the ex parte jury claim, noting that Plank's counsel had raised the claim and the Court had suggested it warranted relief.[5] Describing the error as "egregious", the Kentucky Court of Appeals held that:

> The jury's note regarding Plank's statement to police clearly indicates that they were unable to understand or find portions of Plank's statements in the videotape of her testimony. The transcript did in fact exist, and thus the judge's response to the jury was erroneous and misleading, at best. While the record indicates that Pollini had at some point objected to the introduction of Plank's statement to police, at the very least, the judge was required to present

[4] *Pollini v. Commonwealth*, 172 S.W.3d 418 (Ky. 2005).

[5] *Pollini v. Commonwealth*, 2009-CA-964 (12/22/2011), Apx. E.

> the jury's request to counsel in Pollini's presence. Accordingly, the trial court committed reversible error when it provided false information outside of Pollini and counsel's presence to the jury. This is exactly the behavior that RCr 9.74 is intended to prevent.[6]

The Kentucky Supreme Court subsequently granted the Commonwealth's motion for discretionary review, in order to consider the issue of whether Pollini's appellate counsel was ineffective.

In the Kentucky Supreme Court, the briefing focused on whether the error was subject to harmless error analysis in the period from 2003 to 2005 when the case was briefed and decided, with Pollini arguing that the standard at the time was structural error, and the Commonwealth arguing that the issue was subject to harmless error. Three days after Pollini's post-conviction brief was filed, and before the Commonwealth's reply brief was due, the Kentucky Supreme Court finally decided *McAtee v. Commonwealth*.[7] In *McAtee*, the Kentucky Supreme Court held for the first time that errors under RCr 9.74 were only reversible if they "impugn[ed] the fundamental fairness of an otherwise constitutionally acceptable trial."[8] The Court went on to describe the standard of harmless error to be consistent with the "effect on the verdict" test identified by this Court in *Kotteakos v. United States*.[9] This

[6] *Id.*, Apx. D, Page 10.

[7] *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013)

[8] *Id.*, at 627.

[9] *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750 (1946))

standard was not in use in Kentucky for any issue until well after Pollini's original appeal had been decided in 2006.[10]

Other than including *McAtee* in a string cite to support the proposition that a harmless error standard applied, the Commonwealth did not argue in its reply brief that the new standard was applicable. At no point prior to the opinion did either party suggest that a new standard of harmless error could be retroactively applied to Pollini's ineffective assistance of appellate counsel claim, nor did either party reference *Lockhart v. Fretwell*.

The Kentucky Supreme subsequently reversed the Court of Appeals and reinstated the judgment of conviction and sentence.[11] Relying on state precedent applying *Smith v. Robbins* and *Strickland v. Washington*,[12] the Court noted that to prevail in addition to proving deficient performance, Pollini would have to show "that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded."[13] The Court then turned to the question of whether any deficiency was prejudicial under that standard.

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[10] The Kentucky Supreme Court has acknowledged that *Kotteakos* standard was first adopted by Kentucky in the 2009 case of *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky.2009). *See Elery v. Commonwealth*, 368 S.W.3d 78, 85, n.4 (Ky. 2012)(noting that the prior, *Chapman*-style test "has been supplanted by the effect-on-the-verdict test of *Winstead*.")

[11] *Commonwealth v. Pollini*, 437 S.W.3d 144 (Ky. 2014).

[12] *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).

[13] *Id*., at 149, citing *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010).

Describing the question of what harmless error standard to apply to the error as a debate over the "appellate standard of review", the Kentucky Supreme Court held that it "will not conduct an inquiry into which appellate standard of review was applicable to RCr 9.74 violations in 2004 without first questioning whether the standard at issue was procedural or substantive law."[14] The Court then concluded that the "appellate standard of review" identified in *McAtee* was "procedural" and not "substantive", and therefore could be retroactively applied to Pollini's case.[15] In determining what standard of appellate review to apply, neither *Lockhart v. Fretwell* nor its reasoning was ever mentioned. That decision played no apparent role in the Kentucky Supreme Court's decision, which was based on conflating the standard of *Strickland* prejudice with the standard of harmless error to be used on direct appeal.

Using the recently adopted standard, the Kentucky Supreme Court concluded that the error was harmless, and denied relief. Pollini's rehearing petition arguing that the Court erred by retroactively applying the standard of review was rejected in a summary order.

4. **Federal Habeas Corpus Proceedings:** Pollini filed the instant habeas action arguing in pertinent part that the Kentucky state courts resolution of Pollini's claim of ineffective assistance of appellate counsel regarding the RCr 9.74 violation was contrary to, or an unreasonable application of, *Smith* and *Strickland*. Pollini further argued that the resolution of the issue was based on an unreasonable

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[14] *Id.*, at 150.

[15] *Id.*, at 150-152.

determination of the facts, because the findings that the jury had an operable copy of the correct tape and eventually listened to the statement was little more than "rank speculation." The Warden, on behalf of the Commonwealth, argued that the state court decision was not unreasonable, because under *Lockhart v. Fretwell*, the Court was required to use the law in effect at the time of the post-conviction decision.

The case was referred to a magistrate judge, who on December 22, 2016, issued a recommendation that Pollini be granted habeas corpus relief in the form of a new appeal on the ex parte jury issue, based on ineffective assistance of appellate counsel.[16] The Warden objected, and the District Court overruled the Magistrate Judge.[17] On the issue of whether the Kentucky Supreme Court applied the correct prejudice standard, the District Court rejected the Magistrate Judge's reasoning and construed *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) to hold that "[i]n determining whether prejudice has occurred, the reviewing court should apply current governing law rather than the law in place at the time of the alleged deficiency."[18]

5. **The Opinion Below:** Pollini appealed the decision, and a Certificate of Appealability was granted. On appeal, the Sixth Circuit summarized the problem as follows:

> Whether Pollini would have prevailed turns on what standard of review the Kentucky Supreme Court was required to apply to a Rule 9.74 violation: a "structural

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[16] Findings of Fact, Conclusions of Law, and Recommendation, R. 39, PageID## 1559-1618.

[17] Memorandum Opinion and Order, R. 50, PageID ##1726-1741

[18] *Id.* at 1730.

> error" or "fundamental fairness" standard. On that issue, the legal landscape shifted during the course of Pollini's appeal. At the time of his direct appeal, Rule 9.74 violations were subject to a structural error standard, meaning Pollini likely would have prevailed had his counsel raised the issue. But by the time of his collateral attack, Rule 9.74 violations were reviewed under a fundamental fairness standard, one more favorable to the Commonwealth. The Kentucky Supreme Court held that the latter standard applied in Pollini's case. As a result, Pollini could not show prejudice from his appellate counsel's error.[19]

The Sixth Circuit found that the Kentucky Supreme Court's decision was not contrary to *Strickland* and *Smith*, stating that "Pollini does not point to (nor can we identify) any Supreme Court holding directly prohibiting the Kentucky Supreme Court from applying the current standard of review to his case."[20] The Court then concluded that the Kentucky Supreme Court's conclusion was not "objectively unreasonable" because *Fretwell* might have permitted the court to use the current standard of review. The Sixth Circuit acknowledged that *Fretwell*'s "footprint is limited",[21] and that while *Fretwell* and the cases relying on it "relied on a defunct legal right that no longer existed (and could even be characterized as having never validly existed), Pollini still maintained a valid legal claim to be privy to jury communications. Only the standard of review for violations of that right has changed (in a way, all agree, that

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[19] *Pollini v. Robey*, 981 F.3d 486, 493 (6th Cir. 2020)

[20] *Id*. at 494.

[21] *Id*.

dramatically undercut Pollini's likelihood of success)."[22] However, the Court rejected those limitations, finding that "[t]he upshot is thus the same in both instances: Pollini would receive something to which he is no longer entitled."[23]

Noting that "[w]e have disagreed ourselves over whether to apply current law retroactively for *Strickland* claims", the Sixth Circuit concluded that "perhaps the best one can say is that it is not entirely clear whether the Kentucky Supreme Court's decision to retroactively apply a new legal standard to Pollini's Strickland claim was correct."[24] Based on that ambiguity, the Sixth Circuit found that the Kentucky Supreme Court's resolution of the issue was not "objectively unreasonable."

The Sixth Circuit denied relief on this claim, and remanded a separate claim to the District Court for further proceedings. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court has made clear that "the proper standard for evaluating [a] claim that appellate counsel was ineffective . . . is that enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)."[25] Prejudice under *Strickland* requires the Petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of ***the proceeding*** would have been different."[26] In

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[22] *Id.* at 496.

[23] *Id.*

[24] *Id.*

[25] *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

[26] *Strickland, supra* at 694 (emphasis added).

the context of ineffective assistance of appellate counsel, that means that "he must show a reasonable probability that, but for his counsel's [deficient performance] he would have prevailed on ***his appeal***."[27]

By those standards, Pollini should have easily passed through the § 2254(d) threshold, and received *de novo* review of his ineffectiveness claim. After all, the Sixth Circuit found that "[a]t the time of his direct appeal, Rule 9.74 violations were subject to a structural error standard, meaning Pollini likely would have prevailed had his counsel raised the issue."[28] The Kentucky Supreme Court denied relief only because it conflated the standard of harmless error on direct appeal, with the standard of *Strickland* prejudice, and therefore never addressed whether Pollini would have prevailed had counsel raised the issue at the time. In doing so, the Kentucky Supreme Court acted contrary to *Strickland*, or at the very least, unreasonably applied the "reasonable probability of a different result" standard.

The Sixth Circuit made no effort to defend the Kentucky Supreme Court's actual reasoning. Rather, the Sixth Circuit's opinion focused exclusively on the question of whether *Lockhart v. Fretwell* – a case the Kentucky Supreme Court did not consider – applied to this situation.[29] After concluding that *Fretwell* ***might*** apply, the Sixth Circuit further concluded that ***if*** it applied, it was ***possible*** (though by no

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[27] *Robbins*, *supra* at 285.

[28] *Pollini v. Robey*, *supra* at 493

[29] *Id.*, at 494-496 citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)

means certain) that the Kentucky Supreme Court reached the right result.[30] On that basis, the Court found that Pollini could not cross the § 2254(d) threshold.

This Court should grant review of this case for several reasons. First, this Sixth Circuit's ruling largely disregards this Court's past attempts to limit *Fretwell* to its facts. *Fretwell* does not directly apply to this situation, and allowing the Sixth Circuit to apply *Fretwell's* language rejecting "mere outcome determination" as part of its § 2254(d) analysis, especially in a case where *Fretwell* played no role, prevented review of Pollini's ineffectiveness claim. Second, the Sixth Circuit's approach to this case yet again demonstrated a misunderstanding of the requirement that it the court first identify the "clearly established law", rather than speculating about where the law might go and conducting an analysis of the reasonableness of the state court's decision based on that speculation.

I. This Court Should Grant Review to Determine the Application of *Fretwell*'s "Mere Outcome Determination" Language to Claims of *Strickland* Prejudice, in Light of Subsequent Limiting Decisions.

This court has on several occasions concluded that *Fretwell* did not modify the ordinary standard of *Strickland* prejudice, for purposes of habeas corpus analysis.[31]

[30] *Pollini v. Robey*, *supra*, at 496 ("perhaps the best one can say is that it is not entirely clear whether the Kentucky Supreme Court's decision to retroactively apply a new legal standard to Pollini's *Strickland* claim was correct.")

[31] *Lafler v. Cooper*, 566 U.S. 156, 166(2012)("The Court has rejected the argument that *Fretwell* modified *Strickland* before and does so again now"); *Williams v. Taylor*,

The reason this Court has sought to limit the reach of *Fretwell's* "fundamental fairness" language is that it brings more heat than light to the question of whether a person was harmed by his or her attorney's nonperformance. At the time of Fretwell's habeas petition, he was seeking to take advantage of a temporary state of the law, since reversed, which would have resulted in his ineligibility for the death penalty. This Court rejected that argument because "in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'"[32] Justice O'Conner concurred separately to note that "today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* . . .."[33] Emphasizing the "narrow" nature of the ruling, Justice O'Conner emphasized her view that the only thing *Fretwell* should stand for is that certain matters – such as the fact that the objection might have erroneously been sustained – are excluded as a matter of law from the *Strickland* calculus.[34]

Unfortunately, in describing its conclusion, the *Fretwell* majority opined that "an analysis focusing solely on mere outcome determination, without attention to

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529 U.S. 362, 391 (2000) ("The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell* . . . modified or in some way supplanted the rule set down in *Strickland* "); *see also Glover v. United States*, 531 U.S. 198, 203 (2001)("[O]ur holding in *Lockhart* [*v. Fretwell*] does not supplant the *Strickland* analysis.")

[32] *Fretwell*, *supra* 506 U.S. at 370 (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986), and *Strickland*, *supra*.)

[33] *Fretwell*, *supra*, 506 U.S. at 373 (O'Conner, J. concurring).

[34] *Id.*

whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[35] Since that time, many lower court rulings have embraced the "mere outcome determination" language to conclude that in addition to determining the probability of a different result, they were also expected to determine whether the different result comported with fundamental fairness.

This Court's subsequent decisions have generally embraced Justice O'Conner's "narrow" view of *Fretwell*, and sought to roll back its emphasis on "mere outcome determination." First, in *Williams*, a state trial court found that there was a reasonable probability of a different result had counsel investigated and presented the substantial mitigation evidence presented, in light of the absence of mitigation evidence offered at the first trial. The Virginia Supreme Court disagreed, finding that the trial court's analysis "demonstrates an emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable."[36] Emphasizing Justice O'Conner's concurring opinion, this Court reversed, finding that the Virginia Supreme Court's decision was both contrary to and an unreasonable application of *Strickland* for the purposes of § 2254.[37]

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[35] *Id.*, majority opinion, at 369.

[36] *Williams v. Warden of the Mecklenburg Correctional Center*, 254 Va. 16, 27, 487 S.E.2d 194, 200 (1997)

[37] *Williams v. Taylor, supra* at 397.

Subsequently, in *Glover*, the Seventh Circuit interpreted *Fretwell* to authorize a finding of no prejudice when it concluded that the difference in sentence would not be sufficient to warrant relief. Once again emphasizing Justice O'Conner's concurring opinion, this Court rejected that analysis as a misapplication of *Fretwell*.[38]

Finally, in *Lafler* the warden in a § 2254 case relied on *Fretwell*'s "mere outcome determination" language to argue that Lafler was not deprived of fundamental fairness by his counsel's failure to communicate a plea offer, because he nevertheless received a "fundamentally fair" trial. Once again emphasizing Justice O'Conner's concurring opinion, this Court rejected that conclusion. As this Court explained, "*Fretwell* and *Nix* are instructive in that they demonstrate 'there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,' because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law."[39] However, where "the injured client seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it", *Nix* and *Fretwell* have no application.[40]

This Court's attempts to steer federal courts back to *Strickland* for guidance have failed, because lower courts continue to rely on *Fretwell* to deny relief in § 2254

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[38] *Glover v. United States*, *supra* at 203.

[39] *Id*. at 167.

[40] *Id.*

cases. In the post *Williams* era, at least six circuits have invoked *Fretwell*'s fundamental fairness standard to evaluate whether a state court's resolution of a claim of *Strickland* prejudice was objectively unreasonable, without reference to *Williams'* or *Lafler's* limitations.[41] The Sixth Circuit, in particular, has invoked

[41]*Aeid v. Bennett*, 296 F.3d 58, 63 (2d Cir. 2002)(Noting in light of *Fretwell* "[t]he prejudice inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him"); *McAfee v. Thaler*, 630 F.3d 383, 394 (5th Cir. 2011)(Quoting *Fretwell* to require a finding of fundamental unfairness, noting that "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him"); *Hanna v. Ishee*, 694 F.3d 596, 613 (6th Cir. 2012)("Thus, analysis focusing solely on mere outcome determination, without attention to whether the proceeding was fundamentally unfair or unreliable, is defective", quoting *Fretwell*); *Makiel v. Butler*, 782 F.3d 882, 910 (7th Cir. 2015)(Noting that *Fretwel*l "reject[ed] petitioner's argument that prejudice under *Strickland* should be evaluated under the laws existing at the time of trial and concluding that prejudice "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"); *Gallegos v. Ryan*, 820 F.3d 1013, 1033 (9th Cir. 2016)("Moreover, and dispositively, any such contention would fail at the *Strickland* prejudice prong, under the Supreme Court's application of that prong in *Lockhart v. Fretwell*); *Johnston v. Secretary, Florida Department of Corrections*, 949 F.3d 619, 639 (11th Cir.)(2020)("The prejudice inquiry, after all, is "focuse[d] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair", quoting *Fretwell*); renders the result of the trial unreliable or the proceeding fundamentally unfair", quoting *Fretwell*). Even after *Lafler*, Federal courts continue to apply *Fretwell* in § 2255 cases as well. *See, e.g., United States v. Deiter*, 890 F.3d 1203, 1209 (10th Cir. 2018)(Noting that "[t]he focus of the [prejudice] inquiry is **"**whether counsel's deficient performance *United States v. Bernard*, 762 F.3d 467, 471 (5th Cir. 2014)("To establish prejudice under the second prong of the *Strickland* test, the defendant must show that his attorney's errors were so serious that they rendered "the result of the trial unreliable or the proceeding fundamentally unfair", quoting *Fretwel*l).

