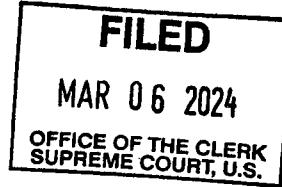


No. _____

ORIGINAL

23-6987

IN THE
SUPREME COURT OF THE UNITED STATES



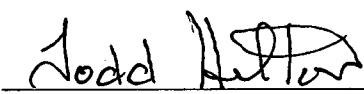
MICHAEL TODD HILTON – PETITIONER

VS.

DANIEL AKERS, WARDEN, LEE ADJUSTMENT CENTER – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI


Michael T. Hilton, pro se
Inmate #201314
Lee Adjustment Center
168 Lee Adjustment Center Dr.
Beattyville, KY 41311

QUESTIONS PRESENTED

Introduction:

Mr. Hilton was indicted for murder and other offenses stemming from an automobile accident which occurred while he was under the influence of alcohol. Medical records and other discovery materials were provided to defense counsel ten months prior to trial. The trial court entered an order requiring disclosure of intent to present expert testimony at least thirty days prior to trial. Six days after the expert notice requirement expired, numerous pages of additional medical records were provided to the defense which prompted counsel to request the trial be continued to a later date. The trial court denied the continuance but granted funding for counsel to retain a medical expert. Halfway through the prosecution's case in chief, on the second day of trial the court denied counsel's oral notice to present testimony of the recently retained medical expert.

The above facts resulted in three claims for post conviction relief: 1) the trial court erred by failing to grant a continuance; 2) trial counsel was ineffective for failing to timely meet the trial court's expert notice deadline; and, 3) appellate counsel was ineffective for failing to argue the trial court erred by excluding the testimony of the defense's medical expert.

Question I:

If a defendant is prevented, either by the court or his counsel, from presenting a complete defense by the exclusion of a substantial expert witness, but the testimony in the record through avowal does not provide a legal defense under state law, has there been a violation of his federal constitutional rights, and if counsel is at fault is prejudice under Strickland satisfied?

Question II:

During appellate review of a habeas corpus claim submitted by a state prisoner, does a Federal Circuit Court, after finding the state courts and the district court mischaracterized and failed to address Petitioner's presented claim, run afoul of the AEDPA by making factual determinations de novo from state findings previously given deference on other claims?

Question III:

When reviewing an ineffective assistance of counsel claim, if a State court in setting forth the standard of review, correctly recites what constitutes "prejudice" under Strickland, but during its analysis denying relief, uses terminology such as: "exonerate," "lose what he otherwise would have won," or "defeat was snatched from this hands of probable victory," does the court employ a standard contrary to clearly established federal law, and if so does it mandate a habeas court to conduct de novo review?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Hilton v. Akers, Case No. 23-5567, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Dec. 12, 2023

Hilton v. Akers, Case No. No. 3:20-cv-769-RGJ-HBB, U.S. District Court for the Western District of Kentucky. Judgment entered Dec. 12, 2023.

Hilton v. Commonwealth, Case No. 2020-SC-0000113-D, Kentucky Supreme Court. Judgment entered May 20, 2020.

Hilton v. Commonwealth, Case No. 2018-CA-001858-MR, Kentucky Court of Appeals. Judgment entered Feb. 7, 2020.

Hilton v. Commonwealth, Case No. 14-CR-00427, Kentucky, Hardin Circuit Court. Judgment entered Nov. 21, 2018.

Hilton v. Commonwealth, Case No. 2015-SC-000452-MR, Kentucky Supreme Court. Judgment entered Feb. 15, 2018.

Hilton v. Commonwealth, Case No. 14-CR-00427, Kentucky, Hardin Circuit Court. Judgment entered Aug. 17, 2015.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3-5
STATEMENT OF THE CASE	6-15
REASONS FOR GRANTING THE WRIT	16-18
CONCLUSION	18

