APPENDIX

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRANCE MILES, *Petitioner-Appellant*, *v.* SCOTT JORDAN, Warden, *Respondent-Appellee.*	No. 19-5340

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:17-cv-00558—Joseph H. McKinley, Jr., District Judge.

Argued: January 29, 2021

Decided and Filed: February 24, 2021

Before: COOK, GRIFFIN, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: Ilana B. Gelfman, JONES DAY, Boston, Massachusetts, for Appellant. Thomas A. Van De Rostyne, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Louis K. Fisher, Kathryn Kimball Mizelle, JONES DAY, Washington, D.C., for Appellant. James C. Shackelford, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

OPINION

GRIFFIN, Circuit Judge.

Petitioner Terrance Miles claims that the Kentucky Supreme Court erred in adjudicating his federal speedy-trial and ineffective-assistance claims. The district court disagreed and denied his habeas corpus petition. Because the district court appropriately deferred to the Kentucky Supreme Court's reasonable resolutions of Miles's claims, we affirm.

I.

A Kentucky jury convicted Miles of murder, wanton endangerment, tampering with physical evidence, and being a persistent felony offender in the second degree. *Miles v. Commonwealth*, No. 2007-SC-000298-MR, 2009 WL 160435, at *1 (Ky. Jan. 22, 2009). The Kentucky Supreme Court summarized the facts of his crimes:

> On the night of February 27, 2005, Michael Teasley, a bouncer at Club 502, was shot and killed outside the club as he attempted to clear

> the parking lot after the club had closed. Earlier that same evening, after another bouncer had removed Terrance Miles from the club for smoking marijuana, Miles and Teasley got into a fight. Teasley's wife, Crystal, who also worked at the club, testified that after the fight, Miles grinned and said to her husband, "you might have whipped my ass, but I'm going to get you."
>
> Officer Frank Hill of the Louisville Metro Police Department, who was working extra security for the club while off duty, observed the fight between Teasley and Miles. While Hill did not witness the actual shooting, he heard the gunshots and then looked in the direction of the gunshots and saw a male running across the parking lot dressed in all dark clothing and wearing a toboggan hat. Officer Hill testified that the man he observed running across the parking lot was the same man who had been fighting with Teasley earlier in the night. Hill gave chase in his patrol car with the assistance of another bouncer and at one point located the suspect behind a dumpster in back of the club. However, Hill eventually lost sight of the suspect.
>
> A number of items were collected from the crime scene, including a black toboggan hat and a cell phone. The number of the cell phone matched the number Miles gave to Enterprise Rent–a–Car when he switched his rental vehicle the day after the murder.

Id. In March 2005, Miles was indicted for Teasley's murder and other charges related to the shooting. *Id.* At that time, he was already in custody on unrelated

state charges. Eight months after Miles's indictment, law enforcement sent the toboggan hat recovered at the crime scene to a lab for DNA testing. *Id.* at *2.

Before trial, the prosecutor requested, and the state trial court granted, several continuances. The prosecutor asked for these delays because the lab had not yet returned the DNA results for the hat. In the prosecutor's view, these results were a "vital piece of evidence which could prove to be either inculpatory or exculpatory." *Id.* Miles's counsel did not initially object to the delay and at one point agreed that the results were a "crucial piece of evidence." *Id.* But Miles himself filed a speedy-trial motion and told the court that he viewed the DNA testing as a "stall tactic." The state court denied Miles's pro se motion and others filed by his counsel as the delay continued for about a year after Miles's initial pro se objection. Eventually, the testing results arrived and showed that the hat was "negative for Miles' DNA." *Id.* at *1.

Miles's trial began approximately twenty-one months after he was indicted. *Id.* at *2. On appeal, two evidentiary aspects of the trial—a gun and Miles's nicknames—are at issue. Regarding the gun, the prosecutor told the jury in his opening statement that, during a search of Miles's apartment, the police "found a gun under [his] mattress, which . . . was not the same gun used in the murder, but [Miles] did, in fact, have a gun." Moreover, during trial, the prosecutor repeatedly referenced this gun, but also reiterated that it was not connected to the nightclub shooting. For example, when the police officer in charge of the investigation testified, the following exchange occurred:

Q. Well, let's talk about that hand gun real quick. Was that hand gun sent off for testing?

A. Yes, it was.

Q. And did it match the bullets?

A. No, it did not.

. . .

Q. That is not the gun that was used to shoot Michael Teasley?

A. No, it was not.

Defense counsel also emphasized that the gun was not used in the murder. During his cross examination of the officer-in-charge, he asked "[D]oes that gun have anything, anything to do with this case?" The officer responded, "It doesn't now, no." And during his closing argument, defense counsel reiterated that the gun was "[c]ompletely unrelated to the case." Although defense counsel did not object to the prosecutor's references to the gun, he successfully opposed a motion to admit a picture of the gun into evidence.

With respect to the nicknames, the prosecutor's closing argument repeatedly referenced Miles's two nicknames, "Cat Daddy" and "Old Gangsta," which he had elicited from a defense witness during cross-examination.[1] Defense counsel did not object to the prosecutor's use of the nicknames. All told, the prosecutor used "Cat Daddy" six times and "Old Gangsta" four times. The prosecutor used both

[1] The prosecutor mischaracterized part of the witness's testimony. The witness actually testified that Miles's nickname was "O.G." and that these initials stand for "Original Gangster," not "Old Gangsta."

nicknames when arguing that Miles had killed Teasley because Teasley had "disrespected" him by throwing him out of "his" club:

- "They're not going to kick him out. This is his club. This is Cat Daddy, Old Gangsta He's angry."
- "That night, he was embarrassed in front of a lot of people on his turf. Okay. What's his state of mind? He's known as Cat Daddy there. He's known by Old Gangsta."
- "[This case is] about Mike Teasley. He's a loving father, husband, and son. And he was killed because Cat Daddy got his feelings hurt."

He also used both nicknames to downplay the significance of the hat's negative DNA test:

- "He wants to make a big deal about that hat. Saying we want to distance ourselves from the hat. I would, if I thought the hat played any role at all. . . . It's covered in leaves. It's covered in crusty old dirt. Do you think the Old Gangsta Cat Daddy's going to be wearing this thing to the club?"

Finally, the prosecutor used both nicknames to generically refer to Miles:

- "What do you know about Cat Daddy? You know he's 5, 10. You know he's got a lean build."
- "The evidence points to the man with the black on, the man that had the motive, the man that fits the identification to a tee. Points to Cat Daddy. It points to the Old Gangsta. Who done it? He's sitting right there."

After a two-and-a-half-day trial, the jury convicted Miles of all charges. *Id.* Miles appealed to the Kentucky Supreme Court, arguing, among other things, that the 21-month delay between his indictment and trial violated his Sixth Amendment right to a speedy trial. Applying the four-factor test established in *Barker v. Wingo*, 407 U.S. 514 (1972), the Kentucky Supreme Court "adjudge[d] that Miles was not denied his right to a speedy trial in this case," and affirmed his convictions. *Miles*, 2009 WL 160435, at *3, *7.[2]

Miles then sought relief in collateral proceedings. In a habeas corpus petition filed in Kentucky state court, Miles argued that his trial counsel was ineffective for failing to object to the prosecutor's references to the gun found at his apartment and to the prosecutor's use of his nicknames. After an evidentiary hearing, the trial court denied his petition. The Kentucky Court of Appeals reversed, concluding that these failures—collectively and in conjunction with other errors—constituted ineffective assistance of counsel. *Miles v. Commonwealth*, No. 2012-CA-001240-MR, 2014 WL 4177446 (Ky. Ct. App. Aug. 22, 2014). The Kentucky Supreme Court granted discretionary review and reversed the Kentucky Court of Appeals, concluding that there was not a reasonable probability that the verdicts would have been different if his counsel had objected to the gun or nickname references. *Commonwealth v. Miles*, Nos. 2014-SC-

[2] The Warden moved for us to take judicial notice of an unsuccessful motion to supplement the record that Miles filed with the Kentucky Supreme Court on direct appeal. In view of our disposition of this appeal, we dismiss this motion as moot.

000580-DG & 2015-SC-000321-DG, 2017 WL 5504212, at *3–5 (Ky. Mar. 23, 2017). After exhausting state-court remedies, Miles unsuccessfully petitioned the District Court for the Western District of Kentucky for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

II.

"This Court reviews de novo the legal conclusions involved in the district court's decision to deny the writ under § 2254, and reviews for clear error its findings of fact." *Reiner v. Woods*, 955 F.3d 549, 554 (6th Cir. 2020) (citation omitted). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we can overturn a state conviction for an issue adjudicated on the merits only if the relevant state-court decision was (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States;" (2) "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States;" or (3) "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

To prevail under the "contrary to" clause, Miles must show that the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that it "confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite" to that reached by the Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). To prevail under the "unreasonable application" clause, Miles must show that "the state court identifie[d] the correct governing legal principle from th[e] Court's

decisions but unreasonably applie[d] that principle to the facts of [his] case." *Id.* at 413. To prevail under the "unreasonable determination of the facts" clause, Miles must show an unreasonable determination of fact and "that the state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011).

Under AEDPA, "unreasonable" is not equivalent to "incorrect." *See Renico v. Lett*, 559 U.S. 766, 773 (2010). Indeed, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted). And, "the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Renico*, 559 U.S. at 776 (brackets and internal quotation marks omitted). In short, AEDPA imposes a "highly deferential standard for evaluating state-court rulings," and "demands that state-court decisions be given the benefit of the doubt." *Id.* at 773 (quotations omitted).

In this appeal, Miles raises three issues adjudicated on the merits by the Kentucky Supreme Court: (1) whether his Sixth Amendment right to a speedy trial was violated by the 21-month delay between his indictment and trial; (2) whether his trial counsel was ineffective for failing to object to the prosecution's reference to the gun; and (3) whether his trial counsel

was ineffective for failing to object to the prosecution's use of his nicknames.[3] We address each in turn.

III.

First, Miles argues that the Kentucky Supreme Court's adjudication of his speedy-trial claim was contrary to, and an unreasonable application of, the Supreme Court's holdings in *Barker* and *Doggett v. United States*, 505 U.S. 647 (1992). We disagree.

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The speedy-trial right is "amorphous," "slippery," and "necessarily relative," so any claimed violation must be evaluated on an *"ad hoc* basis." *Barker*, 407 U.S. at 522, 530. In *Barker*, the Supreme Court established four factors for courts to consider when evaluating a speedy-trial claim: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice to the defendant resulted. 407 U.S. at 530. "No one factor is dispositive. Rather, they are related factors that must be considered together with any other relevant circumstances." *United States v. Sutton*, 862 F.3d 547, 559 (6th Cir. 2017) (citing *Barker*, 407 U.S. at 533).

The first factor is a "threshold" requirement. *Doggett*, 505 U.S. at 652. The rationale here is that judicial examination of a speedy trial claim is needed only where the delay crosses the line dividing the

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[3] The district court also granted a certificate of appealability on a fourth issue: whether Miles's counsel was ineffective for failing to object to certain hearsay testimony. Miles, however, waived this claim on appeal.

"ordinary" from the "presumptively prejudicial." *Id.* at 651–52. The Supreme Court has never clearly drawn that line, but has noted that "[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial'" once the delay "approaches one year." *Id.* at 652 n.1, 658. Although "presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of the delay." *Id.* at 656 (internal citation omitted).

The second *Barker* factor looks at "whether the government or the criminal defendant is more to blame for th[e] delay." *Id.* at 651. "Governmental delays motivated by bad faith, harassment, or attempts to seek a tactical advantage weigh heavily against the government, while neutral reasons such as negligence are weighted less heavily, and valid reasons for a delay weigh in favor of the government." *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006) (citing *Barker*, 407 U.S. at 531). Thus, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531.

The third factor relates to "the defendant's responsibility to assert his right," and its effect will depend on the other factors. *Id.* "The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain." *Id.*

The fourth and final *Barker* factor is actual prejudice to the accused. "Prejudice 'should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect,' of which there are three: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *United States v. Ferreira*, 665 F.3d 701, 706 (6th Cir. 2011) (quoting *Barker*, 407 U.S. at 532).

Although the Kentucky Supreme Court correctly identified the four *Barker* factors, Miles takes issue with its analysis of the second and fourth factors.[4] We agree with the district court that Miles cannot overcome AEDPA deference.

A.

The Kentucky Supreme Court addressed the second *Barker* factor as follows:

> As for reason for the delay, the Commonwealth argued that the toboggan hat was vital evidence in the case and that they could not go forward with the trial without the DNA testing being completed. Nevertheless, after the testing came back negative, the Commonwealth still proceeded

[4] Miles also faults the state court for not "stating whether, and to what degree, each of the factors weigh in favor or against a conclusion that the Commonwealth violated [his] speedy-trial right." But as the Warden correctly notes, the United States Supreme Court has never required courts to so precisely define the weighing of the *Barker* factors. Thus, he cannot show that the Kentucky Supreme Court's failure to do so was contrary to, or an unreasonable application of, law established in the holdings of the Supreme Court. 28 U.S.C. § 2254(d).

with the trial and obtained a conviction against Miles. In fact, at trial the prosecutor elicited testimony from the lead investigator on the case, Detective Chris Ashby, that the hat had no relevance in the case and argued such in his closing argument. Miles asserts that this demonstrates that the testing on the hat was not a legitimate reason for the delay in this case and that the prosecutor intentionally misled the court as to the importance of the hat to the case.

The black toboggan hat in question was found and collected by the police as potential evidence at the scene. Officer Hill and two other witnesses testified at trial that the man who shot Teasley was wearing a toboggan hat. Simply because the testing came back negative on the hat and the prosecution subsequently argued at trial that the hat was not significant to the case, does not mean that the Commonwealth acted in bad faith in seeking DNA testing on the hat. After the hat tested negative for Miles' DNA, the Commonwealth had no choice but to minimize the evidentiary value of the hat at trial. In reviewing the record, there is no indication that the Commonwealth acted in bad faith. At the pre-trial hearings wherein the status of the testing on the hat was discussed, the prosecutor reported that he was regularly calling the lab to inquire about the status of the testing. Defense counsel admitted that the hat was crucial evidence and stated no objection to having the hat tested, although he sought to have their own expert present for testing.

Miles, 2009 WL 160435, at *2–3. Miles takes issue with this analysis, arguing that it failed to answer "the relevant legal question": "whether the government or the criminal defendant is more to blame for th[e] delay." In his view, the Kentucky Supreme Court reduced this factor to an inquiry of whether the government acted in bad faith and failed to consider whether the government exercised "reasonable diligence" in waiting to test the hat and allowing the hat to languish at the lab.

The state court's treatment of this issue was not contrary to, or an unreasonable application of, a clearly established holding of the Supreme Court. Despite Miles's attempt to challenge the framing of this issue, state courts are not required to use specific language in addressing the *Barker* factors. *See Barker*, 407 U.S. at 530 ("[S]ome might express [the *Barker* factors] in different ways.") And the Kentucky Supreme Court clearly did not limit its analysis to just a bad-faith inquiry[5] or ignore the question of who bore responsibility for the delay. It noted that "[d]efense counsel admitted that the hat was crucial evidence." *Miles*, 2009 WL 160435, at *3. Given the representations from both sides that the hat could be decisive either way, the court could have reasonably concluded that there was a valid reason for the delay. *See Barker*, 407 U.S. at 531 (providing the example of

[5] We note, moreover, that the only argument Miles presented to the Kentucky Supreme Court was that the prosecution had acted in bad faith by sending the hat for testing. He made no argument, as he does now, related to prosecutorial negligence. As such, the Kentucky Supreme Court was not treating a lack of bad faith as dispositive; it was responding to Miles's only argument on this issue.

a "missing witness" as a valid reason for delay). Such a reason weighs in favor of the government and "justif[ies] appropriate delay." *Id.*

The Kentucky Supreme Court also noted that Miles's counsel did not initially object to the testing (even though the testing process started months after indictment), and the prosecutor was regularly calling the lab to inquire about the status of the results. This recognition supports the reasonable conclusions that testing was at first agreeable to both sides; that the government was diligent once the hat was sent to the lab, *see Doggett*, 505 U.S. at 656; and that the resulting delay was appropriate, *Barker*, 407 U.S. at 531.

In sum, the Kentucky Supreme Court's decision is not contrary to, or an unreasonable application of, *Barker*'s second factor.

B.

The Kentucky Supreme Court provided the following analysis of the fourth Barker factor:

> As for prejudice to Miles as a result of the delay, Miles alleges that he lost a key witness for trial, Steven Edwards, who died on June 25, 2006 in a motorcycle accident. Upon review of the record, the only references to Edwards were in a March 2007 motion to dismiss indictment for speedy trial violation and as an alias for Miles. According to the record, no subpoenas were issued for Edwards' appearance at either of the two trial dates prior to Edwards' death. Further, Miles does not allege what Edwards' testimony would have been and why he was so crucial to his case.
>
> Finally, although Miles was convicted, the negative test results on the hat were favorable to

> Miles' case at trial. The negative DNA results on the hat were a large part of Miles' defense and were repeatedly referred to by defense counsel at trial as proof that Miles was not the shooter.

Miles, 2009 WL 160435, at *3. Miles argues that the state court erred by requiring him to show "affirmative proof of particularized prejudice" when he had established presumptive prejudice under the first *Barker* factor. Miles also contends that the court failed to consider this presumptive prejudice in its *Barker* analysis and failed to account for the other forms of prejudice that Miles suffered—oppressive pretrial incarceration and anxiety and concern.

Miles's arguments are meritless. Finding actual prejudice based on length of delay alone is the exception, not the rule. *See Doggett*, 505 U.S. at 655; *see also Robinson*, 455 F.3d at 608 ("In the absence of particularized trial prejudice, delay attributable to the government's negligence has typically been shockingly long to warrant a finding of prejudice." (internal quotation marks omitted)). And when the government acted with reasonable diligence or the delay was for a valid reason, a speedy-trial claim fails "no matter how great the ensuing delay." *Robinson*, 455 F.3d at 608 (citation omitted); *see Doggett*, 505 U.S. at 656. Even if the government acted negligently, we have declined to conclude that presumptive prejudice resulting from delays similar to that experienced by Miles justified an inference of actual prejudice. *See United States v. Jackson*, 473 F.3d 660, 667–68 (6th Cir. 2007) (collecting cases and holding that a nearly two-year delay between a defendant's indictment and his arrest, attributable to the government's negligence, did not satisfy the actual prejudice factor of *Barker*); *see also*

Barker, 407 U.S. at 533–34 (finding that "prejudice was minimal" despite delay "well over five years").

Nor can we conclude that the state court failed to consider presumptive prejudice in its weighing of the *Barker* factors. Applying the first *Barker* factor, the Kentucky Supreme Court concluded that the 21-month delay in this case was "presumptively prejudicial." *Miles*, 2009 WL 160435, at *2. The court then held that "[u]pon consideration of all of the above factors in *Barker*, we adjudge that Miles was not denied his right to a speedy trial." *Id.* at *3. We take the Kentucky Supreme Court at its word and conclude that the state court considered presumptive prejudice in its *Barker* decision.

Finally, Miles's other prejudice concerns are not sufficient to invalidate the state court's conclusion. For one, AEDPA requires "deference to be given even in cases, such as this one, where the state court's reasoning is . . . abbreviated." *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009); *see Johnson v. Williams*, 568 U.S. 289, 300 (2013). That the state court did not expressly weigh the two less "serious" forms of actual prejudice, *Barker*, 407 U.S. at 532, does not mean that it "arrive[d] at a conclusion opposite to that reached by [the Supreme Court] on a question of law," *Williams*, 529 U.S. at 405. Indeed, to receive AEDPA deference, a state court does not even have to "explicitly address the factors outlined in *Barker*" at all, "as long as the court does not apply a test or standard that is contrary to federal law." *Brown v. Bobby*, 656 F.3d 325, 330 (6th Cir. 2011). In any event, Miles was already incarcerated on other state charges while he awaited trial on his murder charges. We have held that being "ineligible for certain placements and programs in the

state prison" because of the charges underlying a speedy-trial claim is "not the type of prejudice cognizable under the Sixth Amendment." *Robinson*, 455 F.3d at 609. And Miles did not provide any indication to the Kentucky Supreme Court that his anxiety was "beyond that which is inevitable in a criminal case." *Hakeem v. Beyer*, 990 F.2d 750, 762 (3d Cir. 1993) (internal quotation marks omitted); *see Smith v. Commonwealth*, 361 S.W.3d 908, 918 (Ky. 2012); *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir. 1998).

For these reasons, the Kentucky Supreme Court's decision was not contrary to, or an unreasonable application of, *Barker*'s fourth factor.

C.

Barker's "balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." 407 U.S. at 530. Given the *Barker* inquiry's generality, *see Sutton*, 862 F.3d at 559, we cannot conclude that the Kentucky Supreme Court's decision "was so lacking in justification" as to require habeas relief. *Harrington*, 562 U.S. at 103. We therefore reject Miles's speedy-trial claim.

IV.

Next, Miles asserts that his trial counsel was ineffective by failing to object to the prosecutor's references to the gun found in his apartment and to the prosecutor's references to his nicknames in closing. AEDPA, coupled with the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), provides the proper framework for assessing these claims. Under *Strickland*, Miles must show that his counsel provided "deficient" performance that

"prejudiced the defense." *Id.* at 687. Prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, and a reasonable probability is a "substantial, not just conceivable, likelihood of a different result," *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks omitted). This standard is "highly demanding," *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986), and when, as here, an ineffective-assistance-of-counsel claim is subject to AEDPA's constraints, our review is "doubly deferential," *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

The Kentucky Supreme Court identified and applied *Strickland*, so the question is whether its decision involved an "unreasonable application of" *Strickland* or was based on an unreasonable determination of the facts. To meet that standard, Miles must show far more than that the state court's decision was "merely wrong" or "even clear error." *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks omitted). He must show that the state court's decision is so obviously wrong that its error lies "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Congress "meant" this standard to be "difficult to meet." *Id.* at 102. And Miles has not satisfied that standard here.

A.

Miles argues that the Kentucky Supreme Court committed two legal errors in considering the prejudice prong of his ineffective-assistance claim based on failure to object to the gun. First, he contends

that the court "set[] the bar higher" by applying a harmless-error standard under its decision in *Harris v. Commonwealth*, 384 S.W.3d 117 (Ky. 2012), rather than *Strickland*. This argument misreads the Kentucky Supreme Court's opinion. The court cited *Harris* only for the proposition that "[t]he Court of Appeals correctly noted that weapons unrelated to the crimes charged are generally inadmissible." *Miles*, 2017 WL 5504212, at *4. And that is all that the cited portion of *Harris* stands for. *See Harris*, 384 S.W.3d at 123–24 (collecting cases where weapons with no connection to the crime were held to be inadmissible). Although *Harris* confronted the issue of an unrelated gun in the context of harmless-error review, the Kentucky Supreme Court clearly applied *Strickland*'s prejudice standard in Miles's case. *Miles*, 2017 WL 5504212, at *2–5.

Miles also faults the state court for failing to undertake a "probing and fact-specific" prejudice inquiry. *See Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). But it noted that the officer-in-charge had admitted that the gun was not connected to Teasley's murder, that the jury was repeatedly informed that the gun was unrelated to the murder, and that the gun itself was not admitted into evidence. To be sure, the Kentucky trial court could have done more to ensure that the gun did not factor into the jury's decision, such as giving a specific curative instruction. But the Kentucky Supreme Court clearly understood the facts of Miles's case and reasonably concluded that he had not met *Strickland*'s prejudice prong. This is all that is required to satisfy AEDPA deference on this issue, so we reject this ineffective-assistance claim.

B.

Finally, Miles alleges two points of error regarding the use of his nicknames. First, he contends the Kentucky Supreme Court miscounted the number of times the prosecutor referred to his nicknames, which means its no-prejudice conclusion was based on an unreasonable determination of fact. In arguing the nickname issue before the Kentucky Supreme Court, Miles relied on *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009), where the Second Circuit held that the district court should not have allowed the Government to repeatedly reference the defendant's nickname when "identity was not an issue," the nickname "had no legitimate relationship to the crimes charged," and it was "suggestive of a criminal disposition." *Id.* at 146 (internal quotation marks omitted). The Kentucky Supreme Court distinguished *Farmer* from this case as follows:

> Miles and the Court of Appeals cite cases that found the use of an alias created so much prejudice that it created an unfair trial. For instance, *United States v. Farmer*, in which the Second Circuit Court of Appeals found the use of the defendant's nickname "Murder" was overly prejudicial. In *Farmer*, the court stated, "In our prior cases, the government's use of a defendant's nickname was 'occasional' or 'brief and isolated." But *Farmer*'s nickname was the main rhetorical trope used by the prosecution to address the jury and was used no fewer than thirty times."
>
> Miles's facts are distinct from those in *Farmer*. Miles's nickname was used a total of three times after it was first mentioned in the testimony of a

> defense witness. The present case is a far cry from the "rhetorical trope" in *Farmer*.

Miles, 2017 WL 5504212, at *3 (footnotes, brackets, and ellipses omitted). Miles is correct that the court miscounted the instances where the prosecutor used his nicknames—the prosecutor used the name "Old Gangsta" four times, not three.[6] Nonetheless it is immaterial.

Despite the state court's miscalculation, Miles has not shown that its prejudice finding was *based on* there being only three uses of "Old Gangsta," or that its conclusion would have been different had it properly considered the additional use. Even with four uses, the prosecutor's conduct remained a "far cry . . . from *Farmer*." *Id.* There, the prosecution used the nickname "no fewer than thirty times during the rebuttal summation in a presentation that occupies only sixteen transcript pages." *Farmer*, 583 F.3d at 147. In contrast, the prosecutor here used "Old Gangsta" four times in a summation spanning eighteen transcript pages. As the Kentucky Supreme Court recognized, this case is closer to instances where the prosecutor's misuse of a nickname was "occasional" or "brief and isolated" than it is to instances were a nickname became a "rhetorical trope." *Id.* (citations omitted). Thus, the Kentucky

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[6] We focus on "Old Gangsta" because "Cat Daddy" is not suggestive of criminal disposition. *See Farmer*, 583 F.3d at 146. Although it is unclear why Miles was called "Cat Daddy," there is no indication that this nickname has a criminal connotation, which is presumably why defense counsel was comfortable using it in his opening statement. In addition, Miles never argued to the state courts that his counsel should have specifically objected to the prosecution's use of "Cat Daddy." Nor did he do so below.

Supreme Court's prejudice decision was not based on an unreasonable determination of the facts in light of the record before it. *See Rice*, 660 F.3d at 250.

Second, Miles again contends that the state court failed to undertake a "probing and fact-specific" prejudice inquiry. *See Sears*, 561 U.S. at 955. We disagree. The court's opinion shows that it had reviewed the factual and procedural history of the case and concluded that the nickname references "in the context of [the] entire trial, were de minimis," and that "[b]elieving the reference to Miles's nickname somehow would have changed the course of his verdict is speculative." *Miles*, 2017 WL 5504212, at *3. This approach and conclusion are consistent with *Strickland*. Thus, the Kentucky Supreme Court's treatment of the nickname references survives AEDPA review, and Miles's ineffective-assistance-of-counsel claim fails.[7]

V.

For these reasons, we affirm the district court's judgment and deny the pending motions.

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[7] After Miles filed his appeal, prison officials transferred him from a prison located in the Western District of Kentucky to a prison located in the Eastern District of Kentucky. We previously concluded that this transfer "clearly violated" Federal Rule of Appellate Procedure 23(a) because the Warden did not obtain the district court's permission before initiating the transfer. We deny petitioner's motion for a transfer without prejudice to its refiling in the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5340

TERRANCE MILES,

Petitioner - Appellant,

v.

SCOTT JORDAN, Warden,

Respondent - Appellee.

FILED
Feb 24, 2021
DEBORAH S. HUNT,
Clerk

Before: COOK, GRIFFIN, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Terrance Miles's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT
s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:17CV-00558-JHM

TERRANCE MILES **PETITIONER**

VS.

SCOTT JORDAN, *Warden of Luther Luckett Correctional Complex* **RESPONDENT**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed her Findings of Fact and Conclusions of Law. Both Petitioner and Respondent have filed objections. Petitioner has also filed a motion for leave to file supplemental objections and the Court being sufficiently advised;

IT IS ORDERED as follows:

1. Petitioner's motion for leave to file supplemental objections [DN 63] is **GRANTED**. The Clerk is directed to file in the record the supplemental objections tendered with the motion.

2. Respondent's objections [DN 59] are **OVERRULED**.

3. Petitioner's objections [DN 61] and supplemental objections [DN 63] are **OVERRULED**.

4. The Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus [DN 1], Petition for Actual Innocence [DN 23], and Motion for Summary Judgment [DN 45] are **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as to Grounds One, Three, Four, and Five, but **DENIED** as to Grounds Two, Six, Seven, Eight, Nine, Ten, and Eleven.

Copies:
Counsel of Record
Terrance Miles

Joseph H. McKinley Jr., District Judge
United States District Court

March 14, 2019

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:17CV-00558-JHM

TERRANCE MILES **PETITIONER**

VS.

SCOTT JORDAN, *Warden of Luther Luckett Correctional Complex* **RESPONDENT**

JUDGMENT

In accordance with the order of the Court it is hereby **ORDERED AND ADJUDGED** as follows:

(1) The Petition for Writ of Habeas Corpus [DN 1], the Petition for Actual Innocence [DN 23], and the Motion for Summary Judgment [DN 45] are **DISMISSED** with prejudice and judgment is entered in favor of Respondent.

(2) A Certificate of Appealability is **GRANTED** as to Grounds One, Three, Four, and Five but **DENIED** as to Grounds Two, Six, Seven, Eight, Nine, Ten, and Eleven pursuant to 28 U.S.C. § 2254; and

(3) This is a **FINAL** judgment and the matter is **STRICKEN** from the active docket of the Court.

Joseph H. McKinley Jr., District Judge

United States District Court

March 14, 2019

Copies: Counsel

Terrance Mile

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:17CV-00558-JHM-RSE

TERRANCE MILES **PETITIONER**

VS.

SCOTT JORDAN, *Warden of Luther Luckett Correctional Complex* **RESPONDENT**

Findings of Fact, Conclusions of Law and Recommendation

Terrance Miles ("Miles") is a Kentucky prisoner presently serving a 50-year sentence following convictions for the murder of Michael Teasley, for first-degree wanton-endangerment, for tampering with physical evidence, and for being a second-degree persistent felony offender. Miles has now filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DN 1). Respondent Scott Jordan ("Warden") has responded (DN 16), and Miles has filed a reply (DN 20). Miles has also filed several motions related to his petition, including a "petition for declaration of actual innocence and to rebut the state court's presumption of correctness" (DN 23) and a motion for summary judgment (DN 45).

The District Judge referred this matter to the undersigned United States Magistrate Judge

pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact, conclusions of law, and recommendations on any dispositive matter. (DN 7). These matters are ripe for review.

* * *

innocence is speculative at best, and the Court concludes it is not required to provide discovery because Miles has not demonstrated that if the facts were fully developed he would be able to demonstrate he is entitled to relief. Miles' request for discovery should, once more, be denied.

III. Merits Evaluation

Miles' Claim from Direct Appeal

Claim 1: Violation of the Right to Speedy Trial

Approximately twenty-one months passed from the time Miles was indicted in March of 2005 to the time of his trial in December of 2006. In Claim 1, Miles argues this delay violated the Sixth Amendment's guarantee of a speedy trial. Miles raised this claim on direct appeal, but the Kentucky Supreme Court denied relief, finding no violation of Miles' right to a speedy trial under *Barker v. Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *Miles*, 2009 WL 160435, at *2–3.

In *Barker*, the Supreme Court established a four-factor test for evaluating whether a defendant's Sixth Amendment right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. 407 U.S. at 530. None

of these factors is "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533.

The first factor, the length of the delay, is a threshold requirement. *See Maples v. Stegall*, 427 F.3d 1020, 1025 (6th Cir. 2005). If the length of the delay is not "uncommonly long," then the judicial inquiry ends. *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L.Ed.2d 520 (1992). The length of the delay is measured from either the date of the indictment or the date of the arrest, whichever is earlier. *See United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 30 L.Ed.2d 468 (1971). A delay approaching one year is presumptively prejudicial and triggers application of the remaining three factors. *Doggett*, 505 U.S. at 652 n.1. Here, Miles suffered a delay of twenty-one months from the time of his indictment to the time of his trial, and the Warden does not dispute that this period meets the "uncommonly long" standard. Because this period of delay is presumptively prejudicial, examination of the other three factors is warranted.

The second *Barker* factor requires consideration of the reason for the delay. Some reasons, like government delays motivated by bad faith, harassment, or attempts to seek a tactical advantage, weigh heavily against the government; while "more neutral" reasons, like negligence or overcrowded dockets weigh less heavily against the state. *Maples,* 427 F.3d at 1026 (citing *United States v. Schreane*, 331 F.3d 548, 553–54 (6th Cir. 2003) (citing cases)). Valid reasons for a delay, such as locating witnesses or

resolving a defendant's pretrial motions—weigh against a violation. *Barker*, 407 U.S. at 531. The inquiry is geared at determining "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett*, 505 U.S. at 651.

In this case, the sole reason for the twenty-one-month delay was that the Commonwealth sought multiple continuances in trial for forensic testing on a toboggan hat found at the crime scene to be completed. During three pre-trial hearings, held on March 3, 2006, April 11, 2006, and September 26, 2006, the Commonwealth represented to the court that the lab had not completed forensic testing on the hat. The Commonwealth indicated the DNA testing of the hat was a vital piece of evidence which could prove to be either inculpatory or exculpatory. *Miles*, 2009 WL 160435, at *2. Ultimately, after waiting months for the results, the DNA on the toboggan hat was not a match for Miles and did not assist the Commonwealth's case against him.

Miles argues the Commonwealth's delay was in bad faith since it sought a tactical advantage in testing the DNA of the toboggan hat from the crime scene. (DN 1-2, at p. 2). Miles feels that the Commonwealth committed perjury and flagrant prosecutorial misconduct by attempting to justify its delay of trial by waiting on the "critical" DNA evidence from the toboggan hat but then later eliciting testimony from law enforcement at trial stating that the Commonwealth never believed the hat had anything to do with the case, after learning the DNA from the hat did not match Miles. (*Id.* at p. 3). The Warden argues that Miles' trial counsel agreed at the pre-trial hearings that the hat was crucial evidence, whether it

was inculpatory or exculpatory, and stated no objection to having the hat tested. (DN 16, at pp. 29–30). Further, the Warden asserts that once the hat tested negative for Miles' DNA, the Commonwealth had no choice but to minimize the evidentiary value of the hat at trial. (*Id.*).

At first blush this factor appears to weigh both for and against the Commonwealth. On the one hand, the Commonwealth's decision to repeatedly continue the case to test the toboggan hat for DNA evidence is a valid reason for delay since the results of this "crucial evidence" could have favored either party. On the other hand, the Court agrees that three continuances, resulting in a twenty-one-month period between indictment and trial, to test one piece of evidence is problematic. Even so, Miles has not proven that the Commonwealth acted in bad faith in having this evidence tested. The evidence of the toboggan hat ended up being detrimental to the prosecution's case and, if anything, made proving its case beyond a reasonable doubt more difficult. Additionally, Miles' characterization that the Commonwealth gave conflicting statements at trial regarding whether it believed the hat had anything to do with the case is somewhat flawed. When the prosecution questioned Detective Ashby on direct examination about locating and testing the hat, Detective Ashby stated that he sent the hat off for testing because the Commonwealth asked him to, not because he thought it was used in the crime. (DN 17, Trial Tape 1, 12-13-06, 12:52:38–12:55:00). This testimony reveals that the prosecution and law enforcement disagreed as to the potential relevancy of the hat to the crime but does not demonstrate that the Commonwealth committed

misconduct by requesting the hat be tested. Although this factor can cut both ways, it weighs more in favor of the Commonwealth because the "reason for the delay" was valid and neutral and does not appear to be motivated by bad faith, as Miles alleges.

The third *Barker* factor is whether the defendant asserted his speedy trial right. This factor "is entitled to strong evidentiary weight" because "[t]he more serious the deprivation, the more likely a defendant is to complain." *Barker*, 407 U.S. at 531–32. Miles sent a *pro se* letter to the trial court on November 25, 2005, roughly nine months after he was indicted, asserting his Sixth Amendment right to speedy trial. The next month, Miles' trial counsel made a motion for speedy trial under the Kentucky Constitution and the Sixth Amendment of the U.S. Constitution. Then, in September of 2006, Miles filed a *pro se* motion to dismiss the indictment pursuant to KRS § 500.110. The Kentucky Supreme Court noted in its decision that "defense counsel did not initially object to the motions for continuance based on the testing of the hat not being completed." *Miles*, 2009 WL 160435, at *3. The Court notes, however, that at the April 11, 2006 pre-trial conference, Miles' counsel indicated to the Court that the Commonwealth was not offering justification for its delay and that Miles was ready for his day in Court. Because Miles asserted his rights on at least four occasions, whether *pro se* or through counsel, this factor weighs in favor of Miles.