Fretwell a propos of no state court reasoning more than a half dozen times in § 2254 cases decided post-*Williams*.[42] This is problematic for two reasons. First, in light of the high degree of deference afforded state court decisions under § 2254(d), allowing the federal courts to approve of an analysis beyond "mere outcome determination" essentially closes the door on review of *Strickland* claims. The requirement that no reasonable jurist would disagree with the ruling, and the "double deference" it engenders, has already received a fair amount of criticism for being inadequately protective of constitutional rights.[43] As the Sixth Circuit's opinion in this case makes abundantly clear, where all that is required to reject a claim for relief is a finding that "reasonable jurists" might disagree that relief is warranted, freeing the Court's *Strickland* analysis from the shackles of "mere outcome determination" will doom the

[42] In addition to the instant case, and *Hanna v. Ishee*, *supr*a, the Sixth Circuit has used the *Fretwell* "fundamental fairness" standard of prejudice in § 2254 cases in several cases, including *Coley v. Bagle*y, 706 F.3d 741, 752 (6th Cir. 2013), *Black v. Bell*, 664 F.3d 81, 103 (6th Cir. 2011), *Tinsley v. Million*, 399 F.3d 796, 802 (6th Cir. 2005); *Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004); *Cooey v. Coyle*, 289 F.3d 882, 892 (6th Cir. 2002).

[43] See, e.g., Noam Biale *Beyond A Reasonable Disagreement: Judging Habeas Corpus*, 83 U. Cin. L. Rev. 1337, 1360 (2015)("Following the passage of AEDPA and the Supreme Court's decision in *Williams,* scholars debated how the "unreasonable application" clause should be interpreted and struggled to develop a workable standard for adjudicating habeas cases. . . . Professor Ritter has described the *Richter* standard as "dangerous and improper" and has argued, "Far more than deference, this test requires acquiescence." Professor Marceau has called it 'one of the most uncharitable standards of review known to law.' Others have described it as 'super-deferential,' 'completely untethered from Supreme Court precedent,' and, even more dramatically, 'an unworkable . . . standard that fundamentally contradicts American common law decision-making.'")

claim.

This problem is compounded significantly by the fact that the Sixth Circuit, like a majority of circuits, interprets § 2254(d) to require that "[i]n assessing the reasonableness of the state court's application of federal law, ... federal courts are to review the ***result*** that the state court reached, not whether [its decision] [was] well reasoned."[44] Rather than viewing § 2254 (d) as a gateway through which a state court litigant must pass before *de novo* review is offered, the majority rule circuits have

[44] *Holland v. Rivard*, 800 F.3d 224, 235–36 (6th Cir. 2015)(emphasis and punctuation in original, quoting *Robinson v. Polk*, 438 F.3d 350, 358 (4th Cir.2006)). The First, Second, Fourth, Fifth, Seventh, Eighth and Tenth Circuits agree, finding that it is the result (sometimes referred to as the "decision" or "judgment") that matters, not the reasoning. *See Clements v. Clarke*, 592 F.3d 45, 55 (1st Cir. 2010)("It is the result to which we owe deference, not the opinion expounding it."); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001)(Noting that the reasoning offered by state courts is generally irrelevant, because "we are determining the reasonableness of the state courts' 'decision,; 28 U.S.C. § 2254(d)(1), not grading their papers."); *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir.2001)("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision."); *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016)(After *Richter* "we. . .no longer attach significance to the state court's expressed reasons, we would still apply AEDPA deference to the judgment"); *Williams v. Roper*, 695 F.3d 825, 831 (8th Cir. 2012)("In reviewing whether the state court's decision involved an unreasonable application of clearly established federal law, we examine the ultimate legal conclusion reached by the court, . . . not merely the statement of reasons explaining the state court's decision."). The Third, Ninth and Eleventh circuits take the opposite view, requiring that "when the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that 'could have supported' the state court's decision. *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 283 (3d Cir. 2016); s*ee also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008)(We confine our § 2254(d)(1) analysis to the state court's *actual* decisions and analysis); *Johnson v. Secretary, DOC*, 643 F.3d 907, 930 (11th Cir. 2011)(Finding that *Richter* did not apply "because the Florida Supreme Court did provide an explanation of its decision . . .."

essentially transformed § 2254(d)(1) into a single stage process, i.e., a set of elements that if proven, ensures relief will be granted if the error is not harmless.[45] After all, by reviewing all possible explanations, the majority rule circuits have left nearly nothing to review if they find that the state court's result was wrong beyond any possibility of fairminded disagreement.

In a world where *Strickland* prejudice is completely untethered from the "reasonable probability of a different result" standard, the duty of courts to review every possible explanation for a state court result will functionally take those circuits off the board for habeas review of ineffective assistance of counsel claims. Indeed, that seems to be what is occurring. All of the cases cited above where *Fretwell* was invoked as a standard of prejudice were cases where the Petitioner's claim was denied, for example.

This Court's decisions envision § 2254(d) as permitting a more thorough *de novo* review where, as here, the state court ruling appears flatly mistaken.[46] In this

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[45] For example, Judge Posner explained the reason for requiring a review of the result alone was that "[a] federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). Clearly, Judge Posner was not contemplating a second stage, after the "failure of judicial articulateness", which would ensure that there be an actual constitutional violation established.

[46] *See, e.g., Horn v. Bank*s, 536 U.S. 266, 272 (2002)("none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"); *Cullen v. Pinholster*, 563 U.S. 170, 205, 131 S. Ct. 1388, 1412, 179 L. Ed. 2d 557 (2011)(Breyer, concurring in part)(noting that further proceedings are appropriate "[i]f the federal habeas court finds that the state-court decision fails (d)'s test . . ."

case, had the Sixth Circuit applied that logic, it would have found that the Kentucky Supreme Court's decision was contrary to, or at the least and unreasonable application of, *Strickland v. Washington* and *Smith v. Robbins*, and then conducted a more thorough *de novo* review to evaluate whether Pollini's constitutional rights were violated under § 2254(a). That second stage would have allowed the Sixth Circuit to evaluate whether the logic of *Fretwell* should be applied to this case. However, in doing so the Sixth Circuit would have to do more than speculate about what might have been, it would have had to make a firm decision about whether the logic applied, and why.

II. This Court Should Accept Review to Determine Whether *Strickland* and *Smith* Require Prejudice to be Evaluated at the Time of the Original Appellate Decision.

On at least a half dozen occasions in the last ten years, this Court has had to reverse Sixth Circuit decisions that employ the same logic that is at work in this case.[47] Finding that "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law', this Court has found that "clearly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of this Court's decisions.'"[48] A determination of what the "clearly established law" is, logically precedes any evaluation of whether a state court decision was contrary to or

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[47] *Howes v. Fields*, 565 U.S. 499 (2011); *Parker v. Matthews*, 567 U.S. 37 (2012); *Metrish v. Lancaster*, 569 U.S. 351 (2013); *White v. Woodall*, 572 U.S. 415 (2014); *White v. Wheeler*, 577 U.S. 73 (2015); *Shoop v. Hill*, ___ U.S. ___, 139 S.Ct. 504 (2019).

[48] *White v. Woodall*, 572 U.S. 415, 419, 426 (2014)

an unreasonable application of that law. However, repeatedly this Court has had to reverse Sixth Circuit cases where the court failed to clearly identify that law, and instead speculated about where that law would go.

The same faulty logic is at work in this case. As noted above, in *Robbins* this Court applied *Strickland* to a claim of ineffective assistance of appellate counsel and held that "he must show a reasonable probability that, but for his counsel's [deficient performance] ***he would have prevailed on his appeal***."[49] It is difficult to see much room for interpretation in that statement, and as the Sixth Circuit acknowledged, other circuits, and even other panels of the Sixth Circuit, have found that *Strickland* requires merely an evaluation of whether the result of the appeal would be different at the time the appeal was decided, rather than at the time of post-conviction review.[50]

Indeed, it is hard to find any support for the Sixth Circuit's statement that a straightforward application of *Strickland* is "in tension with [*Fretwell*]."[51] *Robbins* was decided well after *Fretwell*, and made no mention of it. More to the point, this

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[49] *Robbins*, *supra* at 285 (emphasis added).

[50] *Pollini v. Robey, supra* at 496 (acknowledging that a different result was reached in *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004), as well as *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004)("in order to decide whether McFarland can present her claim of ineffective assistance of trial counsel, we have to decide whether there is a reasonable probability that the claim would have prevailed at the time counsel failed to raise it").

[51] *Id.*, at 495.

Court has specifically held that *Fretwell*, "do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel ***does*** deprive the defendant of a substantive or procedural right to which the law entitles him."[52] Here, it is undisputed the substantive right that Pollini lost – the right to participate in the formulation of responses to jury questions – is as applicable to him today as it was at the time of the direct appeal. Moreover, unlike *Fretwell*, who was seeking a life sentence he was not entitled to as a matter of law, if granted relief the end result in Pollini's would be the trial he was entitled to at the start, one where he was able to participate in the formulation of important jury questions. Granting Pollini his first fair trial in accordance with the rules of the jurisdiction is hardly a "windfall."

There is no reason for the logic of *Woodall* and similar decisions would apply any differently to a decision where a federal court denies relief, than it would to a case where relief is granted. The requirement of clearly established Federal law is part of the statute, and should apply equally to any § 2254(d) decision. Indeed, as the Sixth Circuit's decision in this case plainly demonstrates, the effect of a failure to articulate the clearly established law has a more significant negative effect on the "unreasonable application" analysis for prisoners, than for the state. After all, in a system where the possibility that a fair-minded jurist might disagree is enough to overrule the claim, a claim based on legal speculation is essentially guaranteed to

[52] *Williams v. Taylor*, *supra* at 393 (emphasis in original).

fail.

Given that the Sixth Circuit has clearly found that he result would have been different, and did not offer any defense of the actual reasoning offered by the Kentucky Supreme Court, which was clearly mistaken, the appropriate approach for the Sixth Circuit to have taken would be to find that the case passed through the threshold of § 2254(d), and then conducted a *de novo* review. As noted above, in that review, the Court would still be permitted to find that Pollini is not being held in violation of the Federal constitution, and is therefore would not entitled to habeas relief under § 2254(a).[53] However, the outcome of that review is not obvious. Allowing a state court to retrospectively apply a harmless error test is a very different decision than evaluating whether the substantive right has changed. Since the state court decision in this case, the Kentucky Supreme Court appears to be moving back towards viewing these errors as structural.[54] Evaluating whether the result would be different provides a much more robust standard on which to base critical Sixth Amendment decisions than allowing courts to use the shifting sands of harmless error to determine whether or not to grant relief.

III. This Case is an Appropriate Vehicle for Reviewing These Issues.

The facts of this case are uniquely clear, and the legal issues starkly drawn, making it an appropriate case to accept for review. The record leaves no doubt that:

1. The ineffectiveness claim was presented to the Kentucky Supreme Court;

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[53] *Supra*, note 50.

[54] *Eversole v. Commonwealth*, 600 S.W.3d 209 (Ky. 2020)

2. The Kentucky Supreme Court refused to decide whether Pollini would have prevailed in his appeal; and
3. "Pollini likely would have prevailed had his counsel raised the issue."[55]

These facts, which are all that is required to fully resolve the legal issues presented, ensure that this Court will not be mired in an internecine factual dispute in this matter.

Granting certiorari in this case, and especially reversing for the reasons in Argument II above, would do more than merely give Mr. Pollini his first review of his ineffective assistance of counsel claim in accordance with the rules of *Strickland*. It would also have salutary effects on the bench and bar. First, it will clarify yet again that courts should not rely upon *Fretwell* to modify the standard this Court clearly laid down in *Strickland*. Second, it will provide clarity on the extent to which the state court reasoning is relevant to federal court review, especially in a Strickland claim. Finally, it will provide valuable clarity that the requirement of first identifying the clearly established law cannot be waived in cases where habeas relief is denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Jasper Pollini respectfully requests that this Petition be granted, and the judgment herein reversed.

Respectfully submitted,

Timothy G. Arnold, Director
Post-Trial Division
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[55] *Pollini v. Robey, supra*, at 493.

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April 26, 2021

No. ______________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JASPER POLLINI, *Petitioner*

v.

AMY ROBEY, WARDEN,
LUTHER LUCKETT CORRECTIONAL COMPLEX, *Respondent*

APPENDIX

981 F.3d 486
United States Court of Appeals, Sixth Circuit.

Jasper POLLINI, Petitioner-Appellant,
v.
Amy ROBEY, Warden,
Respondent-Appellee.

No. 19-5131
|
Argued: August 5, 2020
|
Decided and Filed: November 25, 2020

Synopsis
Background: Following affirmance on direct review of petitioner's convictions for murder, burglary, and receiving stolen property, reduction of his sentence to life imprisonment, and denial of state collateral review, 437 S.W.3d 144, petitioner sought federal writ of habeas corpus. The United States District Court for the Western District of Kentucky, David J. Hale, J., 2019 WL 236721, denied petition. Certificate of Appealability was granted.

Holdings: The Court of Appeals, Readler, Circuit Judge, held that:

Kentucky Supreme Court's decision to apply "fundamental fairness" standard to its review of defendant's ineffective assistance of counsel claim, rather than the "structural error" standard, was not contrary to clearly established federal law;

Kentucky Supreme Court's determination that there was no harm in trial court's decision not to read transcript of witness's conversation with police to jury was not based on an unreasonable determination of the facts; and

petitioner did not procedurally default his claim that his appellate counsel was ineffective for only requesting resentencing, rather than a new trial.

Affirmed in part, vacated in part, and remanded.

***488** Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 3:14-cv-00689—David J. Hale, District Judge.

Attorneys and Law Firms

ARGUED: Timothy G. Arnold, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellant. James C. Shackleford, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. ON BRIEF: Timothy G. Arnold, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellant. James C. Shackleford, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

Before: GILMAN, BUSH, and READLER, Circuit Judges.

OPINION

CHAD A. READLER, Circuit Judge.

Jasper Pollini committed a burglary, fled the scene, and, upon returning to retrieve his burglary tools, shot and killed a man. Following his conviction in Kentucky state court, Pollini asserted numerous grounds for relief in a federal habeas petition. ***489** The district court, however, rejected each of them.

We granted Pollini a certificate of appealability with respect to two claims relating to the alleged ineffective assistance of his appellate counsel in state court. On the first claim, we agree with the district court that the claim fails the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). But for the other, we disagree that Pollini procedurally defaulted the claim. Accordingly, we affirm in part, vacate in part, and remand the case to the district court for further proceedings.

I.

Pollini's Crimes And Trial. While burglarizing a garage late one evening, Jasper Pollini was confronted by Dan Zeigler, the garage's owner, at which point Pollini fled the scene. *Pollini v. Commonwealth*, 172 S.W.3d 418, 421 (Ky. 2005). Zeigler then alerted his neighbor, Byron Pruitt, that a burglar was in the area. *Id.*

Pollini soon realized he had left his tools in Zeigler's garage. Arming himself with a handgun, Pollini recruited his sister, Crystal Plank, to drive him back to the garage. *Id.* at 421–22. As the two neared the garage, Pruitt approached their car with a flashlight. *Id.* Seeing a light in the distance, Pollini fired a gun shot into the dark. *Id.* Tragically, the shot struck and killed Pruitt.

Pollini was charged with various crimes, including murder. Plank was charged with facilitation of murder. Following their arrests, Pollini and Plank each gave a recorded statement to the police recounting the events that unfolded the night of Pruitt's murder. Both statements assert that Pollini did not intend to kill Pruitt when the shot was fired. Because their respective charges arose out of the same set of facts, the two were tried together as co-defendants. During trial, Plank's attorney prepared a transcript of Plank's statement to the police and sought to admit the transcript along with the audiotape of her statement into evidence. The court admitted the audiotape. But it denied admission of the transcript on the grounds that the Commonwealth had not been given the opportunity to verify the transcript's accuracy in its entirety. During closing arguments, however, the Commonwealth was permitted to exhibit a portion of the transcript to the jury. Yet during its deliberations, the jury had access to only the audiotape of Plank's statement and not the transcript.