INDEX TO APPENDICES

APPENDIX A	Denial of Request for Certificate of Appealability by Circuit Judge Clay. Hilton v. Akers, Case No. 23-5567 (6 th Cir. Dec. 12, 2023) 2023 U.S. App. LEXIS 32860
APPENDIX B	Denial of §2254 petition by District Court judge, Hon. ____. Hilton v. Akers, Case No. No. 3:20-cv-769-RGJ-HBB (W.D. Ky. Dec. 12, 2023)
APPENDIX C	District Court Order granting in part denying in part the motion for leave to supplement §2254 petition by District Court Judge, Hon. Rebecca Grady Jennings. Hilton v. Akers, Case No. 3:20-cv-769-RGJ-HBB (W.D. Ky. Sept. 30, 2022), 2022 U.S. Dist. LEXIS 178735, 2022 WL 4686991
APPENDIX D	Report and Recommendation of §2254 petition by Magistrate Judge, Hon. H. Brent Brennenstuhl. Hilton v. Akers, Case No. 3:20-cv-769-RGJ-HBB (W.D. Ky. Sept. 30, 2022)

APPENDIX E	Kentucky Supreme Court, denial of motion for discretionary review Hilton v. Commonwealth, Case No. 2020-SC-0000113-D (Ky., May 20, 2020) 2020 Ky. LEXIS 205
APPENDIX F	Kentucky Court of Appeals affirming trial court's denial of post-collateral motion Hilton v. Commonwealth, 603 S.W.3d 864 (Ky. App., Feb. 7, 2020) 2020 Ky. App. LEXIS 16
APPENDIX G	Trial Court order denying post-collateral (RCr 11.42) motion Hilton v. Commonwealth, Case No. 14-CR-00427 (Nov. 21, 2018)
APPENDIX H	Kentucky Supreme Court, denial of direct appeal Hilton v. Commonwealth, 539 S.W.3d 1 (Ky. Feb. 15, 2018) 2018 Ky. LEXIS 69, 2018 WL 898306 Case No. 2015-SC-000452-MR
APPENDIX I	Trial Court final judgment of Conviction and sentence (date)
APPENDIX J	Trial Court order determining the defense would not be permitted to present the testimony of retained expert, Registered Nurse, Wendy Milliner, entered on June 18, 2015.
APPENDIX K	Defense Counsel's Notice of Expert Opinion filed on 10/15/2015. Disclosing that Registered Nurse, Wendy Milliner, was going to be called as a witness, and of her proposed testimony.
APPENDIX L	Motion for leave to supplement petition for habeas corpus
APPENDIX M	KRS 189A.010 (2010)
APPENDIX N	KRS 189A.010 (2016)

TABLE OF AUTHORITIES

CASES	PAGE NUMBER
<i>Brown v. Commonwealth</i> , 253 S.W.3d 490 (Ky. 2008)	13
<i>Charalambakis v. Asbury Univ.</i> , 488 S.W.3d 568 (Ky. 2016)	15
<i>Charles v. Stephens</i> , 736 F.3d 380 (5th Cir. 2013)	14n.5
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	16
<i>Clark v. Arizona</i> , 548 U.S. 735 (2006)	16n.6
<i>Dunn v. Neal</i> , 44 F.4th 696 (7th Cir. 2022)	14n.5
<i>Ford v. Commonwealth</i> , 628 S.W.3d 147 (Ky. 2021)	13
<i>Frost v. Pryor</i> , 749 F.3d 1212 (10th Cir. 2014)	14n.5
<i>Harrington v. Ricter</i> , 562 U.S. 86, 111-12 (2011)	17
<i>Henry v. Poole</i> , 409 F.3d 48 (2nd Cir. 2005)	14n.5
<i>Hilton v. Commonwealth</i> , 539 S.W.3d 1 (Ky. 2018)	11
<i>Hilton v. Commonwealth</i> , 603 S.W.3d 864, 870-71 (Ky. 2020)	9, 10, 14
<i>Hodge v. Kentucky</i> , 133 S.Ct. 506, 510, 184 L.Ed.2d 514 (2012)	18
<i>Hodge v. Jordon</i> , Case No. 17-6032 (6 th Cir. Feb. 22, 2024) 2024 U.S. App. LEXIS 4101, 2024 WL 726243.....	17-18
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	16n.6
<i>Howard v. United States</i> , 743 F.3d 459, 464 (6 th Cir. 2014)	13
<i>Hummel v. Rosemeyer</i> , 564 F.3d 290 (3rd Cir. 2009)	14n.5
<i>Joseph v. Coyle</i> , 469 F.3d 441 (6th Cir. 2006)	13-14
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	16-17

