No. 23-5567

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL TODD HILTON,

Petitioner-Appellant,

v.

DANIEL AKERS, Warden, Lee Adjustment Center,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Michael Todd Hilton, a Kentucky prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Currently pending are Hilton's application for a certificate of appealability ("COA") and motion to proceed *in forma pauperis* on appeal.

On the evening of June 22, 2014, Hilton was driving in Hardin County, Kentucky, with his brother as a passenger, when he hit another vehicle. *Hilton v. Commonwealth* ("*Hilton I*"), 539 S.W.3d 1, 5 (Ky. 2018). Both Hilton and his brother were taken to the hospital. *Id.* Hilton sustained minor injuries, and his brother was hospitalized for five days. *Id.* Hilton admitted that he had been drinking heavily, and laboratory testing established that his blood alcohol level at the time of collection was more than twice the legal limit to operate a vehicle. *Id.* The driver of the other vehicle, Brianna Taylor, and the passenger, Mickayla Harig, were severely injured. *Id.* At the hospital, doctors were unable to revive Taylor after she went into cardiac arrest due to blood loss from the damage to her organs. *Id.*

After a jury trial in Hardin County, Hilton was convicted of murder, first-degree assault, second-degree assault, operating a motor vehicle under the influence of alcohol which impairs

Appendix A

driving ability, and being a first-degree persistent felony offender. The trial court sentenced Hilton to life imprisonment. The Kentucky Supreme Court affirmed. *Id.* at 19. Hilton then moved to vacate his conviction and sentence pursuant to Kentucky Rule of Criminal Procedure 11.42. The trial court denied the motion, and the Kentucky Court of Appeals affirmed. *See Hilton v. Commonwealth* ("*Hilton II*"), 603 S.W.3d 864, 871–72 (Ky. Ct. App. 2020).

In his § 2254 petition, Hilton raised the following claims: (1) trial counsel was ineffective for failing to timely disclose registered nurse Wendy Milliner as an expert witness, resulting in the exclusion of her testimony at trial, (2) appellate counsel was ineffective for failing to argue that the trial court improperly excluded Milliner's testimony, (3) the trial court violated his right to a fair trial by denying his motion for a change of venue, (4) the trial court erred when it denied his motion to suppress inculpatory statements made to a witness at the scene of the accident, (5) the trial court violated his right to due process by denying his motion for a continuance to review medical records turned over by the prosecution two weeks prior to trial, and (6) the trial court improperly denied his motion to excuse certain jurors for cause. A magistrate judge recommended that Hilton's petition be denied, concluding that all of the claims lacked merit. Over Hilton's objections, the district court adopted the magistrate judge's report and recommendation and denied the petition. The court declined to issue a COA.

Hilton now seeks a COA for claims one, two, three, and five. He does not address claims four and six and has therefore forfeited them. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court previously adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state

court's adjudication of the claim resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, in the COA context, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

I. *Ineffective Assistance of Trial and Appellate Counsel*

Hilton's first two claims concern the handling of Milliner's testimony by trial and appellate counsel. To establish ineffective assistance of counsel, a petitioner must show both that (1) counsel's performance was deficient, i.e., "that counsel's representation fell below an objective standard of reasonableness," and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. On habeas review, the district court must apply a doubly deferential standard of review: "[T]he question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

On March 18, 2015, the trial court ordered Hilton to notify the Commonwealth of any expert witness he intended to call at trial no later than 30 days prior to trial, which was scheduled to begin in June 2015. At the close of evidence on the second day of trial, Hilton tendered a "Notice of Expert Opinion," notifying the prosecution and the trial court that it intended to call Milliner as an expert witness to "discuss several issues that arose during Ms. Taylor's care that

raise concerns and perhaps contributed to her death." Notice of Expert Op., R. 26-2, Page ID #467. Because the notice was untimely, the trial court excluded the testimony but allowed Milliner to testify by avowal outside the presence of the jury. "Milliner was critical of the care rendered by the first responders—particularly the flight crew—to Taylor, up to and including the transfer of care to Dr. [Jason] Smith. Her primary concerns related to actions which decreased Taylor's blood pressure and oxygenation levels." *Hilton II*, 603 S.W.3d at 869. Milliner did not take issue with the care rendered at the hospital by Dr. Smith or with his determination that Taylor died as a result of the injuries she sustained in the collision. *Id.* After hearing the testimony, the trial court reaffirmed its ruling.

In his Rule 11.42 motion to vacate, Hilton argued that trial counsel was ineffective for failing to timely disclose Milliner as an expert witness because her testimony would have provided an alternative theory of causation. On appeal from the trial court's denial of the motion, the state appellate court concluded that Hilton failed to establish that counsel's failure prejudiced him at trial. *Id.* at 871. Applying Kentucky's definitions for the terms "wantonly" and "causal relationships" in analyzing the question of causation, the court explained that Milliner's testimony did not exonerate Hilton because Taylor's death was "foreseeable by Hilton as a reasonably probable result of his own unlawful act of operating a motor vehicle under the influence of alcohol." *Id.* (citing *Robertson v. Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002)). The court explained that Milliner "did not testify with a certain degree of medical probability that the actions of the medical personnel would or could have changed the inevitable outcome of Taylor's death" and that "Dr. Smith's testimony . . . made it clear that the actions of prior medical personnel rendering aid to Taylor were immaterial as there was no way to stop the bleeding sufficiently to save Taylor's life." *Id.* The court therefore concluded that any error in excluding Milliner's testimony "was harmless and not prejudicial to Hilton." *Id.* The district court concluded that this ruling was not based on an unreasonable determination of the facts and did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

In his COA application, Hilton reiterates the argument he raised in his objections to the report and recommendation that the state appellate court's ruling was contrary to *Strickland* because the court applied a more exacting standard of prejudice than *Strickland* requires. Hilton argued that, although the state appellate court recited the correct standard from *Strickland*, it applied a "harsher standard" by requiring him to make an affirmative showing that, had counsel properly introduced Milliner's testimony, he would have been acquitted. COA, ECF No. 6, 7. He pointed to the court's finding that Milliner's testimony would not have "exonerated" him. *Id.*

Reasonable jurists could not disagree with the district court's rejection of Hilton's argument that the state appellate court's ruling was contrary to *Strickland*. In setting forth the applicable federal law, the state appellate court correctly cited the "reasonable probability" standard for prejudice set forth in *Strickland*. *Id.* at 868. When the court used the term "exonerate," it did so when assessing the impact that Milliner's testimony might have on the issue of causation under state law. It stated,

> [T]he fact that . . . 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.

Id. at 871. In making this statement, the court was merely tracking the language used by the Kentucky Supreme Court in a leading case on criminal causation. *See Robertson*, 82 S.W.3d at 836 (explaining that an intervening act does not defeat causation and exonerate the defendant if the victim's injury "was either foreseen or foreseeable by [the defendant] as a reasonably probable result of his own unlawful act"). The court was not holding Hilton to a higher standard of prejudice than *Strickland* requires. Rather, it was merely explaining that, under state law, Milliner's testimony was not material to causation. And the court reasonably concluded that Hilton therefore could not show that, had counsel properly introduced Milliner's testimony, there is a reasonable probability that the outcome of the trial would have been different.

Hilton further argues that the state appellate court's ruling on this trial-counsel claim was based on an unreasonable determination of the facts, citing Milliner's testimony that "Taylor did

not receive adequate oxygen for nearly forty . . . minutes," that the improper administration of fentanyl decreased Taylor's blood pressure, and that "she would not have expected a high mortality rate" had Taylor received proper care before arriving at the hospital. COA, ECF No. 6, 7–8. He contends that there is a reasonable probability that, had the jury heard this testimony, at least one juror would have found that Taylor's death was not a foreseeable result of the car accident.

Review of the state appellate court's determination reveals that it considered all of Milliner's testimony, including her statements expressing concern with certain aspects of Taylor's care. *Hilton II*, 603 S.W.3d at 869. However, the court emphasized that Milliner did not disagree with Dr. Smith's conclusion that Taylor died because of an inability to prevent Taylor's bleeding as a result of the injuries sustained in the collision. *Id.* And Hilton does not dispute this aspect of Milliner's testimony. Reasonable jurists could not disagree with the district court's determination that the state appellate court's decision was not based on an unreasonable determination of the facts.

Hilton next claims that appellate counsel was ineffective for failing to argue on appeal that the trial court erred by excluding Milliner's testimony. In his COA application, Hilton correctly points out that both the state appellate court and the district court mischaracterized his claim and considered whether appellate counsel was ineffective for failing to raise the above trial-counsel claim on appeal rather than appellate counsel's failure to raise the trial court's error in excluding the testimony. He asserts that, because the state courts never reviewed the merits of his actual claim, *de novo* review applies in his habeas proceeding.

Although the state appellate court and the district court misconstrued Hilton's claim, no COA is warranted because Hilton has 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. An attorney is not required "to raise every non-frivolous issue on appeal." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Indeed, "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v.*

Murray, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Where, as here, appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present.'" *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

In its order excluding Milliner's testimony, the trial court explained that Hilton failed to show good cause for why he should be excused from compliance with the court's order requiring 30 days' notice of expert witnesses, noting that Hilton had been in possession of Taylor's medical records for 10 months prior to trial, and that Milliner's testimony "did not constitute a legal defense to causation." Order, R. 26-2, PageID #477. As discussed above, Milliner's testimony did not call into question the treating physician's determination of the cause of death, and the state appellate court determined as a matter of state law that the testimony therefore did not establish that Hilton's actions were not the legal cause of Taylor's death. Hilton therefore cannot make a substantial showing that this claim of trial court error was "clearly stronger" than the issues appellate counsel pursued on appeal or that the result of the appeal would have been different had counsel raised it. *Caver*, 349 F.3d at 348. Appellate counsel cannot be deemed ineffective for failing to raise a meritless claim on appeal. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial."). This claim does not deserve encouragement to proceed further.

II. *Change of Venue*

Hilton's third claim is that the trial court's denial of his motion for a change of venue violated his rights under the Fifth, Sixth, and Fourteenth Amendments. The facts underlying this claim were summarized by the Kentucky Supreme Court:

> Prior to trial, Hilton made a motion for change of venue, contending that extensive media coverage and widespread local knowledge of his actions prevented him from having a fair trial in Hardin County. Hilton requested that the trial be conducted in another county or alternatively that jurors be summoned from other counties or that a survey be sent out to determine community opinion.
>
> Subsequently, the trial court conducted two evidentiary hearings to consider Hilton's motion. In support of his motion, Hilton submitted two affidavits and multiple exhibits demonstrating the pretrial attention surrounding the death of

> Brianna Taylor. Hilton's exhibits included photographs of a roadside memorial to Taylor, Louisville area news reports about Taylor's death, and a copy of a Facebook [memorial] page . . . . In opposition to Hilton's motion, the Commonwealth submitted four counter-affidavits. Additionally, the Commonwealth submitted the 2010 Census figures for Hardin County, the daytime population of Fort Knox, and the daily circulation of the Elizabethtown *News-Enterprise*.
>
> After considering the evidence presented by both parties, the trial court denied Hilton's motion in a detailed order, subject to reconsideration if Hilton renewed the motion during *voir dire*. The trial court concluded that the pretrial media coverage of this case was not reasonably likely to prevent a fair trial in Hardin County. Additionally, the trial court enumerated seven reasons why a change of venue was unnecessary: 1) Hardin County, with a population of approximately 105,000 residents, is relatively large and has numerous cities and school districts; 2) Hardin County is a transient community, where a substantial number of citizens do not have pre-existing ties or relationships with the residents of the county; 3) the nearby presence of the Louisville media market diminishes the impact that a single tragic case has on the public consciousness of potential jurors in the county; 4) the internet coverage of the case is not necessarily relevant because it cannot be quantified to determine the impact within Hardin County; 5) roadside memorials, such as the one to Taylor, are common occurrences in Kentucky and the memorial does not name Hilton nor is its lettering readable to passing motorists; 6) the jury pool from which Hilton's petit jury would be formed was instructed during jury orientation not to watch, listen, or read any media or internet accounts of any criminal cases occurring in Hardin County during their term of service; and 7) the Hardin Circuit Court had been able to seat a fair and impartial jury in similar cases of media exposure without resorting to extraordinary measures such as change of venue or summoning jurors from adjacent counties.

Hilton I, 539 S.W.3d at 6–7 (footnotes omitted).

A change in venue should be granted if pretrial publicity jeopardizes a defendant's right to a fair trial. *See Irvin v. Dowd*, 366 U.S. 717, 722–24 (1961); *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007). "[A] searching voir dire of the prospective jurors is the primary tool to determine if the impact of the publicity rises to th[e] level" of actual prejudice. *Ritchie v. Rogers*, 313 F.3d 948, 962 (6th Cir. 2002). "Prejudice from pretrial publicity is rarely presumed," *Foley*, 488 F.3d at 387, and extensive media coverage is insufficient by itself to create a presumption that a defendant was denied a fair trial, *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). Rather, a presumption of prejudice should be applied only in "the extreme case," *Skilling v. United States*,

561 U.S. 358, 381 (2010), where a conviction was "obtained in a trial atmosphere that had been utterly corrupted by press coverage," *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

In rejecting this claim, the Kentucky Supreme Court first found that "the publicity complained of by Hilton was not so prolific or prejudicial as to rise to a presumption of prejudice" and concluded after considering the totality of circumstances that "the trial setting was [not] inherently prejudicial." *Hilton I*, 539 S.W.3d at 7. The court further concluded that Hilton failed to "establish[] a reasonable likelihood that pretrial publicity actually prejudiced the jury pool." *Id.* Hilton emphasized that 32 out of the 36 jurors called for service responded that they had heard some media coverage of the case, but the court explained that, absent a showing that there was a reasonable likelihood that the media coverage prejudiced Hilton, mere exposure to coverage about the case was not sufficient to warrant a change of venue. *Id.* at 7–8. The court further explained that the trial court carefully examined the jurors about their knowledge of the case due to media coverage and removed any juror who had formed an opinion about the case based on that coverage. *Id.*

In his COA application, Hilton argues that the state appellate court's ruling was based on an unreasonable determination of the facts because it "failed to consider all of the additional evidence presented." COA, ECF No. 6, 10. He contends that the prejudice from his case being "the local CBS affiliate's top news story of the year" was "[c]ompound[ed]" by the proposal of legislation known as the Brianna Taylor Act to amend the look-back period for DUI offenses. *Id.* He states, "Inherent to the community outrage which sparked legislation was the public awareness of [his] past conviction for drinking and driving." *Id.* Hilton also pointed to construction modifications that were made at the site of the accident and the participation of prominent businesses in fundraising for Taylor's family. Although the state appellate court did not mention these facts specifically in its opinion, Hilton points to nothing in the record to show that they were not considered. The trial court held two evidentiary hearings and provided detailed reasons in its order denying Hilton's motion. It also excused jurors when it determined that they had formed opinions about the case. Reasonable jurists would not disagree with the district court's

determination that the Kentucky Supreme Court's ruling on this claim was not based on an unreasonable determination of the facts.

Hilton also argues that the state appellate court's ruling on this claim was an unreasonable application of clearly established federal law because it "failed to consider presumptive prejudice and only conducted a review for actual prejudice." *Id.* at 11. This is not the case. As noted above, the Kentucky Supreme Court specifically found that "the publicity complained of by Hilton was not so prolific or prejudicial as to rise to a presumption of prejudice" and concluded after considering the totality of circumstances that "the trial setting was [not] inherently prejudicial." *Hilton I*, 539 S.W.3d at 7. Reasonable jurists would agree that the court applied the correct standard to Hilton's claim and reasonably concluded that this was not "the extreme case" where a presumption of prejudice would apply. *Skilling*, 561 U.S. at 381.

III. *Motion for Continuance*

Finally, Hilton seeks a COA for his claim challenging the denial of his motion for a continuance to allow additional time for him to review medical records that were produced two weeks before trial. Whether to grant a motion for continuance is within the discretion of the trial judge. *See Ungar v. Sarafite*, 376 U.S. 575, 589–90 (1964). The denial of motion for a continuance "rises to the level of a constitutional violation only if it is so arbitrary as to violate due process." *Foley*, 488 F.3d at 389. Further, a habeas petitioner must show that the denial of his request actually prejudiced his defense. *Franklin v. Bradshaw*, 695 F.3d 439, 453 (6th Cir. 2012). Actual prejudice may be demonstrated by showing that additional time would have benefited the defense. *Id.*

The Kentucky Supreme Court applied the above standards and concluded that the trial court's denial of a continuance did not violate Hilton's right to due process. *Hilton I*, 539 S.W.3d at 10–11. The court found that granting another continuance would have inconvenienced the trial court and witnesses, noting that "it was not a given that the trial could have been moved to the August 10, 2015, date, and if not tried at that time, it is unknown when the case would have finally been presented to a jury." *Id.* at 11. The court further explained that Hilton was aware that the

Commonwealth intended to use medical records in this case and thus could have obtained the records earlier. *Id.* It also pointed out that Hilton was able to obtain pretrial funding for an expert to review the medical records at issue. *Id.* Finally, the court found that Hilton was "unable to identify any specific prejudice he suffered by the trial court's refusal to grant him a continuance." *Id.* Reasonable jurists could not disagree with the district court's conclusion that the state court's ruling was not based on an unreasonable determination of the facts and was not contrary to, or an unreasonable application of, clearly established federal law.

For these reasons, Hilton's application for a COA is **DENIED** and his motion to proceed *in forma pauperis* is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5567

MICHAEL TODD HILTON,

Petitioner-Appellant,

v.

DANIEL AKERS, Warden, Lee Adjustment Center,

Respondent-Appellee.

Before: CLAY, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Michael Todd Hilton for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20CV-00769-JHM-HBB

MICHAEL TODD HILTON **PETITIONER**

VS.

DANIEL AKERS, WARDEN **RESPONDENT**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections [DN 35] and supplemental objections [DN 36] having been filed thereto, and the Court having considered the same:

IT IS HEREBY ORDERED that the Petitioner's objections are overruled, and the Court adopts the Findings of Fact, Conclusions of Law, and Recommendation as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 (DN 1) is **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**.

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

May 17, 2023

Copies to: Michael Todd Hilton, *pro se*
Counsel of Record

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20CV-00769-JHM-HBB

MICHAEL TODD HILTON **PETITIONER**

VS.

DANIEL AKERS, WARDEN **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 filed pursuant to 28 U.S.C. § 2254 (DN 1) is **DISMISSED WITH PREJUDICE**, and judgment is entered in favor of Respondent.

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

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

May 17, 2023

Copies: Michael Todd Hilton, *pro se*
Counsel of Record

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Hilton v. Akers, 2022 U.S. Dist. LEXIS 178735

United States District Court for the Western District of Kentucky, Louisville Division

September 30, 2022, Decided; September 30, 2022, Filed

Civil Action No. 3:20-cv-769-RGJ-HBB

Reporter

2022 U.S. Dist. LEXIS 178735 * | 2022 WL 4686991

MICHAEL TODD HILTON, Petitioner v. DANIEL AKERS, WARDEN, Respondent

Subsequent History: Certificate of appealability **denied**, Motion **denied** by, As moot **Hilton v. Akers**, 2023 U.S. App. LEXIS 32860 (6th Cir., Dec. 12, 2023)

Prior History: **Hilton v. Akers**, 2020 U.S. Dist. LEXIS 214698, 2020 WL 6731108 (E.D. Ky., Nov. 16, 2020)

Core Terms

evidentiary hearing, appointment of counsel, trial court, recommendation, magistrate judge, sentence, district court, state court, autopsy, novo, first-degree, imprisonment, injuries, assault, Corpus, argues, avowal, amend

Counsel: **[*1]** Michael Todd Hilton, Petitioner, Pro se, Beattyville, KY USA.

Appendix C

For Daniel Akers, Lee Adjustment Center, Respondent: Thomas A. Van De Rostyne, LEAD ATTORNEY, Kentucky Attorney General, Frankfort, KY USA.

Judges: Rebecca Grady Jennings, Chief United States District Judge.

Opinion by: Rebecca Grady Jennings

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Petitioner Michael Todd Hilton's ("Hilton") Motion for Leave to Supplement Petition for Habeas Corpus [DE 36] and his Motion for Evidentiary Hearing and Request for Appointment of Counsel [DE 39]. The Respondent, Daniel Akers, the Warden of Lee Adjustment Center ("Warden"), did not respond to either motion. This matter is ripe. For the reasons below, Hilton's Motion for Leave to Supplement [DE 36] is **GRANTED in part and DENIED in part** and his Motion for Evidentiary Hearing and Request for Appointment of Counsel [DE 39] is **DENIED**.