This proved relevant when the jury had difficulty locating or understanding a portion of Plank's statement on the audiotape. That obstacle prompted the jury to write the judge to ask: "Does there exist a transcript of the Plank conversation w/Police? Difficult to locate on tape, if so, can we pls request?" Without communicating with the parties, the judge responded to the jury: "There's none available." There is no dispute between the parties that this ex parte jury communication violated Kentucky Rule of Criminal Procedure 9.74, which prohibits judge-jury communication without apprising counsel of the communication. *See Pollini v. Litteral*, No. 3:14-cv-689-DJH-RSE, 2019 WL 236721 at *3, 2019 U.S. Dist. LEXIS 7459 at *8 (W.D. Ky. Jan. 15, 2019); *see also* Ky. RCr 9.74 ("No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant ... and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.").

Following its deliberations, the jury found Pollini guilty of murder, burglary in the first degree and second degree, and ***490** receiving stolen property. During the ensuing sentencing phase, the court submitted to the jury the following aggravated circumstance for their consideration: Was Pollini in the process of committing burglary when he killed Pruitt? The jury answered in the affirmative, subjecting Pollini to an increased range of sentencing options. From those options, the jury recommended a life sentence without the possibility of parole for 25 years. The trial judge agreed and handed down the recommended sentence.

Pollini's Direct Appeals. Pollini raised a host of issues on direct appeal. Chief among them was his contention that there was insufficient evidence to justify his sentence because he was not committing a burglary when he killed Pruitt. According to Pollini, the shooting occurred after the burglary had ended, when Pollini was returning to recover his tools. The Kentucky Court of Appeals found no merit in Pollini's argument. But the Kentucky Supreme Court did, and accordingly vacated Pollini's sentence and remanded the case. Because Pollini's appellate counsel failed to seek a new trial to remedy the jury's error, the remand was limited to a resentencing without the inclusion of the aggravating circumstance. *See Pollini*, 172 S.W.3d at 432. Notable here is the fact that Plank, in raising a similar challenge to the jury's finding that the two were committing a burglary at the time of the killing, *did* argue for a new trial on appeal. And when the Kentucky Court of Appeals vacated her conviction for facilitating burglary in the first degree for insufficient evidence, it remanded her case for a new trial. *Plank v. Commonwealth*, No. 2003-CA-001861-MR, 2005 WL 1313838, at *8–9, 2005 Ky. App. Unpub. LEXIS 777, at *22–25 (Ky. Ct. App. June 3, 2005).

On remand, Pollini's sentence was reduced to simple life imprisonment. *Pollini v. Commonwealth*, No. 2006-SC-000835-MR, 2008 WL 203035, at *1, 2008 Ky. Unpub. LEXIS 17, at *2 (Ky. Jan. 24, 2008). Pollini again appealed, but to no avail. And here again, it bears comparing what Pollini and Plank argued in their respective appeals. In neither of his direct appeals did Pollini argue that the trial judge violated Rule 9.74 when it communicated ex parte with the jury. Plank, by comparison, did raise the ex parte issue on direct appeal. And while the Kentucky Court of Appeals vacated her conviction on other grounds, the court also found it "very bothersome ... that counsel was never even given notice that [the jury] had requested the transcript." *Plank*, 2005 WL 1313838, at *9, 2005 Ky. App. Unpub. LEXIS 777, at *25.

Pollini's State Court Collateral Attack. Having exhausted his direct appeal options, Pollini, with new counsel, collaterally attacked his state court proceedings. *See* Ky. RCr 11.42 (governing motions to vacate, set aside, or correct sentences). Pollini asserted several claims of ineffective assistance of counsel. Among them was Pollini's Rule 9.74 argument that his prior counsel was constitutionally ineffective, in violation of the Sixth Amendment standard articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because "counsel failed to raise the improper ex parte communication between the trial court and the jury." Unlike the other ineffective assistance of counsel claims Pollini asserted, which he expressly limited to the conduct of his trial counsel, Pollini did not specify which counsel—trial or appellate—failed to raise the Rule 9.74 issue.

Following the trial court's denial of his request for collateral relief, Pollini appealed. The Kentucky Court of Appeals interpreted Pollini's argument regarding the failure to raise the Rule 9.74 violation as ***491** an error by "both his trial and appellate counsel." *Pollini v. Commonwealth*, No. 2009-CA-000964-MR, 2010 LEXIS 128, at *15 (Ky. Ct. App. July 16, 2010). As to Pollini's trial counsel, the appeals court found nothing that constituted deficient performance. *Id.* at *15–16. And as to Pollini's appellate counsel, the appeals court explained that Kentucky law did not recognize ineffective assistance of appellate counsel claims in cases where an appeal was decided following a merits review. *Id.* at *15. Rather, Kentucky law recognized claims for ineffective appellate counsel in just two instances: (1) if a defendant's appeal was dismissed because of ineffective assistance of counsel; or (2) if a defendant's conviction was not appealed due to counsel's neglect. *Boykin v. Webb*, 541 F.3d 638, 647–48 (6th Cir. 2008) (citing *Hicks v. Commonwealth*, 825 S.W.2d 280, 281 (Ky. 1992)). Accordingly, the Kentucky Court of Appeals held that Pollini's ineffective assistance of appellate counsel claim was not a "cognizable issue in this jurisdiction." *Pollini*, 2010 LEXIS 128, at *15 (quoting *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001)).

Proceeding pro se, Pollini sought discretionary review in the Kentucky Supreme Court. Around the same time, the Kentucky Supreme Court, in *Hollon v. Commonwealth*, overruled *Hicks* and "recognize[d] [ineffective assistance of appellate counsel] claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal." 334 S.W.3d 431, 436 (Ky. 2010) (overruling *Hicks*, 825 S.W.2d at 281). In light of this change in law, the Kentucky Supreme Court remanded Pollini's case for consideration as to whether Pollini's direct appeal counsel was ineffective when he failed to raise the alleged ex parte contact between the judge and jury. *See Pollini v. Commonwealth*, No. 2009-CA-000964-MR, 2011 LEXIS 246, at *1, *8 (Ky. Ct. App. Dec. 22, 2011). On remand, the Kentucky Court of Appeals determined that appellate counsel's failure to raise the Rule 9.74 violation constituted deficient performance that was "egregious," and thus amounted to ineffective assistance of appellate counsel. *Id.* at *14–15. In reaching that conclusion, the appeals court noted its earlier observation in Plank's companion appeal that the ex parte communication was "very bothersome." *Id.* at *14; *see also Plank*, 2005 WL 1313838, at *9, 2005 Ky. App. LEXIS 777, at *25. On this basis, the appeals court vacated Pollini's conviction. *Pollini*, 2011 LEXIS 246, at *15.

But Pollini's relief was fleeting. The Commonwealth appealed to the Kentucky Supreme Court, which in turn reinstated Pollini's conviction. *Commonwealth v. Pollini*, 437 S.W.3d 144, 153 (Ky. 2014). After acknowledging the Rule 9.74 violation, the Kentucky Supreme Court assessed what standard of review should apply to that violation. At the time of Pollini's conviction and direct appeal, Kentucky arguably applied a strict structural error standard to Rule 9.74 violations. *See, e.g.*, *Mills v. Commonwealth*, 44 S.W.3d 366, 372 (Ky. 2001) (citing and quoting *Lett v. Commonwealth*, 284 Ky. 267, 144 S.W.2d 505 (1940), for the apparent proposition that prejudice is not required for reversal under Rule 9.74). *But see Johnson v. Commonwealth*, 12 S.W.3d 258, 266 (Ky. 1999) ("Long ago, we joined the trend away from a strict or technical application of the rules forbidding conversations with or among jurors." (citing *Cosby v. Commonwealth*, 451 S.W.2d 653, 654 (Ky. 1970))). But while Pollini's case was pending on collateral review, the ***492** Kentucky Supreme Court adopted a "fundamental fairness" standard of review for Rule 9.74 violations, effectively a harmless error standard, which made it more difficult for appellants to prevail. *See McAtee v. Commonwealth*, 413 S.W.3d 608, 626 (Ky. 2013) ("[W]e review for harmless error, which, in the context of ex parte communications between judge and jury, we define as contact that does not impugn the fundamental fairness of an otherwise constitutionally acceptable trial." (cleaned up)). And notwithstanding the more defendant-friendly standard in effect at the time of Pollini's direct appeal, the Kentucky Supreme Court concluded it was free to apply the new harmless error standard to Pollini's case because the standard of review for a Rule 9.74 violation was an issue of procedure (rather than substance) under Kentucky law. *Pollini*, 437 S.W.3d at 151. Applying this new standard, the Kentucky Supreme

Court found that the trial court's Rule 9.74 violation was not significant enough to "impugn the fundamental fairness of an otherwise constitutionally acceptable trial," rendering the error harmless. *Id.* at 151–52 (citation omitted). Pollini's conviction was therefore reinstated. *Id.* at 153.

One background matter deserves further emphasis. As already noted, Pollini, throughout his state court collateral attack, failed to raise an argument that he presses today: appellate counsel's alleged ineffective assistance in failing to seek a new trial in response to the jury's erroneous conclusion that Pollini was still in the process of committing a burglary when he shot and killed Pruitt. Unlike Pollini's Rule 9.74 ineffective assistance of counsel claim, which the Kentucky courts interpreted broadly to apply to both his trial and appellate counsel, his ineffective assistance claim regarding the failure to seek a new trial involved solely Pollini's appellate counsel. And a claim of that ilk did not exist under Kentucky law at the time Pollini filed his state collateral attack. Ordinarily, the same would have been true for Pollini's Rule 9.74 ineffective assistance of appellate counsel claim. But since the Kentucky courts deemed Pollini to have raised that claim at the time *Hollon* was announced, the claim was addressed and resolved by the Kentucky courts on collateral review.

II.

Two of Pollini's habeas challenges are before us today. First, Pollini argues that the Kentucky Supreme Court unreasonably applied the ineffective assistance of counsel standards articulated in *Strickland* when it utilized the harmless (rather than structural) error standard in reviewing the Rule 9.74 violation. Second, Pollini claims that the remedy for his successful challenge on appeal to the jury verdict should have been a new trial, not merely resentencing, and that his appellate counsel was thus ineffective for failing to request a new trial. On the first claim, the district court rejected Pollini's claim on the merits. *Pollini*, 2019 WL 236721, at *3–4, 4–5, 2019 U.S. Dist. LEXIS 7459, at *10, 12. As to the second, the district court concluded that the claim was procedurally defaulted because Pollini did not raise it in his state court collateral attack. *Id.* at *5, 2019 U.S. Dist. LEXIS 7459, at *13–14.

The Antiterrorism and Effective Death Penalty Act (AEDPA) guides our review. Under AEDPA, we may award Pollini habeas relief only if (1) the Kentucky court's decision was contrary to, or an unreasonable application of, federal law, or (2) the Kentucky court's decision was "based on an unreasonable determination of the facts." ***493** *Harrington v. Richter*, 562 U.S. 86, 100, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting 28 U.S.C. § 2254(d)(1), (d)(2)). In this context, "federal law" means law as "determined by the Supreme Court of the United States." *Abby v. Howe*, 742 F.3d 221, 226 (6th Cir. 2014) (quoting 28 U.S.C. § 2254(d)). And because "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal," *Harrington*, 562 U.S. at 102–03, 131 S.Ct. 770 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in the judgment)), AEDPA requires that we defer to the Kentucky Supreme Court's application of federal law if " 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 101, 131 S.Ct. 770 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)).

A. Pollini Fails To Show That The Kentucky Supreme Court's Treatment Of His Rule 9.74 Claim Ran Afoul Of AEDPA.

With this high bar in mind, we turn to Pollini's claim regarding his appellate counsel's alleged ineffective assistance in failing to seek relief for the trial court's Rule 9.74 violation. *Strickland* provides the relevant federal law by which we measure the state court decision at issue. For Pollini to succeed, then, the Kentucky Supreme Court's resolution of the Rule 9.74 claim must have been (1) contrary to—or an unreasonable application of—*Strickland*, or (2) based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (d)(2). And to prevail on a *Strickland*-based ineffective assistance of appellate counsel claim, Pollini must satisfy two prongs: (1) that his appellate counsel was deficient, and (2) that the deficiency prejudiced him. *Hill v. Mitchell*, 842 F.3d 910, 939, 945–46 (6th Cir. 2016) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052 and *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)).

1. The Kentucky Supreme Court Did Not Unreasonably Apply *Strickland*'s Second Prong

At issue here is *Strickland*'s second prong—whether Pollini was prejudiced by his appellate counsel's failure to raise the trial court's Rule 9.74 violation. Generally speaking, Pollini can demonstrate prejudice by showing that he would have prevailed on appeal had his appellate counsel properly raised the issue. Whether Pollini would have prevailed turns on what standard of review the Kentucky Supreme Court was required to apply to a Rule 9.74 violation: a "structural error" or "fundamental fairness" standard. On that issue, the legal landscape shifted during the course of Pollini's appeal. At the time of his direct appeal, Rule 9.74 violations were subject to a structural error standard, meaning Pollini likely would have prevailed had his counsel raised the issue. But by the time of his collateral attack, Rule 9.74 violations were reviewed under a fundamental fairness standard, one more favorable to the Commonwealth. The Kentucky Supreme Court held that the latter standard applied in Pollini's case. As a result, Pollini could not show prejudice from his appellate counsel's error.

In assessing Pollini's challenge, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable," which "is different from asking whether [ ] counsel's performance fell below *Strickland*'s standard." *Harrington*, 562 U.S. at 101, 131 S.Ct. 770. Out of respect for AEDPA's deference requirement, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." ***494** *Id.* at 101–02, 131 S.Ct. 770. In other words, even if we believe the Kentucky Supreme Court applied *Strickland* incorrectly, that alone is insufficient to grant Pollini relief, for "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 101, 131 S.Ct. 770 (quoting *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Measured against the controlling case law backdrop, the Kentucky Supreme Court's decision to apply the fundamental fairness standard was not "contrary to clearly established Federal law." *Abby*, 742 F.3d at 225–26 (alterations omitted) (quoting 28 U.S.C. § 2254(d)). Under AEDPA, only holdings of the Supreme Court constitute clearly established federal law. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495. And Pollini does not point to (nor can we identify) any Supreme Court holding directly prohibiting the Kentucky Supreme Court from applying the current standard of review to his case.

Indeed, Supreme Court authority leans against Pollini's argument. Instructive here is *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). In *Lockhart*, the Supreme Court reviewed the Eighth Circuit's decision granting a petitioner habeas relief on the ground of ineffective assistance of appellate counsel. In reaching that conclusion, the Eighth Circuit applied the law in effect at the time of the petitioner's appeal rather than the law in effect at the time of the petitioner's collateral attack. Doing so, the Supreme Court explained, was error. In the *Strickland* context, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart*, 506 U.S. at 369–70, 113 S.Ct. 838 (citation omitted). *Lockhart* clarified that *Strickland* is not solely outcome-based, but also incorporates fairness notions. *Strickland*'s prejudice inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372, 113 S.Ct. 838 (citations omitted). A petitioner, in other words, should not benefit from an invalid legal rule in effect at the time of his trial or sentencing.

In many respects, today's outcome follows from *Lockhart*. Pollini's argument is essentially this: he would have received relief had the Kentucky Supreme Court applied the law at the time of his direct appeal, not at the time of his collateral attack. That is the same scenario addressed in *Lockhart*. And to prevent "windfall[s]" to defendants, *Lockhart* applied the law in effect at the time of the collateral attack. *Id.* at 370, 113 S.Ct. 838.

To be sure, *Lockhart*'s footprint is limited. In its aftermath, the Supreme Court clarified that the basic *Strickland* inquiry remains unchanged. *See Lafler v. Cooper*, 566 U.S. 156, 166, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) ("The Court has rejected the argument that [*Lockhart*] modified *Strickland* before and does so again now."). *Lockhart*'s reach thus seems to be contained to scenarios where a petitioner's relief could be categorized as unjust because of the abolition of a legal right. *See id.* at 167, 132 S.Ct. 1376 (observing that *Lockhart* demonstrates that "there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,' because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside ***495** the law." (quoting *Williams*, 529 U.S. at 391, 120 S.Ct. 1495)). But today's scenario falls well within *Lockhart*'s wheelhouse —Pollini claims entitlement to a legal standard that Kentucky no longer employs.

Our prior decisions read *Lockhart* in the same manner. Take, for example, *Abby v. Howe*, 742 F.3d 221 (6th Cir. 2014). In *Abby*, a convicted murderer had a legitimate Fifth Amendment objection that his counsel did not raise at trial. The Supreme Court later changed the law, rendering that objection obsolete. Citing *Lockhart*, we determined that no prejudice existed because "[a]ny objection by [counsel] would be 'wholly meritless *under current governing law*, even if the objection might have been considered meritorious at the time of its omission.' " *Id.* at 228 (emphasis added) (quoting *Lockhart*, 506 U.S. at 374, 113 S.Ct. 838 (O'Connor, J., concurring)). To the same effect is *Evans v. Hudson*, 575 F.3d 560, 566 (6th Cir. 2009). Again relying on *Lockhart*, we held in *Evans* that a petitioner could not "show the necessary prejudice for his claim of ineffective assistance of appellate counsel based on the failure to raise a *now-meritless* claim," even if "the [petitioner]'s claim may have had merit at the time of [petitioner's] appeal." *Id.* (emphasis added). As these cases confirm, when measured against the backdrop of *Lockhart*, the Kentucky Supreme Court's application of the harmless error standard was not unreasonable.