<i>Ouber v. Guarino</i> , 293 F.3d 19 (1st Cir. 2002)	14n.5
<i>Paulson v. Newton Corr. Facility</i> , 703 F.3d 416 (8th Cir. 2013)	14n.5
<i>Robertson v. Commonwealth</i> , 82 S.W.3d 832 (Ky. 2002)	14
<i>Rose v. Lee</i> , 252 F.3d 676 (4th Cir. 2001)	14n.5
<i>Summerlin v. Schriro</i> , 427 F.3d 623 (9th Cir. 2005)	14n.5
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	17
<i>Trevino v. Thaler</i> , 569 U.S. 413 (2013)	16-17
<i>United States v. Eisner</i> , 329 F.2d 410 (6 th Cir. 1964)	15
<i>United States v. Miller</i> , 953 F.3d 804, 808 (D.C. Cir. 2020)	14n.5
<i>Ventura v. AG</i> , 419 F.3d 1269 (11th Cir. 2005)	14n.5
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	17

STATUTES AND RULES

KRS ¹ 189A.010	6n.1, 6n.2
KRS 507.020. Murder	3-4, 6
KRS 507.040. Manslaughter in the second degree	4, 6
KRS 507.060. Vehicular homicide	4, 6n.2
KRS 532.020. Designation of offenses	5, 6n.2

OTHER

United States Constitution, Sixth Amendment	3
U.S. Constitution, Fourteenth Amendment, Section 1	3
2016 Ky. SB 56	6n.1
2023 Ky. HB 262	6n.2

¹ Kentucky Revised Statute

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

For cases from federal courts

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is:

- reported at _____; or
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is:

- reported at _____; or
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts

The opinion of the highest court to review the merits appears at Appendix ___ to the petition and is:

- reported at _____; or
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix ___ to the petition and is:

- reported at _____; or
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

- For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 12, 2023.

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.
- An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A__.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

- For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

- A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
- An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A__.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

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

U.S. Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statute 189A.010. Operating motor vehicle with alcohol concentration of or above 0.08, or of or 0.02 for persons under age twenty-one, or while under the influence of alcohol, a controlled substance, or other substance which impairs driving ability prohibited – Admissibility of alcohol concentration or controlled substance test results – Presumptions – Penalties – Aggravating circumstances:

KRS 189A.010 (2010) – See Appendix M

KRS 189A.010 (2016) – See Appendix N

Kentucky Revised Statute 507.020. Murder:

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a

prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

Kentucky Revised Statute 507.040. Manslaughter in the second degree:

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including but not limited to situations where the death results from the person's:

(a) Operation of a motor vehicle;

(b) Leaving a child under the age of eight (8) years in a motion vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child; or

(c) Unlawful distribution for remuneration of a Schedule I or II controlled substance when the controlled substance is the proximate cause of death.

(2) Manslaughter in the second degree is a Class C. felony.

Kentucky Revised Statute 507.060. Vehicular homicide:

(1) A person is guilty of vehicular homicide when:

(a) He or she causes the death of another, and

(b) The death results from the person's operation of a motor vehicle, including but not limited to boats and airplanes, under the influence of alcohol, a controlled substance, or other substance which impairs driving ability as described in KRS 189A.010

(2) Vehicular homicide is a Class B felony.

Kentucky Revised Statute 532.020:

- (1) Any offense defined outside this code for which a law outside this code provides a sentence to a term of imprisonment in the state for:
 - (a) At least one (1) but not more than five (5) years shall be deemed a Class D felony;
 - (b) At least five (5) but not more than ten (10) years shall be deemed a Class C felony;
 - (c) At least ten (10) but not more than twenty (20) years shall be deemed a Class B felony;
 - (d) At least twenty (20) but not more than fifty (50) years or for life shall be shall be deemed a Class A felony.
- (2) Any offense defined outside this code for which a law outside this code provides a sentence to a definite term of imprisonment with a maximum which falls between ninety (90) days and twelve (12) months shall be deemed a Class A misdemeanor.
- (3) Any offense defined outside this code for which a law outside this code provides a sentence to a definite term of imprisonment with a maximum of less than ninety (90) days shall be deemed a Class B misdemeanor.
- (4) Any offense defined outside this code for which a law outside this code provides a sentence to a fine only or to any other punishment, whether in combination with a fine or not, other than death or imprisonment shall be deemed a violation.