The final *Barker* factor requires the defendant to show that "substantial prejudice" resulted from his delayed trial. The Supreme Court has identified three relevant forms of prejudice in speedy trial cases: (1) "oppressive pretrial incarceration"; (2) "the anxiety

and concern of the accused"; and (3) "'the possibility that [the accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532). Of these three forms, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532.

Miles claims that he suffered from all three forms of prejudice due to the twenty-one-month delay. First, Miles states that the pending indictment prevented him from going to a halfway house, working in the community, and participating in rehabilitation programs for his unrelated parole violation. (DN 1-2, at p. 4). Second, the delay allegedly caused him psychic injury because as time went by his anxiety increased, requiring higher dosages of Paxil for anxiety and Elavil for depression and sleep deprivation from his psychiatrist. (*Id.* at p. 5). And finally, Miles claims that because of the delay, he lost a key witness that was planning to testify at trial, Steven James Edwards. (*Id.* at pp. 5–6). Miles explains that Edwards passed away in a motorcycle accident on June 25, 2006, and would have testified that: "Miles rented him a rental car; that he was at the club and saw the shooting; that the shooter ran in a different direction than alleged by the Commonwealth & that Miles was wearing all tan the night of the crime, amongst other testimony." (*Id.* at p. 6). Miles submits an affidavit outlining the testimony that Edwards would allegedly have presented at trial. (DN 1-3, at pp. 14–15).

None of this evidence is sufficient to satisfy the prejudice required under *Barker* and *Doggett*. As for

his pretrial incarceration, Miles was already being held in prison on other charges and the indictment in this case only caused him "to be housed in a more secure facility" and prevented his participation "in programs for rehabilitation." (*See* DN 16, at p. 30 (citing DN 16-2, at Page ID # 300) While it is true that delays may prejudice a defendant by adversely affecting the conditions of confinement, period of incarceration, or opportunities for rehabilitation," *see Smith v. Hooey*, 393 U.S. 374, 89 S. Ct. 575, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969); *see also Strunk v. United States*, 412 U.S. 434, 439, 93 S. Ct. 2260, 37 L.Ed.2d 56 (1973), Miles fails to demonstrate that had he not been indicted in this case that he would have qualified for the rehabilitation privileges, such as entry into a halfway house, that he presently asserts.

Nor is Miles' argument regarding his "anxiety and concern" persuasive. To establish prejudice based on anxiety and concern over the outcome of the litigation, a petitioner must show that his anxiety extended beyond that which "is inevitable in a criminal case." *Hakeem v. Beyer*, 990 F.2d 750, 762 (3d Cir. 1993) (quoting *United States v. Dreyer*, 533 F.2d 112, 116 (3d Cir. 1976)). Vague allegations of anxiety are insufficient to establish prejudice. *Id.* Instead, a petitioner must establish evidence of a "psychic injury." *Id.* (citing *Dreyer*, 533 F.2d at 115–16). Other than Miles' bare assertions that his anxiety increased, requiring higher dosages of medication, there is no evidence of unusual anxiety or concern which extends beyond that inevitable in a criminal prosecution and, therefore, no meaningful prejudice to consider.

The real crux of Miles' prejudice argument lies in the third "form of prejudice," the allegation that his

defense was impaired by a trial that did not begin until December of 2006. Miles believes his defense was damaged because a key witness, Steven James Edwards, passed away in June of 2006, while Miles' trial was delayed. A defendant can suffer prejudice from a delayed trial if witnesses are no longer available to testify. *See, e.g.*, *Dixon v. White*, 210 F. App'x 498, 502 (6th Cir. 2007); *Maples v. Stegall*, 427 F.3d 1020, 1034 (6th Cir. 2005). Unfortunately, the Court can only rely on Miles' own statements as to the content of Edwards' testimony as Miles never obtained a declaration from Edwards or otherwise attempted to preserve Edwards' testimony. *See Rennie v. Martin*, No. 2:09-cv-698-WBS TJB, 2011 WL 4006575, at *16 (E.D. Cal. Sept. 8, 2011).

Furthermore, as noted by the Kentucky Supreme Court, the only references made to Edwards before the trial were in a March 2007 motion to dismiss indictment for a speedy trial violation and as an alias for Miles, and no subpoenas were issued for Edwards' appearance at either of the two trial dates prior to Edwards' death. *Miles*, 2009 WL 160435, at *3. Also noteworthy is the fact that Miles did not submit any of Edwards' alleged proposed testimony to the Kentucky Court of Appeals. *Id.*

Now Miles has explained in an affidavit what he believes Edwards' testimony would have been and why such testimony was crucial to his defense. Miles swears that Edwards agreed before his death to testify that Miles did not shoot Teasley and that he saw the actual shooter kill Teasley and then run eastbound and jump the fence around the rear of Club 502. (DN 1-3, at pp. 14–15). Although it may be true that Miles' inability to call Edwards as a witness at trial hurt his

defense, Miles cannot prove that he suffered actual prejudice because of Edwards' death during the period of delay.

In light of the split between the four *Barker* factors, the Court cannot find the Kentucky Supreme Court's denial of Miles' speedy trial claim was an unreasonable application of clearly established federal law. Speedy trial determinations are a "slippery" and "difficult and sensitive balancing process" that cannot be quantified into a specified number of days or months." *Barker*, 407 U.S. at 522–23. Two of the speedy trial factors, the first and the third, weigh in favor of a violation. But the first of these is simply a threshold factor. While the other two factors, the second and the fourth, weigh against a violation. Again, on balance, the Court cannot say that the Kentucky Supreme Court unreasonably applied federal law in denying Miles' claim. *See Bowling v. Parker*, No. 03-28-ART, 2012 WL 2415167, at *31 (E.D. Ky. June 26, 2011) (finding no speedy trial violation when second and fourth factors weighed against violation) (citing *Brown v. Bobby*, 656 F.3d 325, 337 (6th Cir. 2011); *United States v. Love*, 178 F.3d 1279, 1999 WL 115523, at *6–8 (6th Cir. Feb. 8, 1999)). As a result, the Court recommends that Miles be denied relief as to Ground One in his petition.

Miles' RCr 11.42 Ineffective Assistance of Counsel Claims

Next, Miles challenges the Kentucky Supreme Court's ruling on the seven ineffective assistance of counsel claims he raised in his RCr 11.42 motion. Claims of ineffective assistance of counsel are evaluated under *Strickland v. Washington,* 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L.Ed.2d 251 (2009); *Strickland,* 466 U.S. at 687. The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness," and the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 688, 690. Surmounting *Strickland's* high performance bar is never an easy task. *Premo v. Moore*, 562 U.S. 115, 122, 131 S. Ct. 733, 178 L.Ed.2d 649 (2011) (quoting *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S. Ct.1473, 1485, 176 L.Ed.2d 284 (2010)). When the Court assesses counsel's performance, it must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 88, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011).

Establishing the required prejudice is a likewise high bar. The prejudice inquiry compels the defendant "to 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. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* The Court need not conduct the two-prong inquiry in the order identified above or even address both parts of the test if the defendant makes an insufficient showing on one part. *Id.* at 697.

Claim 2: Counsel's Failure to Call Heather St. Clair to Testify at Trial

In his RCr 11.42 motion, Miles argued his trial counsel performed deficiently in failing to call Heather St. Clair to testify at trial. (DN 16-2, at Page ID #384–86). The trial court found that Miles' trial counsel made a deliberate decision not to call St. Clair based on trial strategy rather than a lack of preparation or forgetfulness. (DN 16-3, at Page ID #453). The Kentucky Court of Appeals affirmed this decision, stating that the "evidence submitted at the evidentiary hearing supports the trial court's finding that trial counsel did not call St. Claire [sic] . . . as [a] witness as a matter of trial strategy because [her] testimony was not in accordance with the defense strategy being pursued." (*Id.* at Page ID # 544). On appeal, the Kentucky Supreme Court once again found that Miles' trial counsel's failure to call St. Clair as a witness was not error. (DN 16-4, at Page ID # 747–48). The Kentucky Supreme Court noted that:

> At Miles' RCr 11.42 evidentiary hearing, trial counsel testified that he purposely chose not to call St. Clair to testify. He stated that he initially believed St. Clair's testimony would be helpful to the defense, but after the bond hearing he came to believe that calling her as a witness at trial would be inconsistent with the defense theory presented at trial. Furthermore, trial counsel testified that as proof unfolded at trial, he

> believed St. Clair's testimony to be less valuable than at the bond hearing because of the alleged inconsistencies.
>
> While one can speculate on the possible value of St. Clair's testimony at trial, we must resist the temptation to devise trial strategy with the benefit of hindsight. Given our strong deference to a trial attorney's decision to call certain witnesses, and the fact that Miles did not show that failure to call St. Clair was either deficient or prejudicial to his case, we find no error.

(*Id.*).

In his present motion for habeas relief, Miles argues that the Kentucky Supreme Court's decision was an unreasonable application of *Strickland* because it used an incorrect standard of review. (DN 1-2, at pp. 10–11). Although Miles concedes that trial counsel made a strategic trial decision, he believes it was *unreasonable* trial strategy, in violation of *Strickland*. (DN 20, at p. 3). The Court does not agree. The *Strickland* standard includes the strong presumption that counsel's strategic decisions and performance were reasonable. *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004). Counsel's strategic decisions regarding what witnesses to call at trial are "virtually unchallengeable." *Awkal v. Mitchell*, 613 F.3d 629, 641 (6th Cir. 2010). Here, Miles has made only a bald unsupported assertion that his trial counsel's failure to call St. Clair at trial was not reasonable.

During the evidentiary hearing, Miles' trial counsel explained that Miles was very active in the preparation and presentation of his defense and that they had considered "a number of different theories of

defense[.]" (DN 17, Trial Tape 2 Evidentiary Hearing, 6-03-10, 10:36:01–10:36:26). He further explained that although he originally believed St. Clair's testimony from the bond hearing would be favorable to Miles, after hearing the proof at trial, he felt calling her as a witness would be inconsistent with what he'd presented to the jury as the theory of their defense. (*Id.* at 10:36:37–10:37:18). While Miles' trial counsel admitted that it would have been favorable to call St. Clair as a witness at trial and that "two or three defenses may be better than one even if they are inconsistent" (*Id.* at 10:38:46–10:45:26), the Court must assess his performance without the distorting effects of hindsight. *See Strickland*, 466 U.S. at 689. Under these circumstances, Miles' counsel's decision to not call St. Clair at trial was the type of reasonable strategic decision this Court does not second guess on appeal.[9]

Because Miles has not proven that his trial counsel's conduct was objectively unreasonable, the Court declines to address whether he was prejudiced by his conduct. *See Sowell v. Bradshaw*, 372 F.3d 821, 838

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[9] Miles also alleges the Kentucky Supreme Court's decision was contrary to, and an unreasonable application of, *Cullen v. Pinholster*, 563 U.S. 170 (2011) because he believes *Pinholster* should not have applied to state court review of state court collateral proceedings. (DN 1-2, at pp. 11–12). The Kentucky Supreme Court, however, merely cited to *Pinholster* for the proposition that a court reviewing an ineffective assistance of counsel claim should "affirmatively entertain the range of possible reasons [trial] counsel may have had for proceeding as they did." *Miles v. Commonwealth*, 2017 WL 5504212, at *5 (quoting *Pinholster*, 563 U.S. at 196). The Kentucky Supreme Court did not err in citing to United States Supreme Court law in evaluating a constitutional claim.

(6th Cir. 2004) ("The Court is not required to address both components of *Strickland* if one component fails"). Accordingly, the Kentucky Supreme Court's evaluation of Miles' claim was not contrary to or an unreasonable application of *Strickland*, and the Court recommends relief be denied as to this claim.

Claim 3: Counsel's Failure to Object to Miles' Alias

Miles next argued on state court collateral review that his trial counsel rendered ineffective assistance by failing to object to multiple references to his prejudicial nickname/alias. (DN 1-2, at p. 13). The first of these references came from defense witness Vernon Davis on cross-examination when asked if he knew Miles' nickname, to which Davis responded: "I know what people call him, some people call him Terrance, some people call him "OG," Original Gangster I guess. We call him Cat Daddy." (DN 17, Trial Tape 2, 12-14-2016, 11:02:45). Then during closing arguments, the prosecution made multiple references to Miles' nicknames:

> They're not going to kick him out, it's his club. *He's Cat Daddy, Old Gangster*. He gets back in. He's angry. . .
>
> What's his state of mind? *He's known by Cat Daddy. He's known by Old Gangster*. That night was different. He was publicly humiliated. His motive was revenge and that is a powerful motive . . . .
>
> What do you know about *Cat Daddy*? You know he's 5'10. You know he's got a lean build . . . You know he had the motive for revenge . . .
>
> We've got the hat . . . we want to distance ourselves from the hat. . . . It's covered in leaves, it's covered

> in crusty old dirt. Do you think *Cat Daddy's* gonna be wearing this thing to the club? . . .
>
> He was killed because *Cat Daddy* got his feelings hurt. That's why he was killed, for no reason at all . . .
>
> Who dunnit? The evidence points to the man with the black on, the man that had the motive, the man who fits the identification to a T. *It points to Cat Daddy*. *It points to Old Gangster*. Who dunnit? He's sitting right there.

(DN 17, Tape 2, 12-14-06, 13:48:50; 13:52:32–13:52:52; 14:12:40–14:13:00, 14:14:15; 14:15:25). Because these nicknames were not needed to identify him or connect him to the crimes charged, Miles argued he was prejudiced by his counsel's failure to object. (DN 16-1, at Page ID# 403–04).

The trial court ruled that this evidence did not prejudice Miles' substantial rights considering the totality of the proof. (DN 16-3, at Page ID # 455). The Kentucky Court of Appeals reversed, finding that flagrant prosecutorial misconduct occurred during closing argument when the prosecution referred to Miles as "Old Gangster" because these references tended to "mislead and prejudice Miles by inviting the jury to find him guilty based on protecting his gangster reputation[.]" (*Id.* at Page ID # 541). "[W]hile the remarks were somewhat isolated," the Kentucky Court of Appeals noted, "they were deliberately placed before the jury and the evidence against Miles was relatively weak." (*Id.* at Page ID #541–42). The court concluded that Miles' trial counsel's failure to object to the Commonwealth's references to Miles as "Old

Gangster" constituted ineffective assistance of counsel. (*Id.* at Page ID # 542).

On appeal, the Kentucky Supreme Court reversed the Kentucky Court of Appeals' decision, finding the cases cited by Miles and the lower court to be distinguishable. *Commonwealth v. Miles*, 2017 WL 5504214, at *3. Specifically, the Kentucky Supreme Court discussed how in *Farmer v. Commonwealth*, a Second Circuit case, the defendant's nickname of "Murder" was found to be overly prejudicial because it was a "rhetorical trope" used by the prosecution to address the jury no fewer than thirty times. *Id.* (citing *Farmer v. Commonwealth*, 583 F.3d 131, 146 (2d Cir. 2009)). The Kentucky Supreme Court contrasted that Miles was only referred to as "Old Gangster" three times during closing arguments, a "far cry from the 'rhetoric trope' in *Farmer*." *Id.* While the Kentucky Supreme Court agreed that use of a nickname suggesting criminal activity can be prejudicial, it found that Miles failed to show the Commonwealth's use of "Old Gangster" prejudiced his case under *Strickland*. *Id.* The court concluded the comments "in the context of the entire trial, were de minimis" and that "[b]elieving the reference to Miles' nickname somehow would have changed the course of his verdict is speculative." *Id.*

Presently Miles asserts that the Kentucky Supreme Court unreasonably applied *Strickland* in finding the Commonwealth's use of his nickname "Old Gangster" did not prejudice his case in any way. (DN 1-2, at p. 15). Miles also claims the Kentucky Supreme Court made an unreasonable determination of the facts by finding the Commonwealth's use of his nickname was "isolated" when the Commonwealth elicited it from a

witness on cross-examination, posted it on a projection screen during its closing argument, and repeatedly referred to Miles by the nickname during closing argument. (*Id.*). Because the evidence in his case was "circumstantial and 'relatively weak,'" Miles states that the prosecution's use of his nickname was especially detrimental to his case. (DN 20, at p. 4).

The Warden emphasizes that the prosecution only mentioned Miles' nicknames briefly for a few seconds in closing arguments and not for any improper purpose. (DN 16, at p. 34). According to the Warden, the prosecution referenced Miles' nicknames in connection with Miles' "state of mind and motive to exact revenge" rather than to link Miles to other crimes or argue he was a gang member. (*Id.* at p. 35). The Warden asserts that fair minded jurists could find there was no prejudice from these references. (*Id.*).

After reviewing the trial tapes and the state court record, the Court finds the Kentucky Supreme Court did not unreasonably apply *Strickland* in determining that use of Miles' nicknames, specifically "Old Gangster," did not prejudice his case. In *Farmer*, the Second Circuit explained that if a nickname [is] strongly 'suggestive of a criminal disposition,' and a propensity to commit particularly heinous crimes, including the very offenses charges in the indictment," then such a nickname might violate Rule 404(a). *United States v. Farmer*, 583 F.3d 131, 146 (2d Cir. 2009) (quoting *United States v. Dean*, 59 F.3d 1479, 1492 (5th Cir. 1995)). But the "main problem" with the use of a potentially prejudicial nickname arises from the "prosecutors' frequently repeated, gratuitous invocation of [the] nickname in . . . address[ing] . . . the jury, uttered in a context that, in effect, invite[s] the

jurors to infer that the defendant earned his nickname among his . . . colleagues as a result of his proclivity to commit" the charged crime. *Id.* at 146–47. Even then, the "misuse and overuse of [a] nickname" does not "lead us to vacate a conviction unless the defendant suffered 'substantial prejudice, by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 147 (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)).

The concerns articulated in *Farmer* are not present here. While the Court recognizes that the nickname "Old Gangster" or "Original Gangster" signals a criminal background or history, its prejudicial impact is more limited than that associated with the alias "Murder" in *Farmer*. Moreover, Miles has not demonstrated any criminal connotation associated with the nickname "Cat Daddy." The defendant in *Farmer* was on trial for murder and, under those circumstances, it was considerably more likely that the jury would infer, solely from that nickname, that he was guilty of the charged crime. 583 F.3d at 146. The prosecution's three references to Miles as "Old Gangster" and six references to Miles as "Cat Daddy" during its closing argument do not rise to the "rhetoric trope" in *Farmer*, wherein the United States referred to the defendant as "Murder" over 30 times to the jury in its rebuttal argument alone. 583 F.3d at 146.

Accordingly, the Court cannot say that the Kentucky Supreme Court unreasonably applied *Strickland* in finding that counsel's failure to object to the prosecution's use of his nicknames did not constitute prejudice because these references had a *de minimis* effect in the context of the entire trial. These are not circumstances in which an objection to the

prosecution's use of "Old Gangster" three times would have had a reasonable probability of altering the result of the proceeding, as required by *Strickland*. *See United States v. Price*, 443 F. App'x 576, 579 (2d Cir. 2011).

Claim 4: Counsel's Failure to Object to Testimony Regarding Inadmissible Gun

Miles also argued in his RCr 11.42 motion that his counsel erred by failing to object to the prosecution introducing evidence of a gun unrelated to Teasley's murder. (*See* DN 16-2, at p. 122). The Commonwealth first mentioned this gun during its opening argument, stating that in searching Charles Brown's apartment, where Miles had stayed and had a key to, police located "a gun under the mattress, which they later found was not the same gun used in the murder . . but he did in fact have a gun." (DN 17, Tape 1, 12-12-06, 13:32:42). The Commonwealth made further references to the same gun during Detective Chris Ashby's testimony and showed a photo of the gun under his mattress to the jury. (DN 17, Tape 2, 12-13-06, 13:11:10, 13:56:25). Miles' counsel did not make any objection until the Commonwealth moved to submit the photograph of the gun as an exhibit and the trial judge asked if Miles' counsel had any objections. Even though the trial court sustained Miles' counsel's objection, Miles argues the "damage was done" because the Commonwealth painted him in a negative light and inflamed the jury into believing he was involved in criminal activity. (DN 16-2, at p. 22).

The Kentucky Court of Appeals agreed with Miles, finding that his trial counsel "was ineffective for

allowing the introduction of evidence about his gun, which was excluded from being the murder weapon." (DN 16-3, at p. 15). The court followed *Harris v. Commonwealth*, 384 S.W.3d 117, 123–24 (Ky. 2012), noting that "even though the jury was repeatedly informed the gun was unrelated to the murder, the prosecutor's deliberate elicitation of testimony about the gun, in conjunction with other inadmissible evidence about Miles' nickname was used to paint him as a criminal and could allow a conviction based upon a gun-wielding-gangster reputation, rather than based on the evidence relating to the crimes charged." (*Id.* at p. 16). The Kentucky Court of Appeals concluded that Miles' counsel's failure to bring a motion in limine to exclude mention of the gun was prejudicial when considered in conjunction with other errors. (*Id.*).

On discretionary review, the Kentucky Supreme Court reversed. While the court agreed with the lower court's determination that the gun was irrelevant, it found introduction of the gun resulted in no prejudice to Miles for three reasons. (DN 16-4, at Page ID # 746). First, on cross-examination Detective Ashby admitted the gun in question was not connected to Teasley's murder. Second, the Court of Appeals had stated in its opinion that "the jury was repeatedly informed the gun was unrelated to the murder." And third, the gun itself was not allowed into evidence. Because Miles couldn't prove prejudice, the Kentucky Supreme Court found it was not necessary to address the first prong of *Strickland*. (*Id.*).

Now, Miles claims the Kentucky Supreme Court unreasonably applied *Strickland* in finding that Miles failed to show prejudice from the introduction of the

gun. (DN 1-2, at p. 19). Although the gun was not admitted into evidence, Miles explains that the inadmissible picture led the jury to believe Miles was a bad, dangerous person. The evidence regarding the gun, coupled with the Commonwealth's references to him as "Old Gangsta," Miles argues, painted a reputation supporting a conviction in this case. (*Id.*). Miles believes that a juror hearing he had a gun under his mattress could have been the deciding factor in convicting him when the juror otherwise would have acquitted. (*Id.*). The Warden argues the Kentucky Supreme Court's application of the prejudice prong of *Strickland* was not unreasonable because "[f]airminded jurists could conclude there was no reasonable probability the results of the trial would have been different absent testimony about the gun." (DN 16, at p. 36). Once again, Miles argues in reply that because the evidence in his case was circumstantial and "relatively weak," evidence of the unrelated gun prejudiced his case. (DN 20, at p. 5).

Miles' argument is not persuasive. As explained above, establishing prejudice under *Strickland* is not an easy task. While Miles is correct that evidence of the handgun was irrelevant to the case, he falls short of proving the outcome of his trial would have been different had his counsel lodged further objections to such evidence. The Commonwealth made clear that this gun was not connected to Teasley's murder, and when the Commonwealth attempted to enter the photograph of the gun into evidence, Miles' counsel objected, and the trial court sustained the objection. The Kentucky Supreme Court's well-reasoned determination that Miles has not shown any cognizable prejudice is on par with the applicable

principles of *Strickland* and its progeny and is grounded in a reasonable determination of the facts. Further, the Kentucky Court of Appeals' determination was based not only on a finding of prejudice relating to the introduction of this gun, but also relating to the testimony regarding Miles' nicknames, which this Court has already rejected. Accordingly, the Court recommends Miles be denied federal habeas relief with respect to this claim.

Claim 5: Counsel's failure to object to Detective Ashby's testimonial hearsay

Miles next claims that his trial counsel failed to object to testimonial hearsay given by Detective Ashby. Miles specifically takes issue with Detective Ashby's affirmative response when the prosecution asked whether he had shown Reggie Burney a photo pack and asked if he could identify Mr. Miles as being the person who fought with Michael Teasley earlier in the evening. (DN 1-2, at Page ID # 105 (citing Trial Tape 1, 12-13-06; 14:09:50)). The Kentucky Court of Appeals found that "if trial counsel had properly objected to this testimony, it would have been excluded as inadmissible hearsay and violating the confrontation clause." (DN 16-3, at Page ID #543–44 (citing Kentucky Rules of Evidence 801A(a), 804(a); *Flatt v. Commonwealth*, 468 S.W.2d 793, 794–95 (Ky. 1971)). Although other eyewitness testimony identified Miles as fighting with Teasley earlier, the Court of Appeals determined that "when considered in conjunction with previous errors," it could not be considered harmless. *Id.*

The Kentucky Supreme Court disagreed, highlighting the Court of Appeals' sparse analysis on

the issue. (DN 16-4, at Page ID # 744). The Kentucky Supreme Court indicated that Miles again failed to demonstrate prejudice because other eyewitness testimony at trial identified him as the individual who fought Teasley earlier on the night of the murder. (*Id.* at Page ID # 745). One of those witnesses was Officer Hill, who testified that he observed Miles and Teasley in the altercation earlier in the evening and "that he believed the same individual was the one he saw running from the scene of the shooting." (*Id.*). Based on this information, the Kentucky Supreme Court found that Detective Ashby's testimony was not of such a nature that Miles was denied effective assistance of counsel. (*Id.* at Page ID #744).

Now, Miles argues the Kentucky Supreme Court unreasonably applied *Strickland* by only addressing the prejudice prong and because it only identified Officer Hill as "other eyewitness testimony." (DN 1-2, at p. 21). Miles claims that Ashby's testimony that Burney picked Miles out as being in a fight with the victim was "very prejudicial." (*Id.*). The Warden responds that numerous eyewitnesses at trial, including Frank Hill, Crystal Teasley, and Jesse Savage all identified Miles as the individual who fought with Teasley earlier on the night of his murder and that Miles himself admitted to fighting with Teasley when he testified at his evidentiary hearing. (DN 16, at pp. 36–37).

Once again, this Court finds the Kentucky Supreme Court did not unreasonably apply *Strickland* by addressing only the prejudice prong because a reviewing court is not required to "address both components of inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697. The

Court further disagrees that Ashby's testimony was "very prejudicial." The disputed testimony involved the Commonwealth asking Detective Ashby if he had showed Reggie Burney a photopack and asked if he could identify Miles, and further, whether Miles was the person who fought with Teasley earlier in the evening, to which Detective Ashby responded affirmatively. (*See* Trial Tape 2, 12-13-06, 14:10:22). Miles' identity as the individual who fought with Teasley earlier on the night of his murder was not disputed at trial. Miles even admitted at his evidentiary hearing to fighting Teasley on the night in question. (DN 17, Trial Tape 2, Evidentiary Hearing 4-25-11, 11:46:30–11:48:56). Miles' trial counsel testified that by not objecting to Detective Ashby's testimony about Reggie Burney, Miles was denied the opportunity to cross-examine Burney about the potential suggestiveness of the photo-pack. (*Id.* 6-3-2010, 10:52:46–10:54:14). But even if Miles' trial counsel had objected to the hearsay, and the trial court sustained his objection, Miles has not established a reasonable probability that the outcome of his trial would be different. Because it was well-established that the fight between Miles and Teasley occurred, and any argument regarding the suggestiveness of the photo-pack is undeveloped and speculative, the Court finds that trial counsel's failure to object to Detective Ashby's testimony that Reggie Burney identified Miles as the man who fought with Teasley did not constitute prejudice under *Strickland*.[10]

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[10] Even though the Kentucky Supreme Court did not evaluate whether Miles' trial counsel's performance in failing to object was deficient since it relied on Miles' failure to establish the prejudice

Again, the Kentucky Court of Appeals relied on trial counsel's "previous errors," including the introduction of the inadmissible handgun and *de minimis* references to Miles' nicknames, as contributing to the finding that Detective Ashby's hearsay testimony could not be considered harmless. As determined in the preceding sections, however, this Court found counsel's failures did not constitute constitutionally ineffective assistance. The Court therefore finds the Kentucky Supreme Court's decision was well-reasoned

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prong of *Strickland*, the Court notes that in *Lundgren v. Mitchell*, the Sixth Circuit explained:

> As a threshold matter, in a trial of any size, numerous potentially objectionable events occur. "[T]he Constitution does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Moreover, experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. Learned counsel therefore use objections in a tactical manner. In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial to a client that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice. *See Hodge v. Hurley*, 426 F.3d 368, 376 (6th Cir. 2005) ("[C]ounsel's failure to object to *any* of the numerous improper statements in the prosecution's closing argument is well outside [professional norms].") (emphasis in original).

440 F.3d 754, 774–75 (6th Cir. 2006). Because the evidence here was not prejudicial to Miles, in that his fight with Michael Teasley was undisputed at trial, any failure to object by trial counsel could not be considered error.

on this issue and does not recommend habeas relief as to this claim.

Claim 6: Counsel's denial of Miles' right to testify

Miles also claims his counsel performed ineffectively by not preparing him to testify when Miles wanted to and advised counsel on several occasions of this desire. (DN 1-2, at p. 22). In evaluating Miles' RCr 11.42 motion, the trial court found that Miles' decision not to testify, as explained by his trial counsel during the evidentiary hearing, was strategic, and at no time did Miles inform the court that he was being forced into silence. (DN 16-3, at Page ID # 454). The Kentucky Court of Appeals affirmed this decision, noting that Miles failed to establish he received ineffective assistance of counsel where there was no evidence in the record "to show he did not waive right to testify and trial counsel failed to respect his right to testify." (DN 16-3, at Page ID

* * *

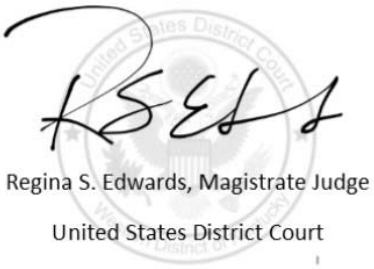
Recommendation

For the foregoing reasons, the Court **RECOMMENDS** the **DENIAL** of all claims in Miles' Petition for Writ of Habeas Corpus (DN 1).

It is further **RECOMMENDED** that a Certificate of Appealability be **GRANTED** and **ISSUED** as to Claims 1, 3, 4, and 5 in Miles' Petition but be **DENIED** as to Claims 2, 6, 7, 8, 9, 10, and 11.

It is further **RECOMMENDED** that Miles' Petition for Actual Innocence and to Rebut the State Court's Presumption of Correctness (DN 23) be **DENIED.**

It is further **RECOMMENDED** that Miles' Motion for Summary Judgment (DN 45) be **DENIED.**



Regina S. Edwards, Magistrate Judge

United States District Court

January 30, 2019

NOTICE

Therefore, under the provisions of 28 U.S.C. Sections 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir.), *aff'd*, U.S. 140 (1984).

Copies: Terrance Miles, *pro se*
Counsel of Record

APPENDIX F

MODIFIED: AUGUST 24, 2017
RENDERED: MARCH 23, 2017
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000558-DG
&
2015-SC-000321-DG

COMMONWEALTH OF KENTUCKY — APPELLANT/ CROSS-APPELLEE

ON REVIEW FROM COURT OF APPEALS
V. CASE NO. 2012-CA-001240
JEFFERSON CIRCUIT COURT NO. 05-CR-000740

TERRANCE MILES — APPELLEE/ CROSS-APPELLANT

MEMORANDUM OPINION OF THE COURT

REVERSING

Terrance Miles is currently serving a fifty-year sentence following convictions for the murder of Michael Teasley, for first-degree wanton endangerment, for tampering with physical evidence, and for being a second-degree Persistent Felony Offender (PFO). Miles moved the trial court for relief from the judgment under Kentucky Rule of Criminal Procedure (RCr) 11.42. The trial court conducted an evidentiary hearing on Teasley's claims, after which it

entered an order denying relief. On appeal, the Court of Appeals reversed the trial court's order.

We granted cross-motion for discretionary review. The Commonwealth asserts the Court of Appeals erred in its conclusion that Miles had received ineffective assistance of trial counsel. Miles on the other hand, while agreeing with the Court of Appeals' reversal of the trial court's order, argues in his cross-motion for discretionary review that it erred when it faded to find error in the trial court's finding that trial counsel's failure to call an important witness at trial was not unreasonable trial strategy.

For the reasons below, we reverse the decision of the Court of Appeals and reinstate the trial court's order denying Miles's RCr 11.42 motion.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Michael Teasley, a club bouncer, was shot and killed while trying to disperse a crowd after the club had closed for the night. Miles was tried and convicted for killing Teasley, and this Court affirmed the judgment of conviction and sentence on direct appeal. Miles filed a pro se motion under RCr 11.42 to vacate his convictions, claiming that his trial counsel was ineffective. Before us are four of his eleven complaints made in the RCr 11.42 motion: (1) the admission at trial of Miles's nick name "OG" or "Original Gangster"; (2) the failure of trial counsel to object to testimony about a gun—found at Miles's residence—that indisputably had no connection to the crime; (3) the failure of trial counsel to object to hearsay testimony; and (4) the failure of trial counsel to call Heather St. Clair as a defense witness.

The trial court conducted a series of three separate evidentiary hearings, spanning five days, to address Miles's RCr 11.42 allegations. The trial court ultimately denied Miles's motion.

The Court of Appeals undertook review on appeal. That court determined that the trial court erred by denying RCr 11.42 relief to Miles because his trial counsel was ineffective. More specifically, the court found that Miles's counsel was ineffective on three separate instances: (1) the admission of Miles's nick name "OG" or "Original Gangster"; (2) the failure to object to testimony about a gun found at Miles's residence; and (3) the failure to object to hearsay testimony. The court remanded the case to the trial court for further proceedings.

II. ANALYSIS.

A. Standard of Review.

A criminal defendant has a constitutional right to effective assistance of counsel. This right is guaranteed under the Sixth and Fourteenth Amendments of the Constitution of the United States and Section Eleven of the Kentucky Constitution.[1] A criminal defendant is entitled to effective assistance of counsel, but he is not entitled to perfect counsel.[2]

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[1] U.S. Const. amend. XI; U.S. const. amend. XIV; Ky. Const. § 11.

[2] *Simmons v. Commonwealth*, 191 S.W.3d 557, 671 (Ky. 2006) ("A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." (citations omitted)).

This Court reviews an ineffective assistance of counsel claim under *Strickland v. Washington*,[3] which we adopted in *Gall v. Commonwealth*.[4] The *Strickland* standard requires Miles to prove both prongs in a two-part analysis. First, Miles must show trial counsel's performance was deficient. Second, Miles must prove that the deficiency by counsel prejudiced his defense.[5] *Strickland* further elaborated that "[t]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies ... [i]f 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."[6]

Proving both deficient performance and prejudice is a substantial burden, especially in the context that counsel's conduct is presumed reasonable and effective.[7] According to *Strickland*, "deficient performance" requires error "so serious that counsel was not functioning as the 'counsel' guaranteed the

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

[4] *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

[5] *Strickland*, 466 U.S. at 687.

[6] *Id*. at 697.

[7] *Humphrey v. Commonwealth*, 692 S.W.2d 870, 873 (Ky. 1998).

defendant by the Sixth Amendment."[8] And to prove prejudice, Miles must demonstrate that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable."[9] Stated another way, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[10]

As the Court of Appeals in this case noted, "[A] court must indulge a 'strong presumption' that counsel's conduct fells within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight."[11]

As Justice Hughes wrote in *Commonwealth v. McGorman*, "When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable."[12] Furthermore, "We must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong

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[8] *Id.*

[9] *Id.*

[10] *Strickland* 466 U.S. at 694.

[11] *Bell v. Cone*, 535 U.S. 685, 702 (2002); (citing *Strickland* 466 U.S. at 699).

[12] *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citations omitted).

presumption that counsel's performance was reasonable."[13]

Lastly, on appellate review of a trial court's decision to deny an RCr 11.42 motion, a reviewing court will only set aside the trial court's factual determinations if they are found to be clearly erroneous or unsupported by substantial evidence.[14] This is similar to Kentucky Rules of Civil Procedure (CR) 52.01, which specifically states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." After review of the trial court order, and its findings of fact, we cannot say that its findings were unsupported by substantial evidence in the record.

B. Counsel's failure to object to the introduction of Miles's alias does not rise to the level of ineffective assistance of counsel.

Miles asserts that trial counsel was ineffective when he failed to object to the introduction of Miles's nickname, "O.G." or "Original Gangster."

During cross examination of defense witness Vernon Douglas, the Commonwealth asked about Miles's nickname. Before this question, the only nickname discussed was "Cat Daddy," which had been discussed by defense counsel in his opening statement. When asked about Miles's nickname, Douglas

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[13] *Id.*

[14] *See Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008); *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

responded that Miles had been known in the past as "O.G." or "Original Gangster." The Commonwealth then referred to Miles by his aliases, "Old Gangster" and "Cat Daddy" on three separate occasions in closing argument.