I. BACKGROUND

In July 2014, the Hardin County, Kentucky, grand jury indicted Hilton for murder; first-degree assault (two counts); operating a motor vehicle under the influence of intoxicants, first offense in a five-year period, aggravated; and for being a first-degree persistent felony offender. *Hilton v. Commonwealth*, 539 S.W.3d 1, 5-6 (Ky. 2018) (hereinafter "*Hilton I*"). Following **[*2]** a June 2015 trial before the Hardin County Circuit Court, the jury found Hilton guilty of murder, first-degree assault, second-degree assault, and operating a motor vehicle under the influence of alcohol. *Id.* at 4, 6. Following the penalty phase of his trial, the jury found Hilton to be a first-degree persistent felony offender and recommended concurrent sentences of life imprisonment for murder, thirty-five years' imprisonment for first-degree assault, ten years' imprisonment for second-degree assault, and thirty days' imprisonment for operating a motor vehicle under influence of alcohol which impairs driving ability. *Id.* at 6. The trial court sentenced Hilton to life imprisonment in conformance with the jury's recommendation. *Id.*

The trial court found the evidence showed the following:

> During the evening of June 22, 2014, Jason Hall was driving down Deckard School Road in Hardin County, Kentucky. After reaching the intersection of Deckard School Road and Patriot Parkway, Hall observed an overturned burning truck. As Hall drove towards the burning wreck he observed a cooler and beer cans in the road. After Hall exited his vehicle, he was approached by Michael Todd Hilton who told Hall that **[*3]** he was unable to find his brother, Kyle Hilton. Hall informed Hilton that he would be with him momentarily, after he called 911 to request emergency assistance. Hilton

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tried to persuade Hall not to call 911, but Hall refused and contacted the authorities.

Faith Terry and Jason Combs also arrived on the scene of the collision. Terry observed a truck flipped upside down and a mangled orange Mustang. Hearing coughing from the Mustang, Terry and Combs attempted to aid the injured driver, Brianna Taylor, but were unable to assist Taylor's passenger, Mickayla Harig, who was pinned down by wreckage from the collision. Subsequently, Terry and Combs overheard Hilton yelling for help for his brother Kyle, who was also injured in the accident.

While attending to Kyle, Hilton admitted to not stopping at the intersection's stop sign and that he had been drinking. Terry also observed beer cans strewn amongst the wreckage.

After the arrival of emergency personnel, Hilton and his brother were transported to the University of Louisville Hospital for medical treatment. Prior to his transport to the hospital, Hilton admitted to emergency personnel that he and Kyle had been drinking heavily. At the hospital, **[*4]** physicians examined and treated Hilton for minor injuries. Kyle was admitted at the hospital and received treatment for five days prior to being discharged.

Due to Taylor and Harig being trapped in their damaged vehicle, they were transported to the University of Louisville Hospital after Kyle and Hilton. Both women were treated for severe injuries. Among other injuries, Harig suffered a traumatic brain injury and was hospitalized for approximately 22 days prior to being discharged. As for Taylor, her extensive injuries induced cardiac arrest. While doctors were initially able to restart Taylor's heart, blood loss from organ damage caused her heart to arrest a second time, and they were not able to revive her.

Responding to the scene of the crime, Officer Thomas Cornett of the Hardin County Sheriff's Office observed beer cans and a cooler near Hilton's damaged vehicle. Officer Cornett suspected that Hilton might have been operating his vehicle while under the influence of alcohol and thus contacted the hospital to have Hilton's blood collected for future laboratory examination. Lab results later established that Hilton's blood alcohol level at the time of the collection was approximately **[*5]** 2.33g/100ml; more than twice the legal limit to operate a motor vehicle.

Id. at 5.

On direct appeal to the Supreme Court of Kentucky, Hilton alleged the trial court erred by: "1) failing to **grant** a change of venue; 2) declining to suppress a witness's statement; 3) refusing to **grant** a continuance; 4) failing to remove jurors for cause; 5) **denying** his request for a mistrial; and 6) by permitting the Commonwealth to inquire of witnesses during the penalty phase what sentence they believed appropriate for Hilton's crimes." *Id.* at 4-5. The Supreme Court of Kentucky concluded: 1) the trial court did not abuse its discretion in **denying** Hilton's motion for change of venue; 2) the trial court did not abuse its discretion in **denying** Hilton's motion to exclude a statement he made to Jason Hall; 3)

the trial court did not abuse its discretion in **denying** Hilton's request for a continuance; 4) the trial court did not abuse its discretion by refusing Hilton's motion to excuse jurors for cause; 5) the trial court did not abuse its discretion in **denying** Hilton's request for a mistrial; and 6) it was harmless error for the trial court to permit testimony about what would constitute an appropriate sentence **[*6]** for Hilton. *Id.* at 6-19. The Supreme Court of Kentucky affirmed Hilton's conviction and sentence in its opinion issued on February 15, 2018. *Id.* at 19.

On July 16, 2018, Hilton, through counsel, filed a Ky. R. Crim. P. 11.42 motion to vacate his conviction and sentence. [DE 26-2 at 414-19]. In the motion, Hilton argued trial counsel rendered ineffective assistance because he failed to timely notify the Commonwealth of his intention to call registered nurse Wendy Milliner ("R.N. Milliner") to testify as to the care given to Brianna Taylor and but for this failure to do so the testimony could have been presented to the jury. [*Id.* at 416-17]. Next, Hilton argued appellate counsel rendered ineffective assistance because he failed to raise the issue despite Ms. Milliner giving her testimony by avowal to preserve the issue for appeal. [*Id.* at 417]. The Hardin Circuit Court **denied** Hilton's Rule 11.42 motion in an order entered November 21, 2018, noting that during the trial it had allowed Ms. Millner's testimony to be given by avowal. [DE 26-2 at 427-32].

Hilton timely appealed. *Hilton v. Commonwealth*, 603 S.W.3d 864, 866 (Ky. App. 2020), *review* ***denied*** (May 20, 2020) (hereinafter "*Hilton II*"). The Court of Appeals of Kentucky affirmed the rulings of the Hardin Circuit Court. *Id.* The Supreme **[*7]** Court of Kentucky **denied** Hilton's petition for discretionary review on May 20, 2020. *Hilton v. Commonwealth*, 2020-SC-0000113-D, 2020 Ky. LEXIS 205 (Ky. May 20, 2020).

On October 14, 2020, Hilton filed his § 2254 petition and supporting memorandum before this Court setting forth several claims. [DE 1]. Akers responded [DN 26] and Hilton replied [DN 27]. Pursuant to this Court's referral order, Magistrate Judge H. Brent Brennenstuhl has made Findings of Fact, Conclusions of Law, and Recommendations [DE 32] ("R&R") on Hilton's § 2254 petition. Hilton has filed Objections to the R&R [DE 35]. Hilton also filed a Motion for Leave to Supplement Petition for Habeas Corpus [DE 36] and a Motion for Evidentiary Hearing and Request for Appointment of Counsel [DE 39]. The Court now considers the latter two motions.

II. DISCUSSION

A. Motion for Leave to Supplement Petition for Habeas Corpus [DE 36].

a. Standard

A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). "A magistrate judge must promptly conduct the required proceedings . . . [and] enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1). This Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." **[*8]** Fed. R. Civ. P. 72(b)(3). The Court need not review under a de novo or any other standard those aspects of the report and recommendation

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to which no specific objection is made and may adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas v. Arn*, 474 U.S. 140, 149-50, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (alterations in original) (citation omitted). A general objection that fails to identify specific factual or legal issues from the R&R is not permitted as it duplicates the magistrate judge's efforts and wastes judicial resources. *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). After reviewing the evidence, the Court is free to accept, reject, or modify the magistrate judge's proposed findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

Under Federal Rule of Civil Procedure 72, parties have fourteen days to object to a magistrate judge's order on non-dispositive motions. Fed. R. Civ. P. 72(a); *see also* Local Rule 72.2. "A party may not assign as error a defect in the order not timely objected to." Fed. R. Civ. P. 72(a). "The district judge in the case must consider *timely* objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.* (emphasis added). Under Federal Rule of Civil Procedure 6, "[w]hen an act may or may not be done within a specified time, the **[*9]** court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B).

"The liberal standards of Rule 15 of the Federal Rules of Civil Procedure govern amendment of a petition for writ of habeas corpus under § 2255." *United States v. Conn*, No. CR 5:18-059-DCR, 2020 U.S. Dist. LEXIS 17812, 2020 WL 515840, at *2 (E.D. Ky. Jan. 31, 2020), (June 7, 2021) (citing *Hodges v. Rose*, 570 F.2d 643, 649 (6th Cir. 1978)). Section 2255 imposes a one-year limitation on the filing of any motion seeking to amend, vacate, or set aside a federal sentence. *See Anderson v. United States*, 39 F. App'x 132, 135-36 (6th Cir. 2002). That said, the mandate of Fed. R. Civ. P. 15(a) that a court freely **grant** leave to amend when justice so requires has been interpreted to allow supplementation and clarification of claims first raised in a timely § 2255 motion. *Id.* For a § 2255 movant to amend a pending motion beyond the one-year limitation, the requested amendment must "relate back" to the original motion in that it seeks only to clarify or supplement claims timely raised in the original pleading. *Watkins v. Deangelo-Kipp*, 854 F.3d 846, 849-50 (6th Cir. 2017).

Finally, although Rule 15(a)(2) provides that leave to amend shall be freely given "when justice so requires," leave may be **denied** based on undue delay, bad faith by the moving party, repeated failure to cure defects by previously allowed amendments, futility of the proposed new claim, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

*b. Discussion **[*10]***

While Hilton captioned this as a motion supplement to his petition, it appears to actually be a supplement to his objections to the R&R, as it discusses the R&R and Hilton's objections and does not contain any true amendments or supplementations to his original petition. Hilton moves to supplement his petition "in conjunction with his petition and

objections to [the R&R]." [DE 36 at 654]. "The purpose of this supplement is to request application of de novo review as governed by pre AEDPA standards and **deny** deference to the state court determinations on his claims." [*Id.*]. Hilton states that Magistrate Judge Brennenstuhl's R&R "found the state courts identified the correct legal standard and the determinations were not an unreasonable application of the Strickland standard." [*Id.*] Hilton argues the application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "and its progeny" to his petition. [*Id.* at 654-62]. Hilton's motion ultimately asks the Court to allow him to file this document as a supplement and "conduct a de novo review [of] his ineffective assistance of trial and appellate counsel claims as presented in his petition, objections and this supplement; [and] reject Magistrate Judge Brennenstuhl's Report and Recommendation." **[*11]** 1 [*Id.* at 662]. Hilton's original objections included "Claim I Trail [sic] Counsel was Ineffective" and "Claim II Counsel on Appeal . . . Depriv[ed] Petitioner of his Right to Effective assistance of Counsel." [DE 35 at 627-36]. Claims properly objected to will be considered under a de novo review. *See* Fed. R. Civ. P. 72(a), (b)(3) ("The district judge in the case must consider timely objections" and "determine de novo any part of the magistrate judge's disposition that has been properly objected to."). Thus, to the extent he is requesting supplementation of his objections and proper review to the R&R, the Court **GRANTS in part** Hilton's Motion for Leave to Supplement [DE 36]. To the extent Hilton is requesting to supplement or amend his petition, he has made no showing under Rule 15(a)(2), and the Court **DENIES in part** Hilton's Motion for Leave to Supplement [DE 36].

B. Motion for Evidentiary Hearing and Request for Appointment of Counsel [DE 39].

a. Standard

Pursuant to 28 U.S.C. § 2254(e)(2), "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that":

> (A) The claim relies on—
>
> > (i) A new rule of constitutional law, made **[*12]** retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) A factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Developing the factual basis of a claim typically requires "that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. If the petitioner did not fail to develop the facts of his claim in state court, then the district court may hold an evidentiary hearing. *Williams v. Taylor*, 529 U.S. 420, 432, 120

S. Ct. 1479, 146 L. Ed. 2d 435 (2000). However, "bald assertions and conclusory allegations do not provide sufficient grounds to warrant requiring . . . an evidentiary hearing." *Washington v. Renico*, 455 F.3d 722, 733 (6th Cir. 2006). The Supreme Court has instructed the reviewing court to "consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 468, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007). "[I]f the record refutes the applicant's factual allegations **[*13]** or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* at 474. The decision of whether to hold an evidentiary hearing is within the discretion of the district court. *Id.*

"If an evidentiary hearing is warranted [in a habeas action], the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A." Rule 8(c) of the Rules Governing § 2254 Cases.

b. Discussion

Hilton requests an evidentiary hearing with appointment of counsel "to develop evidence that an autopsy was not performed as required by state law, and resolve the factual dispute of death causation and the culpability attributed to Petitioner for the death of Ms. Taylor." [DE 39 at 699]. Hilton argues that "by law the treating physician, Dr. Smith, was required to have a postmortem examination performed by a coroner." [*Id.* at 700]. He also argues that the jury did not hear testimony from R.N. Milliner that "established from her experience she would not have expected a high mortality rate from the injuries sustained by Ms. Taylor." [*Id.* at 701]. Hilton contends that he sought and was **denied** an evidentiary hearing on his claims in state court. [*Id.* at 701-02].

Hilton identifies the facts he wishes **[*14]** to develop at an evidentiary hearing: that "by law an autopsy was not performed by a coroner," and that the jury did not hear testimony from R.N. Milliner. [*Id.* at 699-702]. Hilton also states that "[t]he avowal testimony of R.N. Milliner did not establish the autopsy which was not performed was required by state law, or how an autopsy would substantiate the death of Ms. Taylor was not expected but due to initially receiving improper medical care." [*Id.* at 701]. While Hilton makes clear that the factual dispute at trial was the causal connection for Ms. Taylor's death, he does not explain what facts are in dispute for the evidentiary hearing or what further facts he would specifically develop. He argues only that "[d]evelopment of facts pertaining to the lack of autopsy are key." [*Id.* at 702]. Hilton argues the autopsy requirement is statutory, so this is not a factual dispute. [*Id.* at 700]. And R.N. Milliner already testified by avowal, so her testimony is already on the state record. *Hilton II*, 603 S.W.3d at 869; *see* Ellison v. Litteral, No. 3:18-CV-00223 GNS RSE, 2019 U.S. Dist. LEXIS 170372, 2019 WL 4794756, at *10 (W.D. Ky. May 2, 2019), *report and recommendation adopted*, No. 3:18-CV-00223 GNS RSE, 2019 U.S. Dist. LEXIS 168506, 2019 WL 4781877 (W.D. Ky. Sept. 30, 2019) (the court exercised its discretion by not **granting** an evidentiary hearing because the state record was sufficient). That **[*15]** R.N. Milliner's avowal testimony "did not establish" what Hilton wishes it did is not a sufficient basis to hold an evidentiary hearing. Furthermore, Hilton has not identified which of his claims he believes warrants an evidentiary hearing. *See* *Williams v. Bagley*, 380 F.3d 932, 936 (6th Cir. 2004) (citing

Stanford v. Parker, 266 F.3d 442, 460 (6th Cir. 2001)) ("[T]he district court did not abuse its discretion in **denying** Williams's request, given his failure to specify which of his claims warranted an evidentiary hearing and what could be discovered through an evidentiary hearing."). Therefore, the Court **DENIES** Hilton's Motion for Evidentiary Hearing [DE 39].

Hilton bases his request for appointment of counsel on his motion for an evidentiary hearing. [*Id.* at 702]. Because no evidentiary hearing is necessary, and because no factors have changed since Magistrate Judge Brennenstuhl's denial [DE 21] of Hilton's request for appointment of counsel, the Court **DENIES** Hilton's Request for Appointment of Counsel [DE 39].

III. CONCLUSION

Accordingly, for the reasons stated, and the Court being otherwise sufficiently advised, **IT IS ORDERED** that

1) Hilton's Motion for Leave to Supplement Petition for Habeas Corpus [DE 36] is **GRANTED in part and DENIED in part**;

2) Hilton's Motion for Evidentiary Hearing **[*16]** and Request for Appointment of Counsel [DE 39] is **DENIED**.

/s/ Rebecca Grady Jennings

Rebecca Grady Jennings, Chief Judge

United States District Court

September 30, 2022

Footnotes

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1 Hilton also asks the court to "enter an order finding Petitioner was convicted in violation of his rights a protected by the United States Constitution, and **grant** him relief through issuance of a writ of habeas corpus." [DE 36 at 662]. The Court does not reach that issue in this order, as it is the ultimate issue here and is not supported in the briefing on this motion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20-CV-00769-RGJ-HBB

MICHAEL TODD HILTON **PETITIONER**

VS.

DANIEL AKERS, WARDEN **RESPONDENT**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Petitioner Michael Todd Hilton filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1). In compliance with the Court's order (DN 14),[1] Respondent Daniel Akers filed a response to Hilton's petition (DN 26). Hilton filed a reply in support of his petition (DN 27). For the reasons set forth below, the undersigned recommends that Hilton's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) be **DENIED** and **DISMISSED**. Additionally, the undersigned does not recommend issuance of a Certificate of Appealability for the claims set forth in Hinton's petition.

FINDINGS OF FACT

In July 2014, the Hardin County, Kentucky, grand jury indicted Hilton for murder; first-degree assault (two counts); operating a motor vehicle under the influence of intoxicants, first offense in a five-year period, aggravated; and for being a first-degree persistent felony offender.

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1 The District Judge directed Respondent Daniel Akers to file an answer to the petition (DN 14). The District Judge also referred this matter to the undersigned magistrate judge, pursuant to 28 U.S.C. § 636(b)(A) and (B), for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter (Id.).

Appendix D

Hilton v. Commonwealth, 539 S.W.3d 1, 5-6 (Ky. 2018) (hereinafter "Hilton I"). Following a June 2015 trial before the Hardin County Circuit Court, the jury found Hilton guilty of murder, first-degree assault, second-degree assault, and operating a motor vehicle under the influence of alcohol. Id. at 4, 6. Following the penalty phase of his trial, the jury found Hilton to be a first-degree persistent felony offender and recommended concurrent sentences of life imprisonment for murder, thirty-five years' imprisonment for first-degree assault, ten years' imprisonment for second-degree assault, and thirty days' imprisonment for operating a motor vehicle under influence of alcohol which impairs driving ability. Id. at 6. The trial court sentenced Hilton to life imprisonment in conformance with the jury's recommendation. Id.

The evidence presented at trial showed the following:

> During the evening of June 22, 2014, Jason Hall was driving down Deckard School Road in Hardin County, Kentucky. After reaching the intersection of Deckard School Road and Patriot Parkway, Hall observed an overturned burning truck. As Hall drove towards the burning wreck he observed a cooler and beer cans in the road. After Hall exited his vehicle, he was approached by Michael Todd Hilton who told Hall that he was unable to find his brother, Kyle Hilton. Hall informed Hilton that he would be with him momentarily, after he called 911 to request emergency assistance. Hilton tried to persuade Hall not to call 911, but Hall refused and contacted the authorities.
>
> Faith Terry and Jason Combs also arrived on the scene of the collision. Terry observed a truck flipped upside down and a mangled orange Mustang. Hearing coughing from the Mustang, Terry and Combs attempted to aid the injured driver, Brianna Taylor, but were unable to assist Taylor's passenger, Mickayla Harig, who was pinned down by wreckage from the collision. Subsequently, Terry and Combs overheard Hilton yelling for help for his brother Kyle, who was also injured in the accident.

> While attending to Kyle, Hilton admitted to not stopping at the intersection's stop sign and that he had been drinking. Terry also observed beer cans strewn amongst the wreckage.
>
> After the arrival of emergency personnel, Hilton and his brother were transported to the University of Louisville Hospital for medical treatment. Prior to his transport to the hospital, Hilton admitted to emergency personnel that he and Kyle had been drinking heavily. At the hospital, physicians examined and treated Hilton for minor injuries. Kyle was admitted at the hospital and received treatment for five days prior to being discharged.
>
> Due to Taylor and Harig being trapped in their damaged vehicle, they were transported to the University of Louisville Hospital after Kyle and Hilton. Both women were treated for severe injuries. Among other injuries, Harig suffered a traumatic brain injury and was hospitalized for approximately 22 days prior to being discharged. As for Taylor, her extensive injuries induced cardiac arrest. While doctors were initially able to restart Taylor's heart, blood loss from organ damage caused her heart to arrest a second time, and they were not able to revive her.
>
> Responding to the scene of the crime, Officer Thomas Cornett of the Hardin County Sheriff's Office observed beer cans and a cooler near Hilton's damaged vehicle. Officer Cornett suspected that Hilton might have been operating his vehicle while under the influence of alcohol and thus contacted the hospital to have Hilton's blood collected for future laboratory examination. Lab results later established that Hilton's blood alcohol level at the time of the collection was approximately 2.33g/100ml; more than twice the legal limit to operate a motor vehicle.

Id. at 5.