STATEMENT OF FACTS RELEVANT TO THE GRANTING OF MR. HITON'S PETITION FOR CERTIORARI

1. In July 2014, the Hardin County grand jury indicted Mr. Hilton of murder for the death of Brianna Taylor; two counts of first-degree assault for the passenger of each vehicle; operating a motor vehicle under the influence of intoxicants, first offense in a five-year period,¹ aggravated; and for being a first-degree persistent felony offender. At the conclusion of a jury trial in June 2015, Mr. Hilton was convicted of murder, one count of first-degree assault with the second count being found to be second-degree assault, operating a motor vehicle under influence of alcohol which impairs driving ability, and being a first degree persistent felony offender. The trial court sentence Mr. Hilton to life imprisonment with the term of years for the other charges to be run concurrently in conformance with the jury's recommendation.

2. At the time of Mr. Hilton's indictment, Kentucky had two statutes wherein the operation of a motor vehicle under wanton conduct which resulted in the death of another person was subject to prosecution: 1) murder under Kentucky Revised Statute (KRS) 507.020(1)(b), a capital offense punishable by a sentence to death, life in prison, or a term of 20 – 50 years imprisonment; or, 2) Manslaughter in the second degree under KRS 507.040(1)(a), a Class C felony punishable by a term of 5 – 10 years imprisonment.²

1 On April 09, 2016, the Kentucky Legislature enacted 2016 Ky. SB 56, known as the Brianna Taylor Act. Senate Bill 56 was sponsored by Hardin County's state senator and close family friend, Sen. Dennis Parrett. The law change extended the "look-back" period from five to ten years to determine the number of prior offenses a person had for driving under the influence. KRS § 189A.010 imposes graduated penalties based on the number of prior driving under the influence offenses.

2 On March 27, 2023, the Kentucky Legislature enacted 2023 Ky. HB 262, also known as Lily's Law, codifying Vehicular Homicide as KRS 507.060, as a Class B felony: A person is guilty of vehicular homicide when, he or she causes the death of another; and the death results from the person's operation of a motor vehicle under a controlled substance, or other substance which impairs driving ability as described in KRS 189A.010. Class B felonies carry a term of imprisonment from 10 to 20 years. KRS 532.020(c).

3. On the night of June 22, 2014, Mr. Hilton was driving in Hardin County, Kentucky, with his brother, Anthony Kyle Hilton (Kyle Hilton), as a passenger. At the intersection of Deckard School Road and Patriot Parkway Mr. Hilton's truck hit the Ford Mustang driven by Brianna Taylor, and her passenger Mickayla Harig. All four occupants were taken to University of Louisville Hospital. Ms. Taylor and Ms. Harig initially received medical care by EMS responders and then were flown and treated in route to the hospital by an Air Methods flight crew.

4. At the hospital, while being assessed, the trauma unit was able to resuscitate Ms. Taylor after her heart stopped. During abominable surgery complications arose and Ms. Taylor was taken to ICU with the intent to continue with the surgery after she stabilized. However, two hours after arriving at the hospital, Ms. Taylor went into cardiac arrest a second time and the trauma unit was unable to revive her.

5. As part of the initial discovery provided the prosecution turned over 532 pages of medical reports and records. (See Appendix J, at pg. 2, ¶A). The court on March 24, 2015, ordered the defense to supply the Commonwealth with the identity and a written report for any expert they intended to call at trial no later than thirty (30) days prior to trial scheduled to begin on June 8, 2015. (Id., at pg. 2-3).

6. Due to the hospital's withholding a portion of the medical records, the prosecution obtained a court order for the hospital to release all remaining records. (Id., at pg. 3, ¶3). The numerous pages received by the prosecutor were then turned over to defense counsel on May 15, 2015. (Id.). The medical records produced in the original discovery primarily pertained to Ms. Taylor and Mr. Hilton, but did contain some reports for Ms. Harig and Kyle Hilton. The records later released by the hospital were principally for Ms. Harig and Kyle Hilton.