When, the Court of Appeals reviewed Miles's ineffective assistance of counsel claim, as it pertained to this issue, it found prosecutorial misconduct. The court then discussed whether the misconduct was flagrant, and if so, whether that created prejudice under *Strickland*.

The parties contest whether trial counsel should have objected to disclosure of the nickname. Trial counsel in his testimony at the RCr 11.42 hearing testified that in hindsight he should have objected to the introduction of the nickname, but he failed to do so because of the speed in which the questions were asked and answered. The Commonwealth asserts that even if trial counsel had objected to the testimony, the nicknames would have been admissible to show Miles's state of mind and motive for the shooting.

Following the guidance provided in *Strickland*, we address first the prejudice prong.[15] And once again, guided by *Strickland*, Miles must show that the use of his alias created a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[16]

Miles and the Court of Appeals cite cases that found the use of an alias created so much prejudice that it created an unfair trial. For instance, *United States v.*

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[15] *Strickland* 466 U.S. at 697.

[16] *Id.* at 694.

Farmer, in which the Second Circuit Court of Appeals found the use of the defendant's nickname "Murder" was overly prejudicial.[17] In *Farmer*, the court stated, "In our prior cases, the government's use of a defendant's nickname was 'occasional' [or] 'brief and isolated.' But Farmer's nickname ... was the main rhetorical trope used by the prosecution to address the jury ... [and was used] no fewer than thirty times."[18]

Miles's facts are distinct from those in *Farmer*. Miles's nickname was used a total of three times after it was first mentioned in the testimony of a defense witness. The present case is a far cry from the "rhetorical trope" in *Farmer*.

Furthermore, Miles cites *Brown v. Commonwealth* for the proposition that use of a nickname that suggests criminal activity can be prejudicial.[19] We do not disagree. But, Miles has failed to show that the Commonwealth's use of his nickname "Old Gangster" prejudiced his case in any way. These comments, in the context of an entire trial, were de minimis. Believing the reference to Miles's nickname somehow would have changed the course of his verdict is speculative.

In finding there was no prejudice, we find counsel was not ineffective in failing to object to the introduction and isolated use of Miles's nickname.

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[17] *United States v. Farmer*, 583 F.3d 131, 146 (2nd Cir. 2009).

[18] *Id.*

[19] *Brown v. Commonwealth*, 558 S.W.2d 599, 603 (Ky. 1977).

C. Counsel was not ineffective when he failed to object to testimonial hearsay.

Next, Miles asserts that trial counsel was ineffective when he failed to object to certain testimony from Detective Ashby, arguing that the testimony in question was testimonial hearsay without an exception.

While on the witness stand, Detective Ashby testified that a man named Reggie Burney had identified Miles from a photo pack as being the individual in a fight with Teasley on the night of his murder. Miles argues that failing to have Burney testify at trial abridged his constitutional rights to confront witnesses. Miles further argues failing to object to Ashby's reference to Burney was an error sufficiently egregious to constitute ineffective assistance of counsel.

The Court of Appeals opinion does little in its analysis of this issue. It simply states that if an objection had been made to Detective Ashby's testimony that it would have been sustained. While acknowledging that other eyewitness testimony identified Miles as being the individual who fought with Teasley earlier in the night, the Court of Appeals found that Detective Ashby's testimony was "not harmless when considered in conjunction with previous errors...."

We cannot agree that the testimony by Detective Ashby was of such a nature that Miles was denied effective assistance of counsel. Once again, Miles has failed to show prejudice. Other eyewitnesses' testimony at trial identified Miles as the individual who fought Teasley the night of the murder. One of

those eyewitnesses was Officer Hill, who testified that he observed Miles and Teasley in an altercation earlier in the evening and that he believed that the same individual was the one he saw running from the scene of the shooting.

D. Counsel was not ineffective in failing to object to a picture of a gun being displayed.

Miles argues trial counsel was ineffective when he failed to object to the discussion and photograph of an unrelated gun found at Miles's residence.

The Commonwealth referenced this gun in its opening statement, saying "They also found a gun under the mattress which we later found out was not the same gun used in the murder but he did in fact have a gun." Furthermore, the gun was discussed during the testimony of Detective Ashby, who admitted on the stand that the gun found at Miles's residence was not the gun used to kill Teasley and was not connected to the case. This is not before the Commonwealth published a picture of the gun via a projector during Detective Ashby's testimony. However, defense counsel did object when the Commonwealth sought to have the picture of the gun admitted into evidence. The trial court, agreeing with defense counsel, found that the gun was irrelevant evidence and sustained defense counsel's objection.

The Commonwealth argues that defense counsel did not object to the discussion of the gun by Detective Ashby and projecting a photograph as a deliberate trial strategy. Emphasizing that on cross-examination, defense counsel was able to have Detective Ashby testify that the gun had no connection with the murder of Teasley, thereby strengthening

Miles's defense, displaying the lack of substantive evidence. Miles argues that references to the gun and defense counsel's failure to object at its mention were not only done in error but prejudiced Miles to the extent to be ineffective as counsel.

The Court of Appeals correctly noted that weapons unrelated to the crime charged are generally inadmissible.[20] The Court of Appeals also recognized that when defense questioning made clear to the jury that the weapon in question was not the murder weapon, the discussion of it and the publication of the photograph of it was harmless.[21]

We agree with the trial court that the gun is irrelevant, but proving that the introduction of the gun resulted in prejudice is critical to our analysis.[22] While on the stand during cross-examination by defense counsel, Detective Ashby admitted that the gun in question was not connected Teasley's murder. Further, the Court of Appeals stated in its opinion that "the jury was repeatedly informed the gun was unrelated to the murder...." And lastly, the gun itself was not allowed to be submitted into evidence, a fact that further dampens Miles's claim of prejudice.

Finding Miles has failed to prove prejudice, we need not discuss the first prong of *Strickland*.[23] Accordingly, we find that trial counsel was not

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[20] *Harris v. Commonwealth*, 348 S.W.3d 117, 123–24 (Ky. 2012).

[21] *Id*. at 125.

[22] *Humphrey*, 692 S.W.2d at 873.

[23] *Strickland*, 466 U.S. at 697.

ineffective in failing to object to the discussion of the gun found at Miles's residence.

E. Failure to call Heather St. Clair was not ineffective.

Lastly, Miles contends that the Court of Appeals erred when it found no error in the trial's court's ruling that defense counsel's failure to call Heather St. Clair as a defense witness was not ineffective representation.

St. Clair was a cocktail waitress at the club where Teasley worked, and she was working the night of his murder. She was familiar with Miles and recognized him by sight because he was a regular at the club. St. Clair testified at Miles's bond hearing. Miles asserts that St Clair's testimony would be directly contradictory to that of several of the Commonwealth's witnesses. More specifically, Miles asserts that St. Clair would testify that he was not wearing the outfit like the one worn by the person identified as the shooter and the person who picked a fight with Teasley.

We must "affirmatively entertain the range of possible 'reasons [Miles's] counsel may have proceeded as [he] did.'"[24] And as the Court of Appeals noted in its decision, failure to call St. Clair as a witness was not error. A decision whether or not to call a certain witness is presumed to be purposeful trial strategy and will not be second-guessed.[25]

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[24] *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009).

[25] *Saylor v. Commonwealth*, 357 S.W.3d 567, 571 (Ky. App. 2012).

At Miles's RCr 11.42 evidentiary hearing, trial counsel testified that he purposely chose not to call St. Clair to testify. He stated that he initially believed St. Clair's testimony would be helpful to the defense, but after the bond hearing he came to believe that calling her as a witness at trial would be inconsistent with the defense theory presented at trial. Furthermore, trial counsel testified that as proof unfolded at trial, he believed St. Clair's testimony to be less valuable than at the bond hearing because of alleged inconsistencies.

While one can speculate on the possible value of St. Clair's testimony at trial, we must resist the temptation to devise trial strategy with the benefit of hindsight. Given our strong deference to a trial attorney's decision to call certain witnesses, and the fact that Miles did not show that failure to call St. Clair was either deficient or prejudicial to his case, we find no error.

F. Miles is not entitled to a new trial because of Cumulative Error.

Miles is not entitled to RCr 11.42 relief based on a finding of cumulative error. As the Commonwealth notes, and Miles does not refute, we find no cases where cumulative error has formed the basis for RCr 11.42 relief. Cumulative error may be found only when "the individual errors were themselves substantial, bordering, at least, on the prejudicial."[26] As in *Parrish v. Commonwealth*, we reject Miles's argument of cumulative error.[27] Without establishing

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[26] *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010).

[27] *Parrish v. Commonwealth*, 272 S.W.3d 161, 180 (Ky. 2008).

legitimate error in any of his arguments singly, it is nonsensical to accept Miles's assertion that their aggregation constitutes a separate ground for relief.

III. CONCLUSION.

For the foregoing reasons, we reverse the decision of the Court of Appeals and reinstate the trial court's order denying Miles's RCr 11.42 motion for relief from the judgment.

All sitting. Minton, C.J.; Hughes, Keller, VanMeter, Venters and Wright, JJ., concur. Cunningham, J., concurs in result only.

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APPENDIX G

RENDERED: AUGUST 22, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001240-MR

TERRANCE MILES APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CR-000740

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Terrance Miles appeals the denial of his motion for post-conviction relief on the basis of ineffective assistance of counsel after an evidentiary hearing.

Following the shooting death of a bouncer outside a Louisville nightclub, Miles was convicted of murder,

wanton endangerment, tampering with physical evidence and being a second-degree persistent felony offender (PFO II). The Kentucky Supreme Court summarized the underlying facts as follows:

> On the night of February 27, 2005, Michael Teasley, a bouncer at Club 502, was shot and killed outside the club as he attempted to clear the parking lot after the club had closed. Earlier that same evening, after another bouncer had removed Terrance Miles from the club for smoking marijuana, Miles and Teasley got into a fight. Teasley's wife, Crystal, who also worked at the club, testified that after the fight, Miles grinned and said to her husband, "you might have whipped my ass, but I'm going to get you."
>
> Officer Frank Hill of the Louisville Metro Police Department, who was working extra security for the club while off duty, observed the fight between Teasley and Miles. While Hill did not witness the actual shooting, he heard the gunshots and then looked in the direction of the gunshots and saw a male running across the parking lot dressed in all dark clothing and wearing a toboggan hat. Officer Hill testified that the man he observed running across the parking lot was the same man who had been fighting with Teasley earlier in the night. Hill gave chase in his patrol car with the assistance of another bouncer and at one point located the suspect behind a dumpster in back of the club. However, Hill eventually lost sight of the suspect.
>
> A number of items were collected from the crime scene, including a black toboggan hat and a cell

> phone. The number of the cell phone matched the number Miles gave to Enterprise Rent-a-Car when he switched his rental vehicle the day after the murder. The hat was ultimately sent by the Commonwealth to the Kentucky State Police forensic lab for DNA testing to see if trace evidence on the hat matched Miles' DNA. The results of the testing were ultimately determined to be negative for Miles' DNA.

Miles v. Commonwealth, 2007-SC-000298-MR, 2009 WL 160435, 1 (Ky. 2009) (unpublished). After Miles was found guilty, he was sentenced to serve fifty years' incarceration. Miles's conviction was affirmed on appeal.

Miles filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of counsel and requesting an evidentiary hearing. Miles argued that his trial counsel was ineffective as follows: (1) failing to call Heather St. Claire, who testified at his bond hearing that Miles was wearing all tan and had been thrown out of a different door than the shooter; (2) failing to call Dalco Lanier and Andre Judkins, who would have testified Miles was wearing tan, and the shooter was wearing all black and ran off in a different direction than other witnesses testified; (3) failing to call him to testify on his own behalf because he believed his testimony was key in refuting the prosecution's case; (4) denying him the right to testify after he asked to testify; (5) failing to object to Officer Ashby's testifying that Reggie Burney picked Miles out of a photopack as being in a fight with Teasley earlier where Burney did not testify and Burney was available as a witness; (6) failing to object and move for an admonition or mistrial for the

introduction of his nickname of "O.G." for "Original Gangster" and the Commonwealth's repeated references to him as "Old Gangster" during its closing argument; (7) failing to object to the introduction of evidence about his unrelated gun which had been excluded as the murder weapon; and (8) failing to strike a biased juror who admitted having a conversation with an officer involved in the case while she was serving on the jury. He argued each incident of trial counsel's ineffectiveness was individually prejudicial and, when considered together, were cumulatively prejudicial. At an evidentiary hearing, the trial court heard testimony from Miles's trial counsel, Miles and potential defense witness Lanier.

Miles's trial counsel testified as to the choices he made in calling certain witnesses, pursuing certain defenses and his failure to object to the admission of certain types of evidence. He stated he was hindered by lack of access to his file, which had been delivered to Miles and destroyed in a prison fire, and imperfect recollection. He testified he made a number of mistakes, which in hindsight seemed significant.

Trial counsel could not remember why he did not call St. Claire and now believed he should have done so because pursuing inconsistent defenses may have been a better strategy. He explained St. Claire could have refuted Officer Hill's identification of Miles, because she would have testified consistent with her bond hearing testimony that Miles was ejected out of a different door than the person who was in a fight with Teasley and that Miles was wearing a tan hat and a tan Dickie outfit.

Further, trial counsel recalled advising Miles not to testify because he believed he could establish mistaken identity more effectively without Miles's testimony, which would contradict the defense theory he was presenting to the jury.[1] Miles could also be impeached by his earlier statement which would not come into evidence unless Miles testified.

Trial counsel testified he vigorously attempted to locate and interview all the witnesses Miles told him about. He was not able to reach Lanier and Judkins, but their testimony would have been problematic because they were former felons who had close relationships with Miles and did not come forward at the time of the shooting.

He believed he should have objected to the testimony regarding Miles's nickname, but explained he only knew about Miles's nickname as "Cat Daddy" and did not expect the defense witness to testify on cross-examination that Miles's nickname was "O.G." for "Original Gangster" and this testimony came out too quickly for him to object. He believed he erred by failing to move to suppress the gun found at Miles's home and allowing Ashby to testify that Burney had identified Miles as the shooter.

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[1] It appears trial counsel was attempting to challenge the Commonwealth's theory that Miles had been thrown out of the bar, had been in a fight with Teasley earlier and then killed him to defend his honor by showing the weakness of the various links of identification used to establish he was the shooter, including the absence of his DNA on the shooter's hat. However, St. Claire would testify Miles was thrown out of the club and Miles would testify he did get in an earlier fight with Teasley outside the club, thus weakening the defense theory of mistaken identity.

Miles testified he consistently told his trial counsel he needed to testify but believed the decision was ultimately up to trial counsel, who laughed at Miles and told him "no" when Miles asked to testify. Trial counsel never informed him it was his right to decide whether or not to testify and during opening statement trial counsel told the jury he was the quarterback and if Miles didn't testify to blame him.

Miles testified about the events that gave rise to the charges against him, which he asserted would have established his innocence. He stated he was at the club that night but was not inebriated, was not using drugs and did not get thrown out of the club for using drugs. Instead, he left on his own around midnight. He talked to Teasley in the club parking lot. He had known Teasley since he was seventeen years old and, although they were not friends, they were on good terms. Miles testified that on the night of the shooting, they were talking and joking when Teasley, who was high on cocaine, took offense at Miles's comment that Teasley had been knocked out of a tough man contest. Teasley pushed Miles. Miles reactively hit Teasley, but realized it was a mistake because he did not want to fight and there was no one to break up the fight. They were fighting when Officer Hill intervened and separated them. Miles testified he was not angry at Teasley and told him "Man, it was a good fight, you won fair and square." He then left the parking lot and never returned. Miles testified Teasley's wife, Crystal, lied when she testified she saw the fight and heard him threaten Teasley because she was not present.

Miles also testified he could have explained his actions after the shooting that seemed suspicious. He

returned his rental car the day after the shooting because it was due back and he could have returned it the day before, had he been attempting to evade the police. He secured a new car at that time because his lease was up on the previous car.

Miles testified he told trial counsel about Lanier and Judkins, and informed him they had exculpatory evidence because they would testify he was wearing tan rather than black like the shooter, and saw the shooter run in a different direction than other witnesses indicated. He stated trial counsel told him he did not have time to interview them and never interviewed them. Trial counsel told him St. Claire offered favorable evidence at Miles's bond hearing and he would call her to testify at trial but did not call her.

Lanier testified he was friends with Miles and saw him at the club wearing tan or khaki clothes. He was outside the club when Teasley was shot, heard the gunshot, saw Teasley fall and saw someone running off who was dressed in black wearing a hoody. He could not see the shooter's face. He was on probation and not supposed to be at the club, so he did not report what he had seen.

The trial court determined Miles failed to establish ineffective assistance of counsel, making the following findings of fact and rulings of law: trial counsel made a strategic decision not to call St. Claire; trial counsel tried to contact Lanier and Judkins and failed but, even had he succeeded, Miles failed to show their testimony would have changed the outcome of the trial; Miles failed to inform the trial court he was prevented from testifying and the decision to not testify was strategic; use of Miles's nickname did not

prejudice his substantial rights considering the totality of the proof; Miles failed to establish any reason for the juror to be struck; and there was no error, individual or cumulative.

When an evidentiary hearing has been held pursuant to RCr 11.42, we review the trial court's findings of fact for abuse of discretion. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). The trial court is in the best position to judge the credibility of the witnesses and determine the weight to be given their testimony. *Id.* We may set aside the factual findings of the trial court only if they are clearly erroneous. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). Findings are clearly erroneous if they are not supported by substantial evidence. *Id.*

In order to be entitled to the extraordinary relief of RCr 11.42, Miles must establish he was deprived of his constitutional right to counsel. *Brown*, 253 S.W.3d at 500. Under *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), Miles must show his counsel's performance was incompetent and prejudiced him because it fell below an objective standard of reasonableness and there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Hatcher v. Commonwealth*, 310 S.W.3d 691, 696 (Ky.App. 2010).

Proving deficient performance and prejudice is a heavy burden, especially given the presumption that counsel's conduct was reasonable and effective. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 873 (Ky. 1998). "The focus of the inquiry must be on whether trial counsel's decision not to pursue evidence

or defenses was objectively reasonable under all the circumstances." *Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky.App. 2012). "[A] court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002).

We first discuss trial errors that trial counsel admitted resulted from his deficient performance in failing to object: the introduction of Miles's nickname and the Commonwealth's repeated references to it during its closing argument; the introduction of evidence about Miles's unrelated gun; and testimonial identification hearsay that violated the confrontation clause.

Miles argues trial counsel should have objected and requested an admonition or mistrial when the Commonwealth (1) elicited testimony from a defense witness on cross-examination that Miles's nickname was "O.G." for "Original Gangster" and (2) made repeated references to him as "Old Gangster" during its closing argument. Miles argues the Commonwealth had no need to elicit testimony as to this nickname or use it during its closing argument because the nickname was not being used to establish his identity.

Miles is essentially arguing a claim for prosecutorial misconduct that was not preserved for appeal due to trial counsel's failure to object to the use of his nickname. We note that while this error could have been raised on Miles's direct appeal under the

palpable error standard,[2] it is appropriate to raise it as an ineffective assistance of counsel claim. *Martin v. Commonwealth*, 207 S.W.3d 1, 4–5 (Ky. 2006).

Use of a nickname which suggests criminal activity may be prejudicial. See *Brown v. Commonwealth*, 558 S.W.2d 599, 603 (Ky. 1977). We agree with those courts which have held that it is error for the government to elicit testimony of a nickname strongly suggestive of a criminal disposition, where the nickname is not needed to establish identity, the defendant has not put his reputation into issue and the nickname has no reasonable relationship to the crimes charged. *United States v. Farmer*, 583 F.3d 131, 146 (2nd Cir. 2009); *United States v. Williams*, 739 F.2d 297, 299–300 (7th Cir. 1984); *Commonwealth v. Martin*, 442 Mass. 1002, 809 N.E.2d 536, 537–538 (2004); *State v. Paduani*, 307 N.J. Super. 134, 147, 704 A.2d 582, 589 (App. Div. 1998). Here, the Commonwealth had no legitimate purpose in eliciting Miles's nickname of "Original Gangster" or calling him "Old Gangster" in its closing argument.

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[2] Miles raised an unpreserved claim of prosecutorial misconduct in his direct appeal based on statements made during the Commonwealth's closing argument. The Kentucky Supreme Court determined prosecutorial misconduct took place as to the Commonwealth's statement in its closing argument that Miles was lying, because he was not a witness in the case. However, the Supreme Court "adjudge[d] that in this case such misconduct was neither flagrant nor of such an egregious nature to deny Miles his constitutional right to due process of law, especially given the absence of a contemporaneous objection to the comment." *Miles v. Commonwealth*, 2007-SC-000298-MR, 2009 WL 160435, 6 (Ky. 2009).

When considering whether trial counsel was ineffective for failing to object to improper questioning of a defense witness by the prosecutor, prejudice cannot result where "proof of the defendant's guilt was not such as to render the misconduct harmless" or "the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). In *Brown*, our Supreme Court determined a single inappropriate reference to the nickname "Killer" by a Commonwealth witness that was not directly elicited on direct examination was harmless because it was not necessarily pejorative, a strong admonition was given and the totality of the evidence supported the conviction, including Brown's confession. *Brown*, 558 S.W.2d at 603. Therefore, a single mention of Miles's nickname by a defense witness on cross-examination is not necessarily sufficient to show prejudice. When considered in isolation, the neutral question eliciting this answer does not establish flagrant misconduct or render the trial fundamentally unfair. Thus, trial counsel's failure to object, request an admonition[3] or move for a mistrial, does not establish prejudice.

The use by the prosecution of Miles's nickname during closing argument is more problematic. In closing argument, the prosecutor referred to Miles three times as "Old Gangster" and "Cat Daddy" to discuss Miles's motive for the murder to stigmatize

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[3] We note that once a nickname has been uttered, counsel may not want to draw attention to it by use of an admonition. Therefore, it may be appropriate trial strategy not to request an admonition to prevent attracting further attention to the nickname. *Charles v. Commonwealth*, 2006-SC-000185-MR, 2008 WL 2484958, 5 (Ky. 2008) (unpublished).

Miles as someone who had to protect his "gangster" reputation. The prosecutor's statements referencing the nickname were as follows:

> They're not going to kick him out, this is his club, this is "Cat Daddy," "Old Gangster." He gets back in, he is angry.
>
> . . . .
>
> He's known by "Cat Daddy" there, he's known by "Old Gangster." But that night was different. He was publically humiliated. His motive was revenge.
>
> . . . .
>
> Who dunnit? . . . It points to "Cat Daddy," it points to the "Old Gangster." He's sitting right there.

We have no difficulty in determining such use constituted prosecutorial misconduct.

We apply the *Strickland* standard to prosecutorial misconduct. Under this standard, Miles must demonstrate his trial counsel was deficient in failing to object to the prosecutorial misconduct during closing arguments, move for an admonition or request a mistrial and, but for that failure, there is a reasonable probability that the result of the trial would have been different. On direct appeal, "[r]eversal is proper only if the prosecutorial misconduct is so serious as to render the trial fundamentally unfair." *Parker v. Commonwealth*, 291 S.W.3d 647, 659 (Ky. 2009). A trial is fundamentally unfair "only when the misconduct is 'flagrant,' or when all of the following elements are satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense

counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 194 (Ky. 2013). In determining whether a prosecutor's misconduct was "flagrant," reviewing courts consider "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) (quoting *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994)).

We consider whether the prosecutorial misconduct that occurred was flagrant because the alternative test is inapplicable to an ineffective assistance of counsel claim. Accordingly, if the misconduct was flagrant and would be corrected had counsel made an appropriate objection, there is a reasonable probability that the result of the trial would have been different but for counsel's error.

In determining whether prosecutorial misconduct was flagrant in admitting a prejudicial nickname, it is useful to review cases in other jurisdictions that determined whether prosecutorial misconduct in using a prejudicial nickname warranted reversal. In the following cases, the defendant's conviction was reversed on direct appeal due to inappropriate use of a prejudicial nickname. In *Farmer*, 583 F.3d at 146–148, "prosecutors' frequently repeated, gratuitous invocation of Farmer's nickname ['Murder'] in their address to the jury . . . invited the jurors to infer that the defendant had earned the nickname among his gang colleagues as a result of his proclivity to commit

murder" for a crime lacking conclusive evidence. In *Martin*, 442 Mass at 1002, 809 N.E.2d at 538, "the repeated references to Martin's prior use of an alias before and during the Commonwealth's case-in-chief (compounded by further references in the Commonwealth's rebuttal case and closing argument) constituted a gratuitous, improper, and prejudicial attack on the defendant's character and credibility."

In the following ineffective assistance of counsel cases, prejudice was established based on trial counsel's failure to object to: the prosecution's repeated use of the nickname "Killer" and prosecutor's use of the nickname in summation to encourage the jury to consider the nickname as evidence that the defendant committed murder in *People v. Collier*, 114 A.D.3d 1136, 1137, 979 N.Y.S.2d 726, 728 (2014); testimony elicited on cross-examination of a defense witness that defendant's nickname was "Threat" and this nickname was used on summation to establish that "the jury should consider his nickname as evidence that he possessed the weapon at issue" in *People v. Webb*, 90 A.D.3d 1563, 1564–1565, 935 N.Y.S.2d 423, 424 (2011); and prosecutor's repeated references to defendant's nickname "Homicide" in *People v. Lauderdale*, 295 A.D.2d 539, 540–541, 746 N.Y.S.2d 163, 165–166 (2002).

The prosecutorial misconduct that took place during the closing argument was flagrant because the remarks tended to mislead the jury and prejudice Miles by inviting the jury to find him guilty based on protecting his gangster reputation, and while the remarks were somewhat isolated, they were deliberately placed before the jury and the evidence

against Miles was relatively weak.[4] We conclude trial counsel's failure to object to the Commonwealth's references to Miles as "Old Gangster" constituted ineffective assistance of counsel. We determine that this error, considered in conjunction with other errors, rendered the trial fundamentally unfair and reverse.

Cumulative error is sufficient to overturn a conviction where the individual errors are substantial

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[4] The evidence to support Miles's conviction required the jury to believe (1) the person who fled the scene of the shooting was in fact the shooter; (2) the witnesses had a sufficient view of that person to recognize that he was the same person earlier ejected through a particular door who fought Teasley; (3) the person who fought Teasley earlier was in fact Miles; (4) Miles was dressed in black like the shooter; and (5) the fight was a sufficient motive for Miles to shoot Teasley. Countering this evidence was uncertainty in every supposition and a real danger in misidentification because the identification of the assumed fleeing shooter took place at a distance, at night, and resulted in a description of the shooter wearing a toboggan hat. This description suggested another person may have been the shooter because the recovered toboggan hat did not contain Miles's DNA; the prosecution was left to argue that the hat identified with the shooter was in fact irrelevant and not associated with the shooter, but connect the black clothing with Miles. There was absolutely no physical evidence tying Miles to the crime. While the discovery of Miles's phone in the parking lot placed him in the area that evening, his presence at the club and in the parking lot earlier was undisputed, this area was used by all the club's patrons and did not establish that Miles had anything to do with the shooting. While Miles's exchange of the rental car appeared to be an attempt to cover up evidence or flee, nothing was recovered from the previous rental car to tie him to the crime. Additionally, witness testimony not presented at trial could have countered which door Miles was ejected from, establish he was wearing all tan, defuse a motive by discrediting eyewitness testimony as to who observed the fight and Miles's reaction to it, and provide an innocent explanation as to why Miles exchanged his rental car.

and bordering on prejudicial, none of them individually is sufficient to overturn a conviction, but when considered together they establish that the trial was fundamentally unfair. *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012).

Miles argues trial counsel was ineffective for allowing the introduction of evidence about his gun, which was excluded from being the murder weapon. Evidence relating to weapons not connected to the crime charged is inadmissible. *Harris v. Commonwealth*, 384 S.W.3d 117, 123–124 (Ky. 2012). However, in *Harris*, the Supreme Court held when it is made clear to the jury that the weapon admitted was not the murder weapon, its admission is harmless error. *Id*. at 125.

While we are obligated to follow *Harris*, we believe in certain circumstances use of an unrelated gun is not automatically harmless and can be prejudicial. *See United States v. Williams*, 585 F.3d 703, 709–710 (2nd Cir. 2009). Here, even though the jury was repeatedly informed the gun was unrelated to the murder, the prosecutor's deliberate elicitation of testimony about this gun, in conjunction with other inadmissible evidence about Miles's nickname, was used to paint him as a criminal and could allow a conviction based upon a gun-wielding-gangster reputation, rather than based on the evidence relating to the crimes charged. Therefore, trial counsel's failure to bring a motion in limine to exclude mention of the gun was prejudicial when considered in conjunction with other errors.

Miles argues trial counsel erred by allowing testimonial identification hearsay that violated the confrontation clause. It is undisputed trial counsel

failed to object to Officer Ashby's testimony that Burney picked Miles out of a photopack as being in a fight with Teasley earlier and, if trial counsel had properly objected to this testimony, it would have been excluded as inadmissible hearsay and violating the confrontation clause. Kentucky Rules of Evidence (KRE) 801A(a); KRE 804(a); *Flatt v. Commonwealth*, 468 S.W.2d 793, 794–795 (Ky. 1971). Although other eyewitness testimony also identified Miles as being in a fight with Teasley earlier, this violation was not harmless when considered in conjunction with previous errors to improperly strengthen the case against him. Cumulative error made the trial fundamentally unfair.

Having concluded that these errors cumulatively require reversal, we briefly address Miles's other claims of ineffective assistance of counsel: failing to call St. Claire, Lanier, Judkins and Miles as witnesses; denying Miles the right to testify; and failing to strike a biased juror.

The decision whether to call certain witnesses is presumed to be deliberate trial strategy and will not be second-guessed. *Saylor v. Commonwealth*, 357 S.W.3d 567, 571 (Ky.App. 2012). The evidence submitted at the evidentiary hearing supports the trial court's finding that trial counsel did not call St. Claire and Miles as witnesses as a matter of trial strategy because their testimony was not in accordance with the defense strategy being pursued. The evidence also supports the trial court's finding that trial counsel made a reasonable effort to locate Lanier and Judkins, and did not call them to testify because they could not be located.

Miles failed to establish he received ineffective assistance of counsel by being denied his constitutional right to testify where there is no evidence in the record to show he did not waive his right to testify and trial counsel failed to respect his right to testify. *Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009). "[The defendant's] present allegations that he wanted to testify and was prevented from doing so do not suffice to overcome the presumption that he assented to the tactical decision that he not testify." *Id*. *See Kinder v. Commonwealth*, 269 S.W.2d 212, 214 (Ky. 1954).

Miles argues the trial court erred by denying his request to call a juror to testify at his RCr 11.42 hearing to determine whether she should have been excluded from the jury on the basis of bias, and trial counsel erred by failing to inquire further into her possible bias and striking her from the jury. The record established the juror approached the trial court to inform it she knew one of the police officers involved in the case and had spoken to him. As a result, the trial court allowed the parties to question her regarding possible bias. When the Commonwealth told the juror the officer would not be testifying in the case, the juror was satisfied she could serve and trial counsel did not inquire further.

Under these facts, Miles fails to establish any prejudice from counsel's failure to inquire further because there is no constitution prohibition against a juror's knowing the parties involved, being acquainted with a testifying officer, being related to a prosecuting witness or having advanced knowledge of the case, so long as a juror can remain impartial. *See Hodge v. Commonwealth*, 17 S.W.3d 824, 838 (Ky. 2000);

Sanders v. Commonwealth, 801 S.W.2d 665, 670 (Ky. 1990); *Dupin v. Commonwealth*, 404 S.W.2d 280, 281 (Ky. 1966).

Accordingly, we reverse and remand the Jefferson Circuit Court's order denying Miles's motion for RCr 11.42 relief based on cumulative error.

ALL CONCUR.

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APPENDIX H

RENDERED: JANUARY 22, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky
2007-SC-000298-MR

FINAL
DATE 4/3/09 Kelly Klaber

TERRANCE MILES — APPELLANT

ON APPEAL FROM
JEFFERSONCIRCUIT COURT
V. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
No. 05-CR-000740

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT
AFFIRMING

This is an appeal from a judgment convicting Appellant of murder, wanton endangerment, tampering with physical evidence, and being a persistent felony offender in the second degree (PFO II) stemming from the shooting death of a bouncer outside a Louisville nightclub. Appellant argues that he was denied a speedy trial, that there was misleading and false testimony presented to the grand jury, that defense counsel's cross-examination of a jailhouse witness was improperly limited, and that

a number of unpreserved errors cumulatively amounted to palpable error. Upon review of the record, we adjudge that the claimed errors were either not error or did not rise the level of reversible or palpable error. Thus, we affirm.

On the night of February 27, 2005, Michael Teasley, a bouncer at Club 502, was shot and killed outside the club as he attempted to clear the parking lot after the club had closed. Earlier that same evening, after another bouncer had removed Terrance Miles from the club for smoking marijuana, Miles and Teasley got into a fight. Teasley's wife, Crystal, who also worked at the club, testified that after the fight, Miles grinned and said to her husband, "you might have whipped my ass, but I'm going to get you."

Officer Frank Hill of the Louisville Metro Police Department, who was working extra security for the club while off duty, observed the fight between Teasley and Miles. While Hill did not witness the actual shooting, he heard the gunshots and then looked in the direction of the gunshots and saw a male running across the parking lot dressed in all dark clothing and wearing a toboggan hat. Officer Hill testified that the man he observed running across the parking lot was the same man who had been fighting with Teasley earlier in the night. Hill gave chase in his patrol car with the assistance of another bouncer and at one point located the suspect behind a dumpster in back of the club. However, Hill eventually lost sight of the suspect.

A number of items were collected from the crime scene, including a black toboggan hat and a cell phone. The number of the cell phone matched the number

Miles gave to Enterprise Rent-a-Car when he switched his rental vehicle the day after the murder. The hat was ultimately sent by the Commonwealth to the Kentucky State Police forensic lab for DNA testing to see if trace evidence on the hat matched Miles' DNA. The results of the testing were ultimately determined to be negative for Miles' DNA.

On March 5, 2005, Miles was indicted for the murder of Teasley, as well as other charges related to the shooting. After a series of continuances related to the testing of the toboggan hat, a jury trial was held on December 12, 2006. The jury found Miles guilty of murder, first-degree wanton endangerment, tampering with physical evidence and PFO II, and recommended a sentence of fifty (50) years in prison. From the amended judgment of April 5, 2007, accepting the jury's recommendations, Miles now appeals as a matter of right.

SPEEDY TRIAL

Miles alleges that the twenty-one (21) month time period between his indictment and trial violated his Sixth Amendment right to a speedy trial. During the twenty-one (21) month period, the Commonwealth requested and was granted three continuances. The stated reason for each motion for continuance was that they were awaiting the DNA test results on the black toboggan hat. The hat was sent to the lab for testing on November 7, 2005.

On November 25, 2005, Miles pro se asserted his right to speedy trial in a letter to the court, which was followed by a formal motion for speedy trial, filed on December 13, 2005 by defense counsel. However, defense counsel stated no objection to the continuance

at the December 5, 2005 hearing prior to the first proposed trial date, wherein the prosecutor maintained that the hat was a vital piece of evidence which could prove to be either inculpatory or exculpatory.

At a subsequent pre-trial hearing on March 3, 2006, the prosecution informed the court that when he called to check on the progress of the DNA testing on the hat, he was told that the lab had not even started testing the hat. During this hearing, Miles' counsel agreed that the toboggan hat was a "crucial piece of evidence" in the case. At the April 11 and September 26, 2006 hearings, however, Miles' counsel objected to the unnecessary delay in the case and announced ready for trial even though testing was not complete on the hat.

A defendant's right to a speedy trial under both the United States and Kentucky Constitution is analyzed under the four-prong balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001). The four factors to be considered are: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of his right to a speedy trial; and 4) prejudice to the defendant. *Barker*, 407 U.S. at 530.

Regarding the first factor, we deem the twenty-one (21) month delay in this case to be presumptively prejudicial. *See Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004) (holding an eighteen (18) month delay in a murder case to be presumptively prejudicial). "That prejudice, however, is not alone dispositive and must be balanced against the other

factors." *Parker v. Commonwealth*, 241 S.W.3d 805, 812 (Ky. 2007) (citation omitted).

As for reason for the delay, the Commonwealth argued that the toboggan hat was vital evidence in the case and that they could not go forward with the trial without the DNA testing being completed. Nevertheless, after the testing came back negative, the Commonwealth still proceeded with the trial and obtained a conviction against Miles. In fact, at trial the prosecutor elicited testimony from the lead investigator on the case, Detective Chris Ashby, that the hat had no relevance in the case and argued such in his closing argument. Miles asserts that this demonstrates that the testing on the hat was not a legitimate reason for the delay in this case and that the prosecutor intentionally misled the court as to the importance of the hat to the case.