On direct appeal to the Supreme Court of Kentucky, Hilton alleged the trial court erred by: "1) failing to grant a change of venue; 2) declining to suppress a witness's statement; 3) refusing to grant a continuance; 4) failing to remove jurors for cause; 5) denying his request for a mistrial; and 6) by permitting the Commonwealth to inquire of witnesses during the penalty phase what

sentence they believed appropriate for Hilton's crimes." Id. at 4-5. The Supreme Court of Kentucky concluded: 1) the trial court did not abuse its discretion in denying Hilton's motion for change of venue; 2) the trial court did not abuse its discretion in denying Hilton's motion to exclude a statement he made to Jason Hall; 3) the trial court did not abuse its discretion in denying Hilton's request for a continuance; 4) the trial court did not abuse its discretion by refusing Hilton's motion to excuse jurors for cause; 5) the trial court did not abuse its discretion in denying Hilton's request for a mistrial; and 6) it was harmless error for the trial court to permit testimony about what would constitute an appropriate sentence for Hilton. Id. at 6-19. The Supreme Court of Kentucky affirmed Hilton's conviction and sentence in its opinion issued on February 15, 2018. Id. at 19.

On July 16, 2018, Hilton, through counsel, filed a Ky. R. Crim. P. 11.42 motion to vacate his conviction and sentence (DN 26-2 PageID # 414-19). In the motion, Hilton argued trial counsel rendered ineffective assistance because he failed to timely notify the Commonwealth of his intention to call Wendy Milliner, RN, to testify as to the care given to Brianna Taylor and but for this failure to do so the testimony could have been presented to the jury (Id. at PageID # 416-17). Next, Hilton argued appellate counsel rendered ineffective assistance because he failed to raise the issue despite Ms. Milliner giving her testimony by avowal to preserve the issue for appeal (Id. at PageID # 417).

The Hardin Circuit Court denied the Rule 11.42 motion in an order entered November 21, 2018 (DN 26-2 PageID # 427-32). It noted that during the trial it had allowed Ms. Millner's testimony to be given by avowal (Id. at PageID # 428). It also observed that Ms. Millner testified "she was 'not second guessing' Dr. Jason Smith's (U of L Trauma Surgeon) testimony as Brianna

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Taylor's treating physician that she received life threatening injuries as a result of the collision; that she received proper medical care by the emergency responders; and that she died as a result of poly-trauma and blood loss caused by the collision" (Id.). The Hardin Circuit Court acknowledged trial counsel's statement on the record that he did not previously disclose Ms. Milliner as a testifying expert and provide a report because he believed he could develop the defense and information needed through the witness called by the Commonwealth (Id. at PageID # 430). It found this a very reasonable and common trial strategy (Id.). The Hardin Circuit Court also noted it was reasonable trial strategy for defense counsel not to disclose trial consultants as experts (Id.). It determined that trial counsel was in the best position to decide whether the testimony of Ms. Milliner could help Hilton's case (Id. at PageID # 431). Therefore, the Hardin Circuit Court concluded that this decision by trial counsel did not result in ineffective assistance of counsel (Id.).

Moreover, the Hardin Circuit Court determined that Hilton cannot demonstrate any prejudice because of the exclusion of Ms. Milliner's testimony at trial (Id.). In reaching this determination, the Hardin Circuit Court noted that Ms. Milliner's testimony, which related to the medical care Brianna Taylor received prior to arriving at the hospital, did not contradict the testimony of the experts for the Commonwealth (Id.). Additionally, it recognized that Ms. Milliner "conceded that she was not a doctor or a coroner and that she never examined Taylor and was not trained to determine a cause of death" (Id.). The Hardin Circuit Court observed that Ms. Milliner stated that she "was 'not second guessing' Dr. Jason Smith's (U of L Trauma Surgeon) testimony as Brianna Taylor's treating physician that she received life threatening injuries as a

result of the collision; that she received proper medical care by the emergency responders; and that she died as a result of poly-trauma and blood loss caused by the collision" (Id.).

The Hardin Circuit Court concluded because it found no ineffective assistance of trial counsel, there was no reasonable probability that the appeal verdict would have been different if this issue had been raised by appellate counsel (Id.). The Hardin Circuit Court noted that appellate counsel must look at all possible claims to raise on appeal and determine those that are the most likely to succeed (Id.). The Hardin Circuit Court commented, "It cannot be argued that the strategy of the appellate counsel is inadequate when they determine a possible claim is not strong enough to raise on appeal" (Id.). In sum, the Hardin Circuit Court concluded the record was adequately developed to conclude the actions of both trial and appellate counsel were appropriate and competent and not prejudicial (Id.).

Hilton timely appealed the unfavorable ruling. Hilton v. Commonwealth, 603 S.W.3d 864, 866 (Ky. Ct. App. 2020) (hereinafter Hilton II"). The Court of Appeals of Kentucky conducted a thorough review of Hilton's two claims of ineffective assistance of counsel, the applicable law, the evidence in the record, and the trial court's analysis. Id. at 868-72. The state appellate court affirmed the rulings of the Hardin Circuit Court. Id. The Supreme Court of Kentucky denied Hilton's petition for discretionary review on May 20, 2020. Hilton v. Commonwealth, 2020-SC-0000113-D, 2020 Ky. LEXIS 205 (Ky. May 20, 2020).

On October 14, 2020, Hilton filed his § 2254 petition and supporting memorandum setting forth several claims (DN 1 PageID # 5-13; DN 1-1 PageID # 34-62). Akers has responded to each claim (DN 26 PageID # 267-81), and Hilton has replied (DN 27 PageID # 537-49).

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CONCLUSIONS OF LAW

Standard of Review

Because Hilton filed his petition for writ of habeas corpus on October 14, 2020, review of the State court decisions is governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") (DN 1). Lindh v. Murphy, 521 U.S. 320, 336 (1997). Under AEDPA, as to each claim asserted by Hilton, the Court must first determine whether a federal Constitutional right has been violated. Williams v. Taylor, 529 U.S. 362, 367 (2000). If the answer is in the affirmative and the State court adjudicated the federal Constitutional claim on its merits, then this Court must employ the standard of review set forth in 28 U.S.C. § 2254(d) to determine whether to grant the petition. Williams, 529 U.S. at 367, 402-403, 412-413. As amended, by Chapter 153 of AEDPA, § 2254(d) provides as follows:

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

The phrase "contrary to" means "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" Williams, 529 U.S. at 405 (citing Webster's Third New International Dictionary 495 (1976)). Thus, under the "contrary to" clause of § 2254(d)(1), the Court may grant the writ if (a) the state court arrives at a conclusion opposite to that reached by the Supreme Court

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on a question of law; or (b) the state court decides a case differently than the Supreme Court "has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-413.

Under the "unreasonable application" clause of § 2254(d)(1), the Court may grant the writ if the state court identifies the correct governing legal rule from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Id. at 407-408, 413. When the Court makes the "unreasonable application" inquiry it "should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. Thus, the state court's application of clearly established federal law must be more than simply erroneous or incorrect, it must be objectively unreasonable. Id. at 409-411; Macias v. Makowski, 291 F.3d 447, 451 (6th Cir. 2002).

Under § 2254(d)(2), the petitioner may obtain relief only by showing the State court's conclusion is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus, § 2254(d)(2) applies when a petitioner challenges the factual determinations of the State court. *See e.g.* Mitzel v. Tate, 267 F.3d 524, 537 (6th Cir. 2001) (challenge to state court's determination that the evidence did not support an aiding and abetting suicide instruction); Clark v. O'Dea, 257 F.3d 498, 506 (6th Cir. 2001) (challenge to state court's factual determination that Sheriff Greer had not seen the letter prior to Clark's trial); Stallings v. Bagley, 561 F.Supp.2d 821, 880-881 (N.D. Ohio 2008) (challenge to state court's factual finding regarding issue of mental retardation). When the Court addresses such a claim, it must presume that the state court's factual findings are sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." Miller-El v. Dretke, 545 U.S. 231, 240 (2005)

(quoting 28 U.S.C. § 2254(e)(1)). Although this standard is demanding, it is not insatiable, and this "[d]eference does not by definition preclude relief." Id. (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (alteration in the original case text)). In sum, with respect to § 2254(d)(2), "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding . . ." Miller-El, 537 U.S. at 340.

Grounds One and Two

1. Arguments of the Parties

Grounds One and Two challenge the state court adjudication of Hinton's claims of ineffective assistance of trial counsel and appellate counsel (DN 1 PageID # 5, 7; DN 1-20 PageID # 178-85, 185-87). Hilton rehashes his argument before the state courts that: 1) trial counsel rendered ineffective assistance because he failed to timely disclose Wendy Milliner, RN, as an expert witness thereby preventing her testimony from being heard by the jury; and 2) appellate counsel rendered ineffective assistance because he failed to raise the issue despite Ms. Milliner giving her testimony by avowal to preserve the issue for appeal (*compare* Id. at PageID # 5, 7 *with* DN 1-20 PageID # 175-85, 185-87 *and* Hinton II, 603 S.W.3d at 869-72).

Akers responds by asserting that Hilton has failed to demonstrate adjudication of these two claims by the Court of Appeal of Kentucky is contrary to or an unreasonable application of clearly established precedent of the Supreme Court of the United States (DN 26 PageID # 267-72 , citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Additionally, Akers contends that Hilton's

claims of ineffective assistance of trial counsel and appellate counsel have not satisfied both prongs of the test in Strickland (Id.).

In reply, Hilton argues that he has satisfied both prongs of the test in Strickland as to his claims of ineffective assistance of trial counsel and appellate counsel (DN 27 PageID # 537-40, 541-42). However, he fails to explain how the state court adjudication of his claims was contrary to or an unreasonable application of the clearly established precedent in Strickland (Id.).

2. Discussion

By its terms, § 2254(d) bars relitigating any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (2). Harrington v. Richter, 562 U.S. 86, 98 (2011). Here, the parties acknowledge, and the undersigned finds, that Hilton's ineffective assistance of trial and appellate counsel claims were adjudicated on the merits by the trial court and the Court of Appeals of Kentucky. Thus, federal habeas relief may not be granted for either of these claims which are subject to § 2254(d) unless it is shown that the decision of the state appellate court "was contrary to" federal law then clearly established in the holdings of the Supreme Court of the United States, § 2254(d)(1); or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2). *See* Richter, 562 U.S. at 100 (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)).

Hilton has not expressly indicated under which exception in § 2254(d) he is proceeding (DN 1 PageID # 5, 7; DN 1-20 PageID # 178-85, 185-87; DN 27 PageID # 537-40, 41-42). The undersigned will begin with the exception in § 2254(d)(2) as Hilton seems to be arguing the

decision of the Court of Appeals of Kentucky is based on an unreasonable determination of the facts. To substantiate his claims of ineffective assistance of counsel, Hilton relies on excerpts from Registered Nurse Wendy Milliner's testimony by avowal (Id.). But as demonstrated below, the Court of Appeals of Kentucky considered all of R.N. Milliner's testimony by avowal and the testimony of Dr. Smith, the treating physician. Hilton II, 603 S.W.3d at 869-71. Further, the Court of Appeals of Kentucky provided a well-reasoned explanation why Hilton was not prejudiced by the exclusion of R.N. Milliner's testimony. Id. at 871. This means, Hilton has not rebutted "by clear and convincing evidence" the "presumption of correctness" accorded to the factual findings of the Court of Appeals of Kentucky. *See* Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)). Thus, to the extent that Hilton is arguing the state appellate court's decision is based on an unreasonable determination of the facts, he is not entitled to federal habeas relief under § 2254(d)(2).

Next, the undersigned will address the two exceptions in § 2254(d)(1). Regarding the "contrary to" exception in § 2254(d)(1), Hilton is not arguing the Court of Appeals of Kentucky arrived at a conclusion that is opposite to that reached by the Supreme Court of the United States on a question of law; or that the Court of Appeals of Kentucky decided the case differently than the Supreme Court of the United States "has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. Thus, Hilton does not appear to be seeking federal habeas relief under the "contrary to" exception in § 2254(d)(1). But if he were, Hilton has failed to demonstrate the state appellate court arrived at a conclusion that is opposite to that reached by the Supreme

Court of the United States on a question of law; or that it decided the case differently than the Supreme Court of the United States has on a set of materially indistinguishable facts.

All that remains to be ascertained is whether Hilton is pursuing the "unreasonable application" exception in § 2254(d)(1). When the Court conducts a review under the "unreasonable application" clause in § 2254(d)(1), it must look only to the clearly established precedent of the United States Supreme Court.[2] Lockyear v. Andrade, 538 U.S. 63, 70-71 (2003). Here, the clearly established precedent is set forth in Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. Further, the pivotal question under the "unreasonable application" inquiry is whether the state appellate court's application of the Strickland standard is objectively unreasonable. *See* Richter, 562 U.S. at 101; Williams, 529 U.S. at 409-11. This is different from asking whether counsel's performance fell below Strickland's standard. Richter, 562 U.S. at 101.

"For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" Id. (quoting Williams, 529 U.S. at 410). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." Id. For example, a federal habeas court may not find a state adjudication to be "unreasonable" simply because that court decides, in its own judgment, that the relevant state decision applied federal law incorrectly. Williams, 529 U.S. at 410–11 (noting that it must instead determine if the state court's application of clearly established federal

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2 Only "holdings, as opposed to the dicta, of [Supreme Court of the United States] decisions as of the time of the relevant state-court decision" constitute "clearly established Federal law" under AEDPA. Williams v. Taylor, 529 U.S. 362, 412 (2000). Accordingly, an inmate cannot meet his burden by merely showing that a state court's decision conflicts with federal circuit court precedent. 28 U.S.C.§ 2254(d)(1); Parker v. Matthews, 567 U.S. 37, 48 (2012) (per curiam).

law was "objectively unreasonable"). Thus, § 2254(d)(1) "goes no further" than to "preserve[ ] authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court of the United States'] precedents." Richter, 562 U.S. at 102. This means the state court's application of clearly established federal law must be more than simply erroneous or incorrect, it must be objectively unreasonable. Williams, 529 U.S. at 409-411. Further, the petitioner bears the burden of proof under this "highly deferential standard for evaluating state-court rulings[.]" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citation and internal quotation marks omitted).

The undersigned concludes that Hilton probably is not pursuing the "unreasonable application" exception in § 2254(d)(1) because his argument focuses on whether trial and appellate counsel's performance fell below Strickland's standard (DN 1 PageID # 5, 7; DN 1-20 PageID # 178-85, 185-87; DN 27 PageID # 537-40, 41-42). But even if the Court gives Hilton, a *pro se* petitioner, the benefit of the doubt and construes his argument as doing so, he would not be entitled to relief because of the following reasons.

The Court of Appeals of Kentucky acknowledged the clearly established precedent set forth in Strickland. *See* Hilton II, 603 S.W.3d at 868. Further, it accurately expressed the performance and prejudice prongs of the Strickland test and recognized that both prongs must be met before relief may be granted. *Compare* Hilton II, 603 S.W.3d at 868 *with* Strickland, 466 U.S. at 688-90, 694-95. Additionally, the Court of Appeals of Kentucky appropriately recognized that under Strickland it need not address the performance component because Hilton made an insufficient showing as to the prejudice component. Hilton II, 603 S.W.3d at 868 & n.2 (citing

Strickland, 466 U.S. at 697). The undersigned will now move on to the pivotal question whether the state appellate court's application of the Strickland standard is objectively unreasonable.

In pertinent part, the legal analysis of the state appellate court reads as follows:

> On the instant appeal, Hilton raises two arguments alleging that the trial court erred in denying his RCr 11.42 motion: (1) trial counsel allowed the expert filing deadline to pass, resulting in the exclusion of critical evidence and depriving Hilton of his right to a fair trial; and (2) appellate counsel failed to raise the issue of the exclusion of his defense expert's testimony, depriving him of his right to effective assistance of counsel on appeal. We will address each argument, in turn.
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> Hilton's first argument concerns the exclusion of the testimony of his expert witness, Registered Nurse Wendy Milliner, from being presented to the jury at trial. Hilton received copies of Taylor's medical records in August 2014. On March 26, 2015, the trial court ordered Hilton to identify experts intended to be called at trial no later than thirty days prior to the trial date, which was set and did begin on June 8, 2015. On June 10, 2015, after the Commonwealth had presented a significant portion of its case-in-chief, Hilton tendered his notice of expert opinion regarding R.N. Milliner's expected testimony.
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> On June 11, 2015, the trial court allowed R.N. Milliner to testify by avowal. R.N. Milliner was critical of the care rendered by the first responders -particularly the flight crew—to Taylor, up to and including the transfer of care to Dr. Smith. Her primary concerns related to actions which decreased Taylor's blood pressure and oxygenation levels. Dr. Smith had previously testified that Taylor's oxygen levels and blood pressure were improved at the hospital to an appropriate level; however, the inability to prevent Taylor's bleeding as a result of the injuries she sustained in the collision caused her death. R.N. Milliner testified that she was not critical of Dr. Smith's care and did not challenge his determination of Taylor's cause of death.
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> After hearing R.N. Milliner's testimony, the trial court stated, as a matter of trial fairness, it was the type that had to be revealed before the witnesses of whom she was critical had testified and been

released. The trial court further stated that R.N. Milliner did not take exception to Dr. Smith's opinion as to cause of death, nor did her testimony provide Hilton with a legal defense to the murder charge. We agree with both reasons for the trial court's ruling, which were memorialized in its order entered June 18, 2015. However, because the court's second reason also demonstrates that counsel's actions did not prejudice Hilton and disposes of his claim for IAC, we choose to discuss it only.

In its order excluding the expert testimony of R.N. Milliner, the trial court cited to *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002). Like *Robertson*, the instant case—concerning whether Hilton's act of operating a motor vehicle under the influence of alcohol was a legal cause of Taylor's death—requires application of the provisions of KRS 501.020(3) (which defines the term "wantonly") and KRS 501.060 (which defines causal relationships).

KRS 501.020(3) defines "wantonly" as:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

"Thus, wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded, and recklessness is the failure to perceive a risk that a reasonable person in the same situation would have perceived." *Robertson*, 82 S.W.3d at 835.

KRS 501.060 provides in pertinent part:

> (1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.
>
> ...

(3) When wantonly or recklessly causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware unless:

(a) The actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

It is clear that Hilton's unlawful act of operating a motor vehicle under the influence of alcohol was a "but for" cause of Taylor's death. The issue then becomes one of *mens rea.*

Once an act is found to be a cause in fact of a result and a substantial factor in bringing about that result, it is recognized as the proximate cause unless another cause, independent of the first, intervenes between the first and the result. And even then the first cause is treated as the proximate cause if the harm or injury resulting from the second is deemed to have been reasonably foreseeable by the first actor.

Robertson, 82 S.W.3d at 836 (citation omitted).

Therefore, 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. KRS 501.060(3)(b) clarifies that it is

immaterial that the treatment provided by medical personnel following the collision possibly increased the probability of the inevitable consequence of Taylor's death. R.N. Milliner couched her testimony concerning the effects of the treatment rendered by medical personnel in terms of possibilities and probabilities. She did not testify within a certain degree of medical probability that the actions of the medical personnel would or could have changed the inevitable outcome of Taylor's death. Dr. Smith's testimony—as Taylor's treating physician—made it clear that the actions of prior medical personnel rendering aid to Taylor were immaterial as there was no way to stop the bleeding sufficiently to save Taylor's life. For these reasons, any error of the trial court in excluding R.N. Milliner's testimony was harmless and not prejudicial to Hilton.

Hilton's second argument concerns IAAC. Hilton alleges that his appellate counsel's failure to raise the issue of trial counsel's failure to disclose R.N. Milliner as an expert witness deprived Hilton of his right to effective appellate counsel. However, the Supreme Court of Kentucky has observed:

> As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts.... Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, KBA Op. E–321 (July 1987), and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998).

The Supreme Court of the United States has also held:

> appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.... [I]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is

difficult to demonstrate that counsel was incompetent.

> *Smith*, 528 U.S. at 288, 120 S.Ct. at 765. For the reasons discussed previously, Hilton has not satisfied the prejudice prong of the *Strickland* test to show ineffective assistance of appellate counsel for failure to present this meritless issue on direct appeal.

Hilton II, 603 S.W.3d at 869-71. The undersigned concludes that the state appellate court's application of the Strickland standard is reasonable. Thus, if Hilton were seeking federal habeas relief under the "unreasonable application" exception in § 2254(d)(1), he would not be entitled to that relief because he cannot demonstrate the state appellate court's application of the Strickland standard is objectively unreasonable.

When the Court rejects a claim on the merits, and the habeas petitioner seeks a Certificate of Appealability, he must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the above explained reasons, the undersigned concludes that Hilton is not entitled to relief under § 2254(d)(1) or (d)(2) as to the ineffective assistance of trial counsel claim in Ground One and the ineffective assistance of appellate counsel claim in Ground Two. The undersigned does not believe that reasonable jurists would find the above assessment of these two claims debatable or wrong. Therefore, the Court should not issue a Certificate of Appealability as to the ineffective assistance of counsel claims in Grounds One and Two.

