
No. 21-6734

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON
Petitioner

v.

COMMONWEALTH OF KENTUCKY
Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

**APPENDIX TO
REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE**

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Commonwealth of Kentucky
Supreme Court
2019-SC-000724-MR

ROGER DALE EPPERSON

APPELLANT

v. Appeal from Warren Circuit Court
Hon. Steve Alan Wilson, Judge
Indictment No. 97-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

**Commonwealth of Kentucky's
Petition for Modification**

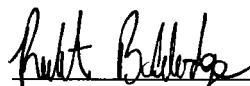
Submitted by,

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CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Modification has been served on October 18, 2021 as follows: by mailing to the Hon. Steve Alan Wilson, Warren County Justice Center, 1001 Center St., Suite 404, Bowling Green, Kentucky 42101 and David M. Barron, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Section 101, Frankfort, KY 40602 and by emailing Gary Gregory, Commonwealth's Attorney.


Robert Baldrige (KBA# 95509)
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The Commonwealth of Kentucky, pursuant to CR 76.32(1)(c), submits this Petition for Modification seeking to have the Court correct a misstatement of fact in its decision rendered September 30, 2021.

In Part I of the Opinion, the Court stated the following:

After a second trial in 1996, Epperson was convicted of two counts of complicity to murder, first-degree robbery, and first-degree burglary. The details of his crimes need not be recounted here. His conviction in 1996 was affirmed on direct appeal.

(Opinion, p. 2.) This passage is not entirely correct. Epperson's second trial occurred in 2003, not 1996. (TR 1302.)¹ It was Benny Hodge, Epperson's codefendant, who was re-tried in 1996. A previous opinion also erroneously stated that Epperson's second trial occurred in 1996. *Epperson v. Commonwealth*, 197 S.W.3d 46, 51 (Ky. 2006).

The Commonwealth asks the Court to correct this minor factual inaccuracy and modify its opinion so that it states that Epperson's second trial occurred in 2003. Epperson's convictions will be subject to federal review, and it is unclear what effect this inaccuracy may have on future litigation. It is better to correct this factual inaccuracy now rather than try to address it later under different circumstances. Doing so will not affect the remainder of the Opinion.

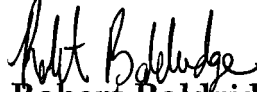
¹ The trial court's Judgment and Sentence on Plea of Not Guilty is attached as Tab 2.

For these reasons, the Commonwealth asks the Court to grant this petition and modify the Opinion in the manner described above.

Respectfully Submitted,

DANIEL CAMERON

Attorney General of Kentucky

A handwritten signature in black ink, appearing to read "Robert Baldrige", is written over the printed name.

Robert Baldrige

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Supreme Court
2019-SC-000724-MR

ROGER DALE EPPERSON

APPELLANT

v. Appeal from Warren Circuit Court
 Hon. Steve Alan Wilson, Judge
 Indictment No. 97-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

Commonwealth of Kentucky's
Second Petition for Modification

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CERTIFICATE OF SERVICE

I certify that a copy of the Second Petition for Modification has been served on January 4, 2022 as follows: by mailing to the Hon. Steve Alan Wilson, Warren County Justice Center, 1001 Center St., Suite 404, Bowling Green, Kentucky 42101 and David M. Barron, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Section 101, Frankfort, KY 40602 and by emailing Gary Gregory, Commonwealth's Attorney.

/s/ Robert Baldridge
Robert Baldridge (KBA# 95509)
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The Commonwealth of Kentucky, pursuant to CR 76.32(1)(c), submits a second Petition for Modification seeking to have the Court correct a misstatement of fact in its decision rendered September 30, 2021 and modified December 16, 2021. The Commonwealth's first Petition for Modification noted that the following passage in the September 30, 2021, opinion¹ was not entirely correct:

After a second trial in 1996, Epperson was convicted of two counts of complicity to murder, first-degree robbery, and first-degree burglary. The details of his crimes need not be recounted here. His conviction in 1996 was affirmed on direct appeal.