The black toboggan hat in question was found and collected by the police as potential evidence at the scene. Officer Hill and two other witnesses testified at trial that the man who shot Teasley was wearing a toboggan hat. Simply because the testing came back negative on the hat and the prosecution subsequently argued at trial that the hat was not significant to the case, does not mean that the Commonwealth acted in bad faith in seeking DNA testing on the hat. After the hat tested negative for Miles' DNA, the Commonwealth had no choice but to minimize the evidentiary value of the hat at trial. In reviewing the record, there is no indication that the Commonwealth acted in bad faith. At the pre-trial hearings wherein the status of the testing on the hat was discussed, the prosecutor reported that he was regularly calling the lab to inquire about the status of the testing. Defense

counsel admitted that the hat was crucial evidence and stated no objection to having the hat tested, although he sought to have their own expert present for testing.

Miles did assert his right to a speedy trial, both pro se and through counsel. However, as noted above, defense counsel did not initially object to the motions for continuance based on the testing of the hat not being completed.

As for prejudice to Miles as a result of the delay, Miles alleges that he lost a key witness for trial, Steven Edwards, who died on June 25, 2006 in a motorcycle accident. Upon review of the record, the only references to Edwards were in a March 2007 motion to dismiss indictment for speedy trial violation and as an alias for Miles. According to the record, no subpoenas were issued for Edwards' appearance at either of the two trial dates prior to Edwards' death. Further, Miles does not allege what Edwards' testimony would have been and why he was so crucial to his case.

Finally, although Miles was convicted, the negative test results on the hat were favorable to Miles' case at trial. The negative DNA results on the hat were a large part of Miles' defense and were repeatedly referred to by defense counsel at trial as proof that Miles was not the shooter.

Upon consideration of all of the above factors in *Barker*, we adjudge that Miles was not denied his right to a speedy trial in this case.

With respect to Miles' claim that his right to a speedy trial under KRS 500.110 was violated, it has been held that said statute only applies when a

defendant is incarcerated for one offense and a detainer has been lodged against him for another offense. *Gabow v. Commonwealth*, 34 S.W.3d 63 (Ky. 2000) *overruled in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 60–61 (2004). From our review of the record, no detainer was lodged against Miles in this case. Hence, KRS 500.110 is not implicated here.

GRAND JURY TESTIMONY

Miles argues that the Commonwealth's witness Sergeant Teddy Laun presented false and misleading testimony to the grand jury when he testified that Officer Hill and Reggie Burney had witnessed the shooting of Teasley. The grand jury testimony is not in the record before us. However, in Miles' motion to dismiss the indictment for misleading the grand jury, Miles refers to the following testimony of Sergeant Laun before the grand jury: "We prepared a photo pack which was shown to two of the witnesses, um, they were at the scene of the altercation and at the scene of the shooting." At trial, Officer Hill's testimony was that, while he did not see the actual shooting, he was nearby and saw the defendant running from the scene. Burney did not testify at trial. We do not see that said Hill's testimony and the evidence adduced at trial was in conflict with the purported grand jury testimony of Sergeant Laun. The grand jury testimony was that Hill and Burney were *at the scene* of the altercation and shooting and were able to identify the defendant, not that they actually saw the shooting. Accordingly, this argument is without merit.

CROSS-EXAMINATION OF BRYCE BONNER

Prior to trial, the Commonwealth made a motion in limine to limit the cross-examination of its jailhouse witness, Bryce Bonner, regarding the nature of his conviction and whether he sought a deal from the prosecutor in exchange for his testimony in this case. The Commonwealth argued that because Bonner had already been convicted and sentenced as of the time of Miles' trial and did not receive a deal or in any way benefit from testifying for the Commonwealth, any potential bias would have been eliminated. The Commonwealth maintained, therefore, that the defense should not be able to inquire into whether Bonner sought a deal in exchange for his testimony. Defense counsel argued that Bonner's initial motive in approaching the Commonwealth and seeking a deal in exchange for his testimony was relevant and could be inquired into by the defense. The court granted the Commonwealth's motion and ruled that the defense could not ask Bonner if he had initially sought a deal from the Commonwealth in exchange for his testimony. Miles argues that his Sixth Amendment right to cross-examine witnesses was violated when the trial court would not allow this evidence of Bonner's bias to be admitted.

> An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 937 (1965). Additionally, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39

> L.Ed.2d 347, 354 (1974). However, it is equally well established that the right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject: "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986) (emphasis in original). . . . In defining reasonable limitations on cross-examination, this Court has cautioned: "a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

Davenport v. Commonwealth, 177 S.W.3d 763, 767–68 (Ky. 2005).

As for limitations on cross-examination on a witness' bias, "this Court has explained: 'So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.'" *Id.* at 768 (quoting *Commonwealth v. Maddox*, 955 S.W.2d at 721). The test espoused by the *Van Arsdall* Court was whether a "reasonable jury might have received a *significantly* different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." 475 U.S. at 680.

A trial court's rulings concerning limits on cross-examination are reviewed for abuse of discretion.

Nunn v. Commonwealth, 896 S.W.2d 911, 914 (Ky.1995). In *Davenport*, we adjudged that the trial court did not abuse its discretion in prohibiting the defense from cross-examining the witness about his probation status or his pending misdemeanor charges where the Commonwealth had made no offer of leniency in exchange for the witness' testimony. 177 S.W.3d at 771. Likewise, in the instant case, Bonner had not been offered a deal for his testimony and had already been convicted and sentenced as of Miles' trial. He admitted to being a convicted felon at trial. Thus, at the time of Miles' trial, Bonner had nothing to gain in testifying against Miles, which presumably explains why he ended up being a hostile witness for the Commonwealth and his testimony was not helpful to the Commonwealth. Apparently Bonner recanted at trial, denying that he previously stated to the prosecutor that Miles' demeanor was arrogant when Miles told Bonner that he could not be convicted. Bonner testified only that Miles told him the Commonwealth did not have the evidence to convict him and that he was angry because he was being accused of crimes he did not commit.

From our review of Bonner's testimony, we do not see that the jury would have received a significantly different impression of Bonner had they heard evidence that he sought a deal with the Commonwealth in exchange for testimony against Miles. The jury knew that Bonner was a convicted felon and was in jail at the time he had the conversation at issue with Miles. And even if there was error, the defense was not prejudiced by Bonner's testimony. Thus, it would have been harmless error. RCr 9.24.

CUMULATIVE EFFECT OF UNPRESERVED ERRORS

Miles argues that the aggregate of several other errors, which were admittedly unpreserved, constituted palpable error under RCr 10.26. A reviewing court may grant relief of an unpreserved error only when manifest injustice has resulted from the error. RCr 10.26. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisdictionally intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). Upon review of the entire record, we cannot say that the alleged errors below, either alone or cumulatively, rise to the level of palpable error.

Miles first assigns as error the improper questioning of Bonner by the prosecutor on direct when he asked him if he remembered the conversation he had with him the previous day, thereby placing the prosecutor's credibility before the jury. As discussed earlier, the testimony of Bonner was not harmful to Miles' case. If anything, it was helpful to the defense. Accordingly, the error, if any, could not constitute palpable error.

Miles next alleges prosecutorial misconduct when the Commonwealth made comments during its closing argument that the defendant and defense witnesses were lying. Responding to the accusation in the defense closing argument that the Commonwealth's witness, Crystal Teasley was lying, the prosecutor argued that Miles and his two witnesses were lying. In so doing, the prosecution pointed to the inconsistencies between the defense testimony and

defense theory of the case and the established facts in the case. However, Miles did not testify in the case. According to the Sixth Circuit:

> If a defendant testifies as here, a prosecutor may attack his credibility to the same extent as any other witness. *See Raffel v. United States*, 271 U.S. 494, 497, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), *see also Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 44 L.Ed. 1078 (1900). This Court has held that a prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony. *See United States v. Veal*, 23 F.3d 985, 989 (6th Cir.1994). To avoid impropriety, however, such comments must "reflect reasonable inferences from the evidence adduced at trial." *See id.* (quoting *United States v. Goodapple*, 958 F.2d 1402, 1409–10 (7th Cir.1992)). Again, misconduct occurs when a jury could reasonably believe that the prosecutor was, instead, expressing a personal opinion as to the witness's credibility. *Taylor*, 985 F.2d at 846 (citing *United States v. Causey*, 834 F.2d 1277, 1283 (6th Cir.1987), *cert. denied*, 486 U.S. 1034, 108 S.Ct. 2019, 100 L.Ed.2d 606 (1988)).

United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999).

As for the prosecution's assertion in closing argument that the defense witnesses were lying, because the prosecution backed up such claims with specific discrepancies between their testimony and the evidence, there was no prosecutorial misconduct. As

to the prosecution's argument that the defendant was lying, because Miles was not a witness in the case, the comment amounted to prosecutorial misconduct. Nevertheless, we adjudge that in this case such misconduct was neither flagrant nor of such an egregious nature to deny Miles his constitutional right to due process of law, especially given the absence of a contemporaneous objection to the comment. *See Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (following the Sixth Circuit Court of Appeals in *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994) and *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)) and *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411–412 (Ky. 1987). In light of the overwhelming evidence adduced against Miles in this case, we likewise cannot say that manifest injustice resulted from said error. Hence, there was no palpable error.

Miles also assigns as palpable error the prosecution's leading of its witnesses, Detective Ashby and Bryce Bonner, in violation of KRE 611. As noted above, Bryce Bonner turned out to be a hostile witness for the Commonwealth. Leading questions of a hostile witness are expressly permitted by KRE 611(c). And the question asked of Detective Ashby regarding the testing of the toboggan hat, if leading at all, would not amount to palpable error.

The last three alleged palpable errors are summarily raised in Appellant's brief without any citation to the record, citation to authority, and without any explanation as to why they constitute error. *See* CR 76.12(4)(c)(v). Those arguments were not properly presented to this Court and thus will not be addressed.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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APPENDIX I

No. 19-5340

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 19, 2021
DEBORAH S. HUNT,
Clerk

TERRANCE MILES, Petitioner - Applellant, v. SCOTT JORDAN, WARDEN, Respondent-Appellee.	)	O R D E R

BEFORE: COOK, GRIFFIN, and LARSEN, Circuit Judges.

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

* Judges Readler and Murphy recused themselves from participation in this ruling.

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX J

IN RE:

COMMONWEALTH OF KENTUCKY
VS.
TERRANCE E. MILES
_____/

TRANSCRIPTION OF AUDIO
RECORDED PROCEEDINGS
PRETRIAL PROCEEDING

December 5, 2005

Transcribed by:
Melissa Iadimarco
Court Reporter/Transcriptionist

P R O C E E D I N G S

THE COURT: Thank you. All right. I've been handed and I know you filed this Friday, but it certainly hadn't made it up through the channels. Two motions to prevent in court ID of Mr. miles and these were I believe filed on Friday. Mr. Davis, you had these?

MR. DAVIS: Judge, these were in my chair when I showed up Monday morning. So whoever received them in our office—

THE COURT: Okay.

MR. DAVIS: —put them in my chair. I may have left a half hour early on Friday or something. I have an officer here I can put on. The very best witness for this hearing is probably the two individuals that actually made the photo pack identifications. And I don't have a problem with putting them on as witnesses, but I didn't know to subpoena them for today, I didn't know what the entire subject matter of the suppressed motion was going to be. And that having been said, there is—there are two items in evidence. One is very substantial, that are not back from the lab yet. I know we're actually scheduled for a trial next week.

THE COURT: Next week.

MR. DAVIS: And Mr. Olash and I had talked about this.

THE COURT: What's that about?

MR. DAVIS: A toboggan found at the scene that the Commonwealth at this point will allege that the

defendant or the shooter was wearing at the time of the shooting. And that toboggan is still at the lab being tested for fibers and hairs. There are no results back yet. I was waiting to see if it was back by now. And even now, even if we had it today, it might be too short of notice for the defense. But we do not have it today. And so it will be our motion for a continuance. It's going to be final evidence, either inculpatory or exculpatory one way or the other. And they've had it for a number of months now. So it should be progressing its way.

THE COURT: You don't know whether it's actually been tested, as we speak?

MR. DAVIS: I do not.

THE COURT: All right. And what else is new?

MR. DAVIS: Ballistics, the gun that was recovered and sent off, we don't have the results on that either.

THE COURT: And you're aware of this, I'm sure?

MR. OLASH: We've had a number of discussions

since the last time we were in the Court.

MR. DAVIS: We've spoken on the phone.

MR. OLASH: I expected this because of the—the normal course of getting evidence back from the lab. It generally requires additional time. But in regard—last time we were here, Your Honor, I advised the Court that I was going to challenge the identification—

THE COURT: Right.

MR. OLASH: —of Mr. Bernie. And in all respect to the Commonwealth, I didn't realize at the time that I

was going to challenge Mr. Bernie's identification. So they didn't have any notice that that was going to be an issue until I filed this late last week. So Mr. Bernie, of course, is not here because the Commonwealth did have an opportunity to secure his appearance.

THE COURT: We have who else? Hill?

MR. DAVIS: Yes, ma'am, Frank Hill, Reggie Bernie.

THE COURT: Is Hill available?

MR. DAVIS: Not today, no, ma'am.

THE COURT: You could put on who?

MR. DAVIS: I could put on my officer, Sergeant Teddy Lawn (phonetic), if you want us to do that. I

will probably not put her on at all if I had the other two witnesses here.

THE COURT: I'm going to end up hearing from the other two, I mean, whether it's morning of trial or whenever. So, first up is to get the labs back. Worst case scenario, your two witnesses will be here on trial date, right.

MR. DAVIS: They should be, yes.

THE COURT: And it's next week.

MR. DAVIS: That's fine.

THE COURT: And if you wish to put this officer on, you may but if you're going to not call her because you're going to call the other two, you might as well not because we're going to hear from the other two next week.

MR. DAVIS: Right. And that's what I plan to do.

THE COURT: Okay. Back here for trial December 13th. Assuming your evidence is back, we'll get a late start on actually starting the trial.

MR. DAVIS: Thank you, Judge.

THE DEFENDANT: Excuse me, Your Honor. They had the—

MR. OLASH: Wait, wait.

THE DEFENDANT: They had the toboggan since February.

Page 6

THE COURT: It's the last—

THE DEFENDANT: It's a stall tactic. I would like to have somebody present.

THE COURT: The labs got it.

THE DEFENDANT: I want to have someone present when it's tested. According to McGregor versus Harris (phonetic) I can do that.

THE COURT: Sir, make your motion.

THE DEFENDANT: I want a motion to see—

THE COURT: Make your motion.

THE DEFENDANT: —the affidavit, to how—how the toboggan is being tested.

THE COURT: Mr. Collins (phonetic), Mr. Salinski (phonetic), I know you're here.

(This section of audio concludes.)

C E R T I F I C A T E

I, MELISSA IADIMARCO, do hereby certify that I was authorized to transcribe the foregoing recorded proceeding, and that the transcript is a true and accurate transcription of my shorthand notes to the best of my ability taken while listening to the provided recording.

Dated this 6th day of April, 2020.

s/Melissa Iadimarco
MELISSA IADIMARCO, CSR

APPENDIX K

IN RE:

COMMONWEALTH OF KENTUCKY
VS.
TERRANCE E. MILES
_____/

TRANSCRIPTION OF AUDIO
RECORDED PROCEEDINGS
PRETRIAL PROCEEDING

December 13, 2005

Transcribed by:
Melissa Iadimarco
Court Reporter/Transcriptionist

P R O C E E D I N G S

THE COURT: Commonwealth versus Terrance Miles. Olash and Davis both present. The matter was scheduled for trial today. I understand there's still—we still don't have DNA on the toboggan?

MR. OLASH: Right.

THE COURT: Still no results?

MR. DAVIS: That's correct, Your Honor.

THE COURT: Counsel, can you go forward without it?

MR. DAVIS: We cannot, Your Honor. We are not prepared to go forward without the DNA test results of that toboggan. Quite honestly, could help both sides. It could be exculpatory. It could be inculpatory. I have—I guess it could be nothing or it could be inculpatory. In any case, the Commonwealth moves for a continuance at this point to wait the results of that test.

I received a pro se motion from the defendant on that issue. And I don't know if the Court wants to address that motion or how we want to do that.

THE COURT: I don't know if I have that.

MR. OLASH: Defense remands any pro se motions.

THE COURT: Is that correct, Mr. Miles?

MR. MILES: Yes, ma 'am.

THE COURT: Well, it could be exculpatory, but we wouldn't know what the results are going to be. I'm looking at April 11th is the next realistic trial date.

MR. OLASH: I'm free all of April.

MR. DAVIS: The 11th is fine, Your Honor.

THE COURT: 4/11 at 9:30. Counsel, do you believe you're going to need any hearing dates between now and then?

MR. OLASH: Yes. May I approach?

THE COURT: You may.

MR. OLASH: Just for the record, I'm filing a motion for a speedy trial.

THE COURT: Okay. All right. I got you. 12/13.

MR. OLASH: Cross file a motion to dismiss the indictment, based on misleading grand jury testimony. And I would ask the Court to—it's my suggestion if we could get a pretrial date—

THE COURT: I'll do that. And I'll—

MR. OLASH: So we can have a hearing on that.

THE COURT: I'll hear this. I'll hear any other motions that are pending. That way, if something comes up, you can notice it for that day, so—

MR. DAVIS: Your Honor, I apologize for interrupting—were you saying something else? I'm

sorry. We still have some (inaudible) issues.

THE COURT: I can give two 30 minutes, as opposed to one full hour.

MR. DAVIS: Okay.

THE COURT: We'll probably go in February.

MR. OLASH: That's fine.

THE COURT: I'll give you an hour on February 17th at 8:30. All right. February 17th at 8:30 is a full hour.

MR. OLASH: That's fine.

THE COURT: 2/17. Mr. Davis, that works?

MR. DAVIS: It does. I have a sentencing next-door at 9:00, but I could have somebody cover that.

THE COURT: All right. 8:30 on 2/17 for an hour. Again, any motions that do come up between now and then, notice them for that day. And we'll see you then.

MR. DAVIS: Thank you, Judge.

MR. OLASH: Thank you, Judge.

MR. DAVIS: Your Honor, I'm sorry. Before we let that go, I just want to make sure the record—

THE COURT: Wait a minute.

MR. DAVIS: I just want to make sure the record is clear. Mr. Olash has been asking for a 502, a

videotape from the Club 502. And we have that tape. We have a backup in the tape copying center. It's there. It's been there for a while. As soon as it's ready, I'm going to give that copy to Mr. Olash.

THE COURT: Get that to him. Okay.

MR. OLASH: And Mr. Davis has also advised me that he's had contact with Officer Frank Hill. And Frank Hill has told him that that there is no in-car video. And Mr. Davis is going to file a written response, so we can put it in the record that there was no in-car video that was recorded at the time or near the time of the shooting.

MR. DAVIS: I got that through second-hand information, not directly from Mr. Hill. So I do still need to talk to Mr. Hill. I think that's the case.

THE COURT: Okay. Well, either way, do it in writing.

MR. DAVIS: I will.

MR. OLASH: Finally, the prosecution is also going to provide the medical examiner's report this week.

MR. DAVIS: I have that.

THE COURT: Okay. Okay. Thank you, all.

(This section of audio concludes.)

C E R T I F I C A T E

I, MELISSA IADIMARCO, do hereby certify that I was authorized to transcribe the foregoing recorded proceeding, and that the transcript is a true and accurate transcription of my shorthand notes to the best of my ability taken while listening to the provided recording.

Dated this 6th day of April, 2020.

s/Melissa Iadimarco
MELISSA IADIMARCO, CSR

APPENDIX L

IN RE:

COMMONWEALTH OF KENTUCKY
VS.
TERRANCE E. MILES
_____/

TRANSCRIPTION OF AUDIO
RECORDED PROCEEDINGS
PRETRIAL PROCEEDING

April 11, 2006

Transcribed by:
Melissa Iadimarco

P R O C E E D I N G S

THE COURT: I'm looking for an August or September date. I'm going to. So just be ready when I ask you, for Miles. Is Miles in the courtroom?

MR. OLASH: Yes.

THE COURT: Olash and Davis present. Thank you. Scheduled for trial today and we had the bad premonition that we wouldn't be able to because of the testing that's not been finished. Am I—

MR. DAVIS: That's correct.

THE COURT: Am I correct.

MR. DAVIS: And I still haven't heard back from them.

THE COURT: Okay.

MR. DAVIS: I intended to call this morning when I got in, but I got swamped by phone calls as soon as I walked in and didn't get a chance to. But as of Wednesday of last week, it was (inaudible).

THE COURT: And you've received nothing?

MR. DAVIS: Right.

THE COURT: And Mr. Olash, you were aware of that? Mr. Miles, you're aware of that.

MR. OLASH: Yes, for the record I represent Mr. Miles, who is present. I believe (inaudible) be noted. We also (inaudible).

MR. DAVIS: Your Honor, I am fully aware of that. Obviously with the crucial evidence—it could be crucial evidence to either side.

THE COURT: Well, you know, that's why I was concerned with it, because it could be exculpatory. And I'm sure that's the hope of the defense, that it is. If we try this case now and it's comes back exculpatory, you know, you would have waived the right to use that evidence. So it's a gamble both ways. So I mean, I'm ready to go forward today if you all want to. But you won't have that evidence and you won't be able to use that evidence if there is a conviction in this case for any, you know, future proceedings. So—

MR. DAVIS: Your Honor, we're not (inaudible) the evidence for the record. I certainly respect the Court's readiness to go (inaudible). We feel like we need this evidence in our case. We feel like it's (inaudible) major way that it is our—a motion to for a continuance based on the outstanding potential DNA evidence, whether it be exculpatory or inculpatory.

THE COURT: Any comments, Mr. Olash?

MR. OLASH: Your honor, the defense is ready to go forward. My client's been in custody (inaudible)

tested since about a week after Mr. Teasley was killed. It's been over a year this case has been pending. There hasn't been any demonstration by the prosecutor to show why the delay occurred. I do know the record reflects (inaudible) sent to the lab. It was early November of 2005. So there's been some unnecessary delay (inaudible) and now that (inaudible). So the defense is ready to go forward. There is a speedy trial motion pending. My client would like to have his day in court (inaudible).

MR. DAVIS: Just a brief response, Your Honor. I don't think it went to the wrong lab. I just think it was

the process that this DNA had to go through. (Inaudible) backed up and then (inaudible) I don't think there was a mistake on where it was sent—

THE COURT: Just a channel of the type of evidence in the—

MR. DAVIS: Yes, ma'am. And I would also bring to the Court that Mr. Miles is serving a sentence I think it's a ten-year (inaudible).

THE COURT: He is.

MR. DAVIS: Terms that we might have (inaudible) custody for someone alleviated by that.

THE COURT: Motion's granted. We'll get a new trial date. Please stay on this lab as best as

everybody can to get these results, but we're ready to go. What's the date?

THE CLERK: June 26th.

MR. OLASH: That's fine.

MR. DAVIS: That's fine.

MR. OLASH: Your Honor, I have a few other motions.

THE COURT: Sure.

MR. OLASH: May I approach?

THE COURT: You may.

MR. OLASH: If the court may continue this (inaudible) Mr. Miles is in custody and if the Court released him on this charge, that would effect the fact that he still remains in custody. It does effect his ability to move in the prison and take advantage of rehabilitative opportunities. So he's on lockdown

much—and he's serving time in a much more restrictive way than he would, had this murder would not be pending or not have a bond notice. So I would request the Court give us 30 minutes for hearing.

THE COURT: I'll be happy to do that. Nona? May 25th at 9:00. 5/25, 9:00.

MR. OLASH: For the record, Mr. Miles is going to waive the appearance (inaudible) he does not want to be here. (Inaudible)

THE COURT: On May 25th, you don't wish to be here?

MR. MILES: No, ma'am.

THE COURT: Okay. Make sure you supply Mr. Olash with all the necessary documentation that he'll present on your behalf then. So that it's in the record. So that sheet shouldn't say—I don't want him back here on that date. All right. Mr. Olash?

MR. OLASH: The prosecution has indicated the toboggan has not been tested. And as the Court has stated and the defense agrees—I think we're all in agreement that this is crucial part of the case. The results are going to favor one side or the other. And it could be the determining factor as far as how this case is resolved. Under the holding of McGregor versus Heinz, I'll provide (inaudible) the Court and prosecution in this case number, Cite No. 99 (inaudible) the defense has a right to be present at the time of the testing. And the defendant has a right to have notice of it or have his attorney of agent present at the time of the testing. And I would ask the Court to sign an order that I would provide (inaudible)

prosecution to provide me notice and the opportunity to be present or have an agent present—

THE COURT: Mr. Davis?

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MR. DAVIS: Your Honor, I haven't seen this motion. If that is in fact, like he says, then we're going to be waiting until we get notice from them that they have someone that can go to Frankfort and they will have to comply with that person's schedule to go back to Frankfort before the testing can even begin. So we're talking about more delays. And I would like to take a look at this McGregor v. Heinz case before I—(Inaudible).

THE COURT: Well this is—because we don't even know when they are going to test it. So—

MR. DAVIS: Right, they could have already started.

THE COURT: Do you have that motion in writing?

MR. OLASH: I can get it over to you today—

THE COURT: Can you get it over here today? Give us that cite on that case for Mr. Davis. I can submit on that. You can file a response. I want to get that resolved quickly. I mean if it's being tested now, we're just going through motions for no reasons.

MR. OLASH: I don't expect there is going to be any issue. I think this is a clear case. I think—

THE COURT: All right. If you'll get it over. Mr. Davis, if you can respond—I can either submit or try to squeeze you all in here sometime this week.

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Thursday, I think.

MR. DAVIS: Judge, if I can have a day to respond to his motion and I'll respond by tomorrow—

THE COURT: Do you want to submit or—

MR. DAVIS: Two days is fine. This is not a big deal to me, other than—

THE COURT: Well, logistically it will be if I grant it. And then we've got to coordinate whoever you're designating to be present with them. I mean—all right. So as soon as I get that, I'll look at it and rule on it. All right. Thank you all. We'll see you—other than Mr. Miles, we'll see you May 25th.

MR. DAVIS: Thank you , Judge.

THE COURT: May 25th, it is. All right.

(This section of audio concludes.)

C E R T I F I C A T E

I, MELISSA IADIMARCO, do hereby certify that I was authorized to transcribe the foregoing recorded proceeding, and that the transcript is a true and accurate transcription of my shorthand notes to the best of my ability taken while listening to the provided recording.

Dated this 11th day of May, 2020.

_____

MELISSA IADIMARCO, CSR

* * *

APPENDIX M

IN RE:

COMMONWEALTH OF KENTUCKY
VS.
TERRANCE E. MILES
_____/

TRANSCRIPTION OF AUDIO
RECORDED PROCEEDINGS
JURY TRIAL

Transcribed by:
Melissa Iadimarco

* * *

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diabetic or has any medical needs, where you need to munch on something? If you do, let me know. If you have a back problem, knee problem, you have to stand, you can do that as well. And if you need to break for a restroom break or make a call before I do, because sometimes I do just go on, raise your hand. We'll do that. So it's not going to be a problem.

I do want to swear you in as the jury in this case. If you'd all raise your right hands. Do each of you solemnly swear or affirm you will impartially try the case between the Commonwealth of Kentucky and Terrance Miles and render a true verdict according to the evidence and the law, unless sooner dismissed by the Court?

THE PANEL: Yes.

THE COURT: All right. We're starting with opening arguments. As you know, many of you are very familiar with this. We always start with the Commonwealth. And at the very end of the case, we will end with the Commonwealth when we do closings. So are we ready for openings, then, Mr. Mascagni?

MR. Mascagni: Yes, Your Honor. Thank you, Your Honor. Ladies and gentlemen of the jury, on the morning of February 7, 2005, Michael Teasley, loving son, loving father, loving husband, loving brother,

* * *

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Hill picked him out. That's him. That's the one he fought with. That's the one I saw running.

The next day, this defendant went to Enterprise Rental and turned in the car he had for a new one. He

left some stuff in his car, personal stuff. So police know that he went to Enterprise the next day and traded out cars. Not only that, he also, sometime in the next few days, wanted to change his appearance. So he cut his hair. He had braids that he cut off. He was all over Louisville's most wanted, all over the news. He knew he was wanted. And he was hiding out. There was all kinds of people looking for him, different types of police officers, different types of U.S. Marshals. They were running on the news every night. He was wanted. He knew it. He was hiding out.

On March 1, 2005, police received a call from a man named Charles Brown. Charles told the police that he was concerned because he had seen that Terrance was wanted, and he had an apartment that he let Terrance stay at. Terrance had a key. Terrance had a bed there. So Charles was worried. He said, look, you all probably need to search this place, gave them consent to go look in his apartment. It was there that the police found black pants and a black shirt.

They also found a gun under the mattress, which we later found out was not the same gun used in the murder, but he did, in fact, have a gun.

Finally, on March 10, 2005, Officer Kelsey, who was a pastor at a local church, received a call from one of the families there, telling him that they had gotten word from the defendant that he knew he was wanted and that he wanted to turn himself in. Officer Kelsey met him that day and the defendant turned himself in and surrendered. When the case is other and you all hear all the evidence, I have no doubts that you all will

conclude that Terrance Miles is a dangerous cold-blood killer and you must hold him responsible for the slaying of this man, Michael Teasley. I thank you.

THE COURT: Okay. Thank you, Mr. Mascagni. Mr. Olash?

MR. OLASH: May it please the Court?

THE COURT: Uh-huh.

MR. OLASH: Mr. Mascagni and ladies and gentlemen of the jury. I prepared my opening and then I just forget about everything after I hear—when we get into the case. First of all, I want to address something that Mr. Mascagni said, that you're going to hear proof that Terrance was thrown out of the club

* * *

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didn't make it.

MR. DAVIS: Okay. That's all the questions I have for you, ma'am, at this time. Thank you.

THE COURT: No questions?

MR. OLASH: No, Judge.

THE COURT: Thank you, ma'am, you're excused. Your next witness, Mr. Davis?

MR. DAVIS: Thank you, Judge. The Commonwealth's next witness is Frank Hill, Officer Frank Hill.

THE COURT: Officer Frank Hill, please. You might be blocking a juror from a witness. Thank you.

Officer Hill, if you'd raise your right hand to be sworn, please. Do you swear or affirm that the

testimony you're about to give will be the truth, so help you God?

THE WITNESS: Yes, it is.

FRANK HILL

having been duly sworn, was accident happened and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Officer, good afternoon.

A. Yeah.

Q. Please introduce yourself to the members of the jury.

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A. Officer Frank Lee Hill.

Q. And sir, where are you employed?

A. Louisville Metro police department.

Q. What division?

A. Second division.

Q. And what is your current assignment? What specific job do you do?

A. I'm a patrol man with the second division.

Q. How long have you been a patrol man with the Louisville Metro police?

A. Approximately, 23 and-a-half years.

Q. Do you recall what you were doing in February of 2005?

A. Yes, I do.

Q. And do you recall where you were working off-duty at that period of time?

A. I was working off duty at a club called 502, located on Dixie Highway.

Q. All right. Where is that? Is that in Jefferson County?

A. Yes, it is.

Q. And specifically, say related to the Watterson Expressway; is it north or south of the Watterson on Dixie Highway?

A. It's going to be south.

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Q. Is that—

A. North, I'm sorry.

Q. Okay. The—how often or how long had you worked there in February of 05?

A. Approximately, maybe eight months. I'm not for sure exactly.

Q. And when you're on duty or on duty—when you're at work, off-duty at 502, what are your duties?

A. My primary duty was to sit there and observe people going in. Make sure they're orderly. People that they put out in the club and everything, to make sure that they leave the club, leave the premises, leave the area and not create a disturbance.

Q. And what are you driving when you're at work at 502?

A. My police cruiser.

Q. And are you wearing your outfit like you are today?

A. Yes, I am.

Q. So is it fair to say that part of your job there is to be a police presence there?

A. Yes, uh-huh.

Q. Let's go back to February the 27, 2005. Tell the jurors in your own words, officer, what you remember from that evening.

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A. I—approximately, about 2:25 hours in the morning, I was sitting in my police car—

Q. You're talking about 2:25 a.m., in the morning?

A. A.m., in the morning. And I was sitting in my police car. And to my left side, I heard a commotion.

Q. I'm sorry. Let me interrupt you. Where are you sitting? Let's—officer—

MR. DAVIS: Judge, may the officer step down?

THE COURT: He may.

BY MR. DAVIS:

Q. Officer, let me have you look at this aerial photograph and try not to block any of the jurors, please. See if you recognize this area. Do you recognize this as the Club 502?

A. Yes, uh-huh.

Q. Okay. All right. And where is Dixie Highway?

A. Right here.

Q. Okay. Now you said, let me just make sure everybody can see. I think you were starting to say you were parked in your car. Where were you parked?

A. I was parked adjacent right here in front of the club. That's the people going to the entrance.

Q. Okay. So where is the entrance to the club?

A. In the rear of the building here.

Q. Right here?

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A. Yes, uh-huh.

Q. Okay. And where was your car?

A. My car was facing diagonal, towards the front door, sort of.

Q. So you're right—right out front?

A. Yes, I was.

Q. Okay. And you said you saw something?

A. Yeah.

Q. Around 2:25, what happened around 2:25?

A. I observed a commotion between two individuals fighting.

Q. And where was that?

A. It was fighting not only on the outside—it was outside the door in the parking lot, right next to where I was almost sitting there.

Q. Okay. So if the front door's here, are you saying it was just off—

A. Yeah, it's off right here.

Q. To the side a little bit?

A. To the side.

Q. And what—did you recognize those individuals?

A. I recognized one individual.

Q. Who did you recognize?

A. It was like Mike. He was the bouncer of the club.

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Q. And we've already seen a picture of this individual. Is that Mike?

A. Yes, it is.

Q. Do you recognize him? Okay. And that's one of the two people you saw in the scuffle?

A. Yes.

Q. What happened, tell them what occurred:

A. Well, I got out of my car and I walked over. And I told both individuals to stop fighting. And at the time, Mike had the individual in a headlock. And with his left arm in a headlock, with his right hand hitting him in the face.

Q. Okay. So he's punching him. And did you break up the fight?

A. I couldn't break it up because Mike is a large-sized individual. And I tried to pull him off, but I couldn't at the time.

Q. So did you get help?

A. Yes, I did. I asked two of the young ladies standing in front of the club to go inside to get one of the other bouncers to come outside to help me break up the fight.

Q. And did that happen?

A. Yes, it did.

Q. All right. So after the fight gets broken up,

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what occurs?

A. After the fight get broken up and everything, I get—they got up and Mike made the statement that

no one ever hit me again. Don't ever sucker punch me or strike me and I looked at Mike. And I said, do you want me to lock this individual up and he said no. He said, get him off the parking lot. And so I turned around, face-to-face to the individual and told him to leave the parking lot, to leave the area and don't come back.

Q. All right. So it cools down. You tell him to leave. Where—did he leave?

A. Not right then. He made a couple statements before he left.

Q. What did he say?

A. He stated you are—you got best of me. You're the man. You're the winner. You the man.

Q. And what was—what was his demeanor? What was the look on his face while he was doing that?

A. It was a calm demeanor. It was a calm look on his face.

Q. Was that unusual to you in any way?

A. Very unusual after fighting like that.

Q. Okay. And do you recall ever having seen somebody that calm?

A. No, never seen anybody that calm before—after

a big fight like that.

Q. Okay. All right. Where did he go?

A. He left the area. He went northbound, made a left turned and went around the building.

Q. Okay. So when you're breaking it up, are you still right in here?

A. Yes, I am.

Q. And which way does he go?

A. He went northbound toward—

Q. This way?

A. —toward the end of the building and made a left and went out.

Q. That way?

A. Yeah.

Q. And you didn't see him any more after that?

A. No, I did not.

Q. Was he walking? Did he get in a car?

A. He was walking.

Q. Okay. Do you remember what he was wearing at that point.

A. It's all dark clothing. I—if I—from what I can remember, maybe a toboggan. I'm not for sure at that time.

Q. Okay. You don't know if he had a hat on at that time or not?

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A. I can't remember whether he had a toboggan or a hat, but I know all dark clothing.

Q. All dark clothing?

A. Uh-huh.

Q. Shirt?

A. Uh-huh.

Q. Pants?

A. Uh-huh.

Q. Okay. You remember shoes standing out at all?

A. I don't remember. I never looked at the shoes.

Q. Okay. Now you said that's about—or started around 2:25?

A. Yes.

Q. And how much time passes before the next incident?

A. Around about 3:30, the club was exiting out. People were walking and everything. And the next thing I usually do is go over to the next parking lot, I chase them from the club to make sure that everybody is off the parking lot. Where people occur, they usually fight or usually argue or they usually get over there and create a disturbance.

Q. Okay. And let's talk about that a little bit. Is that unusual to have fights at the Club 502, or was it?

A. At some time it's unusual. Sometime it's not

unusual.