Pollini disagrees. Emphasizing *Strickland*'s command that, to establish 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," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, Pollini contends that we must "decide whether there is a reasonable probability that the claim would have prevailed *at the time* counsel failed to raise it." *See* McFarland v. Yukins, 356 F.3d 688, 699 (6th Cir. 2004) (emphasis added). But that conclusion is in tension with *Lockhart*. To be sure, one Justice in *Lockhart* agreed that *Strickland* required courts to look to the law "at the time of trial or sentencing" when examining prejudice. *See Lockhart*, 506 U.S. at 381–82, 113 S.Ct. 838 (Stevens, J., dissenting) ("By defining prejudice in terms of the effect of counsel's errors on the outcome of the proceedings, ... the *Strickland* Court establishes its point of reference firmly at the time of trial or sentencing."). But the majority found this dissenting point unpersuasive.

True, in some instances we have applied the law in existence at the time of the alleged ineffective assistance of counsel to assess whether *Strickland*'s prejudice prong was satisfied. *See, e.g.*, *Carter v. Timmerman-Cooper*, 380 F. App'x 470, 474 (6th Cir. 2010) (finding no ineffective assistance of appellate counsel because *at the time of petitioner's appeal*, the law did not support his resentencing argument, making it "unlikely that [petitioner] would have succeeded before the Fifth District on November 23, 2004"); *Benning v. Warden, Lebanon Corr. Inst.*, 345 F. App'x 149, 158 (6th Cir. 2009) (holding that petitioner was prejudiced by his appellate counsel's failure to make an argument that the law supported at the time of his appeal because "if counsel had briefed the *Blakely* issue, [petitioner] would have been entitled to a remand for resentencing"). Both decisions, however, are non-binding unpublished opinions. And both, it bears adding, were decided on de novo review, rather than under the deferential AEDPA standard, because the respective state courts had not assessed the merits of the petitioners' ineffective assistance of counsel claims. *Carter*, moreover, may have misconstrued the relevant legal standard. *Carter* cited to *Smith v. Murray*, in which the ***496** Supreme Court directed lower courts to assess counsel's conduct at the time of the alleged ineffectiveness. *Carter*, 380 F. App'x at 474 (citing *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). But *Smith* was addressing the deficiency prong of the *Strickland* analysis, not the prejudice prong. *Smith*, 477 U.S. at 536, 106 S.Ct. 2661 ("Viewed in light of Virginia law at the time, ... [counsel's conduct] fell well within the wide range of professionally competent assistance." (cleaned up)).

Pollini notes one other difference between himself and the petitioners in *Lockhart*, *Abby*, and *Evans*. While those petitioners relied on a defunct legal right that no longer existed (and could even be characterized as having never validly existed), Pollini still maintained a valid legal claim to be privy to jury communications. Only the standard of review for violations of that right has changed (in a way, all agree, that dramatically undercut Pollini's likelihood of success). But it is unclear why this distinction matters. The underlying logic of *Lockhart* was to prohibit defendants from receiving "windfalls" through the use of old law. *Lockhart*, 506 U.S. at 370, 113 S.Ct. 838. And here, Pollini would be receiving a benefit Kentucky law no longer provides. The upshot is thus the same in both instances: Pollini would receive something to which he is no longer entitled.

Pollini's two out-of-circuit habeas decisions, *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Young v. Dretke*, 356 F.3d 616 (5th Cir. 2004), do not make us think otherwise. Those courts, we acknowledge, applied the law in effect at the time of the trial and sentencing, not that in effect while the case was on appeal. But those cases dealt with a change in *statutory* law. In view of that distinction, those courts reasoned that *Lockhart* was inapplicable because the repeal or amendment of a statute does not render the prior statute invalid during the period it was in effect. *See, e.g.*, *Shaw*, 721 F.3d at 919 ("A legislative repeal of a statute does not present the same situation as the one in which a court mistakenly recognizes a right for some period of time and then corrects itself (or is corrected by a reviewing court)."). And even setting aside this distinctive feature, these decisions do not help Pollini clear the AEDPA bar because they are not holdings of the Supreme Court.

With all of this back and forth, perhaps the best one can say is that it is not entirely clear whether the Kentucky Supreme Court's decision to retroactively apply a new legal standard to Pollini's *Strickland* claim was correct. We have disagreed ourselves over whether to apply current law retroactively for *Strickland* claims. *Compare Carter*, 380 F. App'x at 474 *with Abby*, 742 F.3d at 228. Put another way, today's case arguably is one where "fairminded jurists could disagree" over which legal standard the Kentucky Supreme Court should have applied. *Harrington*, 562 U.S. at 101, 131 S.Ct. 770 (quoting *Yarborough*, 541 U.S. at 664, 124 S.Ct. 2140); *see also id.* (quoting *Williams*, 529 U.S. at 410, 120 S.Ct. 1495) ("[A]n unreasonable application of federal law is different from an incorrect application of federal law." (emphasis omitted)). In that circumstance, however, AEDPA requires that we defer to the Kentucky Supreme Court's resolution of the issue. We thus honor that command.

2. The Kentucky Supreme Court's Decision Did Not Rest On An Unreasonable Factual Determination

Pollini alternatively contends that the Kentucky Supreme Court's *Strickland* determination "was based on an unreasonable determination of the facts in light of the evidence presented in the State ***497** court proceeding." 28 U.S.C. § 2254(d)(2). "To prove that a state court's factual assessment was 'unreasonable,' a petitioner must show that 'a reasonable factfinder must' disagree with the state court's assessment." *Woods v. Smith*, 660 F. App'x 414, 424 (6th Cir. 2016) (quoting *Rice v. Collins*, 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)). Meeting this standard requires Pollini to do more than show an alternative way to view the facts. *Franklin v. Bradshaw*, 695 F.3d 439, 447–48 (6th Cir. 2012) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." (quoting *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010))). Rather, he must show "that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not have support in the record." *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007).

With respect to the Kentucky Supreme Court's interpretation of the facts, we start with the jury's request of the trial judge. The jury wrote: "Does there exist a transcript of the Plank conversation w/Police? Difficult to locate on tape, if so, can we pls request?" Pollini argues that the trial judge prejudiced him by not asking his counsel how to proceed, as Plank's statement to police included evidence that Pollini never intended to shoot Pruitt. In other words, Pollini wanted the jury to have access to the tape, and because the jury might not have had access to Plank's statement through the tape, he was harmed by the trial judge not discussing the matter with Pollini before telling the jury that no transcript was available.

The Kentucky Supreme Court saw things differently. It noted that because the transcript was neither admitted into evidence nor read aloud in court, the trial judge could not have provided the jury with a copy of the transcript of Plank's statement. *Pollini*, 437 S.W.3d at 152. Had it wanted to take some kind of action in response to the jury's note, the trial judge had only two options, the Kentucky Supreme Court explained: allow Pollini to enter the transcript into evidence and read it aloud in court, or bring the jury back into the courtroom to have the relevant portions of the audiotape played again for the jury. *Id.* Neither one seemingly was attractive. Because Pollini had objected to entering the transcript into evidence multiple times at trial, the Kentucky Supreme Court found that Pollini was unlikely to suddenly change course during jury deliberations. *Id.* It thus concluded there was no harm in not reading the transcript aloud to the jury, a judgment that we cannot say is unreasonable.

Nor was there harm in not replaying the audiotape in open court. As the Kentucky Supreme Court observed, the jury "was provided with an audiotape of Plank's statement, which it was allowed to listen to at will in the jury room." *Id.* Implicit in this finding is the notion that the jury had the correct tape and that the tape was working. *Pollini*, 2019 WL 236721, at *4–5, 2019 U.S. Dist. LEXIS 7459, at *11–12. That conclusion too was not an unreasonable determination of the facts. The jury noted that a portion of Plank's statement was "difficult to locate" or comprehend, a clear indication that the jury had a working version of the audiotape. *Id.* And any contention that the jury might have had the wrong tape is pure conjecture. *Id.* Because the tape was played previously in open court, the jurors would have indicated to the judge if the wrong tape was in the jury room. *Id.* We thus cannot say that " 'a reasonable factfinder must' disagree with the state court's assessment." *Woods*, 660 F. App'x at 424 (quoting *Rice*, 546 U.S. at 341, 126 S.Ct. 969). Nor, for these same ***498** reasons, do we agree with Pollini that the Kentucky Supreme Court's factual determination resulted in an unreasonable application of *Strickland*.

B. Pollini Did Not Procedurally Default His Ineffective Assistance Of Appellate Counsel Claim Regarding Counsel's Failure To Request A New Trial.

We next turn to Pollini's claim that his appellate counsel was ineffective for seeking only a new sentence, and not a new trial, as a remedy for the jury's erroneous conclusion that Pollini was still in the process of committing burglary when he shot Pruitt. Pollini acknowledges that he did not raise the argument during the collateral state court proceedings. But, he says, that was because Kentucky did not recognize most types of ineffective assistance of appellate counsel claims at the time of his state court collateral attack, meaning the district court was wrong to find that the argument was procedurally defaulted. *Pollini*, 2019 WL 236721, at *5, 2019 U.S. Dist. LEXIS 7459, at *13–14. In overruling its prior decision disallowing certain types of ineffective assistance of appellate counsel claims, the Kentucky Supreme Court in *Hollon* declared its ruling "to have prospective effect only." *Hollon*, 334 S.W.3d at 439 (overruling *Hicks*, 825 S.W.2d at 281). Because Pollini's just-discussed ineffective assistance of counsel claim involving the alleged violation of Rule 9.74 was read broadly by the Kentucky courts to include both trial and appellate counsel, and was thus already pending on appeal when *Hollon* was decided, the Kentucky Supreme Court was able to grant discretionary review to hear that claim. But because Pollini did not raise his ineffective assistance of appellate counsel argument regarding the failure to seek a new trial, he was not able to retroactively assert that claim post-*Hollon*.

A "habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc)). With roots in notions of federalism and comity, the procedural default doctrine is premised on the idea that state courts should have the first pass at remedying any violation of a state prisoner's federal constitutional rights. *Coleman v. Thompson*, 501 U.S. 722, 730–31, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (internal citations omitted). A state court is deprived of this opportunity, however, when a petitioner violates a state rule of procedure that prevents the state from hearing his claim. For example, in *Coleman*, the Supreme Court held that a petitioner who filed his appellate brief three days late had effectively deprived the state of a fair opportunity to pass on his claims, and thus had procedurally defaulted them, because the state had consistently and strictly applied its timing deadlines for filing such appellate briefs. *Id*. at 742–44, 111 S.Ct. 2546. So long as the state procedural rule is one that is an independent and adequate ground for refusing to fully consider the petitioner's argument, the federal courts likewise will not hear the petitioner's claim. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

Pollini, however, did not fail to comply with state procedural rules. He acknowledges that he did not argue in state court that his appellate counsel was constitutionally ineffective in failing to seek a new trial ***499** rather than solely a resentencing. But nor could he have made that claim under Kentucky law. After all, the Kentucky Supreme Court, at the time Pollini filed for state collateral review, refused to recognize the argument. *See Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1998) ("RCr 11.42 cannot be used as a vehicle for relief from ineffective assistance of appellate counsel." (citation omitted)); *Boykin*, 541 F.3d at 647–48 (noting that "the district court was correct in addressing the merits of [petitioner]'s claim of ineffective appellate counsel even though the Kentucky Supreme Court refuses to recognize such a claim"). In view of that state law limitation, Pollini did not procedurally default his ineffective assistance of appellate counsel claim by failing to raise the claim in state court. *See Matthews v. Parker*, 651 F.3d 489, 499 (6th Cir. 2011) ("Furthermore, according to Kentucky law, Petitioner could not have raised this claim in his state post-conviction motion. ... Petitioner's habeas petition was his first opportunity to raise his ineffective assistance of appellate counsel claim, and he did not procedurally default this claim by not previously raising it."), *rev'd on other grounds*, 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012).

Comity and federalism concerns do not suggest otherwise. Our "duty to protect a state's interest in its procedural rules is only applicable once we determine that the state has decided a given case on a procedural basis." *Guilmette*, 624 F.3d at 292. Here, Kentucky had not made such a procedural determination when Pollini sought collateral review. By not allowing appellants to bring certain types of ineffective assistance of counsel claims, Kentucky voluntarily forwent the opportunity to have a first pass at remedying violations of a state prisoner's federal rights. *See Coleman*, 501 U.S. at 730, 111 S.Ct. 2546. Respecting those rights today thus does no disrespect to decisions of a coordinate state court.

Concluding otherwise, it bears noting, seemingly would deprive Pollini of the opportunity to vindicate his alleged injuries. *See Halvorsen v. White*, 746 F. App'x 489, 494 (6th Cir. 2018) ("Because we have previously permitted district courts to review the merits of [Kentucky ineffective assistance of appellate counsel claims] to ensure that a recognized federal right is not rendered non-cognizable, we accept [defendant's] invitation to address it here ....") (citation omitted)). With that consideration in mind, we held in *Matthews* and *Halvorsen* that a Kentucky prisoner does not default his ineffective assistance of appellate counsel claims when binding state precedent barred him from doing so on direct appeal. The same is true here. Because Pollini did not procedurally default this ineffective assistance of appellate counsel claim, he may proceed on that claim on remand.

III.

For the foregoing reasons, the judgment of the district court is affirmed in part, vacated in part, and remanded for further proceedings.

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Louisville Division.

Jasper POLLINI, Petitioner,
v.
Kathy LITTERAL, Respondent.

Civil Action No. 3:14-cv-689-DJH-RSE
|
Signed 01/15/2019

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MEMORANDUM OPINION AND ORDER

David J. Hale, Judge

***1** This matter is before the Court on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket No. 1) In accordance with 28 U.S.C. § 636(b)(1)(B), the Court referred the matter to United States Magistrate Judge Dave Whalin for initial review and recommended disposition. (D.N. 25) In his Findings of Fact, Conclusions of Law and Recommendation (D.N. 39), Judge Whalin recommended that Pollini's petition be granted on the first asserted ground for relief; Judge Whalin did not evaluate Pollini's other claims. (*Id.*, PageID # 57) For the reasons discussed below, the Court declines to adopt the magistrate judge's recommendation and is not persuaded by Pollini's remaining arguments. The Court will therefore deny Pollini's petition.

I. BACKGROUND

In 2002, Dan Ziegler awoke to find Jasper Pollini burglarizing his garage. *Commonwealth v. Pollini*, 172 S.W.3d 418, 421 (Ky. 2005). After chasing Pollini from his property, Ziegler notified his neighbor, Byron Pruitt, who armed himself and began searching the area. *Id.* Meanwhile, Pollini realized that he forgot his toolbox at Ziegler's home and persuaded his sister, Crystal Plank, to drive him back to the scene. *Id.* Upon their arrival, Plank and Pollini saw a flashlight coming toward their vehicle, prompting Pollini to fire his gun out the window. *Id.* The bullet pierced Pruitt's throat, and he died shortly thereafter. *Id.* at 422.

A.

Following trial in 2003, a Jefferson Circuit Court jury convicted Pollini of murder, burglary in the first degree, burglary in the second degree, and receiving stolen property (D.N. 20, PageID # 121). The trial judge sentenced Pollini to life without the possibility of parole for 25 years. (D.N. 39, PageID # 1559) Thereafter, the case proceeded down a lengthy path of appeals.

On direct appeal in 2005, the Kentucky Supreme Court upheld Pollini's conviction but vacated the case for a new sentencing hearing; the Jefferson Circuit Court subsequently reduced his sentence to life. The court found that Pollini was not eligible for aggravated sentencing because he did not shoot Pruitt during or in immediate flight from the burglary. (*Id.*) After resentencing in 2006, Pollini appealed, but the Kentucky Supreme Court dismissed the appeal finding that the trial court did not abuse its discretion in admitting videotape testimony of Ziegler's mother and that the prosecutor's closing argument was not improper. (D.N. 20, PageID # 124) *Pollini v. Commonwealth*, No. 2006-SC-000835-MR, 2008 WL 203035 (Ky. Jan. 24, 2008). Next, Pollini filed a post-conviction action in state court, which the trial court and the Kentucky Court of Appeals dismissed. (*Id.*)

In 2011, the Kentucky Supreme Court remanded the case to the Kentucky Court of Appeals in light of its ruling in *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), where the court agreed to recognize ineffective-assistance-of-counsel claims based on alleged deficiencies during direct appeal. On remand, the Kentucky Court of Appeals vacated Pollini's conviction based on the trial judge's violation of Kentucky Rule of Criminal Procedure 9.74, which prohibits a judge from responding to jury requests for information outside the presence of counsel. *Pollini v. Commonwealth*, No. 2009-CA-000964-MR, 2011 WL 6412052 (Ky. Ct. App. 2011). The Kentucky Supreme Court then reversed, finding the Rule 9.74 violation harmless error. *Commonwealth v. Pollini*, 437 S.W.3d 144, 153 (Ky. 2014). Accordingly, in 2014, the Kentucky Supreme Court reinstated Pollini's conviction and sentence. *Id.*

B.