Ground Three

1. Arguments of the Parties

Hilton contends that his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated when the trial court refused to grant a change of venue or

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to summon jurors from another county to hear the case (DN 1 PageID # 8; DN 1-20 PageID # 187-92).[3] He cites news coverage of the DUI accident resulting in Brianna Taylor's death, fundraisers for the Taylor and Harig families, speeches by Taylor family members at the local high school regarding the accident, news coverage of an ATV accident that resulted in Brice Taylor's death as he was leaving the memorial service for his sister, and Senate Bill 34, known as the Brianna Taylor Act, that sought to extend the "look-back" period on driving under the influence offenses from five to ten years (DN 1-20 PageID # 187-92). Hilton also points out that voir dire of the jury pool revealed 29 of 36 potential jurors had heard media coverage on the case (Id.). He asserts the trial court only excused four of them that said based on the coverage, they had formed an opinion (Id.). Hilton asserts that any indica of impartiality on the part of the jurors must be disregarded because it is hard to fathom an atmosphere more inflammatory than a community trying a man charged with murder of a young girl who died based on a DUI accident (Id.). Hilton argues it is inconceivable that he could have received a fair trial with an impartial jury because the record shows that 89% of the initial jury pool had been influenced by what he believes was prejudicial pre-trial media coverage (Id. citing Rideau v. Louisiana, 373 U.S. 723, 726 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1978)).

Akers asserts that Hilton essentially repeats the claim he raised before the Kentucky Supreme Court without any explanation of how the state appellate court's ruling ran afoul of

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3 Hilton also alleges his rights under Sections 2, 3, 7, and 11 of the Kentucky Constitution were violated when the trial court refused to grant a change of venue (DN 1 PageID # 8). The Court lacks jurisdiction to address this portion of his claim. The Court's jurisdiction is limited to entertaining "an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court **only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.**" 28 U.S.C. § 2254(a) (emphasis added).

federal law (DN 26 PageID # 272-75). For this reason, Akers contends that Hilton has "failed to show the Kentucky Supreme Court's ruling was either contrary to, or an unreasonable application of federal law or that 'the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement'" (Id. at PageID # 275 citing Harrington v. Richter, 562 U.S. 86, 103 (2011)). Additionally, Akers indicates that Hilton has not demonstrated by clear and convincing evidence that the Kentucky Supreme Court made an "unreasonable determination" of the facts based on the evidence in the State court record (Id. at PageID # 272-75).

In his reply, Hilton reiterates his position that potential jurors in Hardin County were prejudicially influenced by the pervasive media coverage in the months leading up to the trial and the Taylor family connections to the community (DN 27 PageID # 543-45). Hilton argues that the trial court abused its discretion--when it denied his motion for a change of venue--because it relied on distorted facts and unreliable corroborating data (Id. at PageID # 545). Hilton explains that abuse of discretion occurs when a district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard (Id. citing United States v. Munoz, 605 F.3d 359, 366 (6th Cir. 2010)).

2. Discussion

As mentioned above, when the Court conducts a review under § 2254(d)(1), it must look only to the clearly established precedent of the United States Supreme Court. Lockyear v. Andrade, 538 U.S. 63, 70-71 (2003). Here, the clearly established precedent is set forth in cases such as Skilling v. United States, 561 U.S. 358 (2010) and Irvin v. Dowd, 366 U.S. 717 (1961).

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The Supreme Court has indicated that the "Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence 'based on the evidence presented in court.'" Skilling, 561 U.S. at 438 (quoting Irvin, 366 U.S. at 723); *see also* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966)). To obtain a change of venue, the moving party must demonstrate prejudicial news coverage prior to trial is reasonably likely to prevent a fair trial. Sheppard, 384 U.S. at 362-363.

Notably, while criminal defendants are guaranteed "a panel of impartial, 'indifferent' jurors", it is not required that the jurors be totally ignorant of the facts and issues involved in a criminal case. Irvin, 366 U.S. at 722 (citations omitted). Due to swift, widespread, and diverse methods of communication, an important criminal case can be "expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." Id. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Id. at 723. It is sufficient if, during voir dire, the juror indicates he "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. (citations omitted). However, the above rule does not foreclose an inquiry into whether its application in a given case results in a deprivation of the prisoner's liberty without due process of law. Id. (citation omitted). When an inquiry is made, the challenger has the burden of demonstrating that the nature and strength of the opinion formed by the juror is sufficient to raise

the presumption of partiality. Id. The finding of the trial judge on the issue of impartiality should not be set aside unless the prejudice is "manifest." Id. at 723-724.

On direct appeal, Hilton contended that the trial court's refusal to grant his motion for change of venue violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Hilton I, 539 S.W.3d at 6 & n.2.[4] In pertinent part, the opinion of the Supreme Court of Kentucky reads as follows:

> Subsequently, the trial court conducted two evidentiary hearings to consider Hilton's motion. In support of his motion, Hilton submitted two affidavits and multiple exhibits demonstrating the pretrial attention surrounding the death of Brianna Taylor. Hilton's exhibits included photographs of a roadside memorial to Taylor, Louisville area news reports about Taylor's death, and a copy of a Facebook page memorializing her and her brother, Brice Taylor.[5] In opposition to Hilton's motion, the Commonwealth submitted four counter-affidavits. Additionally, the Commonwealth submitted the 2010 Census figures for Hardin County, the daytime population of Fort Knox, and the daily circulation of the Elizabethtown *News–Enterprise*.
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> After considering the evidence presented by both parties, the trial court denied Hilton's motion in a detailed order, subject to reconsideration if Hilton renewed the motion during *voir dire*. The trial court concluded that the pretrial media coverage of this case was not reasonably likely to prevent a fair trial in Hardin County. Additionally, the trial court enumerated seven reasons why a change of venue was unnecessary: 1) Hardin County, with a population of approximately 105,000 residents, is relatively large and has numerous cities and school districts; 2) Hardin County is a transient

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4 As mentioned above, prior to trial, Hilton moved for change of venue because extensive media coverage and widespread local knowledge of his actions prevented him from having a fair trial in Hardin County. Hilton v. Commonwealth, 539 S.W.3d 1, 6 (Ky. 2018). Hilton asked that the trial be conducted in another county or alternatively that jurors be summoned from other counties or that a survey be sent out to determine community opinion. Id. at 6 & n.3.

5 In a footnote, the Supreme Court of Kentucky acknowledged that Brice Taylor died in an automobile accident shortly after leaving a memorial service for his sister. Id. at 6 n.4.

community, where a substantial number of citizens do not have pre-existing ties or relationships with the residents of the county; 3) the nearby presence of the Louisville media market diminishes the impact that a single tragic case has on the public consciousness of potential jurors in the county; 4) the internet coverage of the case is not necessarily relevant because it cannot be quantified to determine the impact within Hardin County; 5) roadside memorials, such as the one to Taylor, are common occurrences in Kentucky and the memorial does not name Hilton nor is its lettering readable to passing motorists; 6) the jury pool from which Hilton's petit jury would be formed was instructed during jury orientation not to watch, listen, or read any media or internet accounts of any criminal cases occurring in Hardin County during their term of service; and 7) the Hardin Circuit Court had been able to seat a fair and impartial jury in similar cases of media exposure without resorting to extraordinary measures such as change of venue or summoning jurors from adjacent counties.

"Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a change of venue must be granted when 'it appears that the defendant cannot have a fair trial in the county wherein the prosecution is pending." *Sluss v. Commonwealth*, 450 S.W.3d 279, 285 (Ky. 2014) (*quoting Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978)). Additionally, Kentucky Revised Statute (KRS) 452.210 provides that the defendant is entitled to a change of venue if the presiding judge is satisfied that the defendant cannot receive a fair trial in the county where the prosecution is pending. "It is not the amount of publicity which determines that venue should be changed; it is whether public opinion is so aroused as to preclude a fair trial." *Foster v. Commonwealth*, 827 S.W.2d 670, 675 (Ky. 1991) (*quoting Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 387 (Ky. 1985)). In considering a motion for change of venue, the trial court is vested with "wide discretion," and its decision will not be overturned absent an abuse of discretion. *Wood v. Commonwealth*, 178 S.W.3d 500, 513 (Ky. 2005) (*citing Hurley v. Commonwealth*, 451 S.W.2d 838 (Ky. 1970)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

> Hilton's contention that the trial court erred in denying his motion for change of venue is without merit. Speaking in sweeping terms, Hilton claims that "any indicia of impartiality on the part of the jurors must be disregarded. It is hard to fathom an atmosphere more inflammatory than a community trying a man charged with murder of a young girl who dies based upon a DUI accident." While the facts of this case are clearly tragic, vehicular homicides involving drivers under the influence are, sadly, not uncommon and the publicity complained of by Hilton was not so prolific or prejudicial as to rise to a presumption of prejudice. Rather, after considering the totality of circumstances, we cannot conclude that the trial setting was inherently prejudicial.
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> Nor has Hilton established a reasonable likelihood that pretrial publicity actually prejudiced the jury pool. Hilton contends that he was "undeniably prevented a fair trial," because of the thirty-six jurors initially called for service, thirty-two responded that they heard some media coverage of the case. This is insufficient as "the mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." *Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978); *see also Irvin v. Dowd*, 366 U.S. 717, 722–23, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (It is not required that "jurors be totally ignorant of the facts and issues involved" or that they cannot have "some impression or opinion as to the merits of the case[,]" so long as they can set aside that "impression or opinion and render a verdict based on the evidence presented in court."). In the case at bar, the trial court carefully examined the potential jurors as to their knowledge of the case due to pretrial media coverage. To ensure Hilton's right to a fair jury, the trial court removed those jurors who had formed an opinion based on media coverage. On the record before us, we conclude that the trial court did not abuse its discretion in denying Hilton's motion for change of venue.

Id. at 6-8.

Again, Hilton has not expressly indicated under which exception in § 2254(d) he is proceeding. The undersigned will begin with the exception in § 2254(d)(2) as Hilton appears to

be arguing the decision of the Supreme Court of Kentucky is based on an unreasonable determination of the facts. But as demonstrated above, the Supreme Court of Kentucky thoroughly considered the evidence in the record and provided a well-reasoned explanation why the trial court did not abuse its discretion in denying Hilton's motion for change of venue. Thus, to the extent that Hilton is arguing the decision of the Supreme Court of Kentucky is based on an unreasonable determination of the facts, he is not entitled to federal habeas relief under § 2254(d)(2).

Regarding the "contrary to" exception in § 2254(d)(1), Hilton is not arguing the Supreme Court of Kentucky arrived at a conclusion that is opposite to that reached by the Supreme Court of the United States on a question of law; or that it decided the case differently than the Supreme Court of the United States "has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Thus, Hilton does not appear to be seeking federal habeas relief under the "contrary to" exception in § 2254(d)(1). But if he were, Hilton has failed to demonstrate the Supreme Court of Kentucky arrived at a conclusion that is opposite to that reached by the Supreme Court of the United States on a question of law; or that it decided the case differently than the Supreme Court of the United States has on a set of materially indistinguishable facts.

The undersigned concludes that the Supreme Court of Kentucky's application of the Irvin standard is reasonable. Thus, if Hilton were seeking federal habeas relief under the "unreasonable application" exception in § 2254(d)(1), he would not be entitled to that relief because he cannot demonstrate the state appellate court's application of the Irvin standard is objectively unreasonable.

When the Court rejects a claim on the merits, and the habeas petitioner seeks a Certificate of Appealability, he must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the above explained reasons, the undersigned concludes that Hilton is not entitled to relief under § 2254(d)(1) or (d)(2) as to the change of venue claim in Ground Three. The undersigned does not believe that reasonable jurists would find the above assessment of this claim debatable or wrong. Therefore, the Court should not issue a Certificate of Appealability as to the change of venue claim in Ground Three.

Ground Four

1. Arguments of the Parties

Hilton claims that the trial court erred when it denied his motion to exclude the alleged inculpatory statement he made to Jason Hall which the prosecution did not turn over in discovery until six days before trial (DN 1 PageID # 10; DN 1-20 PageID # 192-94). Hilton relies on the trial court's discovery order directing the Commonwealth to produce by no later than 30 days after arraignment the substance of any oral incriminating statements that Hilton made to any witness (DN 1-20 PageID # 192). Yet the Commonwealth did not provide the inculpatory statement that Hilton made to Jason Hall until six days before trial (Id.). Mr. Hall's statement indicates when he arrived at the scene of the accident Hilton asked him not to call 911 (Id.). Hilton claims the Commonwealth violated Ky. R. Crim. P. 7.24 when it failed to timely comply with the discovery order, its reason for the failure to timely produce the statement is immaterial, and this is a due process violation because it prejudiced Hilton's trial strategy and prevented him from having a

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meaningful opportunity to present a complete defense (Id. at PageID # 194).

Akers contends that the Supreme Court of Kentucky's application of state law did not render Hilton's trial fundamentally unfair or merit relief (DN 26 PageID # 276-77). Akers points out that under AEDPA, federal relief is not normally appropriate for alleged errors of state law (Id. at PageID # 276, citing Estell v. McGuire, 502 U.S. 62, 67-68 (1991)). Additionally, an issue concerning an error of state law does not rise to a level of constitutional magnitude unless the defendant is denied a fundamentally fair trial (Id. at PageID # 276-77, citing Estell, 502 U.S. at 67-68, Lewis v. Jeffers, 497 U.S. 764, 780 (1990)). Akers argues the facts of the case show Hilton's trial was not rendered fundamentally unfair by the delayed discovery (Id. PageID # 277). Additionally, Hilton has failed to show, or even allege, how the Supreme Court of Kentucky's factual findings and its application of state law to those facts was not reasonable (Id.).

In his reply, Hilton rehashes his claim that the trial court abused its discretion when it denied the motion to suppress the inculpatory statement to Mr. Hall (DN 27 PageID # 545-46).

2. Discussion

On direct appeal, Hilton argued that the trial court's refusal to grant his motion to exclude Mr. Hall's testimony violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. Hilton I, 539 S.W.3d at 8 n.6. Thus, Hilton provided the state courts with an opportunity to remedy the alleged constitutional infirmity. *See* Castille v. Peoples, 489 U.S. 346, 349-51 (1989).

In relevant part, the opinion of the Supreme Court of Kentucky reads as follows:

> Hilton argues that the trial court erred by permitting the Commonwealth to present the testimony of Jason Hall concerning a

statement Hilton made to him the night of the collision. Hilton claimed that the admission of this incriminating statement was a violation of Kentucky Rule of Criminal Procedure (RCr) 7.24 and the trial court's discovery order. Further, Hilton contends that the introduction of this statement precluded him from properly preparing and presenting a defense and denied him his right to a fair trial.

On June 1, 2015, while preparing for trial, the Commonwealth reviewed 911 call sheets, which listed the telephone numbers of individuals who had called for emergency services the night of the collision. The Commonwealth contacted Hall who revealed (for the first time) that he had been present at the scene of the vehicle collision and that Hilton had told him not to call 911. After receiving this information, the Commonwealth alerted the court and defense counsel the following day by submitting a summary of Hilton's statement to Hall as a supplemental discovery response.

Hilton moved to exclude Hall's statement, arguing that the Commonwealth had violated RCr 7.24 by failing to discover and turn over the statement until one week before the trial. He requested that the statement be excluded or, alternatively, that the trial court continue the case to allow time to "properly investigate and consider" the statement and Hall.

After a hearing, the trial court denied Hilton's motion to exclude the statement. The trial court explained that the Commonwealth had an obligation under RCr 7.24(1) to timely disclose any self-incriminating, statements made by Hilton in advance of the trial. Further, according to the trial court's pretrial discovery order, the Commonwealth was obligated to disclose oral incriminating statements made by Hilton and known by the Commonwealth or its agents within thirty days of arraignment.

The trial court determined that the Commonwealth did not know of the existence of the statement until June 1, 2015. Further, the trial court concluded that the Commonwealth did not act in bad faith in disclosure of the statement; nor was there any suggestion by Hilton that the Commonwealth had done so. Additionally, the trial court noted that the statement was not in the possession of an agency over which the Commonwealth's Attorney exercises control. The 911 call sheets were records maintained by the Hardin County 911,

which is owned and operated by the Hardin County government, not a law enforcement agency. As the trial court explained, any 911 calls regarding the vehicle collision were a matter of public record and available to all parties.

Also, the trial court concluded that the Commonwealth's disclosure of Hall's intended testimony did not constitute a "surprise attack" on Hilton's trial strategy. Notably, Hilton declined the trial court's offer of an *in-camera* hearing, outside the presence of the Commonwealth's Attorney, to discuss his trial strategy and how Hall's testimony would undermine it. Additionally, after considering this Court's recent opinion in *Trigg v. Commonwealth*, 460 S.W.3d 322 (Ky. 2015), the trial court concluded that Hilton had "not demonstrated that either cross examination of Jason Hall or pre-trial inquiry of other witnesses will be rendered ineffective by the introduction of the statement at trial."

RCr 7.24 states in pertinent part that "[u]pon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness." The Commonwealth is obligated to disclose incriminating statements of the defendant under RCr 7.24, "not only to inform the defendant that *he* has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 297 (Ky. 2008) (emphasis in original). "We review a trial judge's decision concerning discovery issues under an abuse of discretion standard." *Brown v. Commonwealth*, 416 S.W.3d 302, 308 (Ky. 2013) (*citing Beaty v. Commonwealth*, 125 S.W.3d 196, 202 (Ky. 2003)).

Contrary to Hilton's assertions, it is clear that the Commonwealth did not violate RCr 7.24 or the trial court's discovery orders. It is uncontradicted that the Commonwealth did not know that Hilton had made an incriminating statement to Hall until June 1, 2015. Hall, a private citizen, was not an agent of the Commonwealth and his knowledge of Hilton's incriminating statement cannot be imputed to the Commonwealth. Once the Commonwealth learned of Hilton's statement to Hall it was immediately disclosed. Notably, through examination of the available 911 records, Hilton's

> counsel had the same opportunity as the Commonwealth to investigate Hall and his encounter with Hilton that night. Further, Hilton failed to identify to the trial court how he was supposedly prejudiced by Hall's testimony, even when offered an opportunity to present his argument *in camera* to avoid revealing trial strategy. Accordingly, we cannot disagree with the trial court's well-reasoned denial of Hilton's motion to exclude his statement to Hall.

Id. at 8-9. In sum, the Supreme Court of Kentucky did not address the Constitutional component to Hilton's claim because it disposed of his claim on a state law basis.

This Court does not function as an additional state appellate court reviewing state-court decisions on state law or procedure. *See* Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law ... binds a federal court sitting in habeas corpus"); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Instead, this Court is obligated to accept as valid the Supreme Court of Kentucky's interpretation of State law. *See* Bradshaw, 546 U.S. at 76; Estelle, 502 U.S. at 68. For this reason, the undersigned declines to address Ground Four to the extent it challenges the Supreme Court of Kentucky's adjudication of Hilton's claim under state law.[6]

Because the Supreme Court of Kentucky did not address the Constitutional component to Hilton's claim, it will be examined *de novo* instead of performing a § 2254(d) review. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)). Thus, the pivotal question before the Court is whether Hilton's due process rights were violated by the

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6 More specifically, the undersigned is referring to the question whether the Commonwealth's disclosure of the statement six days before trial violated Ky. R. Crim. P. 7.24.

admission of the evidence. Estelle, 502 U.S. at 70.

Hilton's reliance on several Kentucky cases is misplaced. In those cases, the Supreme Court of Kentucky is discussing the prosecution's discovery obligations under Ky. R. Crim. P. 7.24 (DN 1-20 PageID # 193-94, *see, e.g.*, Chestnut v. Commonwealth, 250 S.W.3d 288, 296 (Ky. 2008), Roberts v. Commonwealth, 896 S.W.2d 4, 7 (Ky. 1995), Anderson v. Commonwealth, 864 S.W.2d 909, 914 (Ky. 1993)).

Hilton's dependance on federal case law involving Brady v. Maryland, 373 U.S. 83 (1963) jurisprudence is equally unavailing (Id. citing United States v. Bailleaux, 685 F.2d 1105, 1114 (9th Cir. 1992)). The Supreme Court of the United States has held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith or the prosecution." Brady, 373 U.S. at 87. A three-part test is utilized to determine whether a Brady violation has occurred. Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Specifically, Hilton must demonstrate (1) the evidence was favorable to the defense; (2) the evidence was suppressed (whether intentionally or not) by the government; and (3) prejudice to the defense occurred. *See* id. Notably, to satisfy the "prejudice" requirement, Hilton must show "a reasonable probability that the jury would have returned a different verdict." *See* id. at 296.