Q. Okay.

A. I just see normal procedural some times got out.

Q. Okay. And I think you testified your car was parked here at least when the fight occurs?

A. Uh-huh.

Q. Where did you go after that?

A. Well, I backed up, made a circle in the parking lot that I was sitting in to go over to the next parking lot.

Q. Okay. Hold on. Show them how you made the circle and where you went?

A. Okay. I backed up, made a loop like this to go around this area here and make sure everybody is going out of the parking lot. Then I went back over here and went into the next parking lot.

Q. Okay. I guess you went out on the road?

A. Yes, I did.

Q. To get it to the next parking lot?

A. They came—came through here.

Q. Oh, right in, I see.

A. And came into the next parking lot.

Q. Can you drive through here?

A. No, I cannot.

Q. How come?

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A. There's a drawbridge right here. And you cannot drive through and it's blocked off completely.

Q. So just a little bridge you can walk across?

A. Yes.

Q. All right. Is there a fence or a ditch or—

A. There's a ditch there.

Q. Okay. All right. So when you drove over to the second parking lot, does that belong to Club 502?

A. I don't know if it belongs to them or not. I know they was utilizing for people to park.

Q. Okay. So people were parking there that go to the club?

A. Uh-huh.

Q. And where do you take your car?

A. I take my car and I pull it in approximately right in this area right here, maybe about 30 feet from Dixie Highway, facing eastbound, sitting right here. My lights on and everything. So everybody can see me, so everybody can get them out. And I was to get them out of the parking lot. I was using my loud speaker.

Q. Do you have—and what were you saying over the loud speaker?

A. I was saying, please, everyone exit the parking lot. Please exit the parking lot.

Q. Okay. And do you have any way to estimate how

many people were in the parking lot, a lot, a few?

A. It was a lot of people; probably, maybe if I'm not mistaken, maybe 60, 70 people.

Q. Okay. And are they all in this parking lot, are they coming through, are they in both parking lots?

A. They're in this parking lot, most of this parking lot was empty and some was still trickling through here, but most of them is in this parking lot right here.

Q. All right.

A. Along with the cars and everything was over there.

Q. What did you see?

A. I was sitting there, approximately—I heard about five to six gun shots ring out. And it's like I did—I jumped out of my car, withdrew my weapon and put it down by my side and I was looking in the area the gun shots was coming from. I then proceeded to that area, but I couldn't hardly get through because

the crowds of people was running towards me and as I was pushing people out of the way trying the get to the area. As I got to the area, I observed Mike laying on the ground between two vehicles. And I noticed he had been shot several times. So I asked if people standing there, still there was some people still around the area. I said where is the shooter, where is the shooter and they said there he goes across the

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parking lot. As I look across the parking lot, I observed the subject with all dark clothing on, running across the parking lot.

Q. And did you—were you able to observe his build?

A. Yes, I did.

Q. And what was his build?

A. A slender-type person, slender built.

Q. Slender built. With your able to gauge height from however far away you were?

A. I—not exact. Approximate—about maybe—I—40 feet.

Q. Okay. So you're like 40 feet. Is that something that you could gauge on the inside of this courtroom, like, if you take a seat for a second, if you don't mind. Like, if you are standing with your gun right where you're sitting in the chair?

A. Uh-huh.

Q. And you see this individual running, is it further than from you to me?

A. Yes, it is.

Q. Okay. All right. If I back up into the courtroom, could I represent the distance?

A. A little bit farther.

Q. So it's going to be a little bit further than

* * *

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Maybe not that quite.

Q. Could you come up here again. Have you been out there recently?

A. I—I did a couple times after the shooting incident, but not now.

Q. And do you know if these parking lines are still here?

A. I don't know, sir. They could have paved over by now.

Q. Sure. But if they still exist, we could actually find the number of feet—determine the—

A. Probably could.

Q. —the number of feet?

A. Probably could.

Q. Okay. Thank you. Now if you would, if you'd describe to me everything you remember about the appearance of the shooter.

A. As I looked and observed the subject running across the parking lot in all dark clothing, I didn't look to see if he had anything in his hand or not, but he had all dark clothing, running in that direction. And they, people pointed to me, Officer Hill, that's the shooter, that's the shooter.

Q. Right. You saw the shooter, right?

A. I did not see the shooting take place.

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Q. But you saw the man running—

A. I saw the man running away from the area where the shooting took place.

Q. The suspect?

A. Yes, sir.

Q. Okay. And he was wearing all dark clothing?

A. Yes, sir.

Q. And you just saw the back-side of him?

A. Yes, sir.

Q. You didn't get a good look at him, did you?

A. Not the front, sir.

Q. You didn't get a good look at him?

A. Not the front face, sir, only from the rear.

Q. You've testified about this before, haven't you?

A. (No verbal response).

Q. Not testified, but you've given your statement to the homicide detective from the Shively police department, right?

A. Yes, I did.

Q. And that was on February 28th, 2005?

A. Approximately, if that's correct, yes.

Q. That was at the Shively police department, right?

A. Yes, it was.

Q. And it was 1:52 in the afternoon?

A. I don't remember exactly what time it was.

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Q. But it was in the afternoon and within—witness I guess by 12—within 12 hours of the actual—your actual observations?

A. Yes, uh-huh.

MR. OLASH: And the detective—I'm going to—show the witness this transcript you provided me. I'm looking at 196, line—it's Bates number, Your Honor, 196. And I want to ask the witness to look at this and see if this refreshes his memory.

BY MR. OLASH:

Q. And you can read as much as you want. My attention is directed at Line 9, the question and your answer.

A. Okay.

Q. Okay. Now my question to you: Did you get a good look at him?

A. Sir, he had on all dark clothing. I never saw the front part of the individual. I saw the rear part of the individual. All dark clothing, as I stated here.

Q. Okay. Can I see that? I'm going to ask you to read your response to No. 9.

A. Okay.

Q. Okay the question is: Did he have any particular type of shirt or coat on or anything. That was the question that the detective asked you, correct?

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A. Okay.

Q. And your answer—if you could, read that and tell me if—if that's not correct, let me know.

A. Okay. I don't know exactly what type of shirt or coat or pants he had on. I just know it was all black. If I'm not mistaken, he had dreadlocks. He had a curl or—I'm sorry, he had a toboggan and it looked like he had some braids coming out or something. And if I'm not mistaken. I didn't get a good look at him.

Q. Now is that—does that answer accurately reflect the answer that you gave the homicide detectives?

A. That's what I gave to the homicide detectives at that time.

Q. So that's an accurate transcript?

A. That's accurate at that time.

Q. Okay. Has your story changed?

A. As far as I'm concerned, it was all dark clothing. Like I said, I didn't really get a good look at his hair.

Q. Now correct me if I'm wrong, but since you've been on the stand today, have you mentioned anything about seeing a toboggan?

A. I said he might have had a toboggan on. I don't know for sure. I could have been mistaken.

Q. Okay. So as you stand here today, you don't

remember seeing a toboggan when you're in the parking lot on February the 28th?

A. I don't remember whether he had a toboggan or not on. I can't remember.

Q. Okay. Let's go back on. Let's just make sure we have this. This is in the same line of questioning. If you could, read—you're not sure today or you know for sure he didn't have a toboggan?

A. I'm not sure today.

Q. So he may have had a toboggan on?

A. He might and might could have not. I don't know.

Q. You haven't mentioned at this point, right?

A. I can't remember whether he had a toboggan or not on, sir.

Q. Well, let's see—we'll let's see if this refreshes your memory. Could you read—and read as much as you want, but start at No. 10. That's the continuation of the last spot.

A. Okay. Were there braids or dreads? I think they were braids. Braids, okay. But he had a toboggan on. We then proceeded to look in the area. I knew we had (inaudible) there and other officers there and I wanted to look for the subject. We didn't find him.

Q. Okay. But he had a toboggan on. Is that your—

A. At the time, I said he had a toboggan. At the

time, I can't remember whether he had a toboggan or not.

Q. At the time—

A. At the time, it looked like he had a toboggan on.

Q. At the time you gave the statement—

A. Yes.

Q. And this was within 12 hours of Mr. Teasley being murdered, right?

A. Yes.

Q. This was within 12 hours?

A. Yes, sir.

Q. The morning after—the afternoon after the morning of the shooting, right?

A. Yes, sir.

Q. Your answer was, and this is—but he had a toboggan on. Is that your—

A. At the time, I said he had a toboggan.

Q. Now you're not sure whether he had a toboggan?

A. I—at the time, I said he had a toboggan. At that time, I did.

Q. Now what has taken place? What has taken place between the date you gave this statement, February 28, 2005 and today's date, December 12, 2006—

A. A lot of time.

Q. —that caused you to believe that you were mistaken when you said he had a toboggan on?

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A. I—I just can't remember whether he did or not, sir. At the time, I might have said he had a toboggan on, but I really can't remember whether he did or not.

Q. But you're sure—you're sure that it was Terrance Miles?

A. That's the subject I broke up in the fight with Mike. That is the subject right there.

Q. You're sure about that?

A. I'm sure. I have no doubt in my mind, sir. That is the subject I broke up the fight—

Q. I have no problem with that. I have no problem with that.

A. Yes, sir.

Q. Are you sure—and that was a poor question. Are you sure—

A. Yes, sir, I am sure.

Q. —that the man that you saw running was Terrance Miles, sir?

A. Fit the description, sir.

Q. Fit the description?

A. Yes, sir.

Q. That's a long way away from being certain that that was Terrance Miles?

A. I said he fit the description of the subject.

Q. How many other people fit the description of him?

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A. Lots of people fit descriptions these days.

Q. Lots and lots—

A. Lots of people.

Q. Because basically your description is a man in black clothing?

A. A man in black clothing.

Q. Slender, right, that's all you have?

A. A man in dark clothing, sir, which at the time he was wearing dark clothing.

Q. Now as you sit here today and you're not sure that he was wearing a toboggan, okay.

A. Sir, I'm not sure whether he was wearing a toboggan or not. I can't really be sure on that, sir.

Q. Because are you aware—are you aware that that toboggan was tested?

A. Sir, I'm not.

Q. You're not aware of it?

A. No, sir, I'm not.

Q. You haven't been told anything about that toboggan?

A. No, sir, I have not been told anything about a toboggan.

Q. Could you point—did you find the toboggan?

A. Sir, I didn't find a toboggan.

Q. Do you know where it was located?

* * *

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Q. 20 years, let's say 20 years. 20 years of working for the police. When you've seen someone getting beaten up, their response usually is in the form of a vindictive response, right?

A. Vindictive, angry, upset, saying things or I'm going to get you, I'm going to do something to you later or something to that effect.

Q. Now and you thought originally when you came on the scene and you saw Mr. Teasley on this person beating him, you thought that guy has been injured bad because Mike is a big strong person, right?

A. Well, it didn't appear to be the way he was looked that he was injured or anything, it was just the point that I didn't want Mike to keep striking him.

Q. Right. But after the fight was over, you walk and you had had your conversation with Terrance Miles, right?

A. Yes, I did.

Q. And you looked at him, right?

A. Yes, face-to-face.

Q. And he didn't have any visible sign of injuries, right?

A. No, he did not.

Q. And that was because looking back at it at this point, because he protected himself with his hands?

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A. It looked—it appeared several times he had his hands up to his face and everything.

Q. So when Mike was trying to strike him in the face, it actually appears that he didn't strike any real blows that made visible injuries?

A. No.

Q. And you didn't see any other visible injuries?

A. No, I did not.

Q. And he wasn't limping or falling down or obviously in pain from—

A. No, he was not.

Q. And when he made those comments that you thought were unusual, the—you're the man, you win, that line of remarks, there is—I expect there's going to be testimony that he—he said you whupped me but I'm going to come back and get you. Did you ever hear that?

A. No, I never did hear that.

Q. And you've—you were there the entire time after the fight was—was broke up and until he left the vicinity, right?

A. Yes, I was.

Q. And you never heard—you never heard Terrance say you whupped me, I'm going to come back and get you?

A. No, I never heard him say that.

Q. Now there's something else that was a little bit

unusual about this—about the fight that you saw take place in front of the bar, correct?

A. Yes.

Q. Okay. And there was some other people, some strangers that watched this and you thought it was peculiar, their behavior was peculiar, correct?

A. Yes.

Q. Could you tell ladies and gentlemen of the jury about those strangers and what your observations were?

A. Well, there were several guys standing around, observing the fight taking place, standing there and just watching it. Which is really not unusual because every time that a fight occurs at a club or in any area for example there are kids that fight—when they get off the school bus. All the kids just stand around and watch them fight, instead of just breaking them up or doing anything about it. So it really wasn't unusual for people to stand around and watch two people fighting.

Q. It was three people and they were near a Cadillac that had pulled up?

A. That had parked there, that was already parked there.

Q. So when you were there, the Cadillac had already been parked there?

A. Yes.

* * *

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wearing when you took him out that night. Do you recall?

A. I don't recall, no. I know it was him that I took out.

MR. DAVIS: Okay. Thank you.

THE COURT: Any recross?

MR. OLASH: No. No, Your Honor.

THE COURT: I don't see any questions from the jury either. You're excused, sir. Thank you. Your next witness?

MR. DAVIS: Judge, thank you. Our next witness is Crystal Teasley.

THE COURT: Crystal—is it Crystal Teasley?

MR. DAVIS: Teasley, yes, ma'am.

THE COURT: Ms. Teasley, if you can, come all the way up, please, and have a seat in the witness chair. And if you'll raise your right hand, please. Do you swear or affirm the testimony you're about to give will be the truth, so help you God?

THE WITNESS: Yes.

THE COURT: I'll need you to move up and speak up and into the mic.

CRYSTAL TEASLEY

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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BY MR. DAVIS:

Q. Good afternoon, ma'am.

A. Good afternoon.

Q. Please introduce yourself to the members of the jury.

A. Crystal Teasley.

Q. Ma'am, how are you related, in February of 2005—

A. Mike's—

Q. —to Michael Teasley?

A. Mike's wife.

Q. Where were you working in February of 2005?

A. Club 502.

Q. Okay. And what was your job there?

A. Security.

Q. Why did they need you to be security when they had all these big guys as security, too?

A. To dress—pat down the women and secure the money.

Q. On February the 27th or 26th, early morning hours of the 27th, where were you assigned at the club?

A. The front door.

Q. And the jurors have seen this already. And I'm going to show you. We may refer to it. Do you recognize this picture?

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A. Yes.

Q. All right. Where is the club?

A. Right here.

Q. All right. Where is the front door of the club?

A. Right there.

Q. All right. Back in the corner?

A. Uh-huh.

Q. And that's where you were working that night?

A. Yes.

Q. Taking money and frisking the females?

A. Women, uh-huh.

Q. Tell the members of the jury what you remember occurring that night as it related to Michael and—well, do you know who Terrance Miles is?

A. Yes.

Q. Did you see him at the club that night?

A. Yes.

Q. Had you seen him at the club before that night?

A. Yes.

Q. How often?

A. Mostly every—every weekend.

Q. Okay. When you saw him that night, what was he doing?

A. He had came in the club with a couple guys. He had on a black Dickie outfit with a hoodie. He had a hat

on his head. We asked him to take his hoodie and his hat off because that was one of the rules.

Q. When you're in the club—

A. You cannot wear a hoodie. You cannot wear a hat.

Q. So you are saying he had a hoodie and a hat?

A. Yeah.

Q. What color were they?

A. Black.

Q. Was the hoodie part of his sweat shirt or jacket?

A. Yeah.

Q. Okay. What kind of hat was it?

A. A black toboggan.

Q. And did he take off his hat and hoodie?

A. Yeah.

Q. What did you see him doing next?

A. He had went on in the club. And we didn't see him for a while or nothing. And he had a—Mike had put him out for smoking marijuana in the club, him and a couple of other guys. And they got put out of the back of the club. And he eventually got back in the club not too long after that. Came back through the front door, got back in line. He paid to get back in and came can in and poured some Moet on one of the waitresses. She was one of the ones that had told Mike that he was smoking.

Q. And Moet, is that like champagne—

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A. Wine.

Q. —or wine?

A. No, champagne. He got reput out of the club by another bouncer.

Q. How many people were at the club that night?

A. Roughly 600.

Q. That's a bunch of people?

A. Yeah.

Q. Is somebody keeping count?

A. Yeah, we have a clocker at the front.

Q. Okay. So if he got back in the club, were people watching for him to make sure he didn't get back in?

A. No.

Q. If you had seen him trying to come back in, would you have let somebody know?

A. Yeah.

Q. But you didn't see him when he came back in?

A. I wasn't—no, I wasn't up there when he actually came back in.

Q. Okay.

A. Actually, I was doing a drop when he got back in the club.

Q. A drop?

A. Dropping money.

Q. Oh, Okay. So you were taking the money at that

point?

A. Uh-huh.

Q. What happened after he poured the Moet on waitress?

A. Heather hollered for security.

Q. Heather was the name of the waitress?

A. Yes.

Q. And did security go over there?

A. Yes, Jesse.

Q. Jesse.

A. He had came and put him out of the club, told him he had to go.

Q. Jesse put him out?

A. Gave him five and told him to come back another day. And when he went—

Q. So Jesse was trying to make sure things are cool with this—

A. Yeah.

Q. You know, get on out of here?

A. Because he wasn't arguing with nobody. He was just—he left.

Q. Just didn't want him to cause any more trouble?

A. Yeah.

Q. All right.

A. But when he came out of the club, Mike was

already standing outside, talking to some other people. Him and Mike had a few words. And he initiated the fight. He hit Mike first.

Q. Did you see him hit Mike?

A. Yes. And him and Mike got to fighting. Officer Hill was sitting in the car.

Q. Take your time.

A. By the time Officer Hill actually got out of the car, Terrance was on the ground and Mike was on top of him. And Officer Hill hollered for some more security.

Q. Okay.

A. And Reggie, which is another security guy—

Q. What's Reggie's last name?

A. Bernie. Him and another security guy, I don't remember which one it was—

Q. All right.

A. —went out there and pulled Mike off of him. He got up. He grinned and Terrance said that he would be back. His exact words were, you might have whupped my ass, but I'm going to get you.

Q. All right.

A. Officer Hill had told him to get off the lot. He had a few words with Officer Hill.

Q. And Officer Hill told him to get out of there?

A. To go get off the lot before he arrested him is

what he said.

Q. Okay.

A. We pulled Mike back into the club. Mike's nose was bleeding. We had him sat down. Officer Hill had took Terrance in his car and had him in there for a little while.

Q. Did he take him somewhere or he just put him in the car?

A. No, he was just sitting in the parking lot.

Q. Did he tell anybody why he was doing that?

A. No. When Officer Hill came back in the club about 30 minutes later, he was telling everybody in the club that Terrance was nobody to play with. He would harm somebody. And he meant what he said, that he would come back and get him if that's what he said.

Q. Now did you see Terrance, how he left?

A. No.

Q. So you don't know if he drove away or walked away?

A. No.

Q. Did you think he was going to be arrested when you had saw him put in the police car?

A. Yeah, basically because when any time you have a fight, usually you get locked up. And being the fact that Officer Hill knew his past or whatever he—you know,

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usually when you're in the club and you have a fight and you get thrown out for certain reasons, they do lock you up.

Q. Okay. But he didn't get locked up?

A. No.

Q. Any idea about what time that was, when all that happened?

A. About—

Q. After midnight?

A. Yeah, it was after midnight. I'll say about 1:00, 1:30.

Q. Okay.

A. Because the club went on for a couple for hours before we actually closed it.

Q. The club had some more time to go—

A. Yeah.

Q. —before that happened? Tell the members of the jury what you remember when the club closed down.

A. It was around 3:30, we closed the club. Last call for alcohol. We let everybody out. We had—it was like 12 or 14 of us. Six of us go out and the rest of us stay in. Mike, Jesse, Keith, Ken, Reggie, Bo and Steven were all outside, clearing the lot. I was at the door, locking the door with one of the owners and Steven. And when they cleared the first lot, they moved to the second

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MR. DAVIS: ETU.

THE COURT: Ms. Stephenson, you can come all the way up and have a seat over here in the witness chair. Is it P-H-E-N or V-E-N?

THE WITNESS: P-H.

THE COURT: Okay. If you'll raise your right hand, ma'am. Do you swear or affirm the testimony you're about to give is the truth, so help you God?

THE WITNESS: I do.

THE COURT: All right. And if you will, speak up and into the microphone.

THE WITNESS: Okay.

DONNA STEPHENSON

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Ma'am, good morning.

A. Good morning.

Q. Please, introduce yourself to the members of the jury?

A. My name is Donna Stephenson.

Q. And where do you work?

A. For the Louisville Metro police department evidence unit.

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Q. In the course of your duties, explain to them what you do in the evidence unit.

A. What do I do?

Q. Right. What's your job?

A. Okay. Just a brief description?

Q. Sure.

A. Okay. We photograph, collect, preserve, transport and package the evidence at a crime scene.

Q. And do you do that at the direction of the detectives?

A. That's correct.

Q. Do you recall becoming involved in the case of Commonwealth versus Terrance Miles in February of 2005?

A. Yes.

Q. Okay. And tell the members of the jury what you did on that day.

A. Okay. We were initially called out by Shively Police department to come to 2509 Dixie Highway.

Q. Do you remember what—do you have documented or do you recall what time you showed up at that address?

A. I showed up at 4:30 a.m.—4:39 a.m.

Q. A.m.?

A. Yeah.

Q. And what do you do when you first show up on a crime scene?

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A. I talk to the detective that's in charge.

Q. And who was that at the time?

A. Ashby, Detective Ashby.

Q. Okay. Is this him sitting beside me?

A. Yes.

Q. Okay. If you don't remember, that's fine?

A. I don't really remember his face.

Q. Okay. Could there have been someone else there, if he wasn't there?

A. Yes.

Q. You just didn't show up and start looking around, right?

A. No.

Q. Tell them what work you did once you got there that night.

A. Well, I videotaped the crime scene. I took pictures, three rolls of film.

Q. Okay.

A. Okay. I collected—well, I photographed two vehicles and collected several items.

Q. Tell the members of the jury what items of evidence you collected.

A. Okay. I collected one spent projectile.

Q. And what's a spent projectile, what is that?

A. I guess you could just say just a used bullet.

Q. A bullet?

A. Yeah.

Q. Okay.

A. A cell phone.

Q. All right.

A. A black hat. That's what I did at the scene.

Q. Okay. Let's start with the videotape of the scene. Tell them what you do, how you videotape the scene.

A. Okay. After the detective initially walks me through the scene, kind of tells me what went on, I'll

start at the address and kind of pan around the whole scene.

Q. All right.

A. And then I'll take the path that the—whoever was hurt took. And just kind of get whole scene in there, so you'll know that—you'll have the visual of the whole scene.

Q. All right. And did you do that that night?

A. Yes.

Q. How long would you say that video is?

A. I don't remember.

Q. Is it like a half an hour or a few minutes?

A. Probably about a half an hour.

Q. So it is a long video?

* * *

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we can here. And based on the pictures and what your measurements say, can you give an answer? And take your time. I'm not trying to rush you here. And see if you can figure out exactly where the cell phone was and where the hat was.

A. Okay.

Q. Like I said, take your time. If you need to look at this while you're did it—

A. Okay.

Q. —there it is. And then we can stand up and show the jury.

A. Okay. The cell phone would have been east of this pole, the utility pole on Dixie. And south of the north wall here.

Q. South of the building?

A. Right.

Q. So it's in between the building and the chain-link fence?

A. Right.

Q. In the tree line?

A. Uh-huh.

Q. Will you point out that spot for the jury?

A. Like in this vicinity somewhere.

Q. Okay. Could you mark a little C for cell phone.

All right. Now see if you can tell where the hat was.

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A. Okay. That was west of the east wall. So it's going to be back here, back in the back.

Q. But we know it's off the parking lot, right?

A. Right.

Q. Okay. So it's either right next to the building where there's no black top or it's back in this area?

A. Right.

Q. Okay. And let's mark an H for hat, please. All right. Ms. Stephenson, what steps do you take, when you collect an item of evidence, to make sure that the thing that you pick up is actually the thing that we would bring into the courtroom later on to show somebody?

A. Like I said before, the detective kind of points out different things. And if we see something that would be of interest, we would bring it to the detective's attention.

Q. Then you'd pick it up?

A. That's right.

Q. What do you do the make sure—to preserve it, to make sure—

A. Okay.

Q. —it gets to the property room—

A. Okay.

Q. —and then later on might get to court.

A. Right. We have—we wear gloves, plastic

gloves, rubber gloves. Put it in a brown bag and label it whatever it is.

Q. Paper bag, like an old grocery sack?

A. Yeah.

Q. Okay. And what steps do you take to label it?

A. Well, I'm mark on the bag what the item is.

Q. Okay.

A. Because in my notebook, I would mark down like the measurements, all the detailed information would go in my notebook. Just general information would go on the bag.

Q. And do you take that detailed information and put it into a report like you have?

A. That's correct.

Q. Okay. Now what do you do to seal the bag?

A. We fold it and sometimes we tape it.

Q. And how do you tape it?

A. With some evidence tape, just run it across there until you get it back to the office.

Q. So it's special tape that you have—

A. Right.

Q. —for the evidence technician unit? And then where do you take it?

A. We take it back to the evidence office.

Q. Okay. Now if somebody got that out of the

evidence office, what would they do to document that they had gotten it out?

A. They would do a report—

Q. Okay.

A. On it, saying when and what time they did it.

Q. And where they were taking it?

A. Right.

Q. And what they were doing to it?

A. Right.

Q. Okay. And then that person would be responsible to bring it back?

A. That's correct.

Q. Okay. And that would also be documented?

A. Yes.

MR. DAVIS: Okay. Officer Stephenson, thank you. That's all the questions I have at this time.

THE COURT: Cross?

MR. OLASH: Yes, ma'am.

CROSS EXAMINATION

BY MR. OLASH:

Q. Good morning.

A. Good morning.

Q. Now this was long time ago, right?

A. Yes.

Q. So there was some confusion about where these

were found?

A. Right. That's why I went back to my report.

Q. And it's—you have lots of cases?

A. That's correct.

Q. Right. I'm not—these aren't trick questions. Here is what I want to make perfectly clear, okay. It wasn't clear to me, at least, when you answered questions from Mr. Davis. I believe you said that the hat was found either here on the side of the building or over there; is that right?

A. That's correct.

Q. Okay. Now I want you to look at this picture. Okay. Now you told the jury that you do not disturb the evidence that you collect—

A. Right.

Q. —until after it's photographed?

A. That's right.

Q. So this photograph was taken before it was collected?

A. That's correct.

Q. Right. And what is in the background of this photograph?

A. Some kind of concrete.

Q. I'm telling you and I expect this to be the proof?

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A. Okay.

Q. But I'm telling you, this right here, this concrete, is the corner of the building.

A. Okay.

Q. The foothold of the building.

A. Okay.

Q. Okay. And if that is true, if that turns out to be accurate—

A. Okay.

Q. —then that hat was not found back here in the—

A. No.

Q. —in—

A. In the back of the building.

Q. It would have been found right by the side of wherever this piece of concrete is?

A. That's correct.

Q. Right. And if that concrete's not back in this area where the grass is, then it wasn't found there, right?

A. (No verbal response).

Q. The hat was not found in the grass, in this grassy or wooded area?

A. Okay. This is the back of the building.

Q. Right, or the—I think you said—

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A. Of west side—well—

Q. —this is the side—

A. —along here.

Q. Right. Okay. Now you report to the scene and you look for the detective that's in charge?

A. That's correct.

Q. And you—and you don't go just—you're not on your own. You follow the directions of the detective?

A. That's correct.

Q. And he tells you what he thinks is important, and you photograph and video and collect it?

A. Right. We do a walk-through.

Q. You do a walk-through. Okay. And you arrive there at 4:39, right?

A. That's correct—well, I take it back. I arrived there at 4:49. Got the call at 4:39.

Q. Do you have the capacity to do—to lift fingerprints?

A. Yes.

Q. And you're—okay. You can do that yourself, right?

A. Right.

Q. And were you the only ETU officer on scene?

A. No.

Q. There were others that were working the scene

also?

A. There was one other.

Q. Now I believe you said on—under questioning that when you get the video out, you walk the path of the victim; is that right?

A. We—the detective takes me through the scene. Most—most of the time, it's the path that the victim or whoever or the assailant took.

Q. So you video—and in this situation, in this case, you videoed—let me—

MR. OLASH: Could I ask officer Stephenson—

THE COURT: She may.

MR. OLASH: —to approach the very large photograph.

BY MR. OLASH:

Q. You—Mike Teasley died right here, right, in this second parking lot? That's where the blood was and the car was?

A. Over in this vicinity.

Q. Okay. But somewhere over there, right?

A. That's correct.

Q. And the club is in this building right here, right?

A. That's right.

Q. And the front door is right here, right.

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A. That's correct.

Q. And you were aware, when you spoke with Detective Ashby, that his understanding was he left from here?

A. Okay.

Q. He left from here and went—

A. No. When I arrived, I parked here.

Q. Okay.

A. And I talked to the detective here.

Q. Okay. And where did you start your videotape?

A. We'd normally start at like an address.

Q. Oh, okay.

A. Or a street.

Q. Tell me where you started on that day? Where did you start it?

A. Okay. I'm thinking I started at the Dixie Highway, to pinpoint that it was off of Dixie. And then there's a sign, I think, like right over here somewhere that shows 502 back in the back. Just kind of came around and just walked the whole—around the building.

Q. Okay. You walked around this side, too?

A. Yes.

Q. Okay. Did you video in here?

A. It's been a while back.

Q. Okay. But you walked behind the building?

A. That's correct.

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Q. And there's a well-worn path behind the building isn't there?

A. That's correct.

Q. And there's a fence line there, correct?

A. That's correct.

Q. And did you see two big holes cut out of the fence where people could cut through?

A. I don't remember.

Q. Didn't look. Okay. Now, did anybody ask you to—well, explain this to the jury. What does process a scene mean?

A. When we come to the scene, we'll see what needs to be done. If something needs to be processed—say, when we process the scene, we come. We kind of evaluate the situation. Like, we knew we needed to collect the hat. And we knew we needed to collect the cell phone.

Q. Right.

A. So you kind of get a general idea of like, okay. When I go to the scene, I'm looking for what I need measure off of, if there's anything.

Q. Right.

A. And just making sure there's nothing else and nobody's tromping through your scene.

Q. Okay. So and you try to pick points that are permanent points, though, that—

* * *

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THE COURT: Okay. Bring them in.

THE BAILIFF: All rise for the jury, please.

(The jury entered the courtroom.)

THE COURT: Thank you, sheriff. Thank you, ladies and gentlemen. Welcome back. And everyone may be seated. All right. Mr. Davis, your next witness?

MR. DAVIS: Thank you, Judge. The Commonwealth calls Kevin Lampkin Louisville Metro police.

THE COURT: Kevin Lampkin, please. Mr. Lampkin, if you can have a seat, please, in the witness chair. If you would, raise your right hand, sir. Do you swear or affirm the testimony you're about to give will be the truth, so help you God?

THE WITNESS: I do.

THE COURT: If you would speak up, please and into the mic.

KEVIN LAMPKIN

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Sir, please introduce yourself to the members of the jury?

A. I'm detective Kevin Lampkin with the Louisville Metro police department.

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Q. And what unit are you working in?

A. I'm with the computer forensics examinations. That's the computer forensics and analysis squad. That's in the CIS, detective's bureau.

Q. And what is your job with the computer forensic's unit?

A. We analyze and extract all the digital evidence, the computers or cell phones, you know, of that nature.

Q. Were you asked to conduct an examination in a case, Commonwealth versus Terrance Miles?

A. Yes.

Q. And what were you asked to examine in that case?

A. To look at a specific cell phone.

Q. And did you look at that cell phone?

A. Yes.

MR. DAVIS: May I approach the witness, Your Honor?

THE COURT: You may.

MR. DAVIS: Let me mark this for identification purposes, as 23.

THE COURT: I believe that would be correct. Yes.

BY MR. DAVIS:

Q. Detective Lampkin, if you'll take a look at that report marked for identification as Commonwealth's 23. Do

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you recognize that report?

A. Yes.

Q. And is that a report that you produced?

A. Yes, I did.

Q. And what is—explain to the members of the jury what you did when you examined this cell phone.

A. Yeah, on the cell phone, we have specific computer programs and connections that allows us to forensically extract whatever information that we can get from the phones. And so I did that in this case. And in this case, it was able to give me the cell phone number that is associated with the phone. And there was a few other things of in this case, it shows the last

ten phone numbers that was dialed out at that telephone.

Q. And what was the cell phone number of the phone that you were given?

A. It's—the area code's 502-380-7343.

Q. When you found out what the last ten numbers that that phone had called, did you also get the date and time of the calls that were made?

A. No, the—depending on the phone, some records we can extract or not. What I do is—the program actually extracts the information. I just copy off of that portion of the spreadsheet and paste it in a report. That's all.

* * *

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CHRISTOPHER ASHBY

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Detective, good afternoon. Please, introduce yourself to the members of the jury.

A. Detective Chris Ashby.

Q. Sir, where do you work?

A. Shively Police department.

Q. How long have you been with the Shively police department?

A. Six years.

Q. How did you first become involved in—and it's fair to say you were the lead detective on this case?

A. Yes.

Q. How did you first become involved in the shooting of Michael Teasley?

A. I was contacted at home. I was the on-call detective that night. I was contacted at home that there was a—had been a shooting at Club 502.

Q. All right. And what did you do?

A. Responded to the scene. Met the officer that was there, securing the scene. He informed me that Mr. Teasley had—had passed. I then contacted local

ETU, like we normally do, to help process major crime scenes. And I waited for—

Q. So does Shively police not have their own evidence unit or—

A. No, we do not.

Q. So you get Louisville to help you out with that?

A. Yes.

Q. And you called them?

A. I had our dispatch call them.

Q. All right. Who else were you working with on the scene that night?

A. Along with Louisville ETU, I was working with Louisville homicide.

Q. And what did you do when you showed up at the scene?

A. Like I said, I got with the—the officer that was securing the scene. I spoke briefly with him. At that time, the chief had arrived, along with the news media. I'd briefed him on what was going on. The

officer that was securing the scene had told me that there was witnesses that had possibly went to the hospital with Mr. Teasley. I then got with ETU as they showed up and the Louisville homicide detective. And she agreed that—the homicide detective agreed to help process the scene with their ETU unit and I proceeded to the hospital.

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Q. Okay. So you went to the hospital to try to find witnesses and somebody else became in charge of the evidence technician people that were processing the scene?

A. Yes.

Q. And officer Stephenson mentioned that she videoed the scene. Were there when she did that?

A. No, I was not.

Q. So somebody else was in charge of that?

A. Yes.

Q. How many witnesses do you think you interviewed in the course of this investigation?

A. Approximately, 15.

Q. From the scene, what items of evidence were you able to attempt to conduct some tests on from the scene or from your investigation in the case?

A. From the scene and the rest of the investigation, a cell phone that was found, along with the projectiles or bullets, and then the hat.

Q. Okay. Let's talk about the hat first.

(Audio concludes, new audio begins.)

Q. I think we've got a photo up here of the hat, Exhibit No. 14. I'm going to give you this, Detective. There's a little star by the middle—there for you. Know you know from the testimony—did you see the hat at the scene; let's start with that?

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A. No, I did not.

Q. Okay. Because you went to the hospital?

A. Right.

Q. So ETU collects or takes a look at the hat, photographs it and collects it, right?

A. Right.

Q. And you saw testimony that the hat was collected just off the back-side of the building to the east of the building?

A. Right.

Q. Do you see that? Would that be consistent with the picture? Is there a dirt area off the back of the building, on that side of the building at 502?

A. Yes, there is.

Q. So you don't have any reason to dispute that where the hat was actually found?

A. No.

Q. Now when you got a look at that hat,—first of all, describe the hat for us. And we can see it. Go ahead and describe it.

A. Dark in color covered by leaves and dried mud.

Q. There's dried mud on the hat?

A. It would appear to be dried mud.

Q. Now when was the first time you got to see the hat?

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A. At—once I got it back from the Louisville police department.

Q. Now let me ask you this: Did you think that that hat in the condition that it was in, was an item of evidence that you needed to test in this case?

A. No, I did not.

Q. How come?

A. Just by judging from the pictures, the leaves and the mud that was on it.

Q. And what did that tell you?

A. I'm sorry.

Q. What did that tell you; the state it was in?

A. That I didn't believe it was used in the night of the crime.

Q. Okay. You thought it had been there a while?

A. Yes.

Q. And Mr. Olash, in his opening, and I'll sure he'll question you about this, too, referenced the fact that that hat was sent off for testing. Did you do that?

A. Yes, I did.

Q. Now even though you thought it wasn't relevant, why did you send it off for testing?

A. Because you had asked me to.

Q. Okay. So you weren't going to do that on your own?

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A. No.

Q. All right. And that hat I think we all know, was sent off for testing, in spite of the fact that you didn't want it to. What type of test do you know that they conducted on the hat?