***2** In his habeas petition, Pollini asserts six grounds for relief. (D.N. 20, PageID # 112-14) The magistrate judge recommended that Pollini be given a new direct appeal relating to Ground One of his petition and did not offer a recommendation with respect to any of the other five grounds. (D.N. 44, PageID # 1612) The warden objected to the magistrate judge's recommendation. (D.N. 40) This opinion will therefore address all six grounds of Pollini's petition.

II. STANDARD

The Court reviews de novo the portions of the magistrate judge's report to which objection is made. 28 U.S.C. § 636(b)(1). Under the Antiterrorism and Effective Death Penalty Act of 1996,

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The "contrary to" clause applies "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An "unreasonable application" occurs where "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. If the state court's decision conflicts with clear and convincing evidence to the contrary, there has been an "unreasonable determination of the facts." *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003). Under this clause, the petitioner must show that the state court "applied [a Supreme Court case] to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). There must be no possibility that fair-minded jurists could disagree that the state court's decision conflicts with Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

III. DISCUSSION

A. Ground One

In Ground One of his amended petition, Pollini argues that the Kentucky Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when reviewing his appellate counsel's failure to brief a Kentucky Rule of Criminal Procedure 9.74 violation because the court looked to current governing law, rather than the law that governed at the time of the alleged deficiency. (D.N. 20, PageID # 158) Had his appellate counsel raised the Rule 9.74 issue on appeal, Pollini contends, a structural-error standard would have applied, and his conviction would have been automatically reversed. (*Id.*) But as explained below, this Court agrees with the Kentucky Supreme Court's analysis.

To succeed on a claim of ineffective assistance of counsel under *Strickland*, a petitioner must establish that his counsel's conduct was deficient in light of professional norms and that the deficient performance prejudiced his defense. 466 U.S. at 686, 694. To satisfy the prejudice requirement, the petitioner must show with reasonable probability that but for his counsel's errors, the result would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome of the proceedings. *Id.*

***3** In determining whether prejudice has occurred, the reviewing court should apply current governing law rather than the law in place at the time of the alleged deficiency. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). As the Sixth Circuit has explained, counsel's failure to make an objection that would be meritless under current governing law cannot support an ineffective-assistance-of-counsel claim, even if the objection would have been meritorious if raised at the time of the deficiency. *Berry v. Capello*, 576 F. App'x 579, 589 (6th Cir. 2014); *see also Abby v. Howe*, 742 F.3d 221, 228 (6th Cir. 2014). In *Berry*, the defendant argued that his conviction for both felony murder and the underlying offense violated the Double Jeopardy Clause, as held by the Michigan Supreme Court in *People v. Wilder*, 411 Mich. 328 (Mich. 1981). *See id.* While Berry's appeal was pending, however, the Michigan Supreme Court overruled *Wilder*. *Id.* The Sixth Circuit held that because Berry could not assert a double jeopardy claim under then-current Michigan law, it could not consider his attorney's failure to object in determining Berry's ineffective-assistance-of-counsel claim. *Id.*

Likewise, in *Abby*, the defendant's attorney did not object to the government's use of Abby's pre-arrest silence as evidence of guilt, in violation of *Combs v. Coyle*, 205F.3d 269 (6th Cir. 2000). *See Abby*, 742 F.3d at 228. Before the Sixth Circuit heard Abby's appeal, though, the Supreme Court overruled *Combs* and held that prosecutors could use pre-arrest silence as evidence of guilt. *Id.* Accordingly, the Sixth Circuit held that it could not consider counsel's failure to object because it would be futile under then-current law. *Id.*

Here, the alleged deficiency is appellate counsel's failure to brief the trial judge's violation of Rule 9.74 which prohibits contact between the jury and judge after deliberations have begun, other than in the presence of counsel and parties. (D.N. 39, PageID # 1560) While deliberating, the jury sent a note to the trial judge asking if a transcript of Plank's testimony was available because they were having trouble locating her statement on the provided tape. *Commonwealth v. Pollini*, 437 S.W.3d at 159. Because the transcript was previously ruled inadmissible, the judge unilaterally replied in writing that no transcript was available. *Id.* It is undisputed that this exchange violated Rule 9.74. *Id.*

The parties disagree, however, as to whether the failure to raise this violation on appeal prejudiced Pollini. The Kentucky Supreme Court commenced its analysis by evaluating whether appellate counsel's failure to brief the Rule 9.74 violation prejudiced Pollini because, under *Strickland*, if it is "easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." *Pollini*, 437 S.W.3d at 149 (citing *Strickland*, 466 U.S. at 697). Although it was obvious to the court that the trial judge violated Rule 9.74, that alone was insufficient to show prejudice. *Id.* at 151. The Kentucky Supreme Court explained that the "harmless error analysis is [the] current standard of review for a trial judge's violation of [Rule] 9.74." *Id.* A Rule 9.74 violation is harmless if the contact "does not impugn the fundamental fairness of an otherwise constitutionally acceptable trial." *Id.* (citing *McAtee v. Commonwealth*, 413 S.W.3d 608, 626 (Ky. 2013)). If the error was in fact harmful, there would have been a reasonable probability of Pollini's success on appeal and, accordingly, the *Strickland* prejudice test would be satisfied. *Id.*

The Kentucky Supreme Court concluded, however, that informing the jury that there was no transcript was harmless because the trial judge previously ruled the transcript inadmissible. *Id.* at 151-52. Additionally, Pollini's counsel objected to admission of the transcript throughout the trial. *Id.* Thus, Pollini and his counsel's absence from the exchange was also harmless—had they been present, their only options would have been to "agree to enter the transcript into evidence and have it read in open court or to have the jury come back into open court and listen to selected portions of Plank's taped witness statement [even though the trial] had closed [and] the jury was in its deliberations." *Id.* at 152. The Kentucky Supreme Court concluded that Pollini was not prejudiced by his counsel's conduct and thus was not entitled to relief because Pollini did not demonstrate how the contact between the trial judge and jury "impugned the fundamental fairness" of the trial. *Id.*

***4** This Court likewise finds that Pollini is not entitled to relief because the Kentucky Supreme Court did not unreasonably apply *Strickland.* The Kentucky Supreme Court identified the correct standard for ineffective-assistance-of-counsel claims and applied it to Pollini's case based on the law in effect at the time of review.[1] *Id.* at 149-52; *see also Strickland*, 466 U.S. at 694; *Lockhart*, 506 U.S. at 372. Although Pollini maintains that his conviction would have been reversed if his counsel had objected at the time of his direct appeal, ineffective-assistance-of-counsel claims that are meritless under current law are not sufficient to show prejudice under *Strickland*, as discussed above. *Berry*, 576 F. App'x at 589. Therefore, Pollini has not shown how the Kentucky Supreme Court's application of *Strickland* is unreasonable.

The magistrate judge also recommended that the Court grant Pollini relief on the ground that the Kentucky Supreme Court's decision was an objectively unreasonable determination of the facts in light of the evidence presented at Pollini's trial. (D.N. 39, PageID # 1613) *See* 28 U.S.C. § 2254(d)(2). Specifically, the report finds that the state court's conclusion regarding prejudice rests on erroneous findings that 1) the tape contained Plank's statement and 2) the tape was operable. (D.N. 39, PageID # 1613) After careful review of the record, the Court concludes that the magistrate judge's recommendation is incorrect because the Kentucky Supreme Court's findings were objectively reasonable.

First, the jury's note to the trial judge stated that Plank's statement was "[d]ifficult to locate on the tape," which implies that the tape was operable—there otherwise would not have been "difficult[y]" locating the statement within the tape. *Pollini*, 437 S.W.3d at 147. Second, the record reflects that Plank's statement was played on tape in open court; this means that a tape containing Plank's statement existed and that the jury was familiar with its contents. (D.N. 44, PageID # 1640) It is not objectively unreasonable, then, to conclude that the jury would likely have known if it had the wrong tape, and that, from the context of the note, the jury thought it had the right tape. *See Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007).

In sum, the Kentucky Supreme Court's conclusions that the jury had an operable tape containing Plank's statement and, consequently, that the Rule 9.74 violation was harmless, are not objectively unreasonable. As there is no "clear and convincing" evidence to the contrary, the Court finds that the state court's determination of the facts was reasonable. *See Wiggins*, 539 U.S. at 528-29. Likewise, and as stated above, the state court did not inappropriately apply *Strickland* to Pollini's claim. Accordingly, Ground One of Pollini's amended petition will be denied.

B. Grounds Two and Three

Pollini next contends that his Sixth and Fourteenth Amendment rights were violated because the jury was laboring under the theory that he was still in immediate flight from the robbery when he shot Pruitt (D.N. 20, PageID # 171) and that his appellate counsel was ineffective under *Strickland* for failing to argue that Pollini's conviction, rather than his sentence, should be overturned. (*Id.*, PageID # 176) However, as Pollini concedes, both claims are procedurally defaulted because he did not raise them before the state court. (D.N. 20, PageID # 170-171, 176) *Coleman v. Thompson*, 501 U.S. 722, 748 (1991). Nevertheless, Pollini argues that the Court should review his claims because there was no process available to review them in state court. (D.N. 20, PageID # 171, 176)

***5** A procedurally defaulted claim only warrants review where the petitioner shows cause and actual prejudice. *Reed v. Farley*, 512 U.S. 339, 353-55 (1994). To establish cause, a petitioner must point to an external obstacle that prevented him from presenting the claim in state court. *Coleman*, 501 U.S. at 753. Cause will not be found, though, where a petitioner did not present a claim before the state court simply because he believed doing so would be futile. *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *see also Cvijetniovic v. Eberlin*, 617 F.3d 833, 839 (6th Cir. 2010). Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. *Engle*, 456 U.S. at 130.

Here, Pollini argues that he did not present Grounds Two and Three in his post-conviction petition and initial appeal because "there was no state process" available given that Kentucky courts did not recognize ineffective-assistance-of-appellate-counsel claims based on alleged deficiencies on direct appeal until 2010. (D.N. 20, PageID # 171, 176) *Hollon*, 334 S.W.3d at 433. In other words, Pollini contends that raising the issue before the state court would have been futile. (D.N. 20, PageID # 151) Yet while Pollini's appeal was pending, this issue was presented in *Hollon*, and the Kentucky Supreme Court decided to recognize such claims. *See Hollon*, 334 S.W.3d at 433. Thus, Pollini presents the exact scenario warned against in *Engle*: failing to present seemingly futile arguments deprives state courts of the opportunity to reevaluate, and potentially overrule, prior decisions. 456 U.S. at 130. Accordingly, Pollini has not shown cause for his procedural defaults, and Grounds Two and Three of his petition will be denied.

C. Ground Four

In Ground Four of his amended petition, Pollini maintains that the Kentucky Supreme Court inappropriately applied *Jackson v. Virginia*, 443 U.S. 307 (1979), when assessing the sufficiency of the evidence with respect to his conviction for burglary in the first degree. (D.N. 20, PageID # 177) Under *Jackson*, evidence is sufficient if, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. On habeas review, a federal court may only overturn a state-court determination on sufficiency of the evidence if the state-court decision was objectively unreasonable. *Coleman*, 566 U.S. at 652.

Pollini challenges the sufficiency of the evidence regarding only one element of burglary in the first degree: that he was armed with a deadly weapon while entering, within, or in immediate flight from Ziegler's garage. (D.N. 20, PageID # 177) Although the Kentucky Supreme Court assessed Pollini's claim under the standard articulated in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), the Sixth Circuit has acknowledged that this standard is materially the same as *Jackson*. *See Matthews v. Parker*, 651 F.3d 489, 503 n.3 (6th Cir. 2011); *see also Jackson*, 443 U.S. at 319. Additionally, the state court's description of the *Benham* test is consistent with the holding in *Jackson*: the court stated that it "must consider all evidence favoring the [prosecution] as true and from that evidence, determine whether it is sufficient to induce a reasonable jury to believe beyond a reasonable doubt that the defendant is guilty of each and every element of the crime." *Pollini*, 172 S.W.3d at 429; *cf.* *Jackson*, 443 U.S. at 319 (explaining that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). The Kentucky Supreme Court then identified the evidence indicating Pollini's possession of a deadly weapon: Ziegler's testimony that he thought Pollini had a weapon and Pollini's possession of a gun when he returned to Ziegler's neighborhood minutes later. *Pollini*, 172 S.W.3d at 422, 429. When viewed in the light most favorable to the prosecution, the court concluded, a rational jury could have found that Pollini had a gun during the burglary. *Id.* at 432.

***6** Pollini contends that because Ziegler could not confirm what Pollini was carrying and because Pollini did not fire at Ziegler, the jury's conclusion and state court's finding were illogical. (D.N. 20, PageID # 179) However, the presence of competing evidence does not make the jury's verdict irrational or the state court's review objectively unreasonable; rather, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

In light of the evidence, this Court cannot conclude that the state court was objectively unreasonable in finding that such evidence was sufficient to convince a reasonable jury that Pollini was armed during the burglary. *Pollini*, 172 S.W.3d at 432. This Court therefore finds that the Kentucky Supreme Court correctly applied *Jackson*. Accordingly, the Court will deny Ground Four of Pollini's petition.

D. Ground Five

In Ground Five of his amended petition, Pollini maintains that the jury instructions on murder violated his Sixth and Fourteenth Amendment rights. (D.N. 20, PageID # 179) The Court need not review the merits of this claim, however, because it is procedurally defaulted.

To receive federal habeas corpus relief, a petitioner must first exhaust all available state-court remedies, meaning that each claim must have been "fairly presented" to the state court. *Frazier v. Huffman*, 343 F.3d 780, 797 (6th Cir. 2003). "Fair presentation requires that the state courts be given the opportunity to see both the factual and legal basis for each claim." *Wagner v. Smith*, 581 F.3d 410, 414–15 (6th Cir. 2009). "[T]he applicant is required to make a specific showing of the alleged claim." *Id.* at 415.

Pollini's state-court presentation of Ground Five is strikingly similar to the petitioner's prosecutorial-misconduct argument in *Wagner*. In *Wagner*, the petitioner argued that he sufficiently presented his claim to the state court because he described the claim in a heading[2] and included conclusory statements regarding the prosecutor's conduct within his brief.[3] *Wagner*, 581 F.3d at 416. The Sixth Circuit found these passing references too vague to be considered a fair presentation because they did not establish the factual or legal basis for Wagner's constitutional claim. *Id.* at 415. Similarly, Pollini only described his federal murder-instructions claim in one heading[4] of his state-court brief and summarily stated three times throughout the brief that the murder instructions violated his federal constitutional rights.[5] (D.N. 28-3, PageID # 487, 490-91) Although Pollini also cited two federal cases and the Sixth and Fourteenth Amendments, citations, without more, do not fairly present the claim. *Katt v. Lafler*, 271 F. App'x 479, 480-82 (6th Cir. 2008). Because Pollini did not fairly present his murder-instructions argument before the state court, he has not exhausted all state remedies with respect to this claim. Thus, the Court will deny Ground Five of Pollini's petition.

E. Ground Six

***7** Last, Pollini contends that his appellate counsel was ineffective because he pursued a self-defense theory rather than an unintentional-shooting argument. (D.N. 20, PageID # 182) As the Warden notes, however, this claim is time-barred because it does not relate back to Pollini's original petition. (D.N. 28, PageID # 254)

After he exhausted his state remedies, Pollini had a one-year period to file his habeas corpus petition. 28 U.S.C. § 2244(d)(1). Pollini timely filed his original petition but amended it after the one-year period lapsed. (D.N. 28, PageID # 252) Amendments made after the statute of limitations has run relate back to the original petition only if they arise out of the same "conduct, transaction, or occurrence." Fed. R. Civ. P. 15. Amendments that fall outside the limitations period but do not relate back are time-barred. *Johnson v. Sheets*, No. 2:07-CV-490, 2008 WL 926582, at *4 (S.D. Ohio Apr. 3, 2008).