7. Because of the late disclosure and amount of pages, defense counsel requested the June 8th, trial date to be continued to the alternative back-up date August 10, 2015, previously established. (See Appendix J, at pg. 3, ¶F). The court denied a continuance, but suggested and then authorized defense counsel to obtain the services of an expert to provide assistance with reviewing the medical records. (See Appendix J, at pg. 3, ¶F). The oral ruling by the court identified that if something unexpected or surprising appeared in the medical records pertaining to Ms. Harig and Kyle Hilton, it would entertain a renewed motion for a continuance. (VR: 05/22/2015, 03:13:50 – 03:15:30).³ During the side bar the court asked if defense counsel had already obtained an expert to assist in review of the medical records or whether funding would need to be made available so that one could be retained. Defense counsel clarified the experts previously retained and their involvement, and informed the court that an expert who would be able to review medical records had yet to be contacted. (VR: 05/22/2015, 03:16:10 – 03:19:04).

8. Counsel retained the services of Registered Nurse Wendy Milliner (RN Milliner), whose qualifications included extensive training and over twenty years experience as a flight nurse for Air Methods, emergency room care in level one trauma, and in the intensive care unit. Defense counsel had RN Milliner review all medical records received, including the records provided initially in discovery and those later released by the hospital through court order.

9. After completion of the second day of trial, defense counsel submitted a notice to present the expert testimony of RN Milliner. (See Appendix K). The notice of expert opinion informed the material to be presented pertained exclusively to the treatment and care provided to Ms. Taylor. The prosecution “vigorously objected” based on the untimely notice in violation of the court’s order for notice to be provided 30 days prior to the start of time. (Id.). The trial court

³ Pre-trial and trial video recording (VR) followed by the date and time for the referenced testimony.

determined RN Milliner would testify by avowal, and reserved making a final ruling on the admissibility until after the proposed testimony was heard. (See Appendix J, at pg. 2).

10. The purpose of RN Milliner's testimony was to establish that from the injuries sustained, but for, the improper emergency medical care provided to Ms. Taylor, a high mortality rate would not have been expected. (VR: 05/22/2015, 05:13:55). While it did not provide Mr. Hilton with a "legal defense" See *Hilton v. Commonwealth*, 603 S.W.3d 864, 869-70 (Ky. 2020); (Appendix F, at pg. 9), the defense theory was once testimony by RN Miller was presented, the jury would find the death of Ms. Taylor was not reasonably foreseeable; and Mr. Hilton therefore did not operate his vehicle under circumstances manifesting extreme indifference to human life which would have eliminated murder as a possible verdict.

11. RN Milliner testified that prior to arriving at the hospital the care given to Ms. Taylor was substandard to the level of care expected of emergency medical personnel. (See Appendix K, at pg. 1-2). RN Milliner also testified the medical report provided to hospital staff of what care had been given to Ms. Taylor in transit by emergency personnel differed significantly from the care actually provided. (Id.). One critical piece of missing information from the report provided to the hospital staff was the Air Methods flight crew administered fentanyl to Ms. Taylor. (VR: 05/22/2015, 05:02:40 – 05:03:26 pm). Equally important, the report incorrectly communicated to hospital staff the ventilator settings used to assist Ms. Taylor in breathing. (Id., at 05:03:50). RN Milliner opined the lack of proper medical care, the aforementioned, and other misinformation given to hospital medial staff detrimentally affected Ms. Taylor's chances of survival. (See Appendix K, at pg. 1-2).

12. No autopsy of Ms. Taylor was conducted. In order to establish Mr. Hilton was the cause of Ms. Taylor's death, the Commonwealth provided the testimony of Dr. Jason Smith, the

treating physician at the hospital. Dr. Smith stated in his opinion the injury to Ms. Taylor's liver caused by the accident lead to her death. RN Milliner testified the injury to Ms. Taylor's liver was a 10mm laceration; and that while liver injuries can carry a high mortality rate, she would not have expected the injury sustained by Ms. Taylor to result in death. (VR: 05/22/2015, 05:13:55). During cross-examination the prosecutor asked RN Milliner if she disagreed with Dr. Smith's opinion as to the cause of death. In response RN Milliner explained she could not provide an answer on the cause of death because an autopsy was not performed. ("I am not a coroner, I'm not going to decide a cause of death." (VR: 06/11/2015, 5:17:23).