(Original Opinion, p. 2.) This Commonwealth asked the Court to modify this passage because Epperson's second trial occurred in 2003, not 1996. (TR 1302.) The Court granted the Commonwealth's motion. The Court's modified opinion² now states:

After a second trial in 2003, Epperson was convicted of two counts of complicity to murder, first-degree robbery and first-degree burglary. He was sentenced to death for a second time. The details of his crimes need not be recounted here. *His conviction in 1996* was affirmed on direct appeal.

(Modified Opinion, p. 2.) Unfortunately, the modified opinion is not entirely factually correct. The opinion should state Epperson's second trial occurred in 2003 *and* his 2003 conviction in was affirmed on direct appeal. The Commonwealth should have been more specific in its first petition. The

¹ The September 30, 2021 opinion is attached as Tab 1.

² The Modified Opinion is attached as Tab 2.

Commonwealth asks the Court to correct this minor factual inaccuracy and modify its opinion so that it states that Epperson's 2003 conviction was affirmed on direct appeal. Epperson's convictions will be subject to federal review, and it is better to correct this factual inaccuracy now rather than try to address it later under different circumstances. Doing so will not affect the remainder of the Opinion.

For these reasons, the Commonwealth asks the Court to grant this petition and modify the Opinion in the manner described above.

Respectfully Submitted,

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COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2019-SC-000724-MR

ROGER DALE EPPERSON

APPELLANT

Appeal from Warren Circuit Court
v. Hon. Steve Alan Wilson, Judge
Indictment No. 97-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR COMMONWEALTH

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served October 30, 2020 as follows: by mailing to the Hon. Steve Alan Wilson, Warren County Justice Center, 1001 Center St., Suite 404, Bowling Green, Kentucky 42101 and David M. Barron, Staff Attorney, Department of Public Advocacy, 5 Mill Creek Park, Section 101.

Art Ballinger

Robert Baldridge
Assistant Attorney General

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he even knew that a robbery would occur. Although Epperson may believe different questions might have improved his odds at trial, he has not provided grounds to revisit this Court's previous conclusion that trial counsel did not concede guilt. *Epperson* III, 2017-SC-44-MR; 2018 WL 3920226, at *12.

III. This Court should not consider whether *McCoy* is retroactive.

Epperson also requests that the Court hold that *McCoy* is retroactive. (Appellant Br. 27.) He argues that this Court has already done so "implicitly" by granting his petition for rehearing. *Id.* That argument assumes too much, as this Court was able to deny the *McCoy* claim as meritless on its face without having to resolve the retroactivity issue. Moreover, the case Epperson cites in favor of his argument that *McCoy* is retroactive, *Thompson v. Cain*, 433 P.3d 772 (Ore. App. 2018), does not address the issue at all. Conversely, the United States District Court for the Eastern District of Kentucky found that *McCoy* was not retroactive. *United States v. Allen*, CR 5:15-113-DCR-CJS, 2020 WL 3865094, at 5* (E.D. Ky. Feb. 28, 2020).⁴ It also found that its decision was consistent with *McCoy*'s treatment in other district courts. *Id.* Regardless, there is no need to decide whether *McCoy* is retroactive given the procedural impropriety of Epperson's appeal and his

⁴ Appendix at Tab 1. Cited in compliance with CR 76.28(4)(c).

failure to show trial counsel conceded guilt. Resolution of this issue should be reserved for another time.

IV. The trial judge was not biased against Epperson.

Finally, Epperson argues he was denied independent judicial determination of his claim because the trial judge accepted the reasoning in the Commonwealth's motion to dismiss. (Appellant Br. 31.) He fails to cite where in the record he preserved this argument. Accordingly, this Court cannot consider it on appellate review. *Henderson v. Commonwealth*, 438 S.W.3d 335, 343 (Ky. 2014). Regardless, the argument is meritless. Epperson cites cases which caution against adopting in full another party's proposed findings of fact. (Appellant Br. 32.) These cases are not applicable. There was not an evidentiary hearing, and the trial court did not make any factual findings that an appellate court had to give deference to. The trial court's decision to accept the reasoning in the Commonwealth's motion to dismiss was no different than the act of signing a tendered order. Doing so is a common and accepted practice in the Commonwealth.

CONCLUSION

For all the foregoing reasons, the order of the Warren Circuit Court must be affirmed.