The Supreme Court clarified the meaning of "conduct, transaction, or occurrence" in the habeas corpus context in *Mayle v. Felix*, 545 U.S. 644, 663-64 (2005). In *Mayle*, Defendant Jacoby Felix filed a habeas petition objecting to the trial court's admission of a videotaped interrogation of Felix's friend. *Id.* at 651. After the statute of limitations lapsed, Felix filed an amended petition adding an objection to the admission of pre-trial statements he made to police during interrogation. *Id.* The *Mayle* Court explained that habeas claims relate back to the original petition only when they are tied to a "common core of operative facts," because Rule 15(c)(2) is meant to relax rather than obliterate the statute of limitations. *Id.* at 663-64, 659. Thus, an amended habeas petition does not relate back where it asserts new grounds for relief supported by facts that differ from those in the original petition. *Pinchon v. Myers*, 615 F.3d 631, 642-43 (6th Cir. 2010) (finding that petitioner's claim did not relate back because the initial claim relied on jury instructions and the sufficiency of the evidence presented at trial, but his amended claim depended on his attorney's failure to present evidence of mental impairment). Additionally, a new claim of ineffective assistance of counsel does not automatically relate back merely because it and an original claim both rest on violations of the Sixth Amendment. *Woolbright v. Crews*, No. 1:12-CV-00080-GNS, 2017 WL 6887002, at *10 (W.D. Ky. July 24, 2017); *see also U.S. v. Gonzalez*, 592 F.3d 675, 680 (5th Cir. 2009); *U.S. v. Hernandez*, 436 F.3d 851, 858 (8th Cir. 2006).

Here, Pollini's new claim regarding his counsel's failure to present a theory of unintentional shooting and his previous ineffective-assistance-of-counsel claim do not rest on the same core facts. Originally, Pollini argued that his counsel was deficient on the ground that he did not do enough to present a sound self-defense theory. (D.N. 1, PageID # 18-23) Then, Pollini maintained that his lawyer should have had Pruitt's gun tested for gunpowder residue and should have presented evidence that Pruitt threatened to shoot Pollini and fired his gun. (*Id.*) Now, in his latest argument, Pollini contends that the deficiency was counsel's failure to present a theory of accidental shooting and that it was unreasonable to pursue a self-defense argument; the pertinent facts are counsel's failure to present expert testimony regarding the bullet trajectory, expert testimony regarding Pollini's mental health, and evidence concerning Pollini's inability to perceive the risk involved with firing his gun. (D.N. 20, PageID # 186-92) In sum, Pollini previously relied on facts showing what his trial counsel should have done to present a self-defense argument. He now relies on facts suggesting an unintentional shooting and makes no mention of the evidence previously discussed. (D.N. 20, PageID # 75-81) Thus, the "core facts" of the two claims are not the same. *See Pinchon*, 615 F.3d at 642-44. Ground Six of Pollini's amended petition therefore does not relate back and is time-barred.

IV. CONCLUSION

***8** Pollini has not shown that the state-court decisions were contrary to or involved an unreasonable application of clearly established federal law, or that they were based on an unreasonable determination of the facts in light of the evidence presented. Notwithstanding the magistrate judge's recommendation, the Court finds that Pollini has not made a "substantial showing of the denial of a constitutional right" because reasonable jurists could not debate the Court's assessment of Pollini's constitutional claims. 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Cooey v. Coyle*, 289 F.3d 882, 887 (6th Cir. 2002). Consequently, no certificate of appealability shall issue.

Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) The Court **DECLINES** to adopt the Findings of Fact, Conclusions of Law and Recommendation of Magistrate Judge Dave Whalin (D.N. 39).

(2) The warden's objection to the Findings of Fact, Conclusions of Law and Recommendation (D.N. 44) is **SUSTAINED**.

(3) Pollini's amended petition for habeas relief (D.N. 20) is **DENIED**.

(4) A separate Judgment shall issue this date.

All Citations

Not Reported in Fed. Supp., 2019 WL 236721

Footnotes

1 Notably, Kentucky courts used the harmless-error standard to review Kentucky Rule of Criminal Procedure 9.74 violations at the time of Pollini's direct appeal as well. *See*, *e.g.*, *Garland v. Commonwealth*, 127 S.W.3d 529, 538 (Ky. 2003); *Johnson v. Commonwealth*, 12 S.W.3d 258, 266 (Ky. 1999); *Scalf v. Commonwealth*, No. 2003-CA-001275-MR, 2004 WL 539533, at *2 (Ky. Ct. App. 2004).

2 "Appellant Sherman Wagner was denied a fair trial by the prosecutor's misconduct throughout the trial and violated [the] right to due process of law clause of both the federal and state constitutions." *Wagner*, 581 F.3d at 416 (capitalization altered throughout).

3 Wagner's brief included statements such as "the Prosecutor's pervasive conduct throughout the proceedings denied [Wagner] ... a fair trial," and "[t]he Prosecutor deliberately interjected irrelevant and prejudicial evidence throughout the entire trial." *Id.*

4 "The murder instruction allowed the jury to convict Pollini on the basis of a theory (intentional murder) that was not supported by the evidence and thereby violated the unanimous verdict requirement of the Kentucky Constitution and the majority verdict requirement of the United States Constitution." (D.N. 28-3, PageID # 487)

5 Pollini asserted that "the instruction, which allowed the jury to convict Pollini on an intentional murder theory, violated his right to a unanimous verdict under §§ 2, 7 and 11 of the Kentucky Constitution and his right to a majority verdict under the 6th and 14th Amendments"; "[t]hus, Pollini's right to a unanimous verdict and his right to a majority verdict were violated"; and "[s]ince the murder instruction violated the unanimity requirement of Kentucky law and the majority verdict required by the federal constitution, the conviction must be reversed for a new trial at which the jury is instructed only on wanton murder." (D.N. 28-3, PageID # 487-88, 490)

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437 S.W.3d 144
Supreme Court of Kentucky.

COMMONWEALTH
of Kentucky, Appellant
v.
Jasper POLLINI, Appellee.

No. 2012–SC–000312–DG.
|
April 17, 2014.
|
Rehearing Denied Aug. 21, 2014.

Synopsis
Background: Defendant convicted of complicity to murder and related offenses following joint trial filed motion to set aside, vacate, or correct sentence based on claim that appellate counsel was ineffective for failure to raise issue of trial court's improper ex parte communication with jury after jury had retired to deliberate. The Circuit Court, Jefferson County, denied motion, and defendant appealed. The Court of Appeals affirmed based on determination that claim of ineffective assistance of appellate counsel was not cognizable in motion to set aside, vacate, or correct sentence. On review, the Supreme Court reversed and remanded for reconsideration in light of *Hollon v. Commonwealth*. On remand, the Court of Appeals ruled that appellate counsel rendered ineffective assistance and awarded defendant new trial. Discretionary review was granted.

Holdings: The Supreme Court, Scott, J., held that:

defendant did not waive claim that direct appeal counsel was ineffective for failure to brief issue of trial court's improper ex parte communication with jury;

trial court violated rule governing communications with jury after it retired for deliberations;

caselaw holding that such violation was subject to harmless error review applied retroactively on claim that appellate counsel was ineffective for failure to argue issue in brief;

violation of rule governing trial court's communications with jury after it retired for deliberations was harmless error.

Judgment of the Court of Appeals reversed; judgment of Circuit Court reinstated.

Attorneys and Law Firms

***146** Jack Conway, Jeffrey Allan Cross, Counsel for Appellant.

Timothy G. Arnold, Angela Elaine Slaton, Counsel for Appellee.

Opinion

Opinion of the Court by Justice SCOTT.

A Jefferson Circuit jury found Appellee, Jasper Pollini, guilty of complicity to murder, complicity to first-degree burglary, complicity to second-degree burglary, and complicity to receiving stolen property over $300. After Appellee's sentence of life imprisonment was affirmed by this Court, he filed an RCr 11.42 motion in the ***147** trial court alleging, among other things, that appellate counsel had rendered ineffective assistance by failing to brief the issue of the trial judge's ex parte written communication with the jury after it had retired for deliberations. The circuit court denied Appellee's motion, and the Court of Appeals affirmed the order denying relief, holding that Appellee's claim of ineffective assistance of appellate counsel (IAAC) was not cognizable.

This Court subsequently vacated the Court of Appeals' decision and remanded the case for reconsideration in light of our holding in *Hollon v. Commonwealth,* 334 S.W.3d 431 (Ky.2010). In *Hollon,* we recognized that IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal were cognizable in Kentucky. *Id.* at 436. On remand, the Court of Appeals ruled that Appellee's direct appeal counsel had rendered deficient performance by failing to brief the ex parte communication issue and granted Appellee a new trial.

We granted discretionary review, and the Commonwealth now argues that we should reverse the Court of Appeals because (1) Appellee waived his IAAC claim on appeal, (2) the Court of Appeals erred by concluding that Appellee's RCr 9.74 issue could have succeeded on direct appeal, and (3) the Court of Appeals failed to consider the experience of Appellee's direct appeal counsel. For the following reasons, we reverse the Court of Appeals and reinstate the trial court's order denying Appellee's RCr 11.42 motion.

I. BACKGROUND

The factual background underlying Appellee's convictions has been thoroughly recounted in *Pollini v. Commonwealth,* 172 S.W.3d 418 (Ky.2005), and reiterated in *Pollini v. Commonwealth,* No. 2006–SC–000835–MR, 2008 WL 203035 (Ky. Jan. 24, 2008). These cases explain that, in the early morning hours of May 7, 2002, Appellee burglarized two residential garages. The burglaries were the beginning of a chain of events that ended with Appellee shooting and killing Byron Pruitt.

Appellee was subsequently indicted for murder and the garage burglaries, and his sister, Crystal Plank, was indicted for lesser offenses related to the incident. Appellee and Plank were tried together. After the jury had retired for deliberation, it requested a copy of Plank's witness statement to the police. The trial judge, without notifying the parties, advised the jury that no transcript was available.[1]

Appellee was ultimately convicted of murder, first-degree burglary, second-degree burglary, and receiving stolen property as noted.

II. ANALYSIS

A. Appellee Did Not Waive His IAAC Claim on Appeal of His RCr 11.42 Motion

As stated above, our principal reason for granting discretionary review in this case was to consider whether the Court of Appeals properly applied *Hollon* in its review of Appellee's IAAC claim. However, we will first address the Commonwealth's argument that Appellee waived his IAAC claim on appeal of his RCr 11.42 motion. The Commonwealth contends that Appellee did not brief an IAAC claim to the Court of Appeals and that it was improper for the Court to consider the claim sua sponte.

***148** The Commonwealth admits that Appellee made a claim of IAAC in his RCr 11.42 motion to the circuit court; however, it asserts that Appellee abandoned the IAAC claim on his appeal of the trial court's denial of his motion. The Commonwealth supports its argument by contrasting Appellee's brief to the Court of Appeals with his earlier RCr 11.42 motion to the trial court. The Commonwealth points out that Appellee's argument pertaining to the ex parte communication issue is almost word-for-word the same in the RCr 11.42 motion as it is in the appellate brief. However, the appellate brief's issue heading uses the term "trial counsel" rather than just "counsel," as was used in the RCr 11.42 motion. The Commonwealth points to several other similar changes in Appellee's briefs to support its proposition that appellate counsel consciously abandoned the IAAC claim on appeal of the RCr 11.42 motion.

Nonetheless, even assuming the Commonwealth is correct that Appellee failed to adequately assert his IAAC claim in his appeal of the RCr 11.42 motion, the Commonwealth has not cited any legal authority in support of its claimed relief. The cases cited by the Commonwealth demonstrate that, generally, appellate courts will decline to reach issues an appellant raised in a lower court but failed to brief on appeal. *See Grange Mut. Ins. Co. v. Trude,* 151 S.W.3d 803, 815 (Ky.2004) (holding that failure to address discovery request in appellate brief constituted a waiver of the issue); *Commonwealth v. Bivins,* 740 S.W.2d 954, 956 (Ky.1987) ("Normally, assignments of error not. argued in an appellant's brief are waived."). These cases prove only that appellate courts are *permitted* to ignore claims that have not been adequately raised for review. However, these cases do not go so far as to *require* appellate courts to ignore claims that have not been thoroughly briefed on appeal.

In fact, this Court has explicitly stated that an appellate court may decide an issue not briefed on appeal when that issue "flows naturally under our appellate review of the issue raised." *Barker v. Commonwealth,* 341 S.W.3d 112, 114 (Ky.2011); *see also Mitchell v. Hadl,* 816 S.W.2d 183, 185 (Ky.1991) ("When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law."). Given that this case was remanded to the Court of Appeals to be reconsidered in light of our holding in *Hollon* that IAAC is a cognizable claim in Kentucky, the issue of whether Appellee's appellate counsel was ineffective could certainly be deemed to "flow naturally" from the Court of Appeals' review of the issues on appeal. *See Barker,* 341 S.W.3d at 114. Accordingly, we find no error in the Court of Appeals' consideration of Appellee's IAAC claim. Thus, the Commonwealth's first argument does not justify reversal of the Court of Appeals.

B. The Court of Appeals Erred by Ruling in Favor of Appellee's IAAC Claim

The Commonwealth next argues that the Court of Appeals erroneously determined that Appellee suffered ineffective assistance of appellate counsel. More specifically, the Commonwealth argues: (1) that Appellee failed to prove that the ex parte communication issue was "clearly stronger" than the other issues briefed by his appellate counsel and (2) that Appellee also failed to show he was prejudiced by appellate counsel's failure to brief the issue.

Under the standard articulated by this Court in *Hollon,* to succeed on an ***149** IAAC claim premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal, the defendant must establish that "counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." 334 S.W.3d at 436. The omitted issue must be "clearly stronger" than those presented for the presumption of effective assistance to be overcome. *Id.* Additionally, the defendant must also establish that "he or she was prejudiced by the deficient performance, which ... requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Id.* at 437. Put more concisely, our evaluation of an IAAC claim will require a showing of deficient performance plus prejudice. *See id.* at 436–37. We review the components of an IAAC claim *de novo. See Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky.2008) ("On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.").

Here, Appellee properly argues both deficient performance and prejudice. However, the deficient performance component of an ineffectiveness claim need not be addressed first. *See Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). As explained above, the deficient performance prong of the *Hollon* IAAC standard requires Appellee to prove that the issue appellate counsel failed to brief was "clearly stronger" than the issues that it did brief on appeal. *Hollon,* 334 S.W.3d at 436. In light of the difficulty of assessing the relative strengths of each of the numerous claims Appellee argued on direct appeal, we begin our analysis of Appellee's IAAC claim by considering whether Appellee was actually prejudiced by direct appeal counsel's failure to brief the issue of the trial judge's ex parte communication with the jury.

As previously explained, the jury requested a copy of Plank's witness statement to the police, and the trial judge responded in writing, without notifying either party of the request, that none was available. Now, Appellee argues that the trial judge's ex parte communication with the jury was a violation of RCr 9.74, and that direct appeal counsel's failure to brief the issue prejudiced him.

We agree with Appellee that the trial judge violated RCr 9.74, which states, "No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant ... and the entire jury, and in the presence of or after reasonable notice to counsel for the parties." The trial judge in this case violated the plain language of RCr 9.74 when, after receiving a request for information from the jury after it had retired for deliberation, he responded outside the presence of Appellee and without having provided reasonable notice to counsel for both parties. *See McAtee v. Commonwealth,* 413 S.W.3d 608, 625 (Ky.2013).

However, appellate counsel's failure to brief the issue of the trial judge's violation of RCr 9.74, standing alone, does not necessarily establish the prejudice component of an IAAC claim. To prove prejudice, Appellee must make a "showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Hollon,* 334 S.W.3d at 437. Thus, we must determine whether the appeal would have succeeded if not for appellate counsel's failure to brief ***150** the ex parte communication issue on direct appeal.

If the trial court's violation of RCr 9.74 was harmless error in this instance, as alleged by the Commonwealth, it would not have provided grounds for a successful direct appeal. Therefore, we must first determine whether the trial court's written communication with the jury was harmless error if we are to assess whether Appellee was prejudiced by appellate counsel's failure to brief the issue.

However, Appellee argues that we should not consider whether the trial judge's RCr 9.74 violation was harmless error because, at the time his appellate brief was filed, in 2004, this Court viewed any and all ex parte communications between a judge and jury as structural error. According to Appellee, under the standard of review in use at the time, RCr 9.74 violations automatically amounted to reversible error. Thus, any failure of appellate counsel to brief an RCr 9.74 violation occurring in 2004 would satisfy the prejudice component of an IAAC claim because it would create a "reasonable probability that the appeal would have succeeded." *Hollon,* 334 S.W.3d at 437. The Commonwealth, for its part, asserts that the standard of review for a violation of RCr 9.74 has always been harmless error.

However, we will not conduct an inquiry into which appellate standard of review was applicable to RCr 9.74 violations in 2004 without first questioning whether the standard at issue constitutes procedural or substantive law. This Court has previously held that when a court decision results "in a procedural rather than substantive change in the law" it has retroactive application. *Commonwealth v. Alexander,* 5 S.W.3d 104, 106 (Ky.1999); *see also Miller v. Florida,* 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (quoting *Dobbert v. Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)) ("[N]o *ex post facto* violation occurs if a change does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.' "). Therefore, if the standard of appellate review can be considered "procedural rather than substantive," we would retroactively apply the current standard to Appellee's case rather than exhuming whatever standard existed in 2004. *See Alexander,* 5 S.W.3d at 106.