13. After the conclusion of her cross-examination the court inquired in which order she reviewed the medical records. In response RN Milliner stated she reviewed Mr. Hilton's first, then Ms. Taylor's followed by Kyle Hilton, and Ms. Harig. (VR: 06/11/2015, 05:21:20 – 05:21:37). The court went on to conclude as a matter of trial fairness, it was the type of testimony that had to be revealed before the witnesses of whom she was critical had testified and been released. (VR: 06/11/2015, 5:22:40); *Hilton*, 603 S.W.3d at 869-70; (Appendix F, at pg. 9). The trial court found the records upon which RN Milliner testified to were provided to the defense ten (10) months prior to trial, and that counsel could not show good cause to excuse the non-compliance with the court's order requiring notice thirty (30) days prior to trial.⁴ (See Appendix J at pg. 3).

14. The trial was scheduled to begin on June 8, 2015. The court's 30 days expert notice requirement expired on May 9, 2015. It was six (6) days past the deadline when the court authorized defense counsel to obtain the services of RN Milliner to review the medical records.

⁴ The trial court found RN Milliner could not testify based on untimely notice and trial fairness, not because RN Milliner's testimony was inadmissible. (VR: 06/11/2015, 5:22:40).

The trial court's refusal to grant a continuance to the back up date in August eliminated defense counsel's ability to comply with the 30 day deadline.

15. On direct appeal, counsel argued the trial court erred in failing to grant a continuance based on the late disclosure of the numerous additional medical records. *Hilton v. Commonwealth*, 539 S.W.3d 1, 9-10 (Ky. 2018), (Appendix H at pg. 7). The Kentucky Supreme Court affirmed the trial court's ruling finding the Commonwealth's intention to use medical records in this case was not a surprise and counsel could have requested the information well in advance of trial. *Hilton*, 539 S.W.3d at 11 (Ky. 2018), (Appendix H at pg. 8). In denying a COA the court did not address that the granting of a continuance would have allowed counsel to meet the 30 day notice requirement for expert testimony, thereby allowing RN Milliner to testify; but determined Mr. Hilton was unable to demonstrate he suffered actual prejudice from the denial of a continuance. (Appendix A, at pg. 10-11).

16. During the initial post-collateral proceedings in state court, Mr. Hilton raised two claims based on the trial court's ruling that RN Milliner was not allowed to testify. First that counsel was ineffective for failing to meet the court imposed deadline for notice of expert testimony; and second appellate counsel was ineffective for not arguing on direct appeal the trial court erred by excluding the testimony of RN Milliner.

17. In their findings on Mr. Hilton's continuance argument, each court pointed out that the documents testified to by RN Milliner were in defense counsel's possession for ten (10) months prior to trial. This determination establishes trial counsel was ineffective for failing to act diligently to obtain the assistance of expert to review the medical records. Compliance with the notice deadline would have allowed the trier of fact to consider RN Milliner's determination that a high mortality rate would not be associated with the 10mm laceration to Ms. Taylor's liver and

under normal circumstances would not result in death. The failure of defense counsel to meet the notice deadline left the cause of death proposed by Dr. Smith to go unchallenged. However the courts bypassed review of counsel's performance under Strickland, and held Mr. Hilton could not show prejudice because RN Milliner's testimony did not constitute a legal defense.

This determination is the basis for Question I.

18. The latter claim – the failure of appellate counsel to argue the trial court erred by excluding the testimony of RN Milliner – was misconstrued and never addressed by any of the state courts, nor during district court proceedings. (See Appendix A, at pg. 6). The Sixth Circuit denied issuing a COA finding Mr. Hilton “failed to make a substantial showing that appellate counsel's failure to argue on appeal that the trial court erred by excluding Milliner's testimony deprived him of his right to effective assistance of counsel.” (See Appendix A, at pg. 6). After acknowledging the claim was never properly addressed, the court drew its conclusion based on factual and legal determinations made by the state trial court for denying the requested continuance. (See Appendix A, at pg. 7, “... that Milliner's testimony did not constitute a legal defense to causation.”). The lack of prior judicial review of this claim required the Sixth Circuit to conduct a de novo review and make factual findings and legal conclusions based on its own review of the record, instead of giving the state court determinations deference. Consequently, this claim has never been addressed as to the issue presented, or in the last instance, reviewed under the correct governing standard of review.