First, Hilton refers to the oral statement he made to Mr. Hall as inculpatory evidence. Thus, Hilton concedes **the evidence was not favorable** to the defense. Next, the oral statement was not suppressed by the Commonwealth, either willfully or inadvertently. *See* id. at 282. Instead, the uncontradicted evidence in the state court record shows the Commonwealth did not

know that Hilton had made an incriminating statement to Hall, a private citizen, until June 1, 2015; and once it learned of the statement it was immediately disclosed to Hilton. Hilton I, 539 S.W.3d 1, 9 (Ky. 2018). Third, no prejudice to the defense occurred. Hilton has merely made an unsubstantiated assertion that introduction of the statement precluded him from properly preparing and presenting a defense and denied him his right to a fair trial (DN 1-20 PageID # 194). This means he has fallen woefully short of demonstrating there is a reasonable probability that the jury would have returned a different verdict. Hilton fails to appreciate that exclusion of this oral statement would not have changed the jury verdict because of the overwhelming evidence presented by the Commonwealth. In sum, Hilton's reliance on Brady jurisprudence to demonstrate a due process violation is unavailing.

Finally, Hilton's reliance on Alexander v. Louisiana, 406 U.S. 625 (1972), California v. Trombetta, 467 U.S. 479, 485 (1984), and Chambers v. Mississippi, 410 U.S. 284, 294 (1973) is misplaced. These cases do not hold that a due process violation occurred under circumstances like those discussed above. In sum, Hilton is not entitled to federal habeas relief under Ground Four.

When the Court rejects a claim on the merits, and the habeas petitioner seeks a Certificate of Appealability, he must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the above explained reasons, the undersigned concludes that Hilton is not entitled to relief under the due process claim in Ground Four. The undersigned does not believe that reasonable jurists

would find the above assessment of this claim debatable or wrong. Therefore, the Court should not issue a Certificate of Appealability as to the due process claim in Grounds Four.

Ground Five

1. Arguments of the Parties

Hilton contends he was substantially prejudiced and denied due process of law when the trial court denied his motion for a continuance after the Commonwealth supplemented its original discovery disclosure by providing the medical records for Kyle Hilton and Mickayla Harig (DN 1-20 PageID # 194-97). Hilton asserts that he received hundreds of pages of medical records a couple of weeks prior to trial and did not have the time to conduct a meaningful review of the records (Id.). Hilton argues he was denied due process of law because the trial court failed to conduct a proper analysis of the factors identified in Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991) and Ky. R. Crim. P. 9.04 (Id.).

Akers contends that while Hilton takes issue with the Supreme Court of Kentucky's holding, Hilton has failed to demonstrate the decision is either contrary to or an unreasonable application of clearly established precedent of the Supreme Court of the United States (DN 26 PageID # 277-79). Akers argues the Court should reject Ground Five because it lacks merit (Id.).

In reply, Hilton reiterates his position that the trial court's denial of the motion for a continuance prejudiced his defense (DN 27 PageID # 546-47). He claims the purpose of the continuance was to allow for time to prepare his defense regarding the newly discovered medical evidence and expert testimony by Ms. Milliner (Id.). Hilton asserts that the trial court had a backup date already assigned and could have elected to reschedule for this date (Id.).

2. Discussion

As mentioned above, when the Court conducts a review under § 2254(d)(1), it must look only to the clearly established precedent of the United States Supreme Court. Lockyear v. Andrade, 538 U.S. 63, 70-71 (2003). The Supreme Court of the United States has recognized that trial judges "necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." Morris v. Slappy, 461 U.S. 1, 11 (1983). For this reason, "[t]he matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process . . . ." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Id. (citations omitted). Thus, only an unreasoned and arbitrary insistence on expeditiousness in the face of a justifiable request for delay will violate due process. Id.

On direct appeal, Hilton argued that the trial court erred by failing to grant his multiple requests to postpone the trial. Hilton I, 539 S.W.3d 1, 9-10 (Ky. 2018). He contended that the trial court's denial of his motions for a continuance violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. Id. at 10 n.7. The Supreme Court of Kentucky's analysis and holding reads as follows:

> Hilton's trial was initially scheduled to begin on March 9, 2015. However, on January 28, 2015, Hilton requested that his trial be

continued. The trial court acquiesced and rescheduled Hilton's trial for June 8, 2015.[7] Additionally, the trial court set a backup trial date of August 10, 2015.

Later, on May 15, 2015, the Commonwealth supplemented its original discovery disclosure by providing Hilton with the medical records for Kyle [Hilton] and [Mickayla] Harig. These records formed the basis of Hilton's second motion to continue. Hilton acknowledged that there had been no fault on the part of the Commonwealth in turning over the medical records but, rather, delay by the hospital in providing the records to the Commonwealth. Once the Commonwealth received the medical records, it immediately mailed them to Hilton. Hilton maintained that there was insufficient time prior to trial to review the medical records.

The trial court responded to this argument by explaining that it was clear from the discovery that the Commonwealth had previously tendered in the form of an investigative report and emergency services records that Harig and Kyle had sustained injuries and that they had been treated at the University of Louisville Hospital. The trial court noted that Hilton could have subpoenaed the medical records rather than waiting for the Commonwealth to obtain them and turn them over in discovery. While the trial court understood Hilton's concerns, it concluded that the existence of the records was not a surprise and that two weeks would be sufficient time to review them. Additionally, the trial court explained that the alternate trial date of August 10, 2015, might not be available as a capital murder case was scheduled to be tried on that date.

Despite denying Hilton's motion, the trial court noted that if there was information in the records, discovered during Hilton's review that did constitute a surprise, the court would be willing to entertain a renewed motion for a continuance. Also, the trial court informed Hilton during an *ex parte* proceeding conducted after the hearing that funding could be obtained to hire an expert to help review the medical records. To expedite that process the trial court permitted Hilton to hire an expert immediately, rather than wait for the issuance of a written order allocating funding for this purpose.

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7 The Supreme Court of Kentucky noted that the wording of the trial court's order suggested the Commonwealth either joined Hilton's motion or made a separate request for a continuance. Hilton I, 539 S.W.3d 1, 10 n.8 (Ky. 2018).

A week later, as part of an alternative presented in Hilton's motion for change of venue, he orally requested to continue the trial so that a survey could be conducted to determine community opinion regarding his case. This request was denied. Additionally, three days before trial, Hilton requested that the trial court exclude the "don't call 911" statement he made to Hall or, alternatively, that the court grant him a continuance to investigate the statement and Hall. The trial court denied this final motion for a continuance.

Under RCr 9.04 the trial court, "upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." The trial court is vested with broad discretion in granting or refusing a continuance. *Dishman v. Commonwealth*, 906 S.W.2d 335, 339 (Ky. 1995) (*citing Pelfrey v. Commonwealth*, 842 S.W.2d 524 (Ky. 1993)); *see also Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983) ("[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.") (*quoting Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964)).

In *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), this Court noted that "[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." *Id.* at 581 (*citing Ungar*, 376 U.S. at 589, 84 S.Ct. 841).

> Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id. (*citing Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985)); *see also Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) ("Identifiable prejudice is especially important.").

After considering the *Snodgrass* factors, it is clear that the trial court did not err in denying a continuance. While there had previously

> been a continuance granted at the request of both parties, granting an additional continuance of Hilton's case would have caused inconvenience for the trial court and witnesses. As noted by the trial court, it was not a given that the trial could have been moved to the August 10, 2015 date, and if not tried at that time, it is unknown when the case would have finally been presented to a jury. Moreover, as the trial court explained, the Commonwealth's intention to use medical records in this case was not a surprise and Hilton could have requested this information well in advance of the trial date. Further, Hilton obtained pretrial funding for an expert who was ultimately hired to review the questioned medical records. Finally, even at this juncture, years after Hilton's trial, he is unable to identify any specific prejudice he suffered by the trial court's refusal to grant him a continuance. Accordingly, we hold that the trial court did not abuse its discretion in denying Hilton's requests for a continuance.

Id. at 10-11.

Again, Hilton has not expressly indicated under which exception in § 2254(d) he is proceeding. The undersigned will begin with the exception in § 2254(d)(2) as Hilton appears to be arguing the decision of the Supreme Court of Kentucky is based on an unreasonable determination of the facts. But as demonstrated above, the Supreme Court of Kentucky thoroughly considered the evidence in the record and provided a well-reasoned explanation why the trial court did not abuse its discretion in denying Hilton's motion for a continuance. Thus, to the extent that Hilton is arguing the decision of the Supreme Court of Kentucky is based on an unreasonable determination of the facts, he is not entitled to federal habeas relief under § 2254(d)(2).

Regarding the "contrary to" exception in § 2254(d)(1), Hilton is not arguing the Supreme Court of Kentucky arrived at a conclusion that is opposite to that reached by the Supreme Court of the United States on a question of law; or that it decided the case differently than the Supreme

Court of the United States "has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Thus, Hilton does not appear to be seeking federal habeas relief under the "contrary to" exception in § 2254(d)(1). But if he were, Hilton has failed to demonstrate the Supreme Court of Kentucky arrived at a conclusion that is opposite to that reached by the Supreme Court of the United States on a question of law; or that it decided the case differently than the Supreme Court of the United States has on a set of materially indistinguishable facts.

The undersigned concludes that the Supreme Court of Kentucky's application of the Ungar standard is reasonable. Thus, if Hilton were seeking federal habeas relief under the "unreasonable application" exception in § 2254(d)(1), he would not be entitled to that relief because he cannot demonstrate the state appellate court's application of the Ungar standard is objectively unreasonable.

When the Court rejects a claim on the merits, and the habeas petitioner seeks a Certificate of Appealability, he must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the above explained reasons, the undersigned concludes that Hilton is not entitled to relief under § 2254(d)(1) or (d)(2) as to the claim in Ground Five. The undersigned does not believe that reasonable jurists would find the above assessment of this claim debatable or wrong. Therefore, the Court should not issue a Certificate of Appealability as to the claim in Ground Five.

Ground Six

1. Arguments of the Parties

Hilton claims the trial court violated his due process right to a fair trial by failing to remove several jurors for cause (DN 1-20 PageID # 197-202). Hilton explains that he moved to excuse jurors 601, 99, 21, and 229 for cause and the trial court denied the motions (Id.). Hilton also explains that he followed the procedure in Gabbard v. Commonwealth, 297 S.W.3d 844, 854-55 (Ky. 2009), by specifying that he would have used his peremptory strikes on jurors 142, 195, 3, and 590 but instead had to use them on jurors 601, 99, 21, and 229 because the trial court declined to remove them for cause (Id.). Hilton also explains why he believes the trial court should have removed jurors 601, 99, 21, and 229 for cause (Id.).

Akers argues while Hilton takes issue with the Supreme Court of Kentucky's holding, he has failed to demonstrate the decision is either contrary to or an unreasonable application of clearly established precedent of the Supreme Court of the United States (DN 26 PageID # 279-81). Further, Hilton has offered nothing to rebut the presumption of correctness afforded to the Supreme Court of Kentucky's factual findings (Id.).

In his reply, Hilton reiterates that his due process right to be tried by an impartial jury has been violated by the trial court's failure to strike jurors 601, 99, 21, and 229 for cause (DN 27 PageID # 547-48). Hilton argues that a juror simply indicating he or she can put aside his personal views and decide the case solely on the evidence is not sufficient to qualify an otherwise biased juror (Id.).

2. Discussion

On direct appeal, Hilton argued that the trial court violated his due process right to a fair trial by failing to excuse jurors 601, 99, 21, and 229. Hilton I, 539 S.W.3d 1, 11 (Ky. 2018). More specifically, Hilton contended that the trial court's refusal to strike these jurors violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Id. at 11 n.9. Thus, Hilton provided the state courts with an opportunity to remedy the alleged constitutional infirmity. *See* Castille v. Peoples, 489 U.S. 346, 349-51 (1989).

The Supreme Court of Kentucky assessed his claim and held as follows:

> "Whether to exclude a juror for cause lies within the sound discretion of the trial court, and on appellate review, we will not reverse the trial court's determination 'unless the action of the trial court is an abuse of discretion or is clearly erroneous.'" *Hammond v. Commonwealth*, 504 S.W.3d 44, 54 (Ky. 2016) (*quoting Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)). To determine whether a juror should be stricken for cause, the trial court is mandated to employ the standard set forth in RCr 9.36. *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 193 (Ky. 2017). RCr 9.36(1) states in pertinent part, that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Further, the trial court should base its decision to excuse a prospective juror "on the totality of the circumstances, not on a response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). "[A] trial court's erroneous failure to excuse a juror for cause necessitating the use of a peremptory strike is reversible error." *Little v. Commonwealth*, 422 S.W.3d 238, 241 (Ky. 2013) (*citing Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007)).
>
> When questioned about media coverage, Juror 601 noted what she had heard about the case from press reports. Specifically, she recalled reading that Hilton failed to obey a stop sign and that he had been drinking or under the influence of drugs the night of the collision. Juror 601 went on to explain that she did not know how

to feel about what she had read and expressed doubts about whether what she had read and heard was accurate. Additionally, she stated that she would be able to decide the case based solely on the evidence presented at trial.

Hilton questioned Juror 601 about two unrelated topics—knowledge of the Taylor family and Hilton's right not to testify. Juror 601 explained that her son was friends with Taylor's parents, but that they were not close. Further, she explained that her son had likely spoken with her a little about the case. Additionally, Hilton questioned Juror 601 about his right not to testify. Hilton repeatedly rephrased his questions, which were inartfully phrased to say the least. Juror 601, understandably, did not know how to respond. Ultimately, Juror 601 noted that if the Commonwealth proved its case beyond a reasonable doubt she would probably need to hear something at trial from Hilton. Afterwards the trial court explained to Juror 601 that Hilton had a constitutional right not to testify and that if he elected not to testify that decision could not be used against him. With this explanation from the court, Juror 601 answered that she would have no problem following an instruction that set forth that right.

Hilton moved to strike Juror 601 for cause based on her knowledge of the case and her son's interactions with Taylor's parents. The trial court denied the motion and admonished Hilton for questioning Juror 601 about whether she would expect Hilton to testify given that it was outside of the scope for which they were questioning the potential jurors at that particular time and due to the fact that the court had not yet given information to the jury about Hilton's right not to testify. Later, during *voir dire* Juror 601 offered two additional observations: 1) that she was aware that there had been a song about Taylor posted on Facebook, but that she had not listened to it; and 2) that she saw on Facebook that Taylor's father had recently served as a commencement speaker at a local high school.

The trial court did not abuse its discretion in denying Hilton's motion to strike Juror 601 for cause. Juror 601's knowledge of the June 22, 2014 collision was minimal and she understood that she was to rely only on the evidence presented at trial to decide Hilton's guilt or innocence. Additionally, while Juror 601's son had a tenuous friendship with Taylor's parents, that was no basis for deeming Juror 601 disqualified. *See Derossett v. Commonwealth*,

867 S.W.2d 195, 197 (Ky. 1993) ("Acquaintance with a victim's family or residing in the same general neighborhood is not a relationship sufficient to always disqualify a prospective juror.") (citations omitted). Moreover, we are convinced that Juror 601's statement about wanting Hilton to testify was insufficient to warrant removal when considered in the context of the questions asked. Here, Juror 601 did not have the benefit of the trial court's guidance on the law concerning Hilton's right not to testify before being questioned about that topic. However, once she was informed of the law, she expressed no reservation in being willing to follow the trial court's instructions. As such, we are unable to conclude that the trial court abused its discretion or was clearly erroneous when it declined to excuse Juror 601.

When individually questioned about her knowledge of the case from media coverage, Juror 99 explained that she had heard of a fatality due to an alleged drunk driver. This information was not obtained directly from the media, but rather from Juror 99's daughter who was friends and went to school with some of Taylor's cousins. Juror 99 explained that she was not sure that what she had heard from her daughter was accurate nor would she be influenced by what she had heard. Juror 99 also acknowledged that she had learned about Brice Taylor's death from her daughter. Further, she noted that her daughter had been shocked by the sudden death of these two youths.

Hilton requested the trial court strike Juror 99 for cause based on her daughter's relationship with Taylor's cousins and her knowledge of Brice Taylor's death, a fact the parties had agreed to not discuss during the guilt phase of Hilton's trial due to its irrelevance. In denying the motion, the trial court noted that Juror 99 had limited information about the case and that her words and demeanor demonstrated that she would not be influenced by this knowledge. Later in the *voir dire*, Hilton renewed his motion to strike Juror 99 after she expressed knowledge of the so-called "Brianna Taylor law." The trial court denied the motion finding that Juror 99's knowledge was limited to knowing that the legislation concerned driving under the influence, but did not know how it related to this case.

The trial court did not abuse its discretion in denying Hilton's motion to strike Juror 99 for cause. Similar to his argument to

strike Juror 601, Hilton sought to remove Juror 99 based on her child's relationship with a member of the victim's family. That a family member of a potential juror might have interacted with someone close to the victim of a crime in and of itself is insufficient to warrant the juror's removal. It is obvious that Juror 99's knowledge of Hilton's crimes and related events was limited and her responses clearly indicated a willingness to put that knowledge aside to decide Hilton's case on the evidence presented at trial. *See Furnish v. Commonwealth*, 95 S.W.3d 34, 45 (Ky. 2002) (["]The fact that a prospective juror may have some knowledge of a case does not establish objective bias.["]) (*quoting Foley v. Commonwealth*, 953 S.W.2d 924, 932 (Ky. 1997)). Accordingly, the trial court did not err in denying Hilton's motion to excuse Juror 99 from service.

When asked what she had learned about Hilton's crimes from the media, Juror 21 explained that she had heard that there was a vehicle collision allegedly involving a drunk driver, in which one person was killed and another injured. Additionally, Juror 21 heard that the deceased's brother had been in an accident shortly thereafter. When asked for her feelings about what she had heard, Juror 21 explained that it made her "sad as far as what's happened to the family, to everyone involved." Later she also opined that she was angry that the collision had occurred. She noted that the anger did not arise from the allegations of drunk driving, but rather from the loss itself. Juror 21 explained that it bothered her that people were hurt in this incident, as it does when an injury or death occurs under any circumstance.

After questioning from the trial court, Juror 21 acknowledged that media accounts were not always accurate and that she would rely solely on the information presented in court to determine Hilton's guilt or innocence. Additionally, Juror 21 stated that she had no opinion of Hilton and that she felt that she could be objective. Subsequently, Hilton sought to remove Juror 21 for cause based on her emotional responses about the collision. The trial court denied the request, finding Juror 21 to be objective and, based on her responses, able to make her decision based on the evidence. As for Juror 21's emotional responses, the trial court noted that was a natural reaction to people being hurt.

Clearly, the trial court did not abuse its discretion in denying Hilton's motion to strike Juror 21 for cause. Juror 21's knowledge of the case was minimal and it was clear that she was prepared to set aside that information and rely only on the evidence presented at trial. As to Juror 21's emotional responses, it is not as Hilton suggests that she had a "state of mind that precluded her from being impartial." Instead, her responses clearly indicate that she attributed no blame to Hilton for the collision, rather a general feeling of sadness and anger at the loss of life. Juror 21's remarks simply reflected a natural reaction and timeless concern for loss in an interconnected world. Accordingly, we find that the trial court did not abuse its discretion when it declined to excuse Juror 21

When individually questioned about her pre-existing knowledge of the case, Juror 229 stated that she had watched some television coverage, but that she did not remember specific facts about the case. Further, she agreed that media accounts of events were not always accurate and that she would base her decision as a juror on the evidence presented in court. Also, while she had lived in the area where the collision occurred, she did not know the Taylor family personally. Juror 229 noted that she was aware of fundraisers that had been held for the Taylor family. Also, Juror 229 stated that the victims' families had engaged in some community outreach efforts. Specifically, she had heard from acquaintances of her daughter that the Taylor and Harig families were speaking to high school students about the dangers of drinking and driving.

Hilton requested that Juror 229 be struck for cause due to her knowledge of the Taylors' community outreach efforts. The trial court denied the motion, finding that the juror was not influenced by the limited knowledge that she had and that she could set that information aside in evaluating Hilton's case. Further, the trial court noted that while Juror 229 was aware of the Taylor family's efforts in the community, she did not attach any particular significance to that activity. It is clear that the trial court did not abuse its discretion in denying Hilton's motion to remove Juror 229 for cause. Juror 229's knowledge of the case was limited and her responses demonstrated a willingness to set aside that information and decide the case based on the evidence presented at trial. As she

> was clearly not influenced by her preexisting knowledge, we agree that the trial court acted properly in denying Hilton's motion to remove her for cause.

Id. at 11-15. In sum, the Supreme Court of Kentucky did not address the Constitutional component to Hilton's claim because it disposed of his claim on a state law basis.