A. DNA testing was done, where they pulled fibers, hair fibers from the hat.

Q. All right. And I know you're not an expert in DNA. And I know you don't know how that worked. But are you aware that anything they tested on that hat came back to Mr. Miles?

A. No, it did not.

Q. Okay. So you don't know who it came back to or how many people it came back to, but you know it didn't come back to Mr. Miles, right?

A. Right.

Q. And was it a surprise to you?

A. No.

THE COURT: We need to change tapes.

(Audio concludes, new audio begins.)

THE COURT: Ready.

MR. DAVIS: Thank you.

BY MR. DAVIS:

Q. All right. So this is the hat. Let's talk about the cell phone. We have a picture of the cell phone.

* * *

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do you get a consent to search?

A. You go about who ever the legal—in this case, he was the legal renter for that apartment. The apartment was in his name. He took—he filled out a consent to search form through the Louisville Metro police department, giving consent to search his residence.

Q. Did you actually conduct that search yourself?

A. Yes.

Q. Were there other people with you?

A. Yes.

Q. And what happens when you conduct a search on that apartment?

A. Went in, looking for items that may pertain to the case.

Q. Okay. And what did you find?

A. Shoes, clothing, a hand gun.

Q. Well, let's talk about that hand gun real quick. Was that hand gun sent off for testing?

A. Yes, it was.

Q. And did it match the bullets?

A. No, it did not.

Q. So that's not gun that was used to shoot Terrance Miles (sic), right?

A. I'm sorry?

Q. That is not the gun that was used to shoot

Michael Teasley?

A. No, it was not.

Q. Okay. What steps do you take in the course of that search to document the search itself?

A. I'm sorry?

Q. Like, what do you do to make sure that there's not some claim that later on you stole stuff from the apartment?

A. Photograph whatever is taken.

Q. I'm going to show you what's been marked for identification purposes as Commonwealth's 31. Do you recognize that picture?

A. Yes.

Q. What's that a picture of?

A. A hand gun.

Q. Is that a fair and accurate representation of where you found that gun?

A. Yes.

Q. And describe to the jury where that gun was?

A. Located in the bedroom, underneath the mattress.

Q. Had anybody touched it before you took that picture?

A. No.

MR. DAVIS: Judge, I'd move to introduce No. 31.

THE COURT: Any objection?

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MR. OLASH: I'd object to it.

(The following was held at the bench, out of hearing of the jury:)

MR. OLASH: I'd object. It doesn't have any relevance to this case.

THE COURT: Mr. Davis?

MR. DAVIS: The gun is just part of the search.

It certainly wasn't used in the shooting. I mean, I'm not going to try to connect to it the shooting in any way. So I don't really mind if it doesn't come in, quite honestly.

THE COURT: Sustained. That will not be admitted.

(The following proceedings were held in open court in the presence of the jury:)

MR. DAVIS: I'll scratch out that number.

THE COURT: Yes. You can use that number again.

BY MR. DAVIS:

Q. I think you mentioned that you had collected some shoes. Do you know how many pairs of shoes did you all collect?

A. Two.

Q. Okay. And is this one of the shoes?

A. Yes, it is.

Q. One of the single shoe?

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A. Yes.

Q. Now marked for identification purposes as Commonwealth's 29, what is this?

A. A ruler used by the Louisville Metro ETU.

Q. Okay. Now this ruler—and previously introduced was a picture here. And I'm going to put it up on the—on the screen. Are you familiar with this picture?

A. Yes.

Q. Is that the same ruler or at least the same type of ruler?

A. Yes.

Q. And what is that ruler measuring in that picture?

A. Approximately 11.

Q. No. I'm not asking how far. I'm asking what is that to the side?

A. A foot print.

Q. Okay. And where is that foot print at the scene?

A. Located on the bridge in between the two parking lots.

Q. And that bridge is right next to where Mr. Teasley was shot, correct?

A. Yes.

Q. And as you look at this foot print—I think you already answered the question, how big is that footprint

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print compared to the ruler?

A. Approximately 11 inches.

Q. All right. And this is Mr. Miles' shoe or a shoe collected at the apartment where Mr. Miles was staying?

A. Yes.

Q. All right. And how does that shoe compare to not in the pattern that it makes, but in size to the shoe that was collected on that bridge? Was it similar?

A. Yes.

Q. How did you become aware that Mr. Miles was finally taken into custody?

A. Myself and my partner was contacted that—by Louisville Homicide that Mr. Miles had turned himself in.

Q. Okay. And did you go down there and conduct the booking process?

A. Yes.

MR. DAVIS: Detective, thank you. That's all the questions I have for you at this time.

THE COURT: Cross?

MR. OLASH: Yes, Your Honor.

MR. DAVIS: Well, Your Honor, I'm sorry to interrupt. I'd move to introduce all the items that we've discussed, including 29, which was the shoe.

THE COURT: 26, 27, 28, 29 and 30?

MR. DAVIS: Yes, ma'am.

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THE COURT: Any objection?

MR. OLASH: No objection.

THE COURT: Admitted. Cross?

CROSS EXAMINATION

BY MR. OLASH:

Q. Detective, you were here yesterday, right?

A. Yes.

Q. You were here during the part of the trial called opening statements, right?

A. Yes.

Q. You heard Mr. Mascagni tell the ladies and gentlemen of the jury what he expected the evidence to prove.

A. Yes.

Q. And you—am I recounting this right: Did you hear Mr. Mascagni say that a shirt and a pair of pants collected at the Doral—what's the address, Doral Court?

A. Yes.

Q. Doral Court, at the Doral Court apartment?

A. Yes.

Q. Did he say that? Did he tell the jury that he believes that that black pants and the black shirt were worn by the shooter?

A. Are you saying do I—do I recall him saying that.

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Q. Did he say that?

A. I'm not exactly 100 percent that he did.

Q. Okay. But he did reference in his opening that part of the proof that the Commonwealth was going to show the jury was the fact that the search of the apartment that was controlled by Terrance Miles, that—that that search uncovered a pair of black pants and a black shirt, right?

A. Right.

Q. And you're aware that the descriptions of everybody—I mean, every single description of the

person that committed this heinous act, this murder, that person was wearing black clothing, right?

A. Yes.

Q. And pursuant to this search, you searched this apartment and you found a pair of black clothing, right?

A. Right.

Q. Assume that there's a relationship there, right, between—is that the—do you—as you sit here today, do you believe that the clothes that you found at the apartment have anything to do with this case?

A. They were taken and sent off to the lab, yes.

Q. Okay. What happened at the lab? What tests were conducted at the lab?

A. To identify if there was any blood or anything on

them.

Q. And what—what was the results of that test?

A. Negative.

Q. Do you know if—if—do you know what gun powder residue tests are?

A. Yes.

Q. Could you tell the ladies and gentlemen of the jury what a gun powder residue test is?

A. It's a test to verify if a gun's been shot.

Q. So tell me if I'm—if I'm correct. If I—if I'm wearing this—these clothes and I shoot a gun and in this case, let's say, it was a .357 that was used in this

case? do you know what gun was used in this case, the size gun?

A. No, I do not know.

Q. Okay. Do you know the caliber of the bullet was? I don't know anything about firearms. What caliber of bullet was—

A. A .38.

Q. Okay. A .38. So based on the knowledge that you know the bullet that was used, can you speculate on what size pistol or revolver was used?

A. No.

Q. Cannot?

A. No.

* * *

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then?

A. No.

Q. And those clothes, Mr. Olash had some good questions about these clothes. These are collected at Miles' apartment, correct?

A. Yes.

Q. Black pants, black shirt. We know the guy who shot—who was running away from the scene who shot Mr. Teasley is wearing black pants, black shirt. That's not a Dickie's outfit, though, right?

A. Right.

Q. Okay. Possible that people have black clothes that aren't the same ones they wear when they shoot somebody?

A. Yes.

Q. When the hat's sent off for testing—when? When was the hat sent off for testing?

A. November the 7th of '05.

Q. Okay. And the crime was committed the end of February. Okay. We have march, April, May, June, July, August, September, October, beginning of November. So nearly nine months, right?

A. Yes.

Q. You saw pictures of the hat after they were developed, correct?

* * *

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motion is denied.

MR. DAVIS: Thank you, Judge.

THE COURT: Are you going to call any witnesses?

MR. OLASH: I have three witnesses.

THE COURT: All right.

(The following was held the open court, in the presence of the jury:)

THE COURT: Okay. Mr. Olash, your first witness?

MR. OLASH: We're going to do the avowal later?

THE COURT: Uh-huh, we are.

MR. OLASH: The defense calls Vernon Douglas.

THE COURT: Vernon Douglas, please. Mr. Douglas, come all the way up, please, and have a seat in the witness chair. All right. I need to place you under oath, sir. If you'll raise your right hand. Do you swear or swear or affirm that the testimony

you're about to give will be the truth, so help you God?

THE WITNESS: Yes.

THE COURT: All right. You'll need to move up, move the mic down and speak into it. Thank you.

VERNON DOUGLAS

having been dually sworn, was examined and testified as follows:

MR. OLASH: I was going to wait for counsel.

THE COURT: You can proceed. I've sworn the

witness.

DIRECT EXAMINATION

BY MR. OLASH:

Q. State your name, please?

A. Vernon Douglas.

Q. Where do you live?

A. 4109 Quiet Way.

Q. How long have you lived there?

A. Two years—over two years.

Q. Where did you live in February of 2005?

A. 4903 Aerial Drive.

Q. And where is Aerial Drive in reference to Club 502?

A. It's in the Newburg area. It's about seven to ten miles away from the club.

Q. Do you know this man sitting over at counsel table in this suit?

A. Yes.

Q. Who is he?

A. Terrance Miles. It's my cousin.

Q. How do you know Terrance?

A. He's my cousin. His mother and my mother are sisters.

Q. Are you employed?

A. Yes, I cut hair at home right now. I'm a

* * *

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and I come in. I view—I come in where the tables, was sitting by the bar. Terrance was already in the club. He was sitting down at the table. So I joined him.

Q. So Terrance was there when you arrived?

A. Yeah, he was already there. He had a table for us. So we sit down. He had his drink, his phone on the table. So I sit down, order me a drink, put my coat on, on the table. That's how we claim our table. So we sit down at our table, put our stuff on the table. There's a couple of our friends around, I'd say it was Scooter, Steve, me, Terrance and some other people that was around. So I sat down at the table. We sat there at the table talked for over a half hour or so I guess.

Q. Were you drinking?

A. Yeah.

Q. Okay. Now have you been around Terrance when he drinks?

A. Yes.

Q. Okay. And have you spent time with Terrance when he hasn't been drinking?

A. Yeah.

Q. Is there a difference?

A. Yeah, a big difference to me.

Q. Is it a detectable difference?

A. Yes.

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Q. Okay. Now when you saw Terrance the night that—the last time you were in Club 502, could you tell he had been drinking?

A. Yes.

Q. And—

A. Well, I could tell he had been drinking. When he don't drink and he's sober, he's like a quiet type. You know, he's a regular guy. But when he's drunk, he's more into himself, more I would say—more confident about himself. He's out for the ladies, so he's going to go grab and feel on them and talking and joking. He's more uprised I guess.

Q. More outgoing?

A. More outgoing.

Q. And was he outgoing that night?

A. Yeah, we called, we was talking, I had to play catch up.

Q. Now you said that your stuff was on the table. You understand in this case a crucial piece of evidence in this case is a phone. You're aware of that, right?

A. Yes.

Q. Did you see a phone on the table?

A. Yeah, his phone was on the table beside his drink.

Q. Were there any other phones on the table?

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A. I sat my phone on the table. Well everybody—I'm not going to say everybody, but usually people set their phones on the table because it's really loud in the club. You can't hear your phone ring or vibrate. So you'll set it on the table so it's easy to get to. You can see it light up, check your messages or texts. But you can't really talk. You've got to go in the bathroom or the hallway where you come in at, but you can usually get your calls and your messages.

Q. It's difficult to actually listen to a conversation on the phone while you're in the club?

A. You can't hear nothing in there.

Q. And why is that?

A. It's too loud, very loud.

Q. The music or the people are loud?

A. The people and the music. The music is very loud and the people, too, so you're talking over the music.

Q. And it's hip hop music?

A. Yeah, rap basically.

Q. That's dance music?

A. Yeah.

Q. Now how long—how long were you in the club?

A. I got there about 11:00. I left before it was over. So I left like a little bit after 2:00, close to 3:00. It was close to 3:00 when I left. But it wasn't

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over, because it was still going.

Q. So you left close to 3:00?

A. Uh-huh.

Q. And while you were there those—sometime around 11:00, you left close to 3:00, did you spend every minute with Terrance?

A. No. I spent most of my time when I first got there.

Q. Most of the time when you—and could you give us an estimate: How much time did you spend with him at the table?

A. I got there about 11:00. We sat down. I ordered me a drink. I'd say we talked for over an hour because it was already getting crowded. When I looked up, it was crowded. That's when we started getting up. He gets up. He was already up. We was laughing at him at the table about how he dances and fondling with the girls. So we was sitting in watching that and the club was getting crowded as we're watching people come in. So I get up myself and start going through the club.

Q. At some point, did you notice that Terrance wasn't around?

A. Yeah.

Q. And what did you do?

A. Well, it was—I say after I got up from the

table, I walked around, and ordered a couple more drinks, probably dance a little bit. And so I was looking for him and I didn't find him. So I left the club. It was close to 3:00. It was time for me to go. I was looking for him and I didn't find him, so I went on and left out the club.

Q. And what happened when you left?

A. I left the club, everything was the same. I was going to my car. When I went to my car, I seen Terrance standing by my car, bent over, drunk, laughing, talking about he got put out of the club. And he was just mumbling, talking about some old girls, but he was talking about getting put out the club. So he's at my car. I told him he was going to ride with me. He got in my car. And so he lived too far. So I just went to my house because I was just kind of drunk myself. I went straight home.

Q. Was that unusual or were you shocked when you saw Terrance and learned that he was thrown out of the club?

A. No, I wasn't shocked. He get put out—I ain't going to say all the time. He got put out before at that club and some other clubs. We all—I got put out before. And we get put out sometimes, not all the time.

Q. And why were you put out?

A. I got put out before different clubs but cutting in line. I threw a drink on a girl before. Stuff like

that.

Q. Now you—there's also been an issue regarding braids. Could you—could you tell jury what your hair style is, what you would call that? You're a barber, right?

A. Yeah, I'm a barber, but these right here, these are plaits. These don't hang. These are like plaits. Braids are on to your head. You all would call them corn rolls but we don't use that word. We use braids.

Q. So that's called braids, right.

A. Yeah.

Q. And is that unusual for African-American men to wear braids?

A. No, it's more common to me, it's everywhere.

Q. And just in—just in context of Club 502, you went there for a period of less than six months, right?

A. Yes.

Q. Every—virtually every Saturday night?

A. Yeah.

Q. You were a regular?

A. Yeah.

Q. And you knew a lot of people in there?

A. Almost everybody.

Q. Did many people wear corn roll braids?

A. Yeah, I'd say out of ten guys, it would be about

five or six people that would have them.

Q. So it's very popular?

A. Uh-huh.

MR. OLASH: That's all the questions I have.

THE COURT: Cross?

MR. DAVIS: Thank you, Judge.

CROSS EXAMINATION

BY MR. DAVIS:

Q. Mr. Douglas, good morning.

A. Good morning.

Q. Two years ago, you had your own apartment; is that right?

A. My own apartment?

Q. Yeah, where were you living?

A. I was staying with my girlfriend.

Q. You used to live with your girlfriend?

A. Uh-huh.

Q. And was it just the two of you or was it her mom or somebody lived there?

A. No, just me and my girlfriend and three of my kids and two of my dogs—well, I had one dog then.

Q. And did you have three kids then?

A. Yeah, I got four kids. I live with three and my girlfriend.

Q. Okay. So you had four kids?

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A. But three live in my house.

Q. Three live there?

A. Uh-huh.

Q. With you and your girlfriend.

A. Yes.

Q. And you had those kids with her?

A. Yes.

Q. The three that were there?

A. Yes.

Q. And that apartment was over in the Newburg area?

A. It's a house.

Q. It's a house over in the Newburg area?

A. Yes.

Q. You had your own car then?

A. Yes.

Q. And what work were you doing back then?

A. Cutting hair still.

Q. So you cut—you supported yourself by cutting hair?

A. Uh-huh.

Q. Did you drive trucks at all back then?

A. No, I didn't drive trucks. They was going to send me on the road for two or three weeks straight. So I thought it was going to break my relationship up, so I haven't took it yet.

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Q. All right. You didn't want to break up your relationship, right?

A. Right.

Q. So did your girlfriend go to the club with you when you went with Terrance?

A. She didn't go that night.

Q. All right. Sometimes she'd go?

A. Uh-huh.

Q. Did you go to club every weekend with Terrance?

A. Yeah, most likely, every Saturday.

Q. And you were with Terrance, did you say every Saturday. Would you all go together about every Saturday?

A. Yeah.

Q. I know you can't say every single time all the time, but most of the time you would be with him?

A. Yeah, we'd usually meet at the club. We don't really ride together.

Q. All right. You usually meet this. Where did he live?

A. He live with his mother.

Q. But over in Newburg area, too?

A. No, it wasn't in Newburg.

Q. Where was it?

A. Off of—all the way down Dixie Highway, on Cones Lane, I believe?

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Q. Okay. So it's pretty far from you?

A. Far from my house, uh-huh.

Q. But you got—he's your cousin and—I mean, you'd say you're friends, right?

A. Yeah.

Q. In addition to cousins, you're friends?

A. Uh-huh.

Q. You sort of grew up knowing each other?

A. Uh-huh

Q. You hang out together.

A. Yes, sometimes. Usually towards the weekends, but yeah.

Q. Okay. On the weekends for sure. Ever spend any time together not just clubbing, but during the day.

A. No, not really.

Q. Never watch movies or play video games?

A. I wouldn't say never, but it's not like an everyday thing.

Q. You didn't see him all the time?

A. No, not all the time.

Q. During the day, just at night when you're clubbing. You talked to him on the phone?

A. Yeah.

Q. You had his cell phone number at the time?

A. Did I have it?

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Q: Yeah.

A. Yes.

Q. And he had yours?

A. Yeah.

Q. So you all could call each other if you wanted to?

A. Yes.

Q. Ever go out to eat together after you're clubbing, grab some food?

A. No, I go straight home.

Q. Just run through a McDonalds?

A. I go straight home. McDonalds be closed.

Q. All right. How long have you known him?

A. I'm 29. 29 years.

Q. You're 29. Your first name Vernon or Raymond?

A. Vernon.

Q. What's your birth date, Vernon?

A. May 30th, 77.

Q. Now Vernon, you've never been convicted of a felony, have you?

A. Like last year, I got caught with a DUI. I don't know if that's a felony or not.

Q. Just a DUI?

A. Yeah.

Q. You didn't run from the cops or anything?

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A. No.

Q. You didn't hit anybody?

A. No, I didn't do that.

Q. All right. I didn't think so. I just wanted to ask that. Let's talk about that fight that night specifically. You didn't see the fight, right?

A. No, I didn't see no fight.

Q. Okay. You didn't see the fight between Terrance and Michael Teasley?

A. No.

Q. But you knew that Terrance had been kicked out of the club before?

A. Before that?

Q. Yeah.

A. Yeah, he told me he got kicked out that night.

Q. So you knew he had been kicked out that night?

A. Uh-huh.

Q. And you'd seen him get kicked out of that club other nights?

A. Yeah.

Q. And you'd—

A. Out of that club?

Q. Yeah.

A. That club, no, I only seen him get thrown out of that club one time prior to that one.

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Q. Okay. So you saw him get kicked out of that club one other time at least?

A. Right, right.

Q. What that was for?

A. I believe he was messing with somebody's girlfriend and him and the dude got into a confrontation. And they tried to calm it—the bouncers there tried to calm it down. I believe that's what he got thrown out for that time.

Q. Okay. Messing with somebody's girlfriend?

A. Uh-huh.

Q. You saw him drinking that night, right?

A. Yes.

Q. And you were drinking too?

A. Right.

Q. That's what you do at clubs?

A. Right.

Q. I'm not trying to say there's anything wrong with that. You all were trying to meet girls that night?

A. Meet, yeah. Meet them, dance with them. Uh-huh.

Q. And Terrance was doing that?

A. Yeah.

Q. I think you said you were watching Terrance and I don't remember your exact words. You were watching him doing something with a girl. What did you say?

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A. He was meeting them, I guess, if that's what if you want say.

Q. What were they doing up on the dance floor?

A. He was touching, grabbing and mingling with them, grooving with them, I guess, to the music. I couldn't really hear them. I was just seeing him.

Q. Okay. So you could just see. So he's touching her, grabbing her did you see him pour a drink on a waitress that night?

A. Not that night I didn't.

Q. Have you seen him pour drinks on waitresses before?

A. Yeah—I mean, no, I wouldn't say that.

Q. Never saw him pour a drink on anybody?

A. Throw drinks, he might have hit somebody. I don't know, you think, straight out the top like that.

Q. All right. So you've seen him throw drinks before?

A. Yeah, I've seen him throw some drinks.

Q. Saw him get in confrontations before?

A. Yeah.

Q. Saw him get kicked out of that club and other clubs before, right?

A. Yes.

Q. Okay. Now that particular night when you go in

and you sit down with Terrance—let me ask you this. Do you know him as—do you know his nickname?

A. No. I know what people go by call him.

Q. What's he go by?

A. Some people call him Terrance. Some people call him OG.

Q. What's OG stand for?

A. Original Gangster, I guess, that's what the real word is.

Q. Original gangster?

A. Yeah, they call him Cat Daddy.

Q. Cat Daddy?

A. That's the only names I know.

Q. Okay. When you go in and you sit down that night with your cousin, I think you said you're sitting there. You've got a drink on the table. You've got a coat. You put it on the chair. You're claiming the table, right?

A. Yeah.

Q. And I think you said you saw him put his cell phone on the table, right?

A. His phone was already on the table.

Q. It's already there?

A. Yeah.

Q. Did you put your phone on the table, too?

A. Yeah, I put my phone on the table.

* * *

witnesses, but I asked you to consider what they said. I expect the prosecutor's going to claim, well, they're friends. Friends are always going to lie. The bottom line is think about where you were yesterday, last week, think about where you were Christmastime and where you're going to be Christmastime. Who are you going to be with?

If you're charged with a crime—if I'm charged with a crime, faced with a crime, who do you spend most of your time with, friends, family, people you know. We didn't call any witness from the country club or from the club. They weren't entitled to—his friends were there. They came and they told you what happened.

And I ask that after this case is concluded, after you review the evidence, you return a verdict of not guilty on all three counts. Thank you.

THE COURT: Thank you, Mr. Olash. Mr. Davis?

MR. DAVIS: Thank you, Judge. May it please the Court, Mr. Olash, members of the jury. Who done it? This is a classic case of who done it. Okay. It's like that old Clue game. You take pieces of evidence from here and pieces of evidence from here. And you take pieces of evidence from here and you put them

together. And you figure out who done it. And your job in this case is to take all of the evidence and put all of the evidence together.

Okay. And then, speak the truth. And when you do that, you're going to be convinced that Terrance Miles murdered Michael Teasley in cold blood. You're going to take the evidence of motive. You're going to take

evidence of identity. You're going to take evidence of the actions of a guilty man.

And you can consider all of those things and the big picture, to determine who done it. I'm going to take a few minutes and talk about those types of evidence. The first piece of evidence I want to review in the search for truth is who had motive to kill Michael Teasley? Who had a motive? And what was that motive? Not a theft. Not self-preservation. Not self defense. Not desperation. Not robbery. It's the oldest motive in the world. The oldest motive in the world. It's revenge.

Terrance Miles had a motive and his motive was revenge. There can be no doubt about it. He had a motive. What do you know about him that night that goes to what his state of mind was? What's his motive? You know he was high. You know he got kicked out of the club for smoking dope. His own witness

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said, well, you go up there and sometimes people buy dope, smoke dope. That's what happens at the club.

He's kicked out because he's high. What's his motive? You know he's drunk. Is he is hammered is he falling down passing out, no. But he's drunk. He's dancing with girls. He's fondling girls. He's pouring drinks on the waitress, for Pete's sakes.

He's defiant. He gets kicked out once. He sneaks back in. They're not going to kick him out. This is his club. This is Cat Daddy, Old Gangsta. He gets back in. He's angry. He's been kicked out before. That's not that big of a deal. Okay. He gets kicked out of that club. He gets kicked out of another club. It's no big

deal. He gets kicked out of clubs. That tells you something about him.

But how often does he get kicked out under same circumstances of February 27, 2005. You know he's arrogant. He sneaks back in. He doesn't care what they tell him to do. I shouldn't have to wait back in line, wait in the line next time I come up here. Okay. What's his state of mind? (Inaudible) fighter. Will you stand up for a minute. Terrance Miles, we heard testimony, is about 5, 10, 160 pounds. All right. I'm about 5, 9, 175 pounds. So he is very similar to me.

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Michael Teasley, you heard testimony, is 6, 3, over 300 pounds. Okay. Now I don't—I haven't seen Mr. Mascagni on the scale, but I bet you he needs an extra 100 pounds to get to 300. That didn't scare Terrance Miles a bit, not even a little bit. He punched him right in the jaw. You heard. There was evidence of a bloody nose or bloody lip. He wasn't scared of him. What's his state of mind? He's sure not scared of anything. He's a fighter. And he smirks. You got me. You got me.

And I agree with Mr. Olash. I don't think Michael Teasley was getting him in the face every time. I think he got punched and he got mad and he's obviously bigger. He took down the smaller guy. He's trying get him. The smaller guy's covering up. He just wasn't hitting him. He wasn't make solid contact, which is clear from the physical evidence of Dr. Hunsaker and for physical evidence that you heard about Mr. Miles.

His face isn't bloody. His face isn't bruised. And Mr. Teasley's hands are not bruised. Okay. So he wasn't making contact. He was trying to. Part of the reason

Terrance smirked. Oh, you thought you were getting me. You didn't get a thing. He gets up. He smiles. You got me. I'll get you back. The words of

Crystal Teasley. We'll talk about that in a minute.

He lost the fight. Okay. He got taken down at his club where he is every single weekend. Okay. And he lost in front of over 600 people. He obviously thinks it's a badge of honor to get kicked out of clubs, okay, but not that night. That night, he just didn't get kicked out coming back in. He does what he wants. Fondles women, pours drinks on people, smokes dope. Gets kicked out, comes back in. But that night, he lost. That night, he was embarrassed in front of a lot of people on his turf.

Okay. What's his state of mind? He's known as Cat Daddy there. He's known by Old Gangsta. But that night was different. He was publicly humiliated. His motive was revenge. Okay. And that is a powerful motive, especially when his faculties are depressed by the drugs that he's on. He's not going to be able to control himself like he would if he was clear-headed like any of us. He's high. He's drunk. He's going to do what he wants to do.

So now let's take a look at the identity. You know he's got to motive. It's overwhelming. You heard no other evidence of anybody else having a motive. It all is right there. Right there. Nobody else has a motive to sneak up on Michael Teasley. No

witnesses came in here and said anything about Michael Teasley has ongoing disputes with this person or that person. One guy's motive, just one.

So let's talk about the identity. Mr. Olash makes a lot about Frank Hill because he's right. Do you believe that Frank Hill, when he says, I saw this guy, I saw some guy running from that scene of the shooting. If you believe that, it will take you about five minutes in the back. He's guilty. Okay. On all of it. If you believe that Frank Hill is right, that's it. He's guilty. He saw the shooter. He saw him running.

Mr. Olash tries to pick it apart because the only thing that he can specifically describe, Mr. Hill, is he had black clothes, black shirt. He just saw this guy a few minutes before, an hour maybe less than an hour before, very close-up sent him away at least around the building until he came back. He just saw him. You take a look at people. You see them. You see them running. You still recognize. That's the guy he saw running. I didn't see his face. Same guy. That's not all you have. You have more than Frank Hill.

We know about the shooter, undisputed facts about the shooter. You know the shooter was medium height,

around 5, 10. A couple of witnesses who were a little taller testified he was shorter than them. You know the shooter had a lean build. He's lean. He's fast. He's running like a track star. You know the shooter had on a black shirt and black pants. You know the shooter was an African-American. There are multiple individuals—Frank Hill testified African-American.

You know the shooter had braids. There were multiple people that testified he had braids.

You know his shoe size. You saw it on the bridge. There's a picture of it. It's a bloody footprint on that bridge with a measurement right beside it. There's a picture in evidence that you'll have. You'll know the shoe size. You know the shooter's at the club. Obviously he's out in the parking lot.

You know the shooter drops a cell phone. Nobody else behind there. Mr. Olash wants to make you—wants to suggest that people are walking behind the club to go home. That's sort of a path. Nobody testified there's anybody behind that building, okay, that anybody was going behind that building. Just one guy, the shooter. You know the shooter dropped the cell phone. You know the shooter murdered Michael Teasley. Undisputed, these things about the shooter.

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What do you know about Cat Daddy? You know he's 5, 10. You know he's got a lean build. You know he had a black shirt on that night and black pants. He was an African-American. You know he had braids. He know what his shoe size is. You know he's at the club all night long, until he decides to leave on his own terms. You know he lost his cell phone. And you know he had the motive for revenge.

I want to speak for a moment about the idea of this lost cell phone. Talk about lucky or unlucky individuals. In other words for you to believe this almost insane story about him losing his cell phone, let's talk about what you actually have to believe. Okay. Let's talk—you have to believe that every time he goes to a club, which is every Friday and Saturday

night of his life. He goes to a club. It's a loud club. He takes his cell phone, puts it on the table or on the bar. Okay. Every time, he does it. Because he can see it.

It's too loud. So that's what he does. But not this night. This night, for the first time ever, he forgot it. Or somebody stole it. Okay. The first time ever. Not the most outlandish thing in the world, somebody lost their cell phone. All right. But for the first time out of all the times he puts it

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up there, he loses it or somebody steals it and then the same person that steals it shoots Mike Teasley. Okay. The same person that steals his phone, shoots Michael Teasley.

And not only that, the same night that he accidentally loses his cell phone for the first time, the thief steals his cell phone, shoots Michael Teasley, who happens to beat him up that night. What are the odds. They're astronomical. It is impossible that the one night he gets kicked out of the club, gets in a fight with Michael Teasley, has the motive to come back and get him, then loses his cell phone, that the shooter, the unnamed shooter scoops up the cell phone, decides, I'm going to shoot Michael Teasley, runs behind the club and drops it. It is impossible. It is impossible. That's because he had his cell phone. And he dropped it behind the club.

Frank Hill, an important point, when the shooting occurs, Frank Hill sees the guy running, takes his car. Goes down here. Is looking. Okay. Comes through here and comes and looks behind the club. The two guys from the club are already there. Now you heard Crystal testify that two guys were running after him.

She gave you their names. She thought it was Ken and Keith. We didn't hear from Ken and Keith, but

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Ken and Keith are two guys who were security guys at the club. She testified to that.

Frank Hill said there's guys already there. They said we see him. He says, I see him. Frank—the point is that Frank drives all the way down here on Dixie Highway, all the way here, all the way across the road, up here, walks back through here and the shooter's still back there. Why is he still back there? He's looking for his phone. He's looking for his phone. He knows he dropped it in the dark and he knows that's the only thing that can ID him because he was flying. He shot and he ran. He's looking for his phone.

The next area of evidence I want to discuss with you is what does an innocent person do and what does a guilty person do after they commit a crime? Okay. What happens? What's the difference? And what happened in this case? Actions of a guilty man, there's a whole list of them. I'm going to be back and I'm going to get you.

Now Mr. Olash is very respectful and he's a very talented lawyer. I have a lot of respect for him. And he's saying crystal Teasley, she's not lying, she's saying, but you can't believe her when she says, I'm going to come back and get you. She said she

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heard Terrance say I'm going to come back and get you. He wants to argue that in her mind, things are skewed a little bit and she was still distraught because

her husband had just been shot. And so she's reinventing some facts unintentionally.

All right. Ladies and gentlemen, she's not. Think about this. If Crystal Teasley wants to reinvent facts, don't you think she'd come up with something a little bit better than, he said he would come back. Remember, she heard the shots. She's at the front door. She runs out. They said Mike's been shot. It's her husband for crying out loud. She's going to where Mike's been shot. The shooter runs past her pretty close. And the best she can do is earlier when he got in a fight, he said, I'm going to be back. I'm going to take care of this.

Don't you think she would have gotten up here and said I saw the shooter. He's sitting right there. He ran right past me. I know exactly who it was. If she's going to lie, she'd point him out. She's not lying. Okay. There are a lot of lies she could make up if she wanted to lie. And they have no way to dispute it. She's not lying, unlike some other witnesses that you heard from. She held her head up. She swore to tell the truth and she did. If she

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wanted to lie, she would have been pointing her finger right at him. Nobody was between them. They were close to each other when he ran past.

So guilty man, his words, his actions. He's smiling. He's arrogant. He's knows he's been beat up. He's knows he's embarrassed. He's not going to show that he's upset, because that wouldn't be cool. But he's going to come back and do something. What was his demeanor? He was in the rent a car. Big deal here. He still needs a car. Okay. He's scared. He still needs

a car or he would have dropped it off and been done with it. Or if he really just wanted to still need it, he could have said, hey I just need it for another week. They renewed the contract. That's not what he does.

He drops it off and he does it in a hurry. And you know that because he trades from a black car to a white car. He goes from a Ford Grand Prix to a Toyota Camry. He switches types of cars and colors of car and he does it in a hurry. Pays with cash, thinking I don't want them to be able to track me if I use a credit card. Pays with cash. He does it so quickly, he leaves personal items in the car he trades in. He leaves a phone bill, a personal check, all in evidence. And he leaves a cell phone bill. He leaves

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all those things in the car. He does it in a hurry.

He doesn't want to get caught. He's thinking, what am I going to do, how am I going to get out of this. He knows he left his cell phone at the scene because he couldn't find it rustling around in the dark. So he drops off the—he trades in a black car for the white car. Then he realized, after talking to Terry Maston, he heard from the Enterprise folks that it was Terry Maston that led them to the white car, that Terry Maston had indicated that Terrance wasn't going to turn the car in, but he could take car.

Okay. So he doesn't turn in the white car. Because he knows now he can be tracked through the rental car people because Maston told him, the rental car people know that you're wanted and they want the car back. So he doesn't turn in the white car, either. He just abandons it. He paid cash. Didn't want to be tracked. Abandons the second car.

He's on the run because he knows he did it and he knows that they can track him by his cell phone. And you can use his actions after that night against him in finding him guilty, the actions of a guilty man. He's on the run. On the run for ten days. His face is on the news, just the fact he's on the run are actions of a guilty man. His face is on the news

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Sunday by 3:00. And he's on the run. He's not turned himself in. He's hiding from the police and takes the next step.

He knows braids were flopping. He knows people saw him in the fight in the club, that he had his braids. He gets his barber cousin, not unreasonable to think, to cut his hair. Okay. No more braids. He was in his black car when he drives away from the club. He knows there's 600 people that could have seen him in that car. So he trades it in for the white car, abandons the car, on the run and cuts off his braids. And there's a picture in evidence of what he looked like the day that he turned himself in. No more braids. No more braids. The hair's been cut.

He's changing his appearance. He's dumping his vehicle. He's paying in cash. And he's cutting his hair. I asked what guilty people do. They have to try to hide. He realizes he can't hide. He knows the marshals are after him. It's not just the Louisville Police Department. It's not just the Shively Police. It's the U.S. Marshals. And they have access to the fancy cell phone towers. He knows that it's the marshals that are contacting his relatives.

And he is scared of the marshals. Okay. The marshals are after him every day. They're going to

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homes of relatives. They're getting tips. They think he's at the home. They go the home. They think they're going to bust in. Terrance is gone. Okay. He's contacting relatives. They know that the marshals are after him. He's on the run.

And he lies about what happened to his cell phone. You know that has to be a lie because it is absolutely such preposterous story. You would have to be the unluckiest person on the face of the earth for the murderer of the guy that beat him up to have stolen his cell phone and then dropped it behind the club. Okay. The most unlucky guy in the world.

And that's what happens when you put folks up to lie. You don't have a chance to straighten out all the story. He puts his cousin on the stand and a question came one of you. What happened with the black car? I don't know anything about a black car. What else did he say? Oh, what about the dumpster? I don't remember seeing a dumpster. And what about the cell phone? I don't remember anything about a cell phone. That's because he's just lying. He's just lying.

I mean, do you think if he was so sure his cousin was with him all night long, he would let him sit in jail for almost two years without even trying to tell

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the police? He didn't have anything to lose. He's his close friend. They go to clubs every single weekend. Doing the things at least they were doing at clubs every single weekend and he didn't call soul number one. He didn't call my office, the police, he didn't come to court. He had never been anywhere near this place,

near this case until today. All right. Until today. Nothing that he said was true.