This determination is the basis for Question II.

19. After the Magistrate Judge rendered his Report and Recommendation, but prior to the District Court conducting its review, Mr. Hilton submitted a request for leave to supplement his petition for habeas corpus. In his request he petitioned the district court to review his IATC

and IAAC claims without deference to the state courts decisions. (See Appendix L, at pg. 1). The basis for Mr. Hilton's request to supplement was the release of the Opinion by the Kentucky Supreme Court in *Ford v. Commonwealth*, 628 S.W.3d 147 (Ky. 2021). Contained within the standard of review the Ford Court accurately recited the well known Strickland standard. *Ford.*, 628 S.W.3d at 156. However, when setting forth how the courts of the Commonwealth are to apply the Strickland standard, the *Ford* Court detailed a prejudice prong standard diametrically different and contrary to federal law:

setting aside a conviction just because counsel's error may have caused a different outcome gives the defendant too great of an advantage. Instead the question should be absent counsel's errors, would the factfinder have had a reasonable doubt respecting guilt? Kentucky courts have previously articulated this standard as counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won. The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.

Ford, 628 S.W.3d at 157, quoting *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008).

20. Kentucky has established a prejudice prong which requires, at a minimum, a defendant to show by a preponderance of the evidence the outcome more likely than not would have been different, and borders on requiring a demonstration in terms of changed outcome. The standard employed in Kentucky is contrary to Strickland and as applied under the AEDPA by all 11 Federal and the D.C. Circuit Courts.

21. The Sixth Circuit Court of Appeals, wherein the jurisdiction of Kentucky Falls has explained: "A reasonable probability is less than a preponderance of the evidence, as a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Howard v. United States*, 743 F.3d 459, 464 (6th Cir. 2014) quoting from *Joseph v. Coyle*,

469 F.3d 441, 459 (6th Cir. 2006).⁵ Kentucky's requirement that a defendant show defeat was snatched from the hands of probable victory, does not conform to the federal standard.

22. One example of the reinforced inappropriate procedure can be found in the decision by the Kentucky Court of Appeals in Mr. Hilton's case. The court initially set forth the correct governing standard, but during its analysis the court deviated from clearly established law and denied Mr. Hilton relief because he was unable to demonstrate that he would have been acquitted.

The fact R.N. Milliner was critical of the treatment provided by medical personnel rendering aid to Taylor following the collision does not exonerate Hilton if Taylor's death was either foreseen or foreseeable by Hilton as a reasonably probable result of his own unlawful act of operating a motor vehicle under the influence of alcohol.

Hilton, 603 S.W.3d at 871; (Appendix F, at pg. 10).

23. The state courts found RN Milliner's testimony did not provide a legal defense against causation as explained in *Robertson v. Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002). (See Appendix A, at pg. 4-5). While her testimony did not afford Mr. Hilton an affirmative defense and the right to request a directed verdict, whether Ms. Taylor's death was either foreseen or foreseeable as a reasonably probable result is an issue for the jury to decide. The courts use of the word "exonerate" in both Mr. Hilton's and the Robinson case is in the context of an "affirmative defense." The two words are not interchangeable. The state courts use of the word

⁵ See also: *Ouber v. Guarino*, 293 F.3d 19, 25-26 (1st Cir. 2002) ("we caution that, although the possibility of a different outcome must be substantial in order to establish prejudice, it may be less than fifty percent); *Henry v. Poole*, 409 F.3d 48, 64 (2nd Cir. 2005); *Hummel v. Rosemeyer*, 564 F.3d 290, 304-05 (3rd Cir. 2009); *Rose v. Lee*, 252 F.3d 676, 689 (4th Cir. 2001); *Charles v. Stephens*, 736 F.3d 380, 392 (5th Cir. 2013); *Dunn v. Neal*, 44 F.4th 696, 702 (7th Cir. 2022); *Paulson v. Newton Corr. Facility*, 703 F.3d 416, 419 (8th Cir. 2013); *Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005); *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014); *Ventura v. AG*, 419 F.3d 1269, 1284 (11th Cir. 2005); *United States v. Miller*, 953 F.3d 804, 808 (D.C. Cir. 2020).

exonerate cannot be dismissed as “it is well established that a court speaks through its written decisions.” *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 582n.8 (Ky. 2016). See also *United States v. Eisner*, 329 F.2d 410, 412 (6th Cir. 1964) (“A court of record speaks only through its records.”).