This Court does not function as an additional state appellate court reviewing state-court decisions on state law or procedure. *See* Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law ... binds a federal court sitting in habeas corpus"); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Instead, this Court is obligated to accept as valid the Supreme Court of Kentucky's interpretation of State law. *See* Bradshaw, 546 U.S. at 76; Estelle, 502 U.S. at 68. For this reason, the undersigned declines to address Ground Six to the extent it challenges the Supreme Court of Kentucky's adjudication of Hilton's claim under state law.

Because the Supreme Court of Kentucky did not address the Constitutional component to Hilton's claim, it will be examined *de novo* instead of performing a § 2254(d) review. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)). Thus, the pivotal question before the Court is whether Hilton's due process rights were violated by the trial court's rulings on his for-cause challenges to jurors 601, 99, 21, and 229.

In Ross v. Oklahoma, a criminal defendant used a peremptory challenge to rectify the trial court's erroneous denial of a for-cause challenge, leaving him with one fewer peremptory challenge to use at his discretion. 487 U.S. 81, 83-84 (1988). The Supreme Court of the United

States acknowledged that the trial court's error "may have resulted in a jury panel different from that which would otherwise have decided the case." Id. at 87. However, because no member of the jury as finally composed was removable for cause, the Supreme Court of the United States found no violation of Ross's Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process. Id. at 86-91. In United States v. Martinez-Salazar, the Supreme Court of the United States encountered a similar situation and reached the same conclusion. 528 U.S. 304, 307-17 (2000). It held that if a defendant elects to cure such an error by exercising a peremptory challenge and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right. Id. at 307, 317.

Here, Hilton admits that he elected to cure the trial court's purported error by exercising peremptory challenges to jurors 601, 99, 21, and 229. Because no member of the jury as finally composed was removable for cause, under the clearly established rule in Ross, there is no violation of Hilton's Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process. *See* 487 U.S. at 86-91. This also means that Hilton's cursory citation to Irvin v. Dowd, 366 U.S. 717 (1961) is misguided.

When the Court rejects a claim on the merits, and the habeas petitioner seeks a Certificate of Appealability, he must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the above explained reasons, the undersigned concludes that Hilton is not entitled to relief under the claim in Ground Six. The undersigned does not believe that reasonable jurists would find the

above assessment of this claim debatable or wrong. Therefore, the Court should not issue a Certificate of Appealability as to the claim in Grounds Six.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that Hilton's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) be **DENIED** and **DISMISSED**. Additionally, the undersigned does not recommend issuance of a Certificate of Appealability for any of the claims set forth in Hilton's petition (DN 1).

May 20, 2021

H. Brent Brennenstuhl

H. Brent Brennenstuhl
United States Magistrate Judge

D-47

NOTICE

Under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b)(1), the undersigned 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. 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b)(2). 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, 474 U.S. 140 (1984).

May 20, 2021

H. Brent Brennenstuhl

H. Brent Brennenstuhl
United States Magistrate Judge

Copies to: Michael Todd Hilton, *pro se*
Counsel of Record

D-48

Hilton v. Commonwealth, 2020 Ky. LEXIS 205

Supreme Court of Kentucky

May 20, 2020, Decided

2020-SC-0000113-D

Reporter

2020 Ky. LEXIS 205 *

MICHAEL TODD **HILTON v. COMMONWEALTH** OF KENTUCKY

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: **[*1]** HARDIN.

Hilton v. Commonwealth, 2020 Ky. App. LEXIS 16 (Ky. Ct. App., Feb. 7, 2020)

Opinion

DISCRETIONARY REVIEW DENIED.

Appendix E

Hilton v. Commonwealth, 603 S.W.3d 864

Court of Appeals of Kentucky

February 7, 2020, Rendered

NO. 2018-CA-001858-MR

Reporter
603 S.W.3d 864 * | 2020 Ky. App. LEXIS 16 **

MICHAEL TODD HILTON, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Subsequent History: Review denied by **Hilton v. Commonwealth**, 2020 Ky. LEXIS 205 (Ky., May 20, 2020)

Prior History: **Hilton v. Commonwealth**, 539 S.W.3d 1, 2018 Ky. LEXIS 69, 2018 WL 898306 (Ky., Feb. 15, 2018)

Disposition: AFFIRMING.

Core Terms

trial court, ineffective, probability, motor vehicle, influence of alcohol, collision, assault, appellate counsel, first-degree, injuries, blood, medical personnel, direct appeal, imprisonment, sentence, wantonly, deprive, reasons, murder

Appendix F

Case Summary

Overview

HOLDINGS: [1]-Defendant's claim that the trial court erred in denying his Ky. R. Crim. P. 11.42 motion failed because any error of the trial court in excluding a nurse's testimony was harmless and not prejudicial to defendant because the testimony of the victim's treating physician made it clear that the actions of prior medical personnel rendering aid to the victim were immaterial as there was no way to stop the bleeding sufficiently to save the victim's life; [2]-Trial counsel was not ineffective for failing to disclose the nurse as an expert because defendant could not show prejudice given the treating physician's testimony.

Outcome

Judgment affirmed.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > Counsel ▼ > Effective Assistance of Counsel ▼ > Tests for Ineffective Assistance of Counsel ▼

HN1 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

The Strickland standard sets forth a two-prong test for ineffective assistance of counsel: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome. Both Strickland prongs must be met before relief may be granted. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Counsel ▼ > Effective Assistance of Counsel ▼ > Tests for Ineffective Assistance of Counsel ▼

HN2 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

There is no reason for a court deciding an ineffective assistance claim 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. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which will often be so, that course should be followed. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN3 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To establish prejudice for purposes of a claim of ineffective assistance of counsel, a movant must show a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. In short, one must demonstrate that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Fairness is measured in terms of reliability. The likelihood of a different result must be substantial, not just conceivable. Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel. No conclusion of prejudice can be supported by mere speculation. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

The standard for evaluating claims of ineffective appellate counsel is the same as the deficient-performance plus prejudice standard applied to claims of ineffective trial counsel in Strickland. Respondent defendant must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If defendant succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. More like this Headnote

F-3

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Mens Rea

HN5 **Acts & Mental States, Mens Rea**

Wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded, and recklessness is the failure to perceive a risk that a reasonable person in the same situation would have perceived. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Criminal Offenses

HN6 **Criminal Law & Procedure, Criminal Offenses**

Once an act is found to be a cause in fact of a result and a substantial factor in bringing about that result, it is recognized as the proximate cause unless another cause, independent of the first, intervenes between the first and the result. And even then the first cause is treated as the proximate cause if the harm or injury resulting from the second is deemed to have been reasonably foreseeable by the first actor. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Reviewability

HN7 **Effective Assistance of Counsel, Reviewability**

As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. More like this Headnote

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Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Appeals

View more legal topics

HN8 **Effective Assistance of Counsel, Appeals**

Appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the

likelihood of success on appeal. It is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Counsel: [**1] BRIEFS FOR APPELLANT: G. Scott Hayworth, Lexington, Kentucky.

BRIEF FOR APPELLEE: Andy Beshear, Attorney General of Kentucky, Thomas A. Van De Rostyne, Assistant Attorney General, Frankfort, Kentucky.

Judges: BEFORE: ACREE, DIXON, AND JONES, JUDGES. ALL CONCUR.

Opinion by: DIXON

Opinion

[*866] AFFIRMING

DIXON, JUDGE: Michael Todd Hilton appeals from the November 21, 2018, order of the Hardin Circuit Court denying his motion to vacate the judgment and sentence finding him guilty of murder, first-degree assault, second-degree assault, operating a motor vehicle under the influence of alcohol which impairs driving ability, and being a persistent felony offender in the first degree. Following review of the record, briefs, and law, we affirm.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Direct appeal of this case was affirmed by the Supreme Court of Kentucky in ***Hilton v. Commonwealth***, 539 S.W.3d 1 (Ky. 2018). We adopt the facts therein, as follows:

> During the evening of June 22, 2014, Jason Hall was driving down Deckard School Road in Hardin County, Kentucky. After reaching the intersection of Deckard School Road and Patriot Parkway, Hall observed an overturned burning truck. As Hall drove towards the burning wreck he observed a cooler and beer cans in the road. After Hall exited his [**2] vehicle, he was approached by Michael Todd Hilton who told Hall that he was unable to find his brother, Kyle Hilton. Hall informed Hilton that he would be with him momentarily, after he called 911 to request emergency assistance. Hilton tried to persuade Hall not to call 911, but Hall refused and contacted the authorities.
>
> Faith Terry and Jason Combs also arrived on the scene of the collision. Terry observed a truck flipped upside down and a mangled orange Mustang. Hearing coughing from the Mustang, Terry and Combs attempted to aid the injured driver, Brianna Taylor, but were unable to assist Taylor's passenger, Mickayla Harig, who was pinned down by wreckage from the collision.

F - 5

Subsequently, Terry and Combs overheard Hilton yelling for help for his brother Kyle, who was also injured in the accident. While attending to Kyle, Hilton admitted to not stopping at the intersection's stop sign and that he had been drinking. Terry also observed beer cans strewn amongst the wreckage.

After the arrival of emergency personnel, Hilton and his brother were transported to the University of Louisville Hospital for medical treatment. Prior to his transport to the hospital, Hilton admitted to emergency [**3] personnel that he and Kyle had been drinking heavily. At the hospital, physicians examined and **[*867]** treated Hilton for minor injuries. Kyle was admitted at the hospital and received treatment for five days prior to being discharged.

Due to Taylor and Harig being trapped in their damaged vehicle, they were transported to the University of Louisville Hospital after Kyle and Hilton. Both women were treated for severe injuries. Among other injuries, Harig suffered a traumatic brain injury and was hospitalized for approximately 22 days prior to being discharged. As for Taylor, her extensive injuries induced cardiac arrest. While doctors were initially able to restart Taylor's heart, blood loss from organ damage caused her heart to arrest a second time, and they were not able to revive her.

Responding to the scene of the crime, Officer Thomas Cornett of the Hardin County Sheriff's Office observed beer cans and a cooler near Hilton's damaged vehicle. Officer Cornett suspected that Hilton might have been operating his vehicle while under the influence of alcohol and thus contacted the hospital to have Hilton's blood collected for future laboratory examination. Lab results later established that Hilton's [**4] blood alcohol level at the time of the collection was approximately 2.33g/100ml; more than twice the legal limit to operate a motor vehicle.

In July 2014, the Hardin County grand jury indicted Hilton for murder; first-degree assault (two counts); operating a motor vehicle under the influence of intoxicants, first offense in a five-year period, aggravated; and for being a first-degree persistent felony offender. After a trial in June 2015, Hilton was convicted of murder, first-degree assault, second-degree assault, and operating a motor vehicle under influence of alcohol which impairs driving ability. Following the penalty phase of his trial, the jury found Hilton to be a first-degree persistent felony offender and recommended concurrent sentences of life imprisonment for murder, thirty-five years' imprisonment for first-degree assault, ten years' imprisonment for second-degree assault, and thirty days' imprisonment for operating a motor vehicle under influence of alcohol which impairs driving ability. The trial court sentenced Hilton to life imprisonment in conformance with the jury's recommendation.

Id. at 5-6 (footnote omitted).

On direct appeal, Hilton raised six issues. The Supreme Court of [**5] Kentucky affirmed the trial court on all six issues, finding either no error or harmless error for each.

Following the Supreme Court's opinion, Hilton moved the trial court to vacate the judgment and sentence pursuant to RCr 11.42 on grounds of: (1) ineffective assistance of counsel ("IAC") for failure to timely disclose an expert witness, preventing her testimony from being heard by the jury, and (2) ineffective assistance of appellate counsel ("IAAC") for failing to raise the issue of IAC for failure to timely disclose the same expert witness, leading to the exclusion of her testimony from the evidence at his trial. The Commonwealth filed a response to Hilton's RCr 11.42 motion. The trial court denied the RCr 11.42 motion stating that the expert—whose testimony was submitted to the trial court by avowal—"was 'not second guessing' Dr. Jason Smith's (U of L Trauma Surgeon) testimony as Brianna Taylor's treating physician that she received life threatening injuries as a result of the collision," and that Taylor "died as a result of poly-trauma and blood loss **[*868]** caused by the collision." This appeal followed.

STANDARD OF REVIEW

HN1 As established in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002):

> The *Strickland* standard sets forth a two-prong test for ineffective assistance [**6] of counsel:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the
>
> > defendant must show 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 the probability sufficient to undermine the confidence in the outcome.
>
> *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Both *Strickland* prongs must be met before relief may be granted. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In the instant case, we need not determine whether Hilton's counsel's performance was adequate on the issue raised on this appeal because Hilton fails to demonstrate prejudice resulting from counsel's alleged deficient performance.

HN3 To establish [**7] prejudice, a movant must show a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. In short, one must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Fairness is measured in terms of reliability. "The likelihood of a different result must be substantial, not just conceivable." *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (quoting *Harrington v Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011) (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052)).

> Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. Conjecture that a different strategy might have proved beneficial is also not sufficient. *Baze [v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000)]; *Harper v. Commonwealth*, 978 S.W.2d 311, 45 10 Ky. L. Summary 15 (1998). As noted by *Waters v. Thomas* **[*869]** , 46 F.3d 1506 (11th Cir. 1995) (*en banc*): "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."

Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "No conclusion of prejudice . . . can be supported by mere speculation." *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (citations omitted).

HN4 The standard for evaluating claims of ineffective appellate counsel is the same as the "deficient-performance [**8] plus prejudice" standard applied to claims of ineffective trial counsel in Strickland. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011).

> Respondent [defendant] must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [defendant] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 764, 145 L.Ed.2d 756 (2000).

LEGAL ANALYSIS

On the instant appeal, Hilton raises two arguments alleging that the trial court erred in denying his RCr 11.42 motion: (1) trial counsel allowed the expert filing deadline to pass, resulting in the exclusion of critical evidence and depriving Hilton of his right to a fair trial; and (2) appellate counsel failed to raise the issue of the exclusion of his defense expert's testimony, depriving him of his right to effective assistance of counsel on appeal. We will address each argument, in turn.

Hilton's first argument concerns the exclusion of the testimony of his [**9] expert witness, Registered Nurse Wendy Milliner, from being presented to the jury at trial. Hilton

received copies of Taylor's medical records in August 2014. On March 26, 2015, the trial court ordered Hilton to identify experts intended to be called at trial no later than thirty days prior to the trial date, which was set and did begin on June 8, 2015. On June 10, 2015, after the Commonwealth had presented a significant portion of its case-in-chief, Hilton tendered his notice of expert opinion regarding R.N. Milliner's expected testimony.

On June 11, 2015, the trial court allowed R.N. Milliner to testify by avowal. R.N. Milliner was critical of the care rendered by the first responders—particularly the flight crew—to Taylor, up to and including the transfer of care to Dr. Smith. Her primary concerns related to actions which decreased Taylor's blood pressure and oxygenation levels. Dr. Smith had previously testified that Taylor's oxygen levels and blood pressure were improved at the hospital to an appropriate level; however, the inability to prevent Taylor's bleeding as a result of the injuries she sustained in the collision caused her death. R.N. Milliner testified that she was not [**10] critical of Dr. Smith's care and did not challenge his determination of Taylor's cause of death.

After hearing R.N. Milliner's testimony, the trial court stated, as a matter of trial fairness, it was the type that had to be revealed before the witnesses of whom she was critical had testified and been released. The trial court further stated that R.N. Milliner did not take exception to Dr. **[*870]** Smith's opinion as to cause of death, nor did her testimony provide Hilton with a legal defense to the murder charge. We agree with both reasons for the trial court's ruling, which were memorialized in its order entered June 18, 2015. However, because the court's second reason also demonstrates that counsel's actions did not prejudice Hilton and disposes of his claim for IAC, we choose to discuss it only.

In its order excluding the expert testimony of R.N. Milliner, the trial court cited to *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002). Like *Robertson*, the instant case —concerning whether Hilton's act of operating a motor vehicle under the influence of alcohol was a legal cause of Taylor's death—requires application of the provisions of KRS 501.020(3) (which defines the term "wantonly") and KRS 501.060 (which defines causal relationships).

KRS 501.020(3) defines "wantonly" as:

> A person [**11] acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

HN5 "Thus, wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded, and recklessness is the failure to perceive a risk that a reasonable person in the same situation would have perceived." *Robertson*, 82 S.W.3d at 835.

KRS 501.060 provides in pertinent part:

(1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.

. . .

(3) When wantonly or recklessly causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case [**12] of recklessness, of which he should be aware unless:

(a) The actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

It is clear that Hilton's unlawful act of operating a motor vehicle under the influence of alcohol was a "but for" cause of Taylor's death. The issue then becomes one of *mens rea*.

HN6 Once an act is found to be a cause in fact of a result and a substantial factor in bringing about that result, it is recognized as the proximate cause unless another **[*871]** cause, independent of the first, intervenes between the first and the result. And even then the first cause is treated as the proximate cause if the harm or injury resulting from the second is deemed [**13] to have been reasonably foreseeable by the first actor.

Robertson, 82 S.W.3d at 836 (citation omitted).

Therefore, 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. KRS 501.060(3)(b) clarifies that it is immaterial that the treatment provided by medical personnel following the collision *possibly* increased the *probability* of the *inevitable* consequence of Taylor's death. R.N. Milliner couched her testimony concerning the effects of the treatment rendered by medical personnel in terms of possibilities and probabilities. She did not testify within a certain degree of medical probability that the actions of the medical personnel would or could have changed the inevitable outcome of Taylor's death. Dr. Smith's testimony—as Taylor's treating physician—made it clear that the actions of prior medical personnel rendering aid to Taylor were immaterial as there was no way to stop the bleeding sufficiently to save Taylor's life. For these reasons, any error [**14] of the trial court in excluding R.N. Milliner's testimony was harmless and not prejudicial to Hilton.

Hilton's second argument concerns IAAC. Hilton alleges that his appellate counsel's failure to raise the issue of trial counsel's failure to disclose R.N. Milliner as an expert witness deprived Hilton of his right to effective appellate counsel. ***HN7*** However, the Supreme Court of Kentucky has observed:

> As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. . . . Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, KBA Op. E-321 (July 1987), and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872, 45 3 Ky. L. Summary 17 (Ky. 1998).

The Supreme Court of the United States has also held:

> ***HN8*** appellate counsel who files [**15] a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. . . . [I]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.

Smith, 528 U.S. at 288, 120 S.Ct. at 765. For the reasons discussed previously, Hilton has not satisfied the prejudice prong of the *Strickland* test to show ineffective assistance of appellate counsel for failure to present this meritless issue on direct appeal.

Therefore, and for the foregoing reasons, the order upholding Hilton's judgment **[*872]** and sentence entered by the Hardin Circuit Court is AFFIRMED.

ALL CONCUR.

Footnotes

1 Kentucky Rules of Criminal Procedure.

2 ***HN2*** "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there 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. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

[3] Kentucky Revised Statutes.

HARDIN CIRCUIT COURT
DIVISION II
CASE NO. 14-CR-00427

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V. **ORDER DENYING MOTION TO VACATE CONVICTION**

MICHAEL TODD HILTON — DEFENDANT

* * * * *

On July 16, 2018 the Movant, Michael Todd Hilton ("Hilton"), by counsel, filed a Motion to Vacate Conviction and Sentence and Grant a New Trial pursuant to RCr 11.42 due to ineffective assistance of counsel. The Commonwealth filed a response on August 6, 2018.

FINDINGS OF FACT

The Court by preponderance of the evidence hereby enters the following findings of fact:

1. This case arises from a motor vehicle accident that occurred in Hardin County on June 22, 2014 involving Hilton and victims Brianna Taylor, Mickayla Harig and Kyle Hilton.
2. Hilton was represented by Hon. Heather Gatnarek ("trial counsel").
3. Prior to the trial, on March 24. 2015 the Court entered an Order pursuant to RCr 7.24(3)(a). without objection of the Defendant as follows:

> IT IS HEREBY ORDERED that the defendant shall supply the Commonwealth with the identity of any expert they intend to call at trial;
> IT IS HEREBY FURTHER ORDERED that the defendant shall also include a written summary including the expert's opinion, qualifications, and the basis and reason for those opinions.

IT IS HEREBY FURTHER ORDERED that the above matter shall be tendered to the Commonwealth no later than 30 days prior to the trial date. [Jury trial scheduled to begin on June 8, 2015]

4. At the jury trial on this matter, after the close of evidence on the second day (June 10, 2015) of the Commonwealth's case in chief, the Defendant tendered a "Notice of Expert Opinion" in open court, outside of the presence of the jury. The Commonwealth objected and moved to exclude such expert opinion as not being timely disclosed.

5. The expert the defense wished to introduce for testimony was Wendy Millner, a nurse the defense had retained for trail preparation.

6. The Court allowed Milliner's testimony to be given by avowal on June 11, 2015. (TR, Entry No. 69 at 4:43) During that testimony, Milliner stated she was "not second guessing" Dr. Jason Smith's (U of L Trauma Surgeon) testimony as Brianna Taylor's treating physician that she received life threatening injuries as a result of the collision; that she received proper medical care by the emergency responders; and that she died as a result of poly-trauma and blood loss caused by the collision.