You saw where he had his car parked. He's right by Frank Hill. If you're going to believe that, Frank Hill was from here to the front row from Terrance, who's standing outside his car. We know it's not true. He would have done something about his wrongfully accused friend.

Witness number two, he's a convicted felon. You can hold that against whether you think he's telling the truth or not. In other words, you know he's a convicted felon, you can choose to disbelieve every word he said because of that fact. You don't have to disbelieve him because of that fact. You can watch him testify and disbelieve him.

He's saying he was here. Shooter's in between tables. That's what happens when somebody is telling a lie. You start trying to get them to point out the specifics and they just don't have any. Which way did

he run? Past me. How far away were you? From here to that thing. Did you see—was his face facing you? It was at first. What about when he was shooting? No, no, it wasn't. It was his back. Okay.

This is not entirely unreasonable to think that if he's where he puts himself, he actually is about in that chair and the shooting takes place this far away. Okay. If his back's to him, the shooter's facing this way. Which would require the shooter to be right against the chain-link fence that you can see in the picture in front of the two cars and have no escape route. It's not true. It's not true.

So you have the actions of a guilty man and motive. And he had a strong one. The identification matches. And everything he did until he was taken into custody by Officer Kelsey, were the acts of a guilty man.

The last thing he did, desperation, he gets others to lie. Okay. He gets others to lie. But those guys are lying. There can be no doubt. I want to talk about the phone. If you have any question that phone found back there was his, you can actually, from the evidence you have, see how that we knew that. And I'm not sure that was clear.

The phone number that he gave on his rental car

agreement, one of them—he gave two or three. One of them was the phone that matches the phone found behind club. Okay. You know that it was the phone number of the phone found behind the club because of the forensic exam that was actually done on the phone. You had to have a code to get into the phone. So the officers couldn't just turn it on and figure out what the last ten numbers were.

So they did the forensic exam. It showed that's the numbers. Same number as the number that he himself put on the rental car agreement. We know it's his phone. No question about that. So what do you have? You got the hat. He wants to make a big deal about that hat. Saying we want to distance ourselves from the hat. I would, if I thought the hat played any role at all. (Inaudible) this hat.

It's covered in leaves. It's covered in crusty old dirt. Do you think the Old Gangsta Cat Daddy's going to be wearing this thing to the club? The police knew this had nothing to do with it. They took dozens and

dozens and dozens of pictures of things that may or may not have something to do with it. There was a hat there. They rightfully took a picture of and it collected it. They did not think it was involved.

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You know that because they didn't send it off. It was nine months before I said, hey, send the hat off. We better make sure, at least. I know you don't think it's involved. But let's make sure. We sent it off. They were right, not his hat. You don't have to have DNA to know that somebody's whose—has—his opinion of himself is not going to be wearing this old crusty muddy, leaf-covered hat. He wasn't wearing it. It has nothing to do with the case.

So what is this case about, when you put the evidence together? You've got the motive, the identification, the actions of a guilty man. But it's not what it's about. It's about Mike Teasley. He's a loving father, husband, and son. And he was killed because Cat Daddy got his feelings hurt. That's why he was killed. For no reason at all.

And ladies and gentlemen, when you take a look at all the evidence, the three primary areas, that's the conclusion you're going to come to. You're going to speak the truth, the highest aim of every criminal case is the ascertainment of the truth.

Somewhere in every case, the truth survives. And where truth is, justice steps in and tips the scale in the favor of justice. In this case, you don't have any enemy to punish or any friend to reward. Okay.

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Yours is a solemn duty to speak the everlasting truth. And when you do that, you will know that the evidence points to one place. It points to one place. Who? The evidence points to the man with the black on, the man that had the motive, the man that fits the identification to a tee. Points to Cat Daddy. It points to the Old Gangsta. Who done it? He's sitting right there.

THE COURT: Ladies and gentlemen, you will now be—oh, Darlene, come out, please, and pick out two alternates for us. Now I'll let Darlene be the bad guy or girl, or good girl, depending on how you look at it. Sheriff, in the meantime, will both of you be sitting with the jury? Do each of you swear or affirm you'll take charge of the jury, that you will not allow them to speak to them about this case, and that you will not do so yourself?

THE BAILIFF: I affirm, Your Honor.

THE COURT: Thank you. The sheriff will escort you back to the jury room. Once you have reached a verdict, knock on the door. The sheriff will be outside. If you want to make sure that no one disturbs you, there's restrooms for you, a water fountain and there's double doors. Okay. She's going to pick out two and these two will come up to me and

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I'll give further instructions then.

The alternates are 158527, Mr. Murray, where are you? Sir, you will not go up—go back to deliberate. You'll come up here. Thank you. And juror 156766, Mr. pence, is that you?

JUROR: Spence.

THE COURT: Spence, I'm sorry. You can come up as well. The rest of you may go with the sheriff then.

THE BAILIFF: All rise for the jury, please.

(The jury exited the courtroom.)

THE COURT: Well, gentlemen, thank you very much. You're alternates. So what that means is you're not going to make the decision, as you know. But you can speak to anybody you want now. I mean, you'll have to be quiet about this case. But you don't have to speak to anybody if you don't want to.

JUROR: What about (inaudible)

THE COURT: Keep them. Now do you all have any questions or concerns? Are you going to want to find out what the verdict is? You can call. I'll give you my card. You can call. Darlene will probably answer. Let me turn the noise on.

(Recess taken.)

THE COURT: Ladies and gentlemen, before the jury

gets here, none of us know what the jury has decided. I'd ask there be no outburst, no comments, no nothing untoward. So think on that. Bring them in. We're ready.

THE BAILIFF: All rise for the jury, please.

(The jury entered the courtroom.)

THE COURT: Thank you, Sheriff. Thank you, ladies and gentlemen. Everyone may have a seat. Has the jury reached a verdict, then?

THE FOREPERSON: Yes, ma'am, we have.

THE COURT: And would you hand that, please, to the sheriff. Was this a unanimous verdict?

THE FOREPERSON: Yes, ma'am.

THE COURT: Ladies and gentlemen, was it, by nod of heads? Yes. Okay. And I'll take a poll after I read the verdict as well.

Verdict under instruction No. 1, we the jury find the defendant Terrance Miles guilty under instruction No. 1, which was murder. Ladies and gentlemen, is that, in fact, a unanimous verdict?

THE PANEL: Yes.

THE COURT: I see that it was.

Verdict under instruction No. 2, we the jury find the defendant Terrance Miles guilty under instruction No. 2, which is tampering with physical evidence. Was

this a unanimous verdict, ladies and gentlemen?

THE PANEL: Yes.

THE COURT: I see that it was.

And verdict under instruction 3, we the jury find the defendant Terrance Miles guilty in obstruction three, first degree wanton endangerment. Again, was this a unanimous verdict?

THE PANEL: Yes.

THE COURT: I see that it was. Any further polling of the jury?

MR. OLASH: No.

THE COURT: Counsel, come on up.

(The following was held at the bench, out of hearing of the jury:)

THE COURT: You can look at the verdict forms. They appear to be appropriate. They look appropriate. We'll probably do—we'll start penalty in the morning.

MR. OLASH: Tomorrow morning?

THE COURT: Yeah.

MR. OLASH: How many witnesses?

MR. DAVIS: Just probation, parole and a clerk just on priors. He has one prior felony and some prior misdemeanors.

THE COURT: All right. All right. If you'll—

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C E R T I F I C A T E

I, MELISSA IADIMARCO, do hereby certify that I was authorized to transcribe the foregoing recorded proceeding, and that the transcript is a true and accurate transcription of my shorthand notes to the best of my ability taken while listening to the provided recording.

Dated this 30th day of March, 2020.

s/Melissa Iadimarco
MELISSA IADIMARCO, CSR

APPENDIX N

SUPREME COURT OF KENTUCKY
2007-SC-000298-MR

TERRANCE MILES — APPELLANT

V.

ON APPEAL FROM
JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E.
MCDONALD-BURKMAN JUDGE
NO. 05-CR-000740

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

Respectfully Submitted,

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Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served on this 4th day of September 2007 by U.S. Mail, postage prepaid, on Hon. David Stengel, Commonwealth's Attorney, 514 West Liberty, Louisville, KY 40202, Hon. Greg Stumbo, Attorney General, State Capitol, Suite 118, 700 Capitol Street, Frankfort, KY 40601, and Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division Eleven, 700 West Jefferson Street, Louisville, KY 40202. I further certify that I did not remove the record from the Clerk's Office.

s/Aubrey Williams
AUBREY WILLIAMS

INTRODUCTION

This is an appeal from Jefferson Circuit Court, Division Eleven, Hon. Judith McDonald-Burkman presiding. The Appellant, Terrance Miles, brings this appeal challenging the judgment of the trial court sentencing him to a period of 50 years following a jury verdict finding him guilty of Murder in the First Degree and being a Persistent Felon in the Second Degree. Appellant contends that the trial court committed reversible error in five areas: (1) failure to grant a speedy trial in violation of the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution, (2) failure to grant a speedy trial in violation of KRS 500.110, (3) improper impeachment of a witness by the prosecutor, (4) misleading and false testimony before the grand jury, and (5) the court's limiting defense counsel in the cross examination of the commonwealth's jailhouse witness.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the seriousness of this case, the confusion surrounding the record, the failure of trial counsel to protect the record, and the novelty of the issue relating to the "totality of circumstances" of the whole trial, Appellant believes it would be helpful to the Court if oral arguments were held.

* * *

I. STATEMENT OF THE CASE

Terrance Miles was indicted by the Jefferson County Grand Jury on March 5, 2005 for the alleged murder of Michael Teasley. After several continuances, all of which had been requested by the Commonwealth, the case went to trial on December 12, 2006. The case had previously been set to be tried on December 5, 2005, April 11, 2006, and September 26, 2006. At each call of the case prior to December 12, 2006, Hon. Scott Davis, Assistant Commonwealth's Attorney in charge of the case, moved for a continuance, claiming that DNA testing of a critical piece of evidence, a toboggan, had not been completed.

On each occasion he stated that the test would yield evidence that was either inculpatory or exculpatory. Persuaded by his assertions, the trial court on one occasion expressed concern that the Defendant would be deprived of a fair trial if she were to allow the case to go forward without benefit of the DNA test results. The Defendant announced ready for trial on each call of the case and objected to the continuances. When the case was finally tried, the prosecutor extracted testimony from the investigating officer and argued to the jury that the police never viewed the toboggan as having any evidentiary value at all [Tape 1, 12/12/06at 12:50:00; Tape 2, 12/13/06 at 14:13:19–14:13:49] [emphasis added].

A. STATEMENT OF THE RELEVANT FACTS

During the early morning hours of February 27, 2005, Michael Teasley, a bouncer at Club 502, was shot and killed outside the club. Earlier in the evening, after another bouncer had removed the

Appellant from the club for unruly behavior, he and Teasley got into a fight. Frank Hill, an off-duty Louisville Metro police officer who was working security at the club, testified that the assailant's physical characteristics matched those of the Appellant, whom he had seen fighting Teasley [Tape I, 12-12-06; 14:10:30–53]. On cross-examination, Hill admitted that the shooter was wearing a toboggan [Id. at 14:29:08]. He also admitted telling the investigating officers on the night of the shooting that the shooter was wearing a toboggan [Id. at 14:35:05].

Teasley's widow, Crystal Teasley, also testified that the shooter was wearing a toboggan [Id. at 15:38:20]. Another witness, Raymond Douglas, also testified that the shooter was wearing a toboggan [Tape 2, 12/14/06 at 11:19:40]. A toboggan was found in the vicinity of the shooting [Id. at 14:38:00]. It was collected by the Evidence Technician Unit of the Louisville Metro Police Department on the night of the killing [Tape 1, Donna Stevenson, 12/12/06 at 10:21:10].

Furthermore, in a motion filed on February 9, 2006 requesting DNA samples from the Appellant, the Commonwealth asserted that the assailant was wearing a toboggan and that a toboggan was recovered from the scene [Tr.R. Vol. III at 376–378].

On March 3, 2005, Miles was indicted by the Jefferson County Grand Jury for murder, tampering with physical evidence, first degree wanton endangerment, and for being a persistent felony offender in the second degree. He was arraigned on the charges on March 11, 2005. On May 17, 2005, his case was set to be tried on December 13, 2005. According to Det. Chris Ashby, lead investigator of the

crime, the toboggan was not sent to the lab for testing until November 7, 2005, almost nine months after the murder [Tape 1, Det. Ashby, 12/12/06 at 14:08:40].

At a pretrial of the case on December 5, 2005, Mr. Davis made the following statement to the court: "There're two items in evidence. One is very substantial...not back from the lab yet" [Misc. Tape, 12/5/05]. At that point the court asked the question, "What's not back?" And Mr. Davis stated, "There's a toboggan found at the scene that the commonwealth at this point the defendant or the shooter was wearing at the time of the shooting and that toboggan is still being tested.... It would be our motion for a continuance. The results will be inculpatory or exculpatory." [Id. at 14:33:25–14:33:41].

At the first call of the case for trial on December 13, 2005, the commonwealth moved for a continuance "to wait for the results of the test," and stating further that it would be to the advantage of one or the other of the parties [Misc. Tape, 12/13/05 at 10:18:26–10:22:42]. During the exchange, Miles made an oral motion for a speedy trial, having previously filed a written motion pro se [Id.]. The case was then set for trial on April 11, 2006.

At the call of the case on April 11, 2006, the commonwealth again moved for a continuance because the DNA testing had not been completed [Miscellaneous Tape, 4/11/06 at 10:01:03–10:03:12]. The case was reassigned for trial on September 26, 2006. At the call of the case on that date, the commonwealth again moved for a continuance and the court sustained the motion, again over the objection of the defense [Miscellaneous Tape,

9/26/06 at 9:23:05–9:24:00]. The case was set to be tried the final time on December 12, 2006.

Interestingly and disturbingly, Mr. Davis brings out on direct examination of Det. Ashby that the hat was of no relevance at all. Having him view a photograph of the toboggan, he asks him this question: Did you think that hat and the condition it was in was an item of evidence that you needed to test?" The detective's response, of course, was obvious [Tape 1, 12/13/06 at 12:53:00–12:54:00].

Equally disturbing, in light of his representations to the court concerning the significance of the toboggan, were Davis's remarks to the jury during closing arguments:

> ... He wants to make a big deal about the hat. I would if I thought the hat played any role in it at all. Take a look at this hat. It's covered in leaves. It's covered in crusty old dirt. The police knew this had nothing to do with it. They didn't think it was involved. You know that because they didn't send it off. I told them: "I know you don't think it's involved, but let's make sure...." [Tape 2, 10/14/06 at 14:13:00–14:13:50].

The matter becomes even more unsettling in light of the fact that the toboggan was not available for viewing and examination by the Appellant, the jury or the court at the trial of the case. Not only was it not introduced into evidence, the record is deafeningly silent on the DNA testing of the item and the prosecutor's explanation to the court on his contradictory positions on the relevance of this "once critical piece of evidence." It is more than remarkably curious that neither the prosecutor nor counsel for the

Appellant felt it necessary to confront this obviously very serious issue.

As a result of the delays, the Appellant lost a key witness, namely, Steven James Edwards, who died on June 25, 2006 from a motorcycle accident [Tr. R., Vol. VI at 781].[1] The delay also affected Appellant's classification, freedom of movement and other privileges while he was serving time in Northpoint on unrelated charges. This issue is addressed in his motion for a bond reduction, which is discussed more fully below.

Appellant's counsel filed a written motion for speedy trial and a motion to dismiss the indictment for failure of same on December 13, 2005 [Tr. R., Vol. III at 342–350]. Miles filed a pro se motion to dismiss the indictment for failure to prosecute on September 25, 2006, grounding the motion in KRS 500.110, Section 11 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution [Tr. R., Vol. IV at 538–561]. Previously, he had sent letters to the court protesting the delay and requesting a speedy trial [Tr. R, Vol. III at 416 and 419]. Moreover, he moved the court for a bond reduction, which, if granted, would have affected his classification and freedom of movement in the penitentiary where he was serving time on an unrelated offense [Tr. R, Vol. IV at 452–454].

The prosecution clearly and unequivocally misled the court and unnecessarily delayed the trial of the case. His tactics deprived Appellant of his rights to a

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[1] Appellant has tendered with this brief a motion to supplement the record to include his affidavit and the death certificate on Steven Edwards.

speedy trial under the Sixth Amendment to the United States Constitution and the Eleventh Amendment to the Kentucky Constitution. Additionally, the prosecutor violated Appellant's statutory right to a speedy trial under KRS 500.110.

Other facts critical to a fair disposition of this appeal involve a variety of incidents that occurred during the trial, which either were not preserved or were insufficiently preserved. The first deals with the testimony of the commonwealth's jail house snitch, Bryce Bonner. His testimony creates an issue in two respects. One was preserved and one was not. The former involved the court's refusal to allow defense counsel to impeach Bonner's credibility. The commonwealth moved in limine to prevent the Appellant from cross-examining him about his motive for assisting the prosecution. The court sustained the motion on the grounds that his testimony did not result from the inducement of receiving a deal from the commonwealth. The defense argued that even if he did not get a deal, his motivation for coming forward was prompted by his thinking that he could get a deal. [Tape 1, 12/13/06 at 09:39:09–09:47:10].

The second and most egregious was not preserved, and constitutes the first of the unpreserved errors alluded to above. It involves the prosecutor's improper tactics in the direct examination of Bonner, captured by the following dialogue when the prosecutor's initial questions did not achieve the expected response:

Q. When he's telling you this information, what is his demeanor?

A. Calm, rational

Q. When he's talking to you?

A. Yeah.

Q. Did he have any particular attitude about what he thought would happen in this case?

A. Angry because...

Court: Mr. Bonner, keep your voice up.

A. Angry because he was being accused of charges he didn't commit

Q. Mr. Bonner, you're a convicted felon isn't that correct

A. Yeah.

Q. You remember having a conversation with me and Mr. Mascagni?

A. Yeah.

Q, Right here in this courtroom?

A. Yeah.

Q. You remember when I asked you the same question yesterday in this courtroom what your answer was?

A. No.

Q. You remember me asking you the question what his demeanor was when he was giving you the information?

A. Yeah.

Q. You remember what you said?

A. No. I do not?

Q. You don't remember saying that Mr. Miles had arrogant demeanor and they would never convict him?

A. Yeah.

…….

Q. Did Mr. Miles say he didn't do it?

A. Yes he did.

Q. Do you remember having the same conversation with me and Mr. Mascagni yesterday?

A. Yeah.

Q. You remember us asking you if he ever denied doing the shooting?

A. No. He just said, ah, he wouldn't be convicted of it.

Q. So he didn't deny it He just said there's no way he could be convicted?

Q. In the same conversation we had yesterday, remember us asking you the question about whether he said he was at the scene during the shooting?

A. Yeah.

Q And do you remember what you said yesterday?

A. All I remember is him being there, ah, after the shooting. I don't don't know about during or before.

Q. So he told you he was there after the shooting?

A. Yes.

[Tape 1, 12/13/06 at 10:06:09–10:08:36].

The second of these was the prosecutor's eliciting from Det. Ashby a statement that he had shown a photo pack that included a picture of Appellant to

Reggie Burney, who did not testify at the trial [Id. at 14:09:50–14:10:10]. That clearly was hearsay of a serious nature and deprived Appellant of his right of confrontation.

Another error involved the failure of the court to declare a mistrial when it came to the court's attention that a juror had a professional relationship with and had discussed the case with Officer Tim Crawford, one of the lead investigators in the case. Officer Crawford did contract work for the juror's funeral home. Despite the juror's bringing these facts to the attention of the court, near the conclusion of the trial, she was allowed to remain on the jury [Tape 3, 12/14/06 at 10:15:17–10:16:27].

Another area involved the incessant leading of his witnesses by the prosecutor, too numerous to catalogue here but present throughout the course of the trial. Despite the failure of defense counsel to object, it was fundamentally unfair to Mr. Miles.

Another involved the prosecutor saying to the jury during his closing argument what Terry Masden allegedly said and did when Masden did not testify at the trial of the case [Tape 3, 12/14/06 at 14:04:30–14:04:50].

Finally, the prosecutor argued to the jury that defense witnesses were lying. This was clearly improper and particularly egregious in light of the fact that he himself had caused the delays in the trial of the case, delays which naturally could have had an effect on a witness' memory [Id. at 14:07:56–14:11:30].

All of the foregoing errors, particularly in light of the seriousness of this case, add up to a denial of a fair

trial in violation of both the Kentucky Constitution and the Constitution of the United States.

The final area of concern, properly and sufficiently preserved, involves the presentation of the case to the Jefferson County Grand Jury. Sgt. Laun of the Shively Police Department testified that he showed a photo pack to two individuals, Frank Hill and Reggie Burney, who actually witnessed the shooting of Mike Teasley. Hill did not see the shooting and had given the following statement to Sgt. Laun:

> I heard four or five shots ring out. I immediately got out Of my car to look and see what was going on... as I got there, I noticed Mike lying on.... I said, "Where is the shooter? Who had the gun?"

Reggie Burney had made the following statement to him: "I cleared out the last of the riff raff that was inside and then all I hear is Mike's been shot." He went on to state that he did not see the gun shots and did not see what had happened. [Tr.R., Vol. III at 345–349].[2]

Appellant submits that the foregoing facts clearly show that he was deprived of his rights to a fair trial, that reversible errors occurred, some of which were preserved and others that were not, but should, nonetheless, be reviewed under the doctrine of palpable error. Accordingly, the case should be reversed and returned to the trial court for a new trial.

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[2] The record is not clear on the exact location of this document.

II. ARGUMENT

A. Whether The Prosecutor's Intentional Misleading Of The Court, Which Resulted In Unnecessary Delays Of The Trial Of The Case, Deprived Appellant Of His Rights To A Speedy Trial Under The Sixth Amendment To The United States Constitution And Section Eleven Of The Kentucky Constitution.

Section Eleven of the Kentucky Constitution and the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees an accused the right to a speedy trial. In the case of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), the United States Supreme promulgated four factors to be considered in determining whether the right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.

Under *Barker* the length of the delay must be presumptively prejudicial in order to trigger an inquiry into the other three factors. Miles was indicted on March 3, 2005 but was not tried until December 12, 2006. This delay of approximately 21 months clearly is sufficient to trigger the inquiry. See *Ringstaff v. Howard*, 861 F.2d 644 (11 Cir. 1988) (Delay of 23 months between defendant's arrest for murder and trial for capital murder was serious and presumptively prejudicial for purposes of claim defendant was denied constitutional right to speedy trial); *Arrant v. Wainwright*, 468 F.2d 677 (5th Cir.)

(Almost two-year gap between indictment for murder and trial is clearly sufficient to require serious consideration of petitioner's claim that he was denied his right to a speedy trial).

Miles satisfies the second prong of the test based on the fact that the delays were caused by the prosecution and for no legitimate reason. As pointed out hereinabove, the case was continued because of the prosecution's claim that the toboggan that was found at the scene of the homicide was a critical, vital and essential piece of evidence and that the testing of it would establish either the guilt or innocence of the Defendant. Acting on these assurances, the court continued the case three times, stating on one occasion that despite the Defendant's protestations, she was reluctant to try the case because it could result in the deprivation of his right to a fair trial.

Yet, when the case was finally tried, the prosecutor, using a photograph of the toboggan as a prop, elicited direct testimony from his lead detective that the toboggan was irrelevant and was never considered to be of any evidentiary value to the case. Furthermore, in his closing argument to the jury, he stated that neither he nor the police ever believed that it belonged to the killer of Michael Teasley. Clearly, he intentionally misled the court and intentionally caused a delay in the trial for no legitimate reason.

Miles satisfies the third prong of *Barker* by asserting his right to a speedy trial. As pointed out in his "Statement of Relevant Facts," he wrote two letters to the judge protesting the delays in his trial. His letter dated November 25, 2005 is particularly relevant because it contains the following statement:

> This should serve as notice to the Court that I wish to exercise my Sixth (6th) Amendment right to a Fast and Speedy Trial (sic). I have discussed this with my Attorney, Mr. Olash. It is I alone who will suffer the fate. . . .

[Tr.R., Vol. III at 328–331].

Additionally, his attorney filed a written motion for a speedy trial and on another occasion filed a motion for a bond reduction. With respect to the latter, the Sixth Circuit has held that a request for reduction of bail is equivalent to a request for a speedy trial. *Cain v. Smith*, 686 F.2d. 374, 384 (6th Cir. 1982).

The *Barker* court held that the defendant's assertion of his trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. 407 U.S. at 531–32, 92 S.Ct at 2192–93. The failure to assert the right, however, does not demonstrate that there was no constitutional violation. Id. at 528–29, 92 S.Ct. at 2192.

Turning to the fourth prong of the grid, i.e., whether Miles was prejudiced as a result of the delay. It is submitted that there can be no doubt that he was, indeed, prejudiced because of the delay. As noted hereinabove, a key witness, Steven James Edwards, died in a motorcycle accident while the case was pending. Secondly, he was serving time for an unrelated conviction, he still suffered oppressive pre-trial incarceration. The indictment caused him to be housed at a more secure facility and prevented him from participating in programs for rehabilitation and self-improvement. In *Moore v. Arizona*, 94 S.Ct. 188 (1978), the United States Supreme Court held that some of these factors may carry quite different weight

where a defendant is incarcerated after conviction in another state, but no court should overlook the possible impact pending charges have on his prospects for parole and meaningful rehabilitation. Citing *Strunk v. United States*, 412 U.S. 434, 439, 93 S.Ct 2260, 2263, 37 L.Ed. 2d 56 (1973). See also *Arrant*, *supra* which addresses the anxiety and worries of an accused awaiting trial. More important, however, is the impairment to a defendant's case. *Barker* 407 U.S. at 532, 92 S.Ct. 2182; *United States v. White*, 985 F2d 271, 276 (6th Cir. 1993).

It should be noted, however, that where the first three prongs of *Barker* weigh heavily against the state, the defendant need not demonstrate "actual prejudice." *Moore*, *supra* at 414 U.S. 25–26, 94 S.Ct.188–189, 38 L.Ed. 2d 183. The Kentucky Supreme Court addressing the issue of the right to a speedy trial in the case of *Gabow v. Commonwealth*, 34 S.W.3d 63 (2000), lifted the following language from *Barker*.

> A defendant's right to a speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis in which the conduct of the prosecution and that of the defendant are weighed.

Id. at 514, 92 S.Ct. at 2184.

Appellant submits that the conduct of the parties weighs heavily against the prosecution in the case at bar, and for this reason the judgment below must reversed.

B. Whether The Prosecutor's Conduct Deprived Appellant Of His Right To A Speedy Trial Under KRS 500.110

Appellant submits that in addition to his rights to a speedy trial being violated under the United States and Kentucky Constitutions, he was deprived of these same rights in violation of KRS 500.110, which reads as follows:

> Whenever a person has entered upon a term of imprisonment In a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment…; provided that for good cause shown… the court... may grant any necessary or reasonable continuance.

Although it is not entirely clear from the record, it is believed that the Commonwealth lodged a detainer against Miles in September 2005. As pointed out in the foregoing argument, both pro se and through his trial counsel, Miles made his wishes for a speedy trial known. It is undeniable that in light of the prosecutor's conduct there was no good cause shown for the court to continue the case. Nor, for the same

reason, was it necessary or reasonable for the court to grant the continuances.

Appellant submits that under the facts of this case, it is beyond cavil that the commonwealth failed to comply with the statute. See *Rosen v. Watson*, 103 S.W.3d 25 (2003) (writ properly issued to preclude prosecution where the commonwealth failed to comply with statutory speedy trial right granted in KRS 500.110). Appellant further submits that the dispositive or determinative question, as it were, is whether the continuances that the prosecution obtained were what is described as "ends of justice" continuances under the Federal Speedy Trial Act, 18 U.S.C. § 3161(h)(8). *United States v. Huff*, 246 F.Supp.2d 721, 726 (W.D.Ky. 2003), citing *United States v. Cianciola*, 920 F.2d 1295, 1298 (precludes a district court from relying on the government's lack of preparation as a reason for granting an excludable continuance).

In *Cianciola*, the court excluded the continuance from the calculation because it found that there was no evidence that the government committed chronic discovery abuses or acted in bad faith. Id. at 1300. By analogy, it is clear that the prosecutor at bar abused the Rules and the judicial process by falsely claiming that the toboggan was essential to a just treatment of this case.

Accordingly, for the foregoing reasons and more this case should be reversed.

C. Whether The Compilation Of Unpreserved Errors When Viewed As A Whole And From The Totality Of The Circumstances Constitute Palpable And Reversible Error.

R.Cr. 10.26 reads as follows:

> A Palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Appellant has identified six errors, which, he contends, if considered as a whole or from the totality of circumstances constitute palpable error. They are the prosecutor' s direct examination of Bryce Bonner, Det. Ashby's hearsay testimony that Reggie Burney, who did not testify, identified Appellant from a photo pack; the court's failure to declare a mistrial when it came to her attention that a juror had discussed the case with one of the investigating officers; the prosecutor's incessant leading of his witnesses; the prosecutor's comments about the statement of Terry Masden, who did not testify; and finally, the prosecutor's comments that the defense witnesses were lying.

It is a violation of fundamental fairness and due process for a prosecutor to place his or her credibility before a jury unless the prosecutor is a witness. *Com. v. Cook*, 9 Ky.L.Rptr.829, 86 Ky.663, 7 S.W.155 (1888). SCR 3.130-3.4(e) of the Kentucky Rules of Professional Conduct provides that a lawyer shall not "assert

personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a civil litigant, or the guilt or innocence of an accused." The prosecutor at bar violated this Rule in his direct examination of Bonner by extracting from him the alleged confession of the Appellant. His tactic, in effect, placed the prosecutor in the position of testifying himself.

His tactic was similar to the conduct of the prosecutor in the case of *Dean v. State*, 615 S.W.2d 354 (Ark. 1981), which led to the following exchange between the prosecutor and a witness:

> Q. You remember my telephone conversation with you the other day?
>
> A. I was trying to recall it this morning. I can't recall the specific things that we talked about.
>
> Q. Okay.... Do you recall telling me in our telephone conversation that the Defendant would be very likely to do this sort of thing again?

In that case, unlike the case at bar, the defendant objected and the trial court admonished the jury. The Arkansas Supreme Court held, nonetheless, that the prosecutor statement was a flagrant violation of the appellant's right to a fair trial under the Arkansas and United States Constitutions.

The prosecutor at bar also violated the above-mentioned Rule when he argued that the defense witnesses and the defendant were lying. Unless testifying as a witness, it was highly improper for him to give his personal opinion about the credibility of the

Appellant's witnesses. He certainly should not have commented that Miles was lying for the further reason that he did not testify.

He also violated Rule 611 of the Kentucky Rules of Evidence, which states, "Leading should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." When he was not putting words in Bonner's mouth, he was putting leading questions to him. Note the following exchange:

Q. So, he told you he was there after the shooting/

A Yes.

[Tape 1, 12/13/06 at 10:08:36].

And the following exchange between him and Det. Ashby:

Q. Did you think that hat and the condition it was in was an item of Evidence that you needed to test?

A. No.

[Tape 2, 12/13/06 at 12:54:00].

The trial court enjoys some discretion in allowing leading questions, such as when substantial time has elapsed between an incident and the trial of a matter, or when a case presents complex issues, or when dealing with witnesses of a tender age, to name a few (citations omitted). The case at bar does not fall in any of those categories. There was simply no justification for the incessant leading in this case. Even though trial counsel did not object, the prosecutor's violations of the rule, when viewed from a totality of the

circumstances point of view, constituted reversible error.

D. Whether The Commonwealth's Witness' False And Misleading Testimony To The Grand Jury Constitutes Reversible Error.

Sgt. Teddy Lann's testimony to the grand jury that Frank Hill and Reggie Burney had witnessed the Appellant shooting Teasley was clearly and undeniably inaccurate. In the case of *Comm. v. Baker*, Ky. App., 11 S.W.3d 585 (2000), the commonwealth's witness testified falsely about the type of instrument that the defendant allegedly used in physically punishing her children. The Court stated that dismissal of the indictment was necessary to ensure the integrity of the criminal justice system. The Court articulated the following principle:

> A defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment.

Id. at 588.

Due process demands that the grand jury process remain fair and undistorted by witness manipulation. The right to indictment by grand jury was included in the *Bill of Rights* to protect citizens against the excesses of the government and against unfounded criminal prosecution. The constitutional role of the grand jury as a bulwark between citizens and the government is severely undermined if the prosecution is allowed to manipulate it with misleading and false testimony. *United States v. Dionisio*, 410 U.S. 1, 23 (1973) (Douglas, J. dissent).

It is clear that these principles were violated in the instant case. Accordingly, the judgment of the trial court should be reversed and remanded to the trial court with instructions to dismiss.

E. Whether The Trial Court's Refusal To Allow Appellant To Cross Examine Bryce Bonner On His Motive For Testifying For The Commonwealth Was A Violation Of His Sixth Amendment Right

In response to the Commonwealth's motion in limine to prevent him from cross examining Bonner on his motive for testifying against him, counsel for Appellant pointed out that even if it were true that the Commonwealth did not offer him a deal in exchange for his testimony, the fact remains that Bonner initiated the contact and sought a deal from the Commonwealth [Tape 1, 12/13/06 at 09:40:11]. It is obvious from the discussions with the court that Bonner, a convicted felon, was not motivated by any desire to win a good citizenship award.

His belief that he would profit from his testimony is what prompted him to make the contact. The fact that he did not get a deal, therefore, should not be the focus. This is especially so in light of his demeanor on the stand. That is to say, it cannot be ignored that when he took the stand, he was less than cooperative. It is not illogical to conclude that his lack of cooperation was a result of not being able to get a deal. The prosecutor cleverly, albeit improperly as Appellant has argued, extracted from him the product that he was peddling in the beginning. Put another way, the prosecutor acquired through the back door what Bonner had offered initially to supply through the

front door. When examined in this light it seems clear that the trial court should have allowed defense counsel to probe into Bonner's motive.

As this court noted in *Davenport v. Com*., 177 S.W.3d 763 (Ky. 2003), the Sixth Amendment right to cross examine the prosecution's witness is an essential aspect of Sixth Amendment confrontation clause. *Douglas v. Ala*., 380 U.S. 415, 418, 85 S.Ct 1074,1076, 13 L.Ed, 2d 934, 937 (1965). Additionally, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed. 2d 347, 354 (1974).

The Sixth Amendment's confrontation clause guarantees effective cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed. 2d 674, 683 (1986). That Court stated further,

> .... We think that a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby "to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness….

Id. at 475 U.S. at 680, 106 S.Ct. at 1435–36.

The *Davenport* court, while properly recognizing the discretion that the trial court enjoys in imposing limitations on cross-examination, stated that the Kentucky Supreme Court in defining reasonable limitations has cautioned that a connection must be

established between the cross-examination proposed to be undertaken and the facts in evidence. Citing *Commonwealth v. Maddox*, 955 S.W. 2d 718, 721 (Ky. 1997). Appellant submits that the relevant facts, as outlined above, were those involving the circumstances of Bonner's coming forward offering to testify and the conduct of the prosecutor.

As counsel for Appellant understands the case law, the sum and substance of the inquiry is whether the trial court prevented a reasonably complete picture of Bonner's veracity, bias, and motivation. *Davenport* at 770. Appellant submits that she did. Accordingly, the judgment of the trial court should be reversed and remanded far further proceedings.

CONCLUSION

The Appellant was deprived of his rights to a speedy trial in violation of the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution as a result of the unreasonable continuances of the case. He was also deprived of his statutory right to a speedy trial in violation of KRS 500.110, which requires that a detained defendant be tried within 180 days. He was deprived of his constitutional rights to a fair trial because of numerous unpreserved errors, which should be reviewed for palpable error; false and misleading testimony by the commonwealth's witness to the grand jury; and, finally, by the trial court's limiting his right to cross examine a witness for the commonwealth.

Based on these errors, the judgment of the trial court should be reversed and the case should be remanded there for further proceedings.

Respectfully Submitted,

s/Aubrey Williams
AUBREY WILLIAMS

APPENDIX O

SUPREME COURT OF KENTUCKY
2007-SC-000298-MR

TERRANCE MILES — APPELLANT

V.