We note that this Court has not yet considered the specific question of whether an appellate standard of review is procedural. However, in *Commonwealth v. Reneer,* 734 S.W.2d 794 (Ky.1987), we examined whether KRS 532.055, Kentucky's "truth in sentencing" statute was procedural or substantive in nature. *Id.* at 796. The primary effect of the statute was to bifurcate felony trials into guilt and sentencing phases. *Id.* Additionally, KRS 532.055 allowed the jury, during the sentencing phase, to hear certain evidence of prior convictions that would not have been admissible previously. *Id.* We held that the statute was procedural under the reasoning that "[t]he statute does not add or remove any element necessary to convict of any crime, and it does not increase or lower the penalty that can be imposed upon conviction." *Id.*

The rationale employed in *Reneer* to determine whether a statute was procedural is instructive in our present inquiry into whether an appellate. standard of review is procedural or substantive. In fact, the Fifth Circuit has adopted a similar rationale for determining whether a law is procedural, and, unlike this Court, it has had occasion to apply that reasoning to an appellate standard of review. In *United States v. Mejia,* the Fifth Circuit determined that an appellate standard of review is "procedural rather than substantive because ***151** it neither increases the punishment nor changes the elements of the offense or the facts that the government must prove at trial." 844 F.2d 209, 211 (5th Cir.1988). Additionally, in another case, the Fifth Circuit explained that an appellate standard of review is procedural because "alteration of the appellate standard of review upsets no legitimate reliance interest by a defendant; it could not have induced alteration of the behavior that led to the crime." *United States v. Bell,* 371 F.3d 239, 242 (5th Cir.2004) (citation omitted). Applying our rationale from *Reneer,* we must agree with the Fifth Circuit that an appellate standard of review is a matter of procedural, rather than substantive, law.[2]

In this case, the standard of review at issue (whether we ultimately determine that it is the structural or harmless error standard) will be used to review the actions of the trial judge and not the actions of Appellee. The standard of review will have no effect on Appellee's punishment or the elements of his offense, *see Reneer,* 734 S.W.2d at 796; *Mejia,* 844 F.2d at 211; nor could it have encouraged Appellee to alter his behavior prior to the crime, *see Bell,* 371 F.3d at 242 (citation omitted). Therefore, we must conclude that the appellate standard of review of the RCr 9.74 violation in this case is procedural, rather than substantive, law. Accordingly, we will apply our current standard of review to the trial judge's violation of RCr 9.74 without undertaking any consideration of what the standard may have been in 2004 or whether the. standard was different at all. *See Alexander,* 5 S.W.3d at 106.

In a recent decision from this Court, we clearly articulated that harmless error analysis is our current standard of review for a trial judge's violation of RCr 9.74. *McAtee v. Commonwealth,* 413 S.W.3d 608, 626–27 (Ky.2013); *see also Welch v. Commonwealth,* 235 S.W.3d 555, 558 (Ky.2007) (reviewing trial court's violation of RCr 9.74 for harmless error). In *McAtee,* we also defined harmless error in the context of ex parte communications between judge and jury, explaining it as "contact [that] does not impugn the fundamental fairness of an otherwise constitutionally acceptable trial." 413 S.W.3d at 626. Therefore, we will review the trial judge's violation of RCr 9.74 for harmless error by making *McAtee's* suggested inquiry into whether the error impugned the fundamental fairness of the trial. If the RCr 9.74 violation was, in fact, harmful error, then a "reasonable probability" would have existed that Appellee's direct appeal would have succeeded, which would establish the prejudice prong of our IAAC analysis. *Hollon,* 334 S.W.3d at 437.

We begin our analysis of whether the trial judge's actions were harmless error by noting that the Court of Appeals concluded the trial court's violation of RCr 9.74 would have been successful if raised on appeal. The Court of Appeals based its finding of prejudice on the fact that a transcript of Plank's testimony physically existed and that the trial judge misled the jury by informing them that the transcript was unavailable. However, the Court of Appeals did so without any consideration of whether the RCr 9.74 issue, assuming it had been raised on direct appeal, would have been deemed harmless and, therefore, nonprejudicial by this Court.

***152** While the record reveals that a transcript of Plank's testimony did in fact exist, it is also the case that the trial court had earlier ruled that it was not admissible into evidence. Moreover, the prosecution and defense counsel never agreed to certify a transcript of Plank's testimony, and the transcript was never read in open court.[3] As such, it would have been error for the trial judge to provide the transcript to the jury. *See Sanborn v. Commonwealth,* 754 S.W.2d 534, 540 (Ky.1988), *overruled on other grounds by Hudson v. Commonwealth,* 202 S.W.3d 17 (Ky.2006) (explaining that it is reversible error to admit the prosecution's transcript of a taped witness statement when there has been no certification or agreement as to its veracity). Therefore, at the time the trial judge responded to the jury's question, he was correct in stating that there was no transcript available.

Nonetheless, Appellee does not argue that the trial court's failure to provide the Plank transcript to the jury was harmful error, rather Appellee asserts that the error was the trial court's failure to permit Appellee and his counsel to participate in how the jury's transcript question was addressed. However, since the trial judge could not have provided the transcript to the jury, defense counsel's only options would have been to agree to enter the transcript into evidence and have it read in open court or to have the jury come back into open court and listen to selected portions of Plank's taped witness statement. This would be taking place within a trial that had closed and during the time the jury was in its deliberations. Appellee's argument that he suffered harmful error is unavailing because he has not demonstrated that the exclusion of defense counsel from the formulation of the trial court's response to the jury's question "impugn[ed] the fundamental fairness" of the trial, as required for a finding of harmful error under *McAtee,* 413 S.W.3d at 626–27.

In retrospect, the record indicates that Appellee's counsel actively opposed the admission of transcripts of taped statements at least four times during the trial. In fact, defense counsel repeatedly asserted that audio recordings provided better evidence of a witness's statements than a subjectively prepared written transcript. Appellee even admits in his brief that his counsel consistently argued that the tape was the best evidence and that counsel most likely would have requested to play the tape for the jury again rather than read the transcript in open court. Because defense counsel was unlikely to argue that the transcript should be read in open court, we find that the deprivation of this opportunity was harmless error.

Furthermore, under the circumstances presented in this case, we also hold that it was harmless error for defense counsel to not be given the opportunity to replay, in open court, the audiotape of Plank's statement. Before the jury retired for deliberations, it was provided with an audiotape of Plank's statement, which it was allowed to listen to at will in the jury room. Although the jury was having difficulty locating Plank's statement on the audiotape, we cannot find that it was harmful error for defense counsel to be denied the opportunity to argue that the jury should watch the video in open court. The tape was still available in the jury room. It may have been more convenient for the jury if the trial court would have queued up the audiotape to the relevant portion of testimony, but the failure to do so does not constitute harmful error because it is not significant enough to "impugn the fundamental fairness of an otherwise constitutionally acceptable trial." *Id.* at 626–27.

***153** Having determined that the trial court's failure to answer the jury's question in the presence of counsel was harmless error, it is apparent that, even if it had been properly briefed by appellate counsel, the issue of the trial court's RCr 9.74 violation would not have had a "reasonable probability" of succeeding on appeal. *See Hollon,* 334 S.W.3d at 437. Therefore, Appellee has failed to establish that he was prejudiced by appellate counsel's failure to brief the 9.74 issue on direct appeal. *Id.* Accordingly, we must reverse the Court of Appeals' decision holding that Appellee suffered IAAC and reinstate the trial court's order denying Appellee's RCr 11.42 motion.

Because Appellee's failure to prove the prejudice component alone requires us to reinstate the trial court's denial of RCr 11.42 relief, we need not consider whether direct appeal counsel's performance was deficient. *See id.* at

436–37 (holding that a successful IAAC claim requires a showing of both deficient performance and prejudice). Additionally, because the Commonwealth has already shown that Appellee's RCr 11.42 claim is without merit, we decline to address the Commonwealth's argument that the Court of Appeals should have given weight to the experience of Appellee's direct appeal counsel.

III. CONCLUSION

For the foregoing reasons, the Court of Appeals is reversed, and the trial court's order denying relief for ineffective assistance of appellate counsel is reinstated.

MINTON, C.J.; ABRAMSON, CUNNINGHAM, NOBLE, and VENTERS, JJ., concur. KELLER, J., not sitting.

All Citations

437 S.W.3d 144

Footnotes

1 The exact wording of the jury's request was, "Does there exist a transcript of the Plank conversation w/ Police? Difficult to locate on the tape. If so, can we pls request?" In response, the trial judge wrote, "There's none available."

2 Additionally, case law reveals that the various federal appellate courts to have taken up the issue have characterized appellate standards of review as matters of procedural, rather than substantive, law. *See, e.g., United States v. Bell,* 371 F.3d 239, 241–42 (5th Cir.2004); *United States v. Martin,* 363 F.3d 25, 46 (1st Cir.2004); *United States v. Mallon,* 345 F.3d 943, 946–47 (7th Cir.2003); *United States v. Willey,* 350 F.3d 736, 738–39 (8th Cir.2003).

3 The full extent of the Plank transcript's use was that the prosecution blew up a small portion of it and displayed that portion during its closing argument.

RENDERED: DECEMBER 22, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000964-MR

JASPER POLLINI APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2010-SC-000504-D

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE IRV MAZE, JUDGE
ACTION NO. 02-CR-001146

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This case comes to us on remand from the Kentucky Supreme Court for consideration of Jasper Pollini's ineffective assistance of appellate counsel claim under *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky.

2010). After careful review, we vacate and remand to the trial court for proceedings consistent with this opinion.

The pertinent facts of this case, as set forth by the Kentucky Supreme Court, are as follows:

> In the early morning hours of May 7, 2002, Appellant, who was seventeen years old at the time these crimes were committed, broke into Brian Murphy's garage and stole some tools and a generator. Apparently unable to transport the generator, Appellant returned to his nearby home and sought the assistance of Jason Edwards, the boyfriend of Appellant's sister, Crystal Plank. Edwards drove Appellant back to the area and the pair loaded the generator from Murphy's garage into the trunk of Edward's car. Appellant told Edwards to stay in the car and then proceeded to use a screwdriver to break into the nearby garage of Dan Ziegler.
>
> Ziegler awoke shortly after 5:00 a.m. to the sound of his alarm system beeping. While investigating the source for the alarm, Ziegler went into his garage and saw Appellant. Ziegler testified that he perceived Appellant to have a weapon in his hand, but was not sure what it was. Ziegler told Appellant to stop what he was doing or he would "blow his head off." Appellant fled from the scene and was chased into some nearby woods by Ziegler. Ziegler testified that he soon heard a car drive away after losing sight of Appellant in the woods. After returning to his home, Ziegler called 911 and his neighbor, Byron Pruitt, to report the incident and to advise Pruitt to check his property. After talking with Ziegler, Pruitt armed himself with an automatic pistol and a flashlight and began investigating the area.
>
> Meanwhile, Appellant and Edwards drove back to Appellant's house. Edwards removed the generator from his car, covered the car, and then went into the house. Shortly after retreating into the house, Appellant asked Edwards to take him back to Ziegler's residence to retrieve a toolbox he had left at the scene. When

> Edwards refused to return to Ziegler's residence, Appellant persuaded his sister, Crystal Plank, to drive him back to the scene to retrieve his toolbox.
>
> Between sixteen and thirty minutes after first being confronted by Zeigler, Appellant and Plank returned to the scene of the burglaries. Appellant stated that he armed himself with a semi-automatic pistol immediately before his return to the scene of the crimes because he had been threatened by Ziegler. Upon their return to the scene, Appellant instructed Plank to turn off the lights on the car because he was about to get out to retrieve the toolbox. As Plank stopped the car, she observed a flashlight coming toward the car. Appellant hurriedly instructed Plank to back up; however, Plank had difficulty doing so due to poor visibility. Appellant then fired his gun out the window of Plank's vehicle and the bullet pierced Pruitt in the throat. Pruitt died shortly thereafter from his injury. Immediately after the shooting, Appellant and Plank fled the scene, but were apprehended, along with Edwards, later that day.

Pollini v. Commonwealth, 172 S.W.3d 418, 421-22 (Ky. 2005).

Pollini and his sister, Plank, were tried together. Pollini was ultimately convicted of capital murder (complicity), first-degree burglary (complicity), second-degree burglary (complicity), and receiving stolen property over $300.00 (complicity). *Id*. at 421. On September 22, 2005, the Kentucky Supreme Court vacated Pollini's capital murder conviction and remanded his case for resentencing on noncapital murder. Pollini was resentenced, and the sentence was affirmed on direct appeal. *Pollini v. Commonwealth*, 2008 WL 203035 (Ky. 2008) (2006-SC-000835-MR).

Thereafter, Pollini filed a post-conviction motion for a new trial under Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel (IAC) and ineffective assistance of appellate counsel (IAAC). Upon review, the trial court denied Pollini's motion without a hearing. Pollini then appealed to this Court, and we rendered an opinion on July 16, 2010, affirming the trial court's denial of Pollini's IAC claims and holding that Pollini's IAAC claims were not cognizant under *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992).

However, on April 21, 2011, the Kentucky Supreme Court rendered *Hollon* and ruled that the time had come for recognition of IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal. Specifically, the *Hollon* Court stated:

> We are thus persuaded that it is time, indeed past time, to overrule *Hicks* and the cases relying upon it and to recognize IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal. To succeed on such a claim, the defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy. As the Supreme Court noted in *Smith*, "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome.'" 528 U.S. at 288, 120 S.Ct. 746 (*quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). We further emphasize "ignored issues" to underscore that IAAC claims will not be premised on inartful arguments or missed case citations; rather counsel must have omitted completely an issue that should have been presented on direct appeal. For further clarity, we additionally emphasize that IAAC claims are limited to counsel's performance on direct appeal; there is no counterpart for counsel's performance on RCr 11.42 motions or other requests for post-conviction relief. Finally, the defendant must also establish that he or she was prejudiced by the deficient performance, which, as

> noted, requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded. *Smith*, *supra*.

Hollon, *supra*, at 436-37.

Upon remand, this Court permitted the parties to file supplemental briefs addressing the merits of Pollini's IAAC claim. Just as he did before the trial court, Pollini argues that he received IAAC when his counsel on direct appeal failed to present the issue of *ex parte* contact between the judge and the jury to the Kentucky Supreme Court. Specifically, Pollini noted that during deliberations, the jury asked the following question: "Does there exist a transcript of the Plank conversation with police? Difficult to locate on tape. If so, can we please request?" Without notifying either counsel, the trial judge responded to their note by writing "There's none available." At some point after the verdict, Plank's counsel discovered this *ex parte* contact and notified Pollini's counsel.

Plank raised this issue on appeal, and a panel of this Court found that the trial court's failure to notify counsel of this *ex parte* contact was a violation of RCr 9.74 (no information may be given to a jury except in open court and in presence of defendant and counsel). *Plank v. Commonwealth*, 2005 WL 1313838 (Ky. App. 2005) (2003-CA-001861-MR). However, this Court did not determine whether the error was reversible error because it was already reversing Plank's conviction on other grounds. *Id*. at 9.

In its supplemental brief, the Commonwealth argues that while Pollini raised his IAAC claim to the trial court in his RCr 11.42 motion, he abandoned the claim in the RCr 11.42 appeal to this Court. Instead, the Commonwealth argues, a panel of this Court read one of Pollini's appellate claims as including both an IAC and an IAAC component. The Commonwealth urges this court to deny review of Pollini's IAAC claim on remand because Pollini did not flesh out how his appellate counsel was ineffective in his appeal of the denial of his RCr 11.42 motion.

We disagree with the Commonwealth's argument in this regard. A careful review of the record reflects that in his original RCr 11.42 motion to the trial court, Pollini argued that he received IAAC in his direct appeal when appellate counsel failed to raise the alleged *ex parte* contact between the judge and the jury. In its April 21, 2009, order denying Pollini relief on his RCr 11.42 claims, the trial court summarily denied Pollini's claim for IAAC regarding the *ex parte* contact. The trial court found that because a panel of this Court reversed Plank's conviction on other grounds, her claim concerning the *ex parte* contact was rendered moot. Based on this, the trial court determined that Pollini's claim was also moot and must be dismissed.

In his original RCr 11.42 brief to this Court, Pollini again raised the issue of the improper *ex parte* contact, pointing out that it prejudiced him by preventing him from litigating an issue that had been deemed reversible by Kentucky Courts. Presumably, because Pollini, via counsel, phrased the argument in terms of his trial counsel being ineffective, the Commonwealth urges this Court to hold that Pollini abandoned his IAAC claim on appeal. We simply disagree that Pollini abandoned or waived his IAAC claim on appeal to this Court. His brief clearly presents the issue of the *ex parte* contact and argues that had original counsel been aware of the contact, he would have notified the trial court of the error. Furthermore, despite knowing of the *ex parte* contact, counsel on direct appeal failed to present the error to the Supreme Court for review.