7. The jury at the trial of this case convicted Hilton of Murder in the First Degree (victim Brianna Taylor), Assault in the First Degree (victim, Mickayla Harig), Assault in the Second Degree (victim, Kyle Hilton), and of Operating a Motor Vehicle Under the Influence of Alcohol.

8. The conviction and sentence were upheld on direct appeal by the Kentucky Supreme Court in *Hilton v. Commonwealth*, 529 S.W.3d 1 (2018), (App 1) (February 15, 2018) Hilton was represented on appeal by appellate counsel.

held that in order to succeed on an ineffective assistance of counsel claim based upon appellate counsel's alleged failure to raise a particular issue on direct appeal"

> the defendant must establish that 'counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to appellate court was a reasonable exercise of appellate strategy. The omitted issue must be 'clearly stronger' than those presented for the presumption of effective assistance to be overcome. Additionally, the defendant must also establish that 'he or she was prejudiced by the deficient performance, which ...requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded.

Commonwealth v. Pollini, 437 S.W.144, 149 (Ky. 2014) citing *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010).

A motion under RCr 11.42 "is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

An evidentiary hearing is not required unless the issues presented cannot be determined on the face of the record. RCr 11.42(5). A movant "must aver facts with sufficient specificity to generate a basis for relief." *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971).

ANALYSIS

The first claim by the Defendant as to ineffective assistance of trial counsel is the allegation trial counsel erred by not timely disclosing Milliner as an expert to testify. Trial counsel stated on record that they had not previously disclosed Millner as a testifying expert and provided a report because they believed they could develop their defense and information needed through the witnesses called by the Commonwealth. This is a very reasonable and common trial strategy. It is also a reasonable trial strategy for a defense counsel to not disclose trial consultants as experts.

Trial counsel was in the best position to decide whether the testimony of Milliner could help his case. Therefore, the Court does not find this decision by trial counsel to result in ineffective assistance of counsel.

Moreover, the Court does not find that the defendant can demonstrate any prejudice as a result of the exclusion of this expert testimony. The testimony provided in avowal did not contradict the expert testimony given by the experts for the Commonwealth. The testimony given by Milliner on avowal related to the medical care Brianna Taylor revived prior to arriving at the hospital. Milliner conceded that she was not a doctor or a coroner and that she never examined Taylor and was not trained to determine a cause of death. During that testimony, Milliner stated she was "not second guessing" Dr. Jason Smith's (U of L Trauma Surgeon) testimony as Brianna Taylor's treating physician that she received life threatening injuries as a result of the collision; that she received proper medical care by the emergency responders; and that she died as a result of poly-trauma and blood loss caused by the collision.

Defendant also claims ineffective assistance of appellate counsel in their failure to raise the issue of ineffective assistance of trial counsel and the ruling disallowing expert testimony on direct appeal. As the Court finds no ineffective assistance of trial counsel, there is no reasonable probability that the appeal verdict would have been different if this issued had been raised. Appellate counsel must look at all possible claims to raise on appeal and determine those that are the most likely to succeed. It cannot be argued that the strategy of the appellate counsel is inadequate when they determine a possible claim is not strong enough to raise on appeal. Therefore the Court does not find this claim to meet the requirement laid out in *Hollon v. Commonwealth*.

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Finally, Hilton requested an evidentiary hearing on his RCr 11.42 motion. There is no need for a hearing when the claims can be resolved from the record, *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998), or when there is no actual prejudice, *Brewster v. Commonwealth*, 723 S.W.2d 863, 864-65 (Ky. App. 1987).

The court finds there is no ineffective assistance of counsel claim in this case and any possible "errors" counsel might have made certainly would not prejudice Hilton and they certainly would not meet the standard described above. The record, in this case is sufficient for the Court to rule and no further hearing is required. The Court finds the actions of both trial counsel and appellate counsel to be appropriate and competent and not prejudicial. The evidence against Hilton was overwhelming. He received a fundamentally fair trial, and a evidentiary hearing is not required in determining that his motion does not present any issues that could warrant a basis for relief.

THEREFORE, IT IS HEREBY ORDERED as follows:

1. Hilton's motion for an evidentiary hearing is DENIED.

2. Hilton's Motion for Relief Pursuant to RCr 11.42 is DENIED without a hearing as provided herein.

This 15th day of November, 2016.

ENTERED: 11-21-18
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/DIST COURT
BY _____ D.C.

c: CW
PT
PP
H Gatnarek
S Milner
R Durkem
A Beshear

Judge, Hardin Circuit Court
Division II

Id. Given the egregious violation, the prejudice to the Commonwealth, and the very limited probative weight of the proffered testimony, there is simply no possibility that an appellate court would have found that the trial court abused its discretion in the decision to exclude the evidence. Rather than brief an issue that had no hope of success, appellate counsel rightfully chose to focus upon more viable issues.

CONCLUSION

The defendant has failed to meet his burden under RCr 11.42. Neither trial counsel nor appellate counsel was ineffective in their representation. While the defendant has not met his initial burden under *Strickland* and *Hollon*, he has also failed to demonstrate any prejudice to his case as a result.

Wherefore, the Commonwealth requests this court deny the defendant's motion without hearing.

Respectfully submitted,

Teresa Young

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing response was mailed this 6th day of August 2018, to Stephen D. Milner, 271 West Short Street, Suite 812, Lexington, KY, 40507.

Teresa Young

Teresa Young

Hilton v. Commonwealth, 539 S.W.3d 1

Copy Citation

Supreme Court of Kentucky

February 15, 2018, Rendered

2015-SC-000452-MR

Reporter

539 S.W.3d 1 * | 2018 Ky. LEXIS 69 ** | 2018 WL 898306

MICHAEL TODD HILTON, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Subsequent History: Released for Publication March 08, 2018.
Post-conviction relief denied at **Hilton v. Commonwealth**, 603 S.W.3d 864, 2020 Ky. App. LEXIS 16 (Ky. Ct. App., Feb. 7, 2020)
Habeas corpus proceeding at, Magistrate's recommendation at Hilton v. Akers, 2020 U.S. Dist. LEXIS 213408, 2020 WL 6733685 (E.D. Ky., Oct. 23, 2020)

Prior History: [**1] ON APPEAL FROM HARDIN CIRCUIT COURT. HONORABLE KEN HOWARD, JUDGE. NO. 14-CR-00427.

Core Terms

trial court, Juror, sentence, continuance, admonition, questioned, collision, penalty phase, fair trial, mistrial, pretrial, venue, motion for change, present evidence, medical record, first-degree, discovery, driving, appropriate sentence, media coverage, circumstances,

Appendix H

recommend, responses, contends, daughter, assault, murder, media, incriminating statement, knowledge of the case

Counsel: COUNSEL FOR APPELLANT: Roy Alyette Durham, II, Assistant Public Advocate.

COUNSEL FOR APPELLEE: Andy Beshear, Attorney General of Kentucky, Thomas Allen Van De Rostyne, Assistant Attorney General.

Judges: OPINION OF THE COURT BY JUSTICE HUGHES. All sitting. All concur.

Opinion by: HUGHES

Opinion

[*4] OPINION OF THE COURT BY JUSTICE HUGHES

AFFIRMING

Michael Todd Hilton appeals as a matter of right from a judgment of the Hardin Circuit Court sentencing him to life imprisonment for murder, first-degree assault, second-degree assault, operating a motor vehicle under influence of alcohol which impairs driving ability, and for being a first-degree persistent felony offender. Hilton alleges that the trial court erred by: 1) failing to grant a change of venue; 2) declining to suppress a witness's statement; 3) refusing to grant a continuance; **[*5]** 4) failing to remove jurors for cause; 5) denying his request for a mistrial; and 6) by permitting the Commonwealth to inquire of witnesses during the penalty phase what sentence they believed appropriate for Hilton's crimes. For the following reasons, we affirm the judgment and sentence.

FACTS AND PROCEDURAL HISTORY [2]**

During the evening of June 22, 2014, Jason Hall was driving down Deckard School Road in Hardin County, Kentucky. After reaching the intersection of Deckard School Road and Patriot Parkway, Hall observed an overturned burning truck. As Hall drove towards the burning wreck he observed a cooler and beer cans in the road. After Hall exited his vehicle, he was approached by Michael Todd Hilton who told Hall that he was unable to find his brother, Kyle Hilton.[1] Hall informed Hilton that he would be with him momentarily, after he called 911 to request emergency assistance. Hilton tried to persuade Hall not to call 911, but Hall refused and contacted the authorities.

Faith Terry and Jason Combs also arrived on the scene of the collision. Terry observed a truck flipped upside down and a mangled orange Mustang. Hearing coughing from the Mustang, Terry and Combs attempted to aid the injured driver, Brianna Taylor, but were unable to assist Taylor's passenger, Mickayla Harig, who was pinned down by wreckage from the collision. Subsequently, Terry and Combs overheard Hilton yelling for help for his brother Kyle, who was also injured in the accident. While attending to Kyle, Hilton

admitted to not [**3] stopping at the intersection's stop sign and that he had been drinking. Terry also observed beer cans strewn amongst the wreckage.

After the arrival of emergency personnel, Hilton and his brother were transported to the University of Louisville Hospital for medical treatment. Prior to his transport to the hospital, Hilton admitted to emergency personnel that he and Kyle had been drinking heavily. At the hospital, physicians examined and treated Hilton for minor injuries. Kyle was admitted at the hospital and received treatment for five days prior to being discharged.

Due to Taylor and Harig being trapped in their damaged vehicle, they were transported to the University of Louisville Hospital after Kyle and Hilton. Both women were treated for severe injuries. Among other injuries, Harig suffered a traumatic brain injury and was hospitalized for approximately 22 days prior to being discharged. As for Taylor, her extensive injuries induced cardiac arrest. While doctors were initially able to restart Taylor's heart, blood loss from organ damage caused her heart to arrest a second time, and they were not able to revive her.

Responding to the scene of the crime, Officer Thomas Cornett of the [**4] Hardin County Sheriffs Office observed beer cans and a cooler near Hilton's damaged vehicle. Officer Cornett suspected that Hilton might have been operating his vehicle while under the influence of alcohol and thus contacted the hospital to have Hilton's blood collected for future laboratory examination. Lab results later established that Hilton's blood alcohol level at the time of the collection was approximately 2.33g/ 100ml; more than twice the legal limit to operate a motor vehicle.

In July 2014, the Hardin County grand jury indicted Hilton for murder; first-degree assault (two counts); operating a motor vehicle under the influence of intoxicants, **[*6]** first offense in a five-year period, aggravated; and for being a first-degree persistent felony offender. After a trial in June 2015, Hilton was convicted of murder, first-degree assault, second-degree assault, and operating a motor vehicle under influence of alcohol which impairs driving ability. Following the penalty phase of his trial, the jury found Hilton to be a first-degree persistent felony offender and recommended concurrent sentences of life imprisonment for murder, thirty-five years' imprisonment for first-degree assault, ten [**5] years' imprisonment for second-degree assault, and thirty days' imprisonment for operating a motor vehicle under influence of alcohol which impairs driving ability. The trial court sentenced Hilton to life imprisonment in conformance with the jury's recommendation.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion in Denying Hilton's Motion For Change of Venue.

Hilton contends that the trial court erred by not granting his motion for a change of venue.[2] Prior to trial, Hilton made a motion for change of venue, contending that extensive media coverage and widespread local knowledge of his actions prevented him from having a fair trial in Hardin County. Hilton requested that the trial be conducted in

another county or alternatively that jurors be summoned from other counties or that a survey be sent out to determine community opinion.[3]

Subsequently, the trial court conducted two evidentiary hearings to consider Hilton's motion. In support of his motion, Hilton submitted two affidavits and multiple exhibits demonstrating the pretrial attention surrounding the death of Brianna Taylor. Hilton's exhibits included photographs of a roadside memorial to Taylor, Louisville [**6] area news reports about Taylor's death, and a copy of a Facebook page memorializing her and her brother, Brice Taylor.[4] In opposition to Hilton's motion, the Commonwealth submitted four counter-affidavits. Additionally, the Commonwealth submitted the 2010 Census figures for Hardin County, the daytime population, of Fort Knox, and the daily circulation of the Elizabethtown *News-Enterprise*.[5]

After considering the evidence presented by both parties, the trial court denied Hilton's motion in a detailed order, subject to reconsideration if Hilton renewed the motion during *voir dire*. The trial court concluded that the pretrial media coverage of this case was not reasonably likely to prevent a fair trial in Hardin County. Additionally, the trial court enumerated seven reasons why a change of venue was unnecessary: 1) Hardin County, with a population **[*7]** of approximately 105,000 residents, is relatively large and has numerous cities and school districts; 2) Hardin County is a transient community, where a substantial number of citizens do not have pre-existing ties or relationships with the residents of the county; 3) the nearby presence of the Louisville media market diminishes the impact that a [**7] single tragic case has on the public consciousness of potential jurors in the county; 4) the internet coverage of the case is not necessarily relevant because it cannot be quantified to determine the impact within Hardin County; 5) roadside memorials, such as the one to Taylor, are common occurrences in Kentucky and the memorial does not name Hilton nor is its lettering readable to passing motorists; 6) the jury pool from which Hilton's petit jury would be formed was instructed during jury orientation not to watch, listen, or read any media or internet accounts of any criminal cases occurring in Hardin County during their term of service; and 7) the Hardin Circuit Court had been able to seat a fair and impartial jury in similar cases of media exposure without resorting to extraordinary measures such as change of venue or summoning jurors from adjacent counties.

"Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a change of venue must be granted when 'it appears that the defendant cannot have a fair trial in the county wherein the prosecution is pending.'" *Sluss v. Commonwealth*, 450 S.W.3d 279, 285 (Ky. 2014) (*quoting Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978)). Additionally, Kentucky Revised Statute (KRS) 452.210 provides that the defendant is entitled to a change of venue if the presiding judge is satisfied that the defendant cannot receive a fair trial [**8] in the county where the prosecution is pending. "It is not the amount of publicity which determines that venue should be changed; it is whether public opinion is so aroused as to preclude a fair trial." *Foster v. Commonwealth*, 827 S.W.2d 670, 675, 38 13 Ky. L. Summary 20 (Ky. 1991) (*quoting Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 387 (Ky. 1985)). In considering a motion for change of venue, the trial court is vested with "wide discretion," and its decision will not be overturned absent an abuse of discretion. *Wood v. Commonwealth*, 178 S.W.3d 500, 513 (Ky. 2005) (*citing Hurley v. Commonwealth*, 451 S.W.2d 838 (Ky. 1970)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary,

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unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999)).

Hilton's contention that the trial court erred in denying his motion for change of venue is without merit. Speaking in sweeping terms, Hilton claims that "any indicia of impartiality on the part of the jurors must be disregarded. It is hard to fathom an atmosphere more inflammatory than a community trying a man charged with murder of a young girl who dies based upon a DUI accident." While the facts of this case are clearly tragic, vehicular homicides involving drivers under the influence are, sadly, not uncommon and the publicity complained of by Hilton was not so prolific or prejudicial as to rise to a presumption of prejudice. Rather, after [**9] considering the totality of circumstances, we cannot conclude that the trial setting was inherently prejudicial.

Nor has Hilton established a reasonable likelihood that pretrial publicity actually prejudiced the jury pool. Hilton contends that he was "undeniably prevented a fair trial," because of the thirty-six jurors initially called for service, thirty-two responded that they heard some media **[*8]** coverage of the case. This is insufficient as "the mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." *Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978); *see also Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (It is not required that "jurors be totally ignorant of the facts and issues involved" or that they cannot have "some impression or opinion as to the merits of the case[,]" so long as they can set aside that "impression or opinion and render a verdict based on the evidence presented in court."). In the case at bar, the trial court carefully examined the potential jurors as to their knowledge of the case due to pretrial media coverage. To ensure [**10] Hilton's right to a fair jury, the trial court removed those jurors who had formed an opinion based on media coverage. On the record before us, we conclude that the trial court did not abuse its discretion in denying Hilton's motion for change of venue.

II. The Trial Court Did Not Abuse Its Discretion in Denying Hilton's Motion to Exclude a Statement He Made to Jason Hall.

Hilton argues that the trial court erred by permitting the Commonwealth to present the testimony of Jason Hall concerning a statement Hilton made to him the night of the collision. [6] Hilton claimed that the admission of this incriminating statement was a violation of Kentucky Rule of Criminal Procedure (RCr) 7.24 and the trial court's discovery order. Further, Hilton contends that the introduction of this statement precluded him from properly preparing and presenting a defense and denied him his right to a fair trial.

On June 1, 2015, while preparing for trial, the Commonwealth reviewed 911 call sheets, which listed the telephone numbers of individuals who had called for emergency services the night of the collision. The Commonwealth contacted Hall who revealed (for the first time) that he had been present at the scene of the vehicle collision and that Hilton had [**11] told him not to call 911. After receiving this information, the Commonwealth

alerted the court and defense counsel the following day by submitting a summary of Hilton's statement to Hall as a supplemental discovery response.

Hilton moved to exclude Hall's statement, arguing that the Commonwealth had violated RCr 7.24 by failing to discover and turn over the statement until one week before the trial. He requested that the statement be excluded or, alternatively, that the trial court continue the case to allow time to "properly investigate and consider" the statement and Hall.

After a hearing, the trial court denied Hilton's motion to exclude the statement. The trial court explained that the Commonwealth had an obligation under RCr 7.24(1) to timely disclose any self-incriminating statements made by Hilton in advance of the trial. Further, according to the trial court's pretrial discovery order, the Commonwealth was obligated to disclose oral incriminating statements made by Hilton and known by the Commonwealth or its agents within thirty days of arraignment.

The trial court determined that the Commonwealth did not know of the existence **[*9]** of the statement until June 1, 2015. Further, the trial court concluded [**12] that the Commonwealth did not act in bad faith in disclosure of the statement; nor was there any suggestion by Hilton that the Commonwealth had done so. Additionally, the trial court noted that the statement was not in the possession of an agency over which the Commonwealth's Attorney exercises control. The 911 call sheets were records maintained by the Hardin County 911, which is owned and operated by the Hardin County government, not a law enforcement agency. As the trial court explained, any 911 calls regarding the vehicle collision were a matter of public record and available to all parties.

Also, the trial court concluded that the Commonwealth's disclosure of Hall's intended testimony did not constitute a "surprise attack" on Hilton's trial strategy. Notably, Hilton declined the trial court's offer of an *in-camera* hearing, outside the presence of the Commonwealth's Attorney, to discuss his trial strategy and how Hall's testimony would undermine it. Additionally, after considering this Court's recent opinion in *Trigg v. Commonwealth*, 460 S.W.3d 322 (Ky. 2015), the trial court concluded that Hilton had "not demonstrated that either cross examination of Jason Hall or pre-trial inquiry of other witnesses will be rendered ineffective [**13] by the introduction of the statement at trial."

RCr 7.24 states in pertinent part that "[u]pon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness." The Commonwealth is obligated to disclose incriminating statements of the defendant under RCr 7.24, "not only to inform the defendant that *he* has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 297 (Ky. 2008) (emphasis in original). "We review a trial judge's decision concerning discovery issues under an abuse of discretion standard." *Brown v. Commonwealth*, 416 S.W.3d 302, 308 (Ky. 2013) (*citing Beaty v. Commonwealth*, 125 S.W.3d 196, 202 (Ky. 2003)).

Contrary to Hilton's assertions, it is clear that the Commonwealth did not violate RCr 7.24 or the trial court's discovery orders. It is uncontradicted that the Commonwealth did not

know that Hilton had made an incriminating statement to Hall until June 1, 2015. Hall, a private citizen, was not an agent of the Commonwealth and his knowledge of Hilton's incriminating statement cannot be imputed [**14] to the Commonwealth. Once the Commonwealth learned of Hilton's statement to Hall it was immediately disclosed. Notably, through examination of the available 911 records, Hilton's counsel had the same opportunity as the Commonwealth to investigate Hall and his encounter with Hilton that night. Further, Hilton failed to identify to the trial court how he was supposedly prejudiced by Hall's testimony, even when offered an opportunity to present his argument *in camera* to avoid revealing trial strategy. Accordingly, we cannot disagree with the trial court's well-reasoned denial of Hilton's motion to exclude his statement to Hall.

III. The Trial Court Did Not Abuse Its Discretion in Denying Hilton's Motions for a Continuance.

Hilton contends that the trial court erred by failing to grant his multiple **[*10]** requests to postpone the trial.[7] Hilton's trial was initially scheduled to begin on March 9, 2015. However, on January 28, 2015, Hilton requested that his trial be continued. The trial court acquiesced and rescheduled Hilton's trial for June 8, 2015.[8] Additionally, the trial court set a backup trial date of August 10, 2015.