ON APPEAL FROM
JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E.
MCDONALD-BURKMAN JUDGE
NO. 05-CR-000740

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

Respectfully Submitted,

s/Aubrey Williams
AUBREY WILLIAMS
455 Forth Avenue
Suite 421 Starks Building
Louisville, KY 40202
502-581-1088
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served on this 15th day of April 2008 by U.S. mail, postage prepaid, on Hon. David Stengel, Commonwealth's Attorney, 514 West Liberty, Louisville, KY 40202, Hon. Jack Conway, Attorney General, State Capitol, Suite 118, 700 Capitol Street, Frankfort, KY 40601, and Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division Eleven, 700 West Jefferson Street, Louisville, KY 40202. I further certify that I did not remove the record from the Clerk's Office.

s/Aubrey Williams
AUBREY WILLIAMS

* * *

CORRECTED STATEMENT OF THE RELEVANT FACTS

Counsel for the Appellee states that Appellant's trial counsel objected to only one of the Commonwealth's three requests for a continuance to the trial of the case and that occurred on April 11, 2006 (Commonwealth's Brief on Appeal at 1).[1] Counsel omits the very significant fact that the court made it perfectly clear that she had no intention of trying the case before the test was performed on the toboggan [Misc. Tape, 4/11/06; 10:00:22–10:00:50]. Thus, counsel is being hyper-technical by claiming that the defense did not specifically object to the motion for a continuance at the call of the case on September 26, 2006.

At the same time he acknowledges that counsel for Appellant announced ready (Appellant's brief at 7). No disrespect is intended, but it is a tautological absurdity to equate announcing ready for trial, without more, as being insufficient to show an objection to the trial's being continued. Making the Appellees' argument even more disingenuous is the fact that the Appellant was not even in court at the call of the case. Why? Because the Commonwealth had informed defense counsel on Friday that the testing had not been completed and, therefore, the case would be continued. This was an obvious assumption based on the history of the case and the court's previous comments. Indeed, at the call of the case, even though the Defendant was not present in the courtroom, the court acknowledged that the

---

[1] Counsel for the Appellee mistakenly states April 11, 2005.

defense was announcing ready [Misc. Tape, 9/26/06; 9:22:32–9:24:00).

Although pointed out in Appellant's brief in chief, the Commonwealth's statements to the court concerning the toboggan prior to the trial and during closing argument is worth repeating here. The prosecutor made the following statement to the court on December 5, 2005: "There's a toboggan found at the scene that the Commonwealth will allege the shooter was wearing." Referring to the toboggan, he goes on to state that there are two pieces of evidence and that one is substantial [Misc. Tape, 12/05/05; 14:33:37]. At the call of the case on April 11, 2006, he repeated that statement and added, "We feel like we need this evidence in our case . . . ." [Id. at 10:01:30–10:01:47].

Furthermore, at a pretrial on March 3, 2006, counsel for the Commonwealth informed the court that he had obtained samples of the Appellant's hair to compare with the DNA evidence from the toboggan [Misc. Tape, 3/3/06; 11:44:50–11:45:30]. These stark contradictions between what is now being argued by the Appellee over against what was represented to the trial judge to urge continuances of the trial is self-evident and shows no less than bad faith on the part of the Commonwealth during the proceedings below. This is especially so when viewed in light of the prosecutor's closing argument to the jury.

ARGUMENT

I.

THE APPELLEE HAS FAILED TO SHOW THAT THE PROSECUTOR'S INTENTIONAL MISLEADING OF THE COURT, WHICH RESULTED IN DELAYS IN THE TRIAL OF THE CASE, DID NOT DEPRIVE APPELLANT OF HIS RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION ELEVEN OF THE KENTUCKY CONSTITUTION.

1. Appellant Was Denied His Constitutional Right To A Speedy Trial.

Counsel for the Appellee claims that the Appellant "voiced no objection to the first two continuances (Appellee's brief at 7). That is simply not correct. The case was first set to be tried on December 13, 2005. At that time the Appellant made it clear that he was ready for trial [Misc. Tape 12/13/05; 10:23:23]. The case was re-scheduled to be tried on April 11, 2006. As counsel for the Appellee correctly states, the Appellant objected to the motion on that date. It was then rescheduled for trial on September 26, 2006. The Commonwealth again asked for a continuance over the Defendant's continuing objection.

Commenting on the paradigm prescribed in *Baker v. Wingo*, 407 U.S. 514 (1972), counsel for the Appellee argues that the delay in the trial was caused by a neutral factor, i.e., the testing of the toboggan, over which the Commonwealth had no control (Appellee's brief at 7). Mr. Teasley was killed on February 27, 2005. There is no denying that the Commonwealth

had the evidence in its possession for over nine months before bringing to the court's attention, on the eve of trial, that it represented a critical piece of evidence. The Commonwealth represented that it was critical without stating when he became aware of its relevancy. He did not present the court with any justification for the nine month delay, such as what efforts he had made to have it tested, why his efforts to get it tested were unsuccessful, etc.

Inasmuch as the evidence was collected at the time of the shooting, the court must logically conclude that the police thought it was relevant. Indeed, in light of the statements that they took from witnesses, they apparently believed it was critical to their case. They have offered no argument or evidence to suggest that anything occurred during the interim to change that belief.

It is not insignificant that they do not indicate the date that the item was delivered to the lab, or letters or telephone conversations between them and the lab so as to show due diligence in trying to get it tested. If several months passed before they got it to the lab, it can certainly be concluded that the delay was not justified and, therefore, fails the neutral test. See *Payne v. Reese* 738 F.2d 118 (6th Cir. 1984) (negligent delay weighted against government because of its responsibility to bring cased to trial even where a defendant is incarcerated in another jurisdiction on pending charges).

Finally, counsel for the Appellee claims that the Appellant did not argue the anxiety issue in his brief: This is simply not correct. Please see page 12 of Appellant's brief. Second, he makes light of

Appellant's claim of prejudice under the second prong of *Barker v. Wingo*, i.e., "minimization of anxiety and concern of the accused," arguing that Appellant merely showed the type of concern that one could ordinarily expect when facing prosecution (Appellee's brief at 9).

The fact of the matter is the Appellant pro se emphasized the anxiety issue in his post-trial motion [Tr.R., Vol. VI at 777–795]. It is submitted that his anxiety, combined with the loss of a key witness, Steven James Edwards, combined with the bad faith of the prosecutor in causing the trial to be delayed, are more than sufficient to satisfy the *Barker v. Wingo* test that Miles's constitutional right to a speedy trial was violated. Accordingly, the charges should be dismissed with prejudice. *Strunk v. U.S.*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

CONCLUSION

The Appellant was deprived of his right to a speedy trial as a result of the bad faith conduct of the prosecution. As a result of the delays, he lost a key alibi witness and suffered severe mental anguish. Accordingly, the judgment should be reversed and the case should be dismissed with prejudice.

Respectfully Submitted,

s/Aubrey Williams
AUBREY WILLIAMS

APPENDIX P

THE COMMONWEALTH OF KENTUCKY
Jefferson Circuit Court, Criminal Division
05CR0740-11

MARCH Term A.D., 2005

THE COMMONWEALTH OF KENTUCKY	) MURDER) KRS 507.020) CAPITAL OFFENSE –) 20 YEARS TO 50) YEARS; OR LIFE; OR) LIFE WITHOUT) PAROLE; OR LIFE) WITHOUT PAROLE) FOR 25 YEARS; OR) DEATH) UOR 09100) **ONE COUNT**
Against	
TERRANCE EUGENE MILES A.K.A. "CAT DADDY"	) TAMPERING WITH) PHYSICAL EVIDENCE) KRS 524.100) CLASS D FELONY –) 1 TO 5 YEARS) UOR 50230) **ONE COUNT**
	) WANTON) ENDANGERMENT I) KRS 508.060) CLASS D FELONY –) 1 TO 5 YEARS

) UOR 13201
) **ONE COUNT**
) PERSISTENT FELONY
) OFFENDER II
) KRS 532.080
) INDETERMINATE
) UOR 73101
) **ONE COUNT**
)

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 27th day of February, 2005, in Jefferson County, Kentucky, the above named defendant, Terrance Eugene Miles, committed the offense of Murder by intentionally or under circumstances manifesting extreme indifference to human life wantonly caused the death of Michael Teasley.

COUNT TWO

That on or about the 27th day of February, 2005, in Jefferson County, Kentucky, the above named defendant, Terrance Eugene Miles, committed the offense of Tampering With Physical Evidence when, believing that an official proceeding may be pending or instituted against him, he destroyed, mutilated, concealed, removed or altered the physical evidence which he believed was about to be produced or used in such official proceeding, with the intent to impair its verity or availability in the official proceeding.

COUNT THREE

That on or about the 27th day of February, 2005, in Jefferson County, Kentucky, the above-named defendant, Terrance Eugene Miles, committed the offense of Wanton Endangerment in the First Degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engaged in conduct which created a substantial danger of death or serious physical injury to numerous persons, when he fired a loaded pistol at people near Michael Teasley.

COUNT FOUR

Further, that the defendant, Terrance Eugene Miles, has previously been convicted of the following felony and is now charged as being a Persistent Felony Offender in the Second Degree as follows:

(1) That on or about the 1st day of November, 2001, in Jefferson County, Kentucky, the above-named defendant appeared in the Jefferson Circuit Court, a court of general criminal jurisdiction, pursuant to Indictment No. 99CR0668, charging him with Trafficking in a Controlled Substance while in Possession of a Firearm, a felony in violation of the Kentucky Revised Statutes, and that said court sentenced the defendant to a term of 10 years in the Kentucky Department of Corrections;

AND

(2) (a) That the defendant was 18 years or older at the time he committed the prior offense;

AND

(b) That the defendant is more than 21 years of age;

AND

(c) That the defendant completed service of the sentence imposed on at least one of the previous felony convictions within five years prior to the date of the commission of the offense charged in this indictment;

OR

That the defendant was on a form of legal release from at least one of the previous felony convictions on the date of the commission of the offense charged in this indictment;

OR

That the defendant was legally released or discharged from at least one of the previous felony convictions within five years of the date of the commission of the offense charged in this indictment.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY

A TRUE BILL

FOREPERSON

Wit: Sgt. T. Laun, Shively PD

J. SCOTT DAVIS/plm
Assigned Assistant Commonwealth's Attorney

APPENDIX Q

November 25, 2005

Terrance E. Miles #151766 Dorm 6
Northpoint Training Center
P.O. Box 479
Burgin, Kentucky 40310

Judith McDonald Burkman
Jefferson Circuit Court
Division Nine (9)
700 West Jefferson Street
Louisville, Kentucky 40202

Dear Judge,

The Attorney for the Commonwealth, J. Scott Davis, is withholding exculpatory evidence, specifically one VHS tape of Club 502's security cameras, collected 2/27/05, by the Shively Police. Mr. Davis also stated to my Attorney, Mr. Olash that there wasn't a video tape from the off duty LMPD Officer Frank Lee Hill's Police Cruiser on the night in question, when in fact Ms. Alisia M. Smiley, LMPD Public Information Specialist has informed me that there is a tape in a response to my Open Records Request. (enclosed).

The Commonwealth Attorney's Office has a continuing duty to disclose all exculpatory evidence coming within his knowledge. The knowledge of the Police is also the knowledge of the Prosecutor.

As you may know, my Trial date is set at December 13, 2005. My Attorney Mr. Olash has not

made any attempts to view, copy, or photo copy any of the evidence in the custody of the Assistant Commonwealth Attorney, the SPD or the LMPD. I am sure you will agree that this is not Trial strategy.

This should serve as notice to the Court that I wish to exercise my Sixth (6th) Amendment right to a Fast and Speedy Trial. I have discussed this with my Attorney, Mr. Olash. It is I alone who will suffer the fate of a guilty verdict and I'm adamant about having a Fast and Speedy Trial.

Finally, Mr. Davis is having a toboggan tested for hair and DNA. I am asking the Court to Order Mr. Davis to inform Mr. Olash by way of Affidavit when, where and how the toboggan will be tested. According to *McGregor v. Hines*, 995 S.W.2d 384 (Ky. 1999), if the Commonwealth's method of testing will destroy the evidence and the defense's method will not, the Court must Order the Commonwealth to turn the evidence over to the defense's expert to test first. Defense Attorneys are to be viewed just as trustworthy as Attorneys for the Commonwealth to keep track of the Chain of Custody. If both parties method of testing will destroy the evidence it is up to the Court to decide who does the testing. The non-testing party has a right to have a representative present during all testing, should the Court allow the Commonwealth to conduct the test on the toboggan and or any other evidence pertaining to the case in chief, I wish to have a representative present for all testing, *McGregor*, supra.

Respectfully,

s/Terrance E. Miles
Terrance E. Miles

CC:
J. Scott Davis
Assistant Commonwealth Attorney
514 West Liberty Street
Louisville, Kentucky 40202

John Olash
Attorney for Defendant
121 South 7th Street
Louisville, Kentucky 40202

APPENDIX R

No. 05-CR-00074 3-6-06

Dear Judge,

I just want to let you know how stressful it is for me and my family by the Commonwealth Attorney's stall tactics.

For example, having .357 projectiles and a .22 caliber sent to the Lab on 11-21-05 to compare the two. Any idiot can tell by looking the projectiles will not even fit through the barrel of a .22. Also by collecting a toboggan from the crime scene on 2-27-05 and not sending it to the Lab until 11-3-05. Then taking the toboggan back from that lab, collect my DNA and send both, the toboggan and my DNA to the lab in Bowling Green.

Our Justice System is not perfect but it is the very best system in the world. I think I done the honorable thing by turning myself in. I'm not afraid to say I do not trust the SPD with my DNA. They already lied to get an indictment, which is clearly on the record.

All I ask Your Honor with the utmost respect to you and your court room is to have a fair trial.

Humbly,

s/Terrance E. Miles
Terrance E. Miles

CC: John Olash
J. Scott Davis

APPENDIX S

May 22, 2006

Terrance E. Miles #151766 Dorm 5
Northpoint Training Center
P.O. Box 479
Burgin, Kentucky 40310

Judge, Judith McDonald Burkman
Jefferson Circuit Court Division (9)
700 West Jefferson Street
Louisville, Kentucky 40202

Your Honor,

On May 17, 2005 my trial date was set for December 13, 2005. The Assistant Commonwealth Attorney motioned the court for a continuance to await the results of a toboggan being tested for possible DNA evidence. The court continued my trial date until April 11, 2006 and the commonwealth motioned the court for another continuance for the same reason.

The toboggan that is being tested was recovered from the crime scene on February 27, 2005 but was not sent to the lab until November 3, 2005 almost nine months later.

The defense was ready to proceed on both trial dates. The delay by the commonwealth to send the toboggan to the lab for testing was an obvious stall tactic and is depriving my of my right to a fast and speedy trial.

I am currently serving a ten year sentnece for trafficking in controlled substance. However, this pending indictment prevents me from going to a factility with less restrictions and is hendering me from participanting in programs to better myself within the institution. Therefore, I humbly request the court to reduce my bond to 10% cash or property.

Sincerely,

s/Terrance E. Miles
Terrance E. Miles

CC: John Olash
121 South 7th Street
Louisville, Kentucky 40202
defense counsel

Hon. J. Scot Davis
514 West Liberty Street
Louisville, Kentucky 40202

APPENDIX T

Inmate Name: Terrance Miles
Number: 151766

Reason for Referral/HPI: 33 y.o. BM reports being severely depressed x 5 mo. over "murder case I'm fighting", lack of support from mo E.G.F. arrived @ RCC on Paxil. Social anxiety improvement @ this dose.

□ **Psych Hx:** tx'd by fp for social anxiety.

□ **Suicide Attempts:** Ø

□ **Drug Abuse Hx:** THC Ø X 13 mo. NA & AA

□ **ETOH HX:** DOC Ø X 13 mo.

Medical History:

1 Diabetes	1 Heart Disease
1 HTN	1 Lung Disease
X Hepatitis	X Seizures
X CHI	

Other: neck pain.

Allergies: NKDA

Mental Status Exam:

A & O X 3. Cooperative mood depressed "7.5–8" + anxiety ↓ appetite c̄ probably at loss. Ø sleep though he's in bed continuously. Ø SI, HI. Thoughts of harm to others / easily agitated but is intent. Ø paranoia, Q sx one Insight / judgement good.

Axis I: MDD, recurrent, severe 3 / fx.

Axis II: depressed

Axis III: neck pain

Recommendation/Plan: ↑ Paxil, add Elavil for chr. pain & sleep

Med Orders: Elavil 75 mg po ghs.
Paxil 40 mg po ghs.

Exp: 12/5/05

Lab Orders:

Psychiatrist's Signature s/Dr. Laura Moore
Dr. Laura Moore

Date: 7/20/05

APPENDIX U

CC-1022 (REV. 03/02)

RECLASSIFICATION CUSTODY FORM

NAME TERRANCE MILES NUMBER 151766
INSTITUTION RCC AC CTO M Thompson
CTO CODE 584 CLASSIFICATION DATE 7/29/05

CUSTODY LEVELS
L 1 – Community: 8 or less
L 2 – Minimum: 8 or less
A – Restricted: 8 or less
L 3 – Medium: 9 – 18
L 4 – Close: 19 – 30
L 5 – Maximum: 31 or more

CUSTODY OVERRIDE
0 None
1. Nature/Severity of Crime
2. Void
3. Mental Health Needs
4. Detainer/Pending Charges
5. Documented Escape Risk
6. Lower Custody Indicated
7. No PSI at Time of Initial Reviews
8. Other – comments required!
A. Restricted – comments required!

1. HISTORY OF INSTITUTIONAL VIOLENCE
(Calendar Years)
None 0
Category III Violence during last year
(Cal. III.11) 1
Category IV Violence during last two years
(Cal. IV.1 or 23) 3
Category V Violence during last three years
(Cal. V.11 & 12) 4
Category VI Violence during last five years
(Cal. VI.1, 2, 3, 8, 9, or 12) 5
Any Category VII Violence during last
five years 7

0
Score

2. DID VIOLENCE OCCUR WITHIN THE LAST
6 MONTHS?
No……0 Yes 3

0
Score

3. SEVERITY OF CURRENT OFFENSE
Class D Nonviolent felony 0
Class D Violent felony 1
Class C Nonviolent felony 1
Class C Violent felony 2
Class B Nonviolent felony 2
Class B Violent felony 3
Escape or Felony attempt escape 8
Highest 12
Death Penalty 34

1
Score

4. SEVERITY OF OTHER FELONY INCARCERATIONS

None 0
Class D Felony 1
Class C Felony 2
Class B Felony 3
Highest 5
Highest category defined by Manual as Sex Offender 12

0
Score

5. ESCAPE HISTORY

No Escapes or Attempted Escapes 0
Escape or attempt from a non-secure institution or furlough or arrest 4
Escape or attempt from a secure institution not involving violence 6
Escape or attempt from any inst. involving violence or other additional felony 9

0
Score

6. NUMBER OF DISCIPLINARY REPORTS

None in the past twelve months ..... -3
None in the past six months ..... -1
Not in the system six months 0
One in the past six months 1
Two in the past six months 2
Three in the past six months 4
Four in the past six months 6
Five in the past six months 8
Six in the past six months 10
7+ in the past six months 12

0
Score

7. MOST SEVERE DISCIPLINARY REPORT RECEIVED

None 0
Category III report 1
Category IV report 3
Category V report 5
Category VI report 7
Category VII report 9

0
Score

8. CURRENT AGE

27.99 or less 3
28 – 37.99 2
38 – 45.99 1
46+ 0

2
Score

TOTAL SCORE (Add items 1 – 8) 3

FINAL CUSTODY SCORE	11
ORIG. CUSTODY LEVEL	3
OVERRIDE	Ø
FINAL CUSTODY LEVEL	3

INST. RECOMMENDED [ILLEGIBLE]
[ILLEGIBLE]/NTC

EDUCATION LEVEL 099

CONVICTED UNDER YOUTHFUL OFFENDER ACT (Y OR N) NO

STATUS CODE 000

TOTAL GT LOSS (DAYS) 000

PAROLE ELIG. 1/2007 (18)

MIN. EXP. DATE 1/2009

==========STOP==========

9. ADMINISTRATIVE FACTORS TO BE APPLIED ONLY IF THE INMATE SCORES 8 POINTS OR LESS ON QUESTIONS 1 – 8 (Note: Only 1 of these factors may be applied to each inmate for a maximum of 8 points)

A. [X] None 0

B. [ ] Inmate has more than 90 days statutory or any non-restorable good time loss 8

C. [ ] Inmate has more than 48 months remaining to parole eligibility or release 8

D. [ ] Pending Action for Highest Category, Escape, Class B felony or Immigration Detainer 8

ADMINISTRATIVE SCORE 8

FINAL SCORE 11

PARTICIPATION CODES
1. Currently enrolled
2. Program completed
3. Dropped out
4. Terminated – Behavior
5. Terminated – Administrative reasons
6. Program not available
7. Program full – Placed on waiting list
8. Refuses program
9. Program recommended – Currently not enrolled

10. Denied by program staff

_____	Waived 48 Hour Notice
___✓___	Advised of Appeal Process
___✓___	Advised of Escape Penalty
___✓___	Advised of Visitation Policy

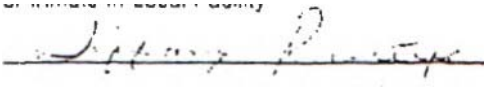
PROGRAM AREAS *Not required for inmate in Local Facility	PROGRAM CODE	PARTICIPATION CODE
Alcohol Abuse Program		
Drug Abuse Program		
Sex Offender Treatment Program		
O J T Work Program	131	09
Educational Programming		
Vocational Programming		
Individual or Group Counseling		
Other:		

COMMENTS: Pending Charges – [ILLEGIBLE], [ILLEGIBLE], [ILLEGIBLE] – [ILLEGIBLE] Psyc. SERVICES [ILLEGIBLE]

INMATE'S SIGNATURE [X] s/Terrance Miles

*Inmate signature not required for inmate in Local Facility

CHAIRPERSON'S SIGNATURE



CODE [ILLEGIBLE]

(✓) PSI AVAILABLE
( ) PSI NOT AVAILABLE – REVIEW IN 90 DAYS

CC-1022 (REV. 03/02)

RECLASSIFICATION FORM

NAME MILES, TERRANCE NUMBER 151766
INSTITUTION N CTO Cochran
CTO CODE 702 CLASSIFICATION DATE 6-1-06

CUSTODY LEVELS
L 1 – Community: 8 or less
L 2 – Minimum: 8 or less
A – Restricted: 8 or less
L 3 – Medium: 9 – 18
L 4 – Close: 19 – 30
L 5 – Maximum: 31 or more

CUSTODY OVERRIDE
0 None
1. Nature/Severity of Crime
2. Void
3. Mental Health Needs
4. Detainer/Pending Charges
5. Documented Escape Risk
6. Lower Custody Indicated
7. No PSI at Time of Initial Reviews
8. Other – comments required!
A. Restricted – comments required!

1. HISTORY OF INSTITUTIONAL VIOLENCE (Calendar Years)
None 0
Category III Violence during last year (Cal. III.11) 1
Category IV Violence during last two years (Cal. IV.1 or 23) 3
Category V Violence during last three years

(Cal. V.11 & 12) 4
Category VI Violence during last five years (Cal. VI.1, 2, 3, 8, 9, or 12) 5
Any Category VII Violence during last five years 7

0
Score

2. DID VIOLENCE OCCUR WITHIN THE LAST 6 MONTHS?
No……0 Yes..... 3

0
Score

3. SEVERITY OF CURRENT OFFENSE
Class D Nonviolent felony 0
Class D Violent felony..... 1
Class C Nonviolent felony..... 1
Class C Violent felony..... 2
Class B Nonviolent felony..... 2
Class B Violent felony..... 3
Escape or Felony attempt escape 8
Highest 12
Death Penalty 34

1
Score

4. SEVERITY OF OTHER FELONY INCARCERATIONS
None..... 0
Class D Felony 1
Class C Felony..... 2
Class B Felony..... 3
Highest 5
Highest category defined by Manual as Sex Offender 12

0
Score

5. ESCAPE HISTORY
No Escapes or Attempted Escapes 0
Escape or attempt from a non-secure institution or furlough or arrest 4
Escape or attempt from a secure institution not involving violence 6
Escape or attempt from any inst. involving violence or other additional felony 9

0
Score

6. NUMBER OF DISCIPLINARY REPORTS
None in the past twelve months ..... -3
None in the past six months ..... -1
Not in the system six months 0
One in the past six months 1
Two in the past six months 2
Three in the past six months 4
Four in the past six months 6
Five in the past six months 8
Six in the past six months 10
7+ in the past six months 12

-1
Score

7. MOST SEVERE DISCIPLINARY REPORT RECEIVED
None 0
Category III report 1
Category IV report 3
Category V report 5
Category VI report 7
Category VII report 9

0
Score

8. CURRENT AGE
   27.99 or less 3
   28 – 37.99 2
   38 – 45.99 1
   46+ 0

2
Score

TOTAL SCORE (Add items 1 – 8) 2

FINAL CUSTODY SCORE	10
ORIG. CUSTODY LEVEL	3
OVERRIDE	0
FINAL CUSTODY LEVEL	3

INST. RECOMMENDED N

EDUCATION LEVEL 099

CONVICTED UNDER YOUTHFUL OFFENDER ACT (Y OR N) N

STATUS CODE 006

TOTAL GT LOSS (DAYS) 000

PAROLE ELIG. 1-07

MIN. EXP. DATE 1-19-09

==========STOP==========

9. ADMINISTRATIVE FACTORS TO BE APPLIED ONLY IF THE INMATE SCORES 8 POINTS OR LESS ON QUESTIONS 1 – 8 (Note: Only 1 of

these factors may be applied to each inmate for a maximum of 8 points)

A. [ ] None 0

B. [ ] Inmate has more than 90 days statutory or any non-restorable good time loss 8

C. [ ] Inmate has more than 48 months remaining to parole eligibility or release..... 8

D. [X] Pending Action for Highest Category, Escape, Class B felony or Immigration Detainer..... 8

ADMINISTRATIVE SCORE 8

FINAL SCORE 10

PARTICIPATION CODES
1. Currently enrolled
2. Program completed
3. Dropped out
4. Terminated – Behavior
5. Terminated – Administrative reasons
6. Program not available
7. Program full – Placed on waiting list
8. Refuses program
9. Program recommended – Currently not enrolled
10. Denied by program staff

_____	Waived 48 Hour Notice
✓	Advised of Appeal Process
_____	Advised of Escape Penalty
✓	Advised of Visitation Policy

PROGRAM AREAS *Not required for inmate in Local Facility	PROGRAM CODE	PARTICIPATION CODE
Alcohol Abuse Program		
Drug Abuse Program		
Sex Offender Treatment Program		
O J T Work Program	131	1
Educational Programming		
Vocational Programming		
Individual or Group Counseling		
Other:		

COMMENTS: pending chg – 05CR0740 murder, tampering W/PE, WEI, PFC J

INMATE'S SIGNATURE X s/Terrance Miles
*Inmate signature not required for inmate in Local Facility

CHAIRPERSON'S SIGNATURE
*Inmate signature not required for inmate in Local Facility
C Clifton, CUBI

CODE 581

(X) PSI AVAILABLE
( ) PSI NOT AVAILABLE – REVIEW IN 90 DAYS

APPENDIX V

REGISTRAR OF VITAL STATISTICS
CERTIFIED COPY

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COMMONWEALTH OF KENTUCKY		
FORM VS NO. 1-A (Rev. 5/02)	CABINET FOR HEALTH SERVICES REGISTRAR OF VITAL STATISTICS	116 2006 19624 FILE NO
CERTIFICATE OF DEATH		
MUST BE TYPED	1. DECEDENT'S NAME (*First, Middle, Last*) STEVEN JAMES EDWARDS	2. Sex MALE
3. DATE OF DEATH (*Month, Day, Year*) JUNE 25, 2006		

DECEDENT		
4. SOCIAL SECURITY NO. …|3410		
5a. AGE last Birthday (*Years*) 33		
5b. UNDER 1 YEAR	(*Months*)	(*Days*)
5c. UNDER 1 DAY	(*Hours*)	(*Minutes*)
6. DATE OF BIRTH (*Month, Day, Year*) …, 1972	7. BIRTHPLACE (*City/State or Foreign Country*) LOUISVILLE, KY	
8. WAS DECEDENT EVER IN THE U.S. ARMED FORCES? ☒ Yes ☐ No		
9a. PLACE OF DEATH (*Check only one*)		
HOSPITAL ☐ Inpatient ☐ ER/Outpatient ☐ DOA		
OTHER ☐ Nursing Home ☐ Residence ☒ Other (Specify)		
9b. FACILITY NAME (*If not institution give street and number*) 2654 ALGONQUIN PARKWAY		
9c. CITY, TOWN, OR LOCATION OF DEATH LOUISVILLE		

9d. COUNTY OF DEATH JEFFERSON	
10. MARTIAL STATUS Married, Never Married, Widowed, Divorced (*Specify*) MARRIED	
11. SURVIVING SPOUSE (*If wife, give maiden name*) TIMIKO BLAKEMORE	
12a. DECEDENT'S USUAL OCCUPATION (*Give kind of work done during most of working life, Do Not use retired*) FORKLIFT DRIVER	
12b. KIND OF BUSINESS/INDUSTRY SMURFIT STONE COMPANY	
13a. RESIDENCE – State KENTUCKY	13b. COUNTY JEFFERSON
13c. CITY, TOWN, OR LOCATION LOUISVILLE	
13d. STREET AND NUMBER 1614 MAE STREET KIDD	
13e. INSIDE CITY LIMITS? ☒ Yes ☐ No	13f. ZIP CODE 40211
14. WAS DECEDENT OF HISPANIC ORIGIN? (*Specify No or Yes – If yes, specify Cuban, Mexican, Puerto Rican, etc.*) ☒ No ☐ Yes	

15. RACE – American Indian, Black, White, etc. (*Specify*) BLACK	
16. DECEDENT'S EDUCATION (*Specify only highest grade completed)*	
Elem/Secondary (0–12) 12th	College (1–4 or 5+)
PARENTS	
17. FATHER'S NAME (*First, Middle, Last*) JAMES F. FREEMAN SR.	
18. MOTHER'S NAME (*First, Middle, Maiden Surname*) KATIE STRONG	
INFORMANT	
19a. INFORMANT'S NAME TIMIKO EDWARDS	
19b. MAILING ADDRESS (*Street and Number or Rural Route Number, City or Town, State, Zip Code*) 1614 MAE STREET KIDD LOUISVILLE, KY 40211	
DISPOSITION	
20a. METHOD OF DISPOSITION	
☒ Burial ☐ Cremation ☐ Removal from State ☐ Donation ☐ Other (*Specify*) _____	

20b. PLACE OF DISPOSITION (*Name of cemetery, crematory, or other place*) GREEN MEADOWS CEMETERY
20c. LOCATION (*City, Town, or State*) LOUISVILLE, KY
21. SIGNATURE OF FUNERAL SERVICE LICENSEE (*Or person acting as such*) 
22. NAME AND ADDRESS OF FACILITY G.C. WILLIAMS FUNERAL HOME INC. 1935 WEST BROADWAY LOUISVILLE, KY 40203
CERTIFIER
23a. To the best of my knowledge, death occurred at the time, date, place and due to the cause stated Signature and Title s/James B. Wesley Deputy Coroner (*MUST USE BLACK INK*)
23b. DATE SIGNED (*Month, Day, Year*) 07-11-06
24. NAME AND ADDRESS OF PERSON WHO COMPLETED CAUSE OF DEATH (ITEM 28) James B. Wesley, Deputy Coroner Dr. Ronald M. Holmes, Coroner – 810 Barret Avenue, Louisville, KY 40204

25. TIME OF DEATH	26 DATE PRONOUNCED DEAD (*Month, Day, Year*)
3:57 P.M.	June 25, 2006

27. WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER?

☒ Yes ☐ No

CAUSE OF DEATH

28. PART I. Enter the disease, injuries, or complications that caused death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock or heart failure. List only one cause on each line.

IMMEDIATE CAUSE (*Final disease or condition resulting in death)*

a. Multiple blunt force injuries sustained in a motorcycle v. automobile collision	Appropriate interval between onset and death
DUE TO (OR AS A CONSEQUENCE OF)	

Sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (*Disease or injury that initiated events resulting in death*) LAST

b.	Appropriate interval between onset and death
DUE TO (OR AS A CONSEQUENCE OF)	

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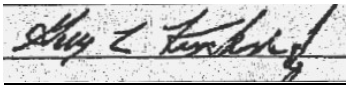
PART II. Other significant conditions contributed to death but not resulting in the underlying cause given in Part I.	
28a. If female, was there a pregnancy in the past 12 months? ☐ Yes ☐ No	
28b. Was autopsy performed? ☒ Yes ☐ No	
28c. Were autopsy findings available prior to completion of cause of death? ☒ Yes ☐ No	
28d. Did the deceased have Diabetes? ☐ Yes ☒ No	
28e. Was Diabetes an immediate, underlying, or contributing cause of or condition leading to death? ☐ Yes ☒ No	
29 MANNER OF DEATH ☐ Natural ☒ Accident ☐ Suicide ☐ Homicide ☐ Pending Investigation ☐ Could not be determined	30a. DATE OF INJURY (*Month, Day, Year*) 06-25-06
30b. TIME OF INJURY 3:50 P.M.	30c. INJURY AT WORK? ☐ Yes ☒ No
30d. DESCRIBE HOW INJURY OCCURRED Auto v. motorcycle	

30e. PLACE OF INJURY – At home, farm, street, factory, office building, etc. (*Specify*) street
30f. LOCATION (*Street and Number or Rural Route Number, City or Town*) Intersection of Algonquin Pkwy. & Beech street, Louisville, KY
REGISTRAR
31. REGISTRAR'S SIGNATURE 
32. DATE FILED (*Month, Day, Year*) JUL 19 2006

* * *

I, Gary L. Kupchinsky, State Registrar of Vital Statistics, hereby certify this to be a true and correct copy of the certificate of birth, death, marriage or divorce of the person therein named, and that the original certificate is registered under the file number shown. In testimony thereof I have hereunto subscribed my name and caused the official seal of the Office of Vital Statistics to be affixed at Frankfort, Kentucky this 24th day of April 2007.

s/Gary L. Kupchinsky
Gary L. Kupchinsky, State Registrar

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EDWARDS,
STEVEN JAMES,

33, of Louisville, died Sunday, June 25, 2006. He was an employee at Smurfit Stone Co. and a member of Cornerstone Missionary Baptist Church.

Survived by a wife, Timiko Blakemore Edwards; son, Jordan Polston; father, James F. Freeman, Sr.; mother Katie M. Edwards; brothers Jimmie Edwards (Sharonda), Leonard Edwards (Shoehorned) and James Freeman, Jr.; sisters, Antionette Hickman, Rosie Freeman and Yvonne Logan; grandmother, Julia Strong, mother-in-law, Deborah Blakemore; host of nieces, nephews other relatives and friends.

Funeral: 11 a.m. Friday at St. Stephen Baptist Church, 1008 So. 15th St. Burial in Green Meadows Cemetery. Vistiation from 6–9 p.m. Thursday at G. C. Williams Funeral Home

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Motorcyclist killed in crash identified as Louisville man

The Courier-Journal

A Louisville man killed Sunday in a motorcycle accident on Algonquin Parkway has been identified as Steven J. Edwards, 33, of the 1600 block of Mae Street Kidd Ave.

Edwards died of multiple injuries at the scene about 4 p.m., Deputy Coroner Jim Wesley said. He wasn't wearing a helmet.

Witnesses said Edwards was driving east on Algonquin Parkway when a westbound sport utility vehicle turned in front of him at Beech Street, police said.

The SUV's two occupants were not injured. Police are still investigating.

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05-CR-000740 Jefferson Circuit Court
Davidson Nine (9)
Judge McDonald-Burkman

Commonwealth of Kentucky — Plaintiff

v. AFFIDAVIT OF TERRANCE MILES

Terrance Miles — Defendant

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

Comes the Affiant, Terrance Miles, being first duly sworn, and states that Steven James Edwards agreed before his death to testify at my trial to the following:

1. That I rented him a car from Enterprise Rental Car on February 21, 2005.

2. That he was at Club 502 February 27, 2005.

3. That he saw me in Club 502 on February 27, 2005, and I was wearing an all tan outfit.

4. That he witnessed the shooting death of Michael Teasley.

5. That the shooter ran eastbound and jumped the fence, not southbound around the rear of the Club.

6. That the shooter was not me.

7. That the shooter was out of sight by the time Officer Frank Hill made his way through the crowed to where the victim was laying on the ground.

8. That we returned the rental car when it was due back on February 28, 2005 @ 1:00 p.m.

9. That he wanted a different car because the one he was currently driving only had one working headlight.

10. That I was not wanted or on the run when we exchanged the cars.

11. That he saw me on the news February 28, 2005 at 10:00 p.m. for the shooting death of Michael Teasley.

12. That after seeing me on the news he tried to contact me to give me the rental car back.

13. That when he could not contact me he gave the rental car to Terry Masden to return because Terry knew the manager of Enterprise Rental Car.

FURTHER THE AFFIANT SAYETH NAUGHT

s/Terrance E. Miles
Terrance E. Miles

Subscribed and sworn to before me by Terrance Miles on this 4 day of April, 2017.

My Commission expires: MARCH 30, 2021

Notary Public, State at Large, Kentucky