We find it troubling that the trial court recognized that this Court found the *ex parte* contact between the judge and jury to be erroneous under RCr 9.74, but then went on to summarily deny Pollini relief based on the same erroneous *ex parte* contact. We also find error with the trial court's statement that because Plank's conviction was reversed on other grounds, Pollini's claims were rendered moot. Because Plank's conviction was reversed on other grounds, this Court was not forced to determine whether the *ex parte* contact was a reversible error, but it does not follow that Pollini's arguments were rendered moot.

Turning to whether the omission of *ex parte* contact on direct appeal amounted to IAAC, we look to *Hollon*, *supra*, for guidance. In *Hollon*, the Kentucky Supreme Court described how the trial court and the appellate courts would work together to address IAAC claims. The court noted:

> For clarity, we note some general principles regarding the courts' roles in review of IAAC claims. The trial court will address the IAAC issue under the aforementioned standards entering findings and an appropriate order pursuant to RCr 11.42(6). Once the trial court rules on a defendant's IAAC claim, that court's order will be reviewable in the same manner as orders addressing RCr 11.42 motions are currently reviewed. *See* RCr 11.42(7) (either movant or Commonwealth may appeal from court's final order on RCr 11.42 motion).

> If the trial court finds that the defendant received ineffective appellate assistance and is entitled to relief under the *Strickland v. Washington* standard, as noted above, the trial court should enter appropriate findings and an order vacating the original judgment. We depart from the approach, adopted by some courts, which also requires the trial court to reenter the original judgment so that an appeal of the omitted issue may proceed. Kentucky trial courts should not reenter the original judgment. The matter-of-right appeal guaranteed by § 115 of the Kentucky Constitution has concluded and it is not necessary to reenter the judgment in order for the omitted issue(s) to receive appellate review; any omitted issue or issues will be reviewed as part-and-parcel of the appeal of the trial court's order on the RCr 11.42 motion.
>
> On the appeal of the trial court's order on the RCr 11.42 motion, it is incumbent on the Court of Appeals to review in the first instance the trial court's ruling regarding IAAC. If the Court of Appeals concludes that there was ineffective appellate assistance, then it should proceed to address the omitted issue or issues on which the IAAC claim is based. Should the Court of Appeals conclude that there was no IAAC meriting relief then, of course, it would be unnecessary for that Court to address the issue or issues omitted from the matter-of-right appeal. Any final opinion of the Court of Appeals would, as always, be subject to discretionary review by the Supreme Court pursuant to CR 76.20.

Hollon, 334 S.W.3d at 439-40. Thus, in the instant case, we must first address whether Pollini received IAAC when his appellate counsel failed to raise the *ex parte* contact as error to the Supreme Court. Per *Hollon*, counsel's failure to raise such contact must have been a stronger issue than the issues appellate counsel did present on appeal in order to overcome the presumption of effective assistance of counsel. A review of the record indicates that the existence of *ex parte* contact between the judge and the jury is indeed as strong as the claims Pollini's appellate counsel did raise. Thus, we conclude that appellate counsel's failure to raise the issue on direct appeal amounts to ineffective assistance of counsel.

Turning to the merits of the omitted issue, we conclude that the omitted *ex parte* contact between the judge and jury in this case amounts to reversible error. A review of the record indicates that while the judge instructed the jury that the transcript of Plank's conversation with police did not exist, in fact the transcript did exist, but had not been entered into the record in its entirety. In this court's opinion in *Plank*, *supra*, this issue was discussed at length. This Court stated:

> It must be noted that during the trial, [Plank's] defense counsel had a transcript of [Plank's] statement to police prepared and sought to have it admitted as evidence along with the tape of [Plank's] statement which was admitted. The court denied admission of the transcript on grounds that defense counsel did not cite adequate legal authority for its admission and/or because the Commonwealth had not had the opportunity to certify the transcript. (The prosecution admitted that they had received the transcript prior to trial, but claimed they had failed to certify it because they were aware that [Pollini's] counsel opposed the admission of the transcript of [Plank's] statement.) The trial court stated that the jury would have the tape of [Plank's] statement for its deliberations and they could play it as many times as they wished. It must also be noted that the Commonwealth blew up a portion of this very transcript of [Plank's] statement and used it during its closing argument devoted to the case against [Plank].
>
> The Commonwealth's position on this issue is that the trial court correctly answered the jury's question (since the transcript of [Plank's] statement was not admitted into evidence, it was not available) and thus no information was given to the jury such that the notice requirements of RCr 9.74 would have been invoked. We disagree that the notice requirements of RCr 9.74 were

> not applicable in this case. In our view, the court's answer, "There's None Available", was itself information given to the jury that required notice to the parties and to counsel. The trial court was most assuredly aware of the desire of [Plank's] counsel to have this transcript before the jury and it is very bothersome to this Court that counsel was never even given notice that they had requested the transcript. This is especially true in light of the following: the Commonwealth used a selected portion of this very transcript in its closing argument; there were questions regarding the audibility of the audiotape of [Plank's] statement; and dicta in *Perdue v. Commonwealth*, 916 S.W.2d 148, 155 (Ky. 1996), regarding the jury's access to transcripts of tape recordings. Given our rulings above, however, we need not proceed to an analysis of whether this error warranted reversal in this case.

Plank, *supra*, at 8-9. The jury's note regarding Plank's statement to police clearly indicates that they were unable to understand or find portions of Plank's statements in the videotape of her testimony. The transcript did in fact exist, and thus the judge's response to the jury was erroneous and misleading, at best. While the record indicates that Pollini had at some point objected to the introduction of Plank's statement to police, at the very least, the judge was required to present the jury's request to counsel in Pollini's presence. Accordingly, the trial court committed reversible error when it provided false information outside of Pollini and counsel's presence to the jury. This is exactly the behavior that RCr 9.74 is intended to prevent.

Based on this egregious error, we vacate Pollini's convictions and remand this matter to the trial court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jasper Pollini, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky

CASE NO. 02-CR-1146

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE IRV MAZE

JASPER POLLINI MOVANT/DEFENDANT

V.

OPINION AND ORDER

COMMONWEALTH OF KENCTUCKY RESPONDENT/PLAINTIFF

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

This matter is before the Court on Defendant's RCr 11.42 Motion to Vacate, Set Aside or Correct the Judgment. The Commonwealth filed its response and the matter stands submitted. The Court has reviewed the file and the videotaped hearings and trial at which the Defendant was found guilty of his charges. For the reasons stated in this opinion, this Court finds that Defendant's Motion must be **DENIED**.

FACTS

On June 19, 2003, Defendant, Jasper Pollini, was convicted, Complicity to Murder, Complicity to Burglary in the First Degree, Complicity to Burglary in the Second Degree, and Complicity to Receiving Stolen Property Over $300, by a jury in Jefferson County Circuit Court. Pollini was sentenced to life without parole for 25 years for the Murder of Byron Pruitt, 15 years to serve for the conviction of Burglary in the First Degree, 10 years to serve for the conviction of Burglary in the Second Degree, and 1 year for the conviction of Receiving Stolen Property over $300. The Court ordered for all sentences to run concurrent.

On September 22, 2005, The Supreme Court of Kentucky vacated Pollini's murder sentence and remanded in part for the resentencing. The Court held that, as a matter of law, there was insufficient evidence to prove that Pollini murdered Pruitt while Pollini was engaged in the commission of Burglary in the First Degree or that Pollini was in immediate flight after the burglary of Zeigler's garage. Pollini v. Commonwelath, 172 S.W.3d 418, 432(Ky.2005). The Supreme Court of Kentucky vacated and remanded the case in part for the resentencing of Pollini's on noncapital murder. Id. at 432.

On January 24, 2008, the Supreme Court of Kentucky affirmed Pollini's new sentence as imposed on remand by the Jefferson Circuit Court. Pollini v. Commonwealth, 2008 WL 203035 (Ky. 2008) (unpublished opinion). On remand, Pollini was resentenced to life imprisonment, to run consecutively with his other sentences pertaining to this case. Id.

Now comes Defendant, Pollini, on his RCr 11.42 Motion to Vacate, Set Aside or Correct the Judgment asserting several claims of ineffective assistance of counsel by his trial counsel.

OPINION

Post conviction relief primarily lies in either RCr 11.42 or CR 60.02 proceedings. The Kentucky Supreme Court in Gross v. Commonwealth, 648 S.W.2d 853 (KY. 1983), detailed the process by which a Defendant may challenge a judgment. First, the defendant must file a direct appeal. Next, he must avail himself of RCr 11.42. The Kentucky Supreme Court noted that RCr 11.42 applies to alleged errors that led to a conviction, but could not have been, and were not, addressed by direct appeal. Brown v. Commonwealth, 788 S.W.2d 500 (Ky.1990); *see also* Gross v. Commonwealth, at 856-57 (*holding* additionally that a defendant is prevented from using CR 60.02 to raise issues that could reasonably have been presented via RCr 11.42).

The Defendant Pollini alleges that he received ineffective assistance of counsel because his trial attorneys failed in their presentation of Pollini's defense. Pollini claims several aspects of trial counsel's alleged failure constitutes ineffective assistance of counsel.

On a claim of ineffective assistance of counsel, the Movant must meet a two-prong test as provided by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test established in Strickland requires the movant to (1) show that counsel's performance is so deficient as to deprive the defendant "counsel" guaranteed by the Sixth Amendment; and (2) prove that the deficiency prejudiced the defendant such that "but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687; *see also* Commonwealth v. Bowles, 237 S.W.3d 137, 139 (Ky. 2007).[1]

"In making a determination of whether counsel was constitutionally ineffective, the "critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Height v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." McQueen v.

[1] The Stickland two-prong test has been recognized and adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (Ky.1985).

Commonwealth, 949 S.W.2d 70 (Ky. 1997). "A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided." Russell v. Commonwealth, 992 S.W.2d 871, 875 (Ky.App. 1999). The Court "must indulge a strong presumption that counsel acted reasonably and effectively." Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky.2005).

In his first appeal, Pollini argued that the trial counsel failed to object to the inclusion of the word "unlawful" in the jury instruction on self-protection.[2] Although the Pollini's trial counsel objected to the wording of the jury instruction both during and after the Commonwealth's closing arguments, the Court ruled that such was made too late to preserve the issue for appellate review. Pollini v. Commonwealth, 172 S.W.3d 418, 428 (Ky.2005). As a result, the Supreme Court of Kentucky declined to address the issue since as "statute requires arguments or objections to be made *prior to the time the Court instructs the jury*." Id at 428. Similarly, Pollini now raises claim that his trial counsel's failure to object to the first-aggressor jury instruction constitutes ineffective assistance of counsel. Similar to the prior issue raised, the Kentucky Supreme Court's earlier ruling applies here in that the issue does not warrant a review for failure to preserve the issue. As discussed above, a defendant is not guaranteed a perfect trial but reasonably effective representation. This Court finds that appellant's claim is a merely a judgment of his representation by hindsight and must dismiss this claim.

Pollini also raises claim that trial counsel was not aware of two of the four charges against Pollini that were tried until the day of trial, thus, constituting ineffective

[2] "If Pollini believed Byron Pruitt was there about to use *unlawful* physical for upon him…" Pollini v. Commonwealth, 172 S.W.3d 418, 428 (Ky.2005)

assistance of counsel. Appellant claims that as a result of trial counsel's failure to move for separate trials on the juvenile charges unfairly prejudiced Pollini, subjecting him to unfair trial. After careful review of the relevant statutes, the Supreme Court of Kentucky determined that Pollini's juvenile charges where properly transferred and consolidated with those in Circuit Court. The Court found the offenses arising from the "same course of conduct" and, as such, "were interrelated enough to be joined at trial...and interrelated enough to constitute the 'same course of conduct' as it is defined in Osborne v. Commonwealth. 43 S.W.3d 234 (Ky. 2001); *see also* Pollini v. Commonwealth, 172 S.W.3d 418, 425 (Ky.2005). This Court sees no reason for which appellant's counsel should have moved for separate trials on the charges after the consolidation was found to be proper by both the trial court and the Kentucky Supreme Court. This issue and the Appellant's claim are dismissed as moot.

Counsel failed to argue for the introduction of evidence showing that Pruitt was under the influence of cocaine and benzodiazepine around the time of the shooting. This issue is an attack on trial counsel's strategy. It is not for the reviewing court to judge, criticize or grade trial strategy utilized by counsel when faced with a claim of ineffective assistance of counsel. Rather, the court must be highly deferential in its review and avoid second guessing counsel's performance. Accordingly, this claim is dismissed.

Counsel failed to present or investigate exculpatory evidence Kentucky Court discussed on the issue of sufficiency of the evidence. Pollini raises this issue on the mere speculation as to the possible existence of any such evidence to the contrary, not presented, and does not show how counsel's performance was deficient and less how such deficiency lead produced a different result. Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, this claim is dismissed.

Pollini also alleges ineffective assistance of counsel because trial and appellate counsel failed to act when given information regarding the trial court's improper *ex parte* communication with the deliberating jury. The *ex parte* issue pertained to the trial of Crystal Plank, Pollini's Co-defendant and sister. However, there was no further discussion on the issue by the Kentucky Court of Appeals, as the Court reversed Plank's case base on other errors made in her case. Plank v. Commonwealth, 2005 WL 1313838 (Ky.App.2005)(Not published). After issuing it's ruling of reversal, the Kentucky Court of Appeals rendered all other issues as moot by the rulings set forth in their opinion. Accordingly, Pollini's claim is moot and must be dismissed.

As noted by the Supreme Court of Kentucky in Commonwealth v. Bowles, there exist differences between even the best criminal defense attorneys enough to produce different presentations of the defense of a particular client. 237 S.W.3d 137, 139 (Ky. 2007): *citing* Strickland v. Washington, 466 U.S. 668, 689 (1984). The Courts have recognized this and have noted that if the Courts were to "reverse every criminal conviction whereby legal representation could have been better or different, the prosecution of criminal cases would slowly grind to a halt" and, as a result, the Courts have "established a very high bar for convicted persons challenging the sufficiency of their legal representation." Bowles at 139; *see also* Strickland at 668; Gall v. Commonwealth, 702 S.W.2d 37 (Ky.1985). Also, if it is "easier to dispose of an infectiveness claim on the ground of lack of sufficient prejudice," a court may do this rather than spending time attempting to "grade counsel's performance." Strickland, at 697.

Lastly, Pollini argues that his possible history of post traumatic stress disorder ("PTSD") as grounds for ineffective assistance of counsel claim. Pollini claims that although he had medical records possibly indicating a history of PTSD, trial counsel presented the testimony of Dr. Alan Josephson, a psychiatrist and Director of the Bingham Child Guidance Clinic at the University of Louisville. According Pollini's most recent and last-minute motion tendered to the court on April 20, 2009, Dr. Josephson's testimony was discredited by the Commonwealth on the basis that Dr. Josephson's meeting with Pollini was brief and insufficient to support Pollini's claim of PTSD defense.

Pollini has requested the Court for an evidentiary hearing on this issue and for the opportunity to supplement the original 11.42 motion to include the new issue of PTSD as grounds for 11.42 relief. This Court granted the motion to supplement the record Similar to the previous arguments raised above, Pollini's newest issue and arguments fail to satisfy the Strickland test. First Pollini has failed to show this Court how the testimony of Dr. Josephson, in support of his claim PTSD defense, was so seriously erroneous that it fell outside the range of reasonably competent assistance of counsel. Strickland at 668. Secondly, Pollini fails to show that Dr. Josephson's testimony on was seriously prejudicial to his defense, that without it, the outcome would have been different. Id. As previously stated, it is not within the purview of this Court to critique, grade and/or second-guess the performance of trial counsel in a claim for ineffective assistance of counsel as Pollini is asking this court to do. After further reading of all the arguments raised and documents filed in this case, this Court dismisses Defendant's claim on the issue of PTSD. Furthermore, it is "unnecessary for the Court to order a hearing if the material issues of fact can fairly be determined on the face of the record." Maggard v. Commonwealth, 386 S.W.2d 893, 894 (Ky.1965). This Court finds this issue to be determinable on the face of the record presented and, accordingly, Defendant's motion for an evidentiary hearing is denied.

In making its actual prejudice determination, a court must consider the totality of the evidence before the judge or jury. Brewster v. Commonwealth, 723 S.W.2d 863 (Ky.) This Court has reviewed and considered the totality of the evidence presented in this case and based on the above:

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that Pollini's Motion to Vacate, Set Aside or Correct Sentence Pursuant to RCr 11.42 is hereby **DENIED**; and Pollini's Motion for an Evidentiary Hearing Pursuant to RCr 11.42 is hereby **DENIED**.

4/21/09
DATE

JUDGE IRV MAZE

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
APR 21 2009
BY DEPUTY CLERK

Cc:
Hon. R. Kenyon Meyer
Hon. Thomas Van De Rostyne