This determination is the basis for Question III.

24. Based on the above stated facts, Mr. Hilton now presents the reasons why he feels this Honorable Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

Reason for Granting Review for Question I

It has been nearly twenty years since this Court has addressed the Federal Constitution's bearing upon the evidentiary admissibility of expert testimony in a criminal case.⁶ A ruling by this Court's will settle the dispute of whether or not the Federal Constitution protects a defendant's right to present pertinent expert testimony even though it does not provide a legal defense under state law.

Further, Mr. Hilton case raises the question, if after the trial court's requirement to submit notice of expert testimony at trial has expired, and instead of granting a continuance the court enters an order allowing for a defendant to retain the services of an expert, but then rules the notice was untimely and sustains the prosecution's objection to exclude the expert testimony, has the court's rulings caused counsel to render ineffective assistance of counsel.

Reason for Granting Review for Question II

In *Martinez* this Court's predecessor carved out a narrow exception to *Coleman's* holding that attorney error cannot constitute cause to excuse procedural default. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) addressing *Coleman v. Thompson*, 501 U.S. 722 (1991). A year later the *Trevino* Court again addressed the concern that a substantial claim of ineffective assistance of trial

⁶ *Holmes v. South Carolina*, 547 U.S. 319 (2006) (This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.); *Clark v. Arizona*, 548 U.S. 735 (2006) (The case presents two questions: whether due process prohibits Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the mens rea, or guilty mind)).

counsel might never undergo judicial review. *Trevino v. Thaler*, 569 U.S. 413, 423, 428 (2013) citing *Martinez*, 566 U.S., at 11. This Court has sought to ensure a substantial claim of attorney error will not go unaddressed. The merits of Mr. Hilton's claim that appellate counsel was ineffective for failing to argue the trial court erred by excluding the testimony of RN Milliner has yet to receive judicial review for the claim presented. While not an IATC claim, were this Court to deny Certiorari or to remand to the Sixth Circuit, Mr. Hilton's claim of trial error will never be addressed.

Reason for Granting Review for Question III

This Court in *Strickland*⁷ firmly established, in claims of ineffective assistance of counsel the prejudice prong is satisfied upon a showing of a reasonable probability of a different result. The possibility of a different result must be substantial not just conceivable. The holding in *Williams*⁸ presented the paradigmatic example of the preponderance standard as diametrically different from a reasonable probability and contrary to clearly established federal law. Thirteen years ago *Harrington* expounded the doubly differential standard required by the AEDPA. In so doing the Court made sure to express nothing in the Strickland standard had changed, reiterating a “reasonable probability does not equate to “more-probable-than-not.” *Harrington v. Ricter*, 562 U.S. 86, 111-12 (2011).

For forty years the Federal Courts have not varied on the standard of prejudice required by Strickland. The courts of Kentucky cannot say the same. (See Appendix L, at pg. 4-9). This past month, after taking a second look at *Hodge v. Jordon* the Sixth Circuit found concern with the standard the state court applied in conducting its analysis of prejudice under Strickland.

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁸ *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

Hodge v. Jordon, Case No. 17-6032 (6th Cir. Feb. 22, 2024), 2024 U.S. App. LEXIS 4101, 2024 WL 726243. Upon its further review, the Court compared Hodge's case with Wiggins and Rompilla and found the Kentucky Supreme Court's requirement to prove a causal connection between mitigation evidence and the underlying crime is contrary to clearly established Supreme Court precedent. *Id.*, at 7-9. And further concluded Kentucky's erroneous determinations "flowed from its legal errors." *Hodge*, Case No. 17-6032 at 9, quoting *Hodge v. Kentucky*, 133 S.Ct. 506, 510, 184 L.Ed.2d 514 (2012). Mr. Hilton did not seek rehearing in the Sixth Circuit, a second look by this Court into the the *Strickland* prejudice standard as altered and employed through state precedent will reveal a systematic use of a standard contrary to the clearly established federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Michael Todd Hilton, pro se

Date: March 6, 2024