Later, on May 15, 2015, the Commonwealth supplemented its original discovery [**15] disclosure by providing Hilton with the medical records for Kyle and Harig. These records formed the basis of Hilton's second motion to continue. Hilton acknowledged that there had been no fault on the part of the Commonwealth in turning over the medical records but, rather, delay by the hospital in providing the records to the Commonwealth. Once the Commonwealth received the medical records, it immediately mailed them to Hilton. Hilton maintained that there was insufficient time prior to trial to review the medical records.

The trial court responded to this argument by explaining that it was clear from the discovery that the Commonwealth had previously tendered in the form of an investigative report and emergency services records that Harig and Kyle had sustained injuries and that they had been treated at the University of Louisville Hospital. The trial court noted that Hilton could have subpoenaed the medical records rather than waiting for the Commonwealth to obtain them and turn them over in discovery. While the trial court understood Hilton's concerns, it concluded that the existence of the records was not a surprise and that two weeks would be sufficient time to review them. Additionally, [**16] the trial court explained that the alternate trial date of August 10, 2015, might not be available as a capital murder case was scheduled to be tried on that date.

Despite denying Hilton's motion, the trial court noted that if there was information in the records, discovered during Hilton's review that did constitute a surprise, the court would be willing to entertain a renewed motion for a continuance. Also, the trial court informed Hilton during an *ex parte* proceeding conducted after the hearing that funding could be obtained to hire an expert to help review the medical records. To expedite that process the trial court permitted Hilton to hire an expert immediately, rather than wait for the issuance of a written order allocating funding for this purpose.

A week later, as part of an alternative presented in Hilton's motion for change of venue, he orally requested to continue the trial so that, a survey could be conducted to determine community opinion regarding his case. This request was denied. Additionally, three days before trial, Hilton requested that the trial court exclude the "don't call 911" statement he made to Hall or, alternatively, that the court grant him a continuance [**17] to investigate the statement and Hall. The trial court denied this final motion for a continuance.

Under RCr 9.04 the trial court, "upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." The trial court is vested with broad discretion in granting or refusing a continuance. *Dishman v. Commonwealth*, 906 S.W.2d 335, 339, 42 10 Ky. L. Summary 26 (Ky. 1995) **[*11]** (*citing Pelfrey v. Commonwealth*, 842 S.W.2d 524 (Ky. 1993)); *see also Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983) ("[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary Insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."') (*quoting Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964)).

In *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), this Court noted that "[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." *Id.* at 581 (*citing Ungar*, 376 U.S. at 589).

> Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id. (*citing Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985)); *see also Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) ("Identifiable-prejudice [**18] is especially important.").

After considering the *Snodgrass* factors, it is clear that the trial court did not err in denying a continuance. While there had previously been a continuance granted at the request of both parties, granting an additional continuance of Hilton's case would have caused inconvenience for the trial court and witnesses. As noted by the trial court, it was not a given that the trial could have been moved to the August 10, 2015 date, and if not tried at that time, it is unknown when the case would have finally been presented to a jury. Moreover, as the trial court explained, the Commonwealth's intention to use medical records in this case was not a surprise and Hilton could have requested this information well in advance of the trial date. Further, Hilton obtained pretrial funding for an expert who was ultimately hired to review the questioned medical records. Finally, even at this juncture, years after Hilton's trial, he is unable to identify any specific prejudice he suffered by the trial court's refusal to grant him a continuance. Accordingly, we hold that the trial court did not abuse its discretion in denying Hilton's requests for a continuance.

IV. The Trial [19] Court Did Not Abuse Its Discretion by Refusing Hilton's Motion to Excuse Jurors for Cause.**

Hilton argues that the trial court violated his due process right to a fair trial by failing to excuse Jurors 601, 99, 21, and 229.[9] "Whether to exclude a juror for cause lies within the sound discretion of the trial court, and on appellate review, we will not reverse the trial court's determination 'unless the action of the trial court is an abuse of discretion or is clearly erroneous.'" *Hammond v. Commonwealth*, 504 S.W.3d 44, 54 (Ky. 2016) (*quoting Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)). To determine whether a juror should be stricken for cause, the trial court is mandated to employ the standard set forth in RCr 9.36. *Sturgeon v.* **[*12]** Commonwealth, 521 S.W.3d 189, 193 (Ky. 2017). RCr 9.36(1) states in pertinent part, that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Further, the trial court should base its decision to excuse a prospective juror "on the totality of the circumstances, not on a response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). "[A] trial court's erroneous failure to excuse a juror for cause necessitating the use of a peremptory strike is reversible error." *Little v. Commonwealth*, 422 S.W.3d 238, 241 (Ky. 2013) (*citing Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007)).

When questioned about media coverage, Juror 601 noted what she had [**20] heard about the case from press reports. Specifically, she recalled reading that Hilton failed to obey a stop sign and that he had been drinking or under the influence of drugs the night of the collision. Juror 601 went on to explain that she did not know how to feel about what she had read and expressed doubts about whether what she had read and heard was accurate. Additionally, she stated that she would be able to decide the case based solely on the evidence presented at trial.

Hilton questioned Juror 601 about two unrelated topics[10]—knowledge of the Taylor family and Hilton's right not to testify. Juror 601 explained that her son was friends with Taylor's parents, but that they were not close. Further, she explained that her son had likely spoken with her a little about the case. Additionally, Hilton questioned Juror 601 about his right not to testify. Hilton repeatedly rephrased his questions, which were iriartfully phrased to say the least. Juror 601, understandably, did not know how to respond.[11] Ultimately, Juror 601 noted that if the Commonwealth proved its case beyond a reasonable doubt she would probably need to hear something at trial from Hilton. **[*13]** Afterwards the trial court explained [**21] to Juror 601 that Hilton had a constitutional right not to testify and that if he elected not to testify that decision could not be used against him. With this explanation from the court, Juror 601 answered that she would have no problem following an instruction that set forth that right.

Hilton moved to strike Juror 601 for cause based on her knowledge of the case and her son's interactions with Taylor's parents. The trial court denied the motion and admonished Hilton for questioning Juror 601 about whether she would expect Hilton to testify given that it was outside of the scope for which they were questioning the potential jurors at that particular time and due to the fact that the court had not yet given information to the jury about Hilton's right not to testify. Later, during *voir dire* Juror 601 offered two additional observations: 1) that she was aware that there had been a song about Taylor posted on Facebook, but that she had not listened to it; and 2) that she saw on Facebook

that Taylor's father had recently served as a commencement speaker at a local high school.

The trial court did not abuse its discretion in denying Hilton's motion to strike Juror 601 for cause. [**22] Juror 601's knowledge of the June 22, 2014 collision was minimal and she understood that she was to rely only on the evidence presented at trial to decide Hilton's guilt or innocence. Additionally, while Juror 601's son had a tenuous friendship with Taylor's parents, that was no basis for deeming Juror 601 disqualified. *See* Derossett v. Commonwealth, 867 S.W.2d 195, 197 (Ky. 1993) ("Acquaintance with a victim's family or residing in the same general neighborhood is not a relationship sufficient to always disqualify a prospective juror.") (citations omitted). Moreover, we are convinced that Juror 601's statement about wanting Hilton to testify was insufficient to warrant removal when considered in the context of the questions asked. Here, Juror 601 did not have the benefit of the trial court's guidance on the law concerning Hilton's right not to testify before being questioned about that topic. However, once she was informed of the law, she expressed no reservation in being willing to follow the trial court's instructions. As such, we are unable to conclude that the trial court abused its discretion or was clearly erroneous when it declined to excuse Juror 601.

When individually questioned about her knowledge of the case from media coverage, [**23] Juror 99 explained that she had heard of a fatality due to an alleged drunk driver. This information was not obtained directly from the media, but rather from Juror 99's daughter who was friends and went to school with some of Taylor's cousins. Juror 99 explained that she was not sure that what she had heard from her daughter was accurate nor would she be influenced by what she had heard. Juror 99 also acknowledged that she had learned about Brice Taylor's death from her daughter. Further, she noted that her daughter had been shocked by the sudden death of these two youths.

Hilton requested the trial court strike Juror 99 for cause based on her daughter's relationship with Taylor's cousins and her knowledge of Brice Taylor's death, a fact the parties had agreed to not discuss during the guilt phase of Hilton's trial due to its irrelevance. In denying the motion, the trial court noted that Juror 99 had limited information about the case and that her words and demeanor demonstrated that she would not be influenced by this knowledge. Later in the *voir dire*, Hilton renewed his motion to strike Juror 99 after she expressed knowledge of the so-called "Brianna Taylor law." The trial court [**24] denied the motion finding that Juror 99's **[*14]** knowledge was limited to knowing that the legislation concerned driving under the influence, but did not know how it related to this case.

The trial court did not abuse its discretion in denying Hilton's motion to strike Juror 99 for cause. Similar to his argument to strike Juror 601, Hilton sought to remove Juror 99 based on her child's relationship with a member of the victim's family. That a family member of a potential juror might have interacted with someone close to the victim of a crime in and of itself is insufficient to warrant the juror's removal. It is obvious that Juror 99's knowledge of Hilton's crimes and related events was limited and her responses clearly indicated a willingness to put that knowledge aside to decide Hilton's case on the evidence presented at trial. *See* Furnish v. Commonwealth, 95 S.W.3d 34, 45 (Ky. 2002) (The fact that a prospective juror may have some knowledge of a case does not establish objective bias.") (*quoting* Foley v. Commonwealth, 953 S.W.2d 924, 932, 44 5 Ky. L.

Summary 13 (Ky. 1997)). Accordingly, the trial court did not err in denying Hilton's motion to excuse Juror 99 from service.

When asked what she had learned about Hilton's crimes from the media, Juror 21 explained that she had heard that there was a vehicle collision allegedly [**25] involving a drunk driver, in which one person was killed and another injured. Additionally, Juror 21 heard that the deceased's brother had been in an accident shortly thereafter. When asked for her feelings about what she had heard, Juror 21 explained that it made her "sad as far as what's happened to the family, to everyone involved." Later she also opined that she was angry that the collision had occurred. She noted that the anger did not arise from the allegations of drunk driving, but rather from the loss itself. Juror 21 explained that it bothered her that people were hurt in this incident, as it does when an injury or death occurs under any circumstance.

After questioning from the trial court, Juror 21 acknowledged that media accounts were not always accurate and that she would rely solely on the information presented in court to determine Hilton's guilt or innocence. Additionally, Juror 21 stated that she had no opinion of Hilton and that she felt that she could be objective. Subsequently, Hilton sought to remove Juror 21 for cause based on her emotional responses about the collision. The trial court denied the request, finding Juror 21 to be objective and, based on her responses, [**26] able to make her decision based on the evidence. As for Juror 21's emotional responses, the trial court noted that was a natural reaction to people being hurt.

Clearly, the trial court did not abuse its discretion in denying Hilton's motion to strike Juror 21 for cause. Juror 21's knowledge of the case was minimal and it was clear that she was prepared to set aside that information and rely only on the evidence presented at trial. As to Juror 21's emotional responses, it is not as Hilton suggests that she had a "state of mind that precluded her from being impartial." Instead, her responses clearly indicate that she attributed no blame to Hilton for the collision, rather a general feeling of sadness and anger at the loss of life. Juror 21's remarks simply reflected a natural reaction and timeless concern for loss in an interconnected world. 12 Accordingly, we find that the trial court did not abuse its **[*15]** discretion when it declined to excuse Juror 21.

When individually questioned about her pre-existing knowledge of the case, Juror 229 stated that she had watched some television coverage, but that she did not remember specific facts about the case. Further, she agreed that media accounts [**27] of events were not always accurate and that she would base her decision as a juror on the evidence presented in court. Also, while she had lived in the area where the collision occurred, she did not know the Taylor family personally. Juror 229 noted that she was aware of fundraisers that had been held for the Taylor family. Also, Juror 229 stated that the victims' families had engaged in some community outreach efforts. Specifically, she had heard from acquaintances of her daughter that the Taylor and Harig families were speaking to high school students about the dangers of drinking and driving.

Hilton requested that Juror 229 be struck for cause due to her knowledge of the Taylors' community outreach efforts. The trial court denied the motion, finding that the juror was not influenced by the limited knowledge that she had and that she could set that information aside in evaluating Hilton's case. Further, the trial court noted that while Juror 229 was aware of the Taylor family's efforts in the community, she did not attach any

particular significance to that activity. It is clear that the trial court did not abuse its discretion in denying Hilton's motion to remove Juror 229 for cause. [**28] Juror 229's knowledge of the case was limited and her responses demonstrated a willingness to set aside that information and decide the case based on the evidence presented at trial. As she was clearly not influenced by her preexisting knowledge, we agree that the trial court acted properly in denying Hilton's motion to remove her for cause.

V. The Trial Court Did Not Abuse Its Discretion in Denying Hilton's Request for a Mistrial.

Hilton contends that the trial court erred by failing to declare a mistrial after the jury learned he had sent letters to Taylor's family while incarcerated pending trial. During the penalty phase of Hilton's trial, David Taylor, the father of Brianna Taylor, was asked if his family had received a letter from Hilton; Taylor responded, "[yes], it came from Nelson County Jail." Despite the prosecutor telling Taylor to "[h]old on a second," Taylor repeated to the jury that "[the letter] came from Nelson County Jail."

Hilton objected and requested a mistrial. Hilton argued that Taylor's statement introduced "inappropriate and irrelevant information." Further, Hilton reminded the trial court that pretrial he had filed a motion for witnesses to testify in accordance [**29] with the rules of evidence and that Taylor's testimony was "exactly the kind of thing I was afraid of at that time." The Commonwealth responded by noting that its witnesses had been instructed not to mention Hilton's incarceration. Also, the Commonwealth argued that the jury had not heard Taylor's statement due to its interjections during Taylor's testimony.

Subsequently, the trial court explained that it had heard Taylor's reference to the Nelson County Jail twice and that the question was what remedy should be used to address this situation. The trial court concluded that a mistrial was not warranted under the circumstances. However, the trial court did offer Hilton an admonition, in which he would order the jury to disregard Taylor's statement. Hilton expressed reservations about the use of an admonition, worrying that it would draw more attention to the statement. Ultimately, while Hilton declined the trial **[*16]** court's offer of an admonition, the trial court decided *sua sponte* to admonish the jury. The trial court stated that "[w]here the letter came from is not germane. You should not give any credibility to that, it's not important in this case as to where the letter came from. So [**30] you are to disregard that." We review the trial court's refusal to grant a mistrial under an abuse of discretion standard. *Shabazz v. Commonwealth*, 153 S.W.3d 806, 811 (Ky. 2005). **13**

A mistrial is "an extreme remedy to be resorted to only when a fundamental defect in the proceedings has rendered a fair trial manifestly impossible." *Bartley v. Commonwealth*, 400 S.W.3d 714, 735 (Ky. 2013) (*citing Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009)). "When an admonitory cure is possible, a mistrial is not required." *Doneghy v. Commonwealth*, 410 S.W.3d 95, 107 (Ky. 2013) (*quoting Shepherd v. Commonwealth*, 251 S.W.3d 309, 318 (Ky. 2008)). Further, the "jury is presumed to follow the trial court's admonition." *Id.* (*quoting Burton v. Commonwealth*, 300 S.W.3d 126, 143 (Ky. 2009)).

There are only two situations in which the trial court's admonition wills not be presumed to cure a reference to inadmissible evidence:

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(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, . . . or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Bartley, 400 S.W.3d at 735 (*quoting Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003) (emphasis and ellipse in original).

Hilton's argument focuses little attention on the trial court's use of an admonition in this case, other than to claim it "exasperated (sic) the harm," by bringing undue attention to Taylor's testimony. Instead Hilton's argument is [**31] replete with citations to cases throughout the country about the deleterious effect to the presumption of innocence where a defendant is bound, handcuffed, or compelled to go to trial in a prison garb. These cases are largely irrelevant to the issue before us.

In the case at bar, the trial court's use of an admonition is presumed to cure Taylor's erroneous reference to inadmissible evidence. Indeed, admonitions have been successfully used both in this Commonwealth and in federal court to address improper testimony about a defendant's prior incarceration. *See United States v. Aichele*, 941 F.2d 761, 765 (9th Cir. 1991) (reversal was not warranted for improper testimony about the defendant's prior incarceration due to trial court's admonition and the strength of the government's case against the defendant); *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005) (trial court did not abuse its discretion where it "refus[ed] to grant a mistrial on the grounds that evidence of [incarceration for] a prior crime was introduced through the non-responsive answer of a witness for the prosecution."). **14**

[*17] Further, our review demonstrates that the exceptions to the use of an admonition do not apply here. As the Commonwealth's question of Taylor was asked with a factual basis—whether his family had received [**32] a letter from Hilton—the second exception does not apply. Nor can we say that the first exception applies as there is no evidence that the jury was unable to follow the court's admonition or that Taylor's statement was "devastating" to Hilton. As noted, the statement occurred in the penalty phase after the jury had found Hilton guilty, lessening its impact. Accordingly, we conclude that the trial court's admonition to the jury was sufficient to cure Taylor's impermissible reference to Hilton's pretrial incarceration.

VI. It Was Harmless Error for the Trial Court to Permit Testimony About What Would Constitute an Appropriate Sentence for Hilton.

Hilton contends that it was error for the trial court to permit the Commonwealth to inquire of a victim and victims' families during the penalty phase what sentence they would like him to receive. **15** Hilton argues that the admission of victim impact evidence is limited to the specific harm caused by the crime and that a victim or a victim's family is not permitted to opine as to what would be an appropriate sentence.

During the penalty phase the Commonwealth questioned Mickayala Harig's mother, Donna McNutt, about how the accident affected her daughter. [**33] During McNutt's testimony,

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the Commonwealth asked, "How long would you like to see the defendant in custody?" Over Hilton's objection, McNutt stated that she would like to see him receive the maximum sentence. A similar sentiment was later expressed by Mickayala Harig and Briana Taylor's parents.

KRS 532.055(2)(a)(7) permits the Commonwealth to present during the penalty phase of the trial "[t]he impact of the crime upon the victim or victims, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims[.]" We review the trial court's decision to admit evidence under an abuse of discretion standard. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006)).

In support of his argument that it was improper for the victim and victims' families to suggest what would constitute an appropriate sentence, Hilton relies upon *Bosse v. Oklahoma*, 580 U.S. , 137 S. Ct. 1, 196 L. Ed. 2d 1 (2016) (*per curiam*). After a jury trial, Bosse was convicted of three counts of first-degree murder. *Id.* at 2. During the penalty phase of his trial, the prosecution was permitted to ask the victims' relatives to recommend a sentence to the jury. *Id.* The victims' relatives recommended death and the jury returned that verdict. *Id.* After Bosse's sentence was affirmed [**34] by the Oklahoma Court of Criminal Appeals, the U.S. Supreme Court accepted certiorari. *Id.*

In vacating the decision of the state appellate court, the *Bosse* Court briefly sketched the recent history of victim impact evidence. In *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 **[*18]** (1987), the Supreme Court held that "the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence," unrelated to the direct circumstances of the crime. *Id.* at 501-02, 507, n.10. Yet, shortly thereafter the Supreme Court reconsidered its position in *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). The *Payne* Court determined that " [v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825. Accordingly, the *Payne* Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827. Notably, the *Payne* Court did not address the portion of *Booth* which held "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* at 830, n.2. However, the Oklahoma Court of Criminal Appeals concluded [**35] that *Payne* implicitly overruled this portion of *Booth*. *Bosse*, 137 S. Ct. at 2.

Admonishing the state appellate court, the *Bosse* Court reiterated that it is the sole prerogative of the Supreme Court to overrule one of its precedents. *Id.* (*citing United States v. Hatter*, 532 U.S. 557, 567, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001)). Further, the *Bosse* Court reiterated that lower courts "remain[] bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban." *Id.*

While it is clear that opinions from the victim's family on what constitutes an appropriate sentence are forbidden in a capital case, the Supreme Court has not addressed whether these opinions are also barred in a non-capital sentencing proceeding. Indeed, the *Booth* Court acknowledged that its

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> disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a non-capital criminal trial.

482 U.S. 496, 507 n.10, 107 S. Ct. 2529, 96 L. Ed. 2d 440. Further, the *Booth* Court explained that its decision [**36] was "guided by the fact death is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations." *Id.* at 509, n.12 (*quoting* *Woodson v. North Carolina*, 428 U.S. 280, 303-304, 305, 96 S. Ct. 2978, 2990-2991, 49 L. Ed. 2d 944 (1976) (plurality opinion)). As such, the *Booth* Court "impl[ied] no opinion as to the use of these statements in noncapital cases." *Id.*

Whether to permit opinions from the victim or victim's family on what constitutes an appropriate sentence in a non-capital penalty phase is an issue of first impression for this Court. **16** After considering this issue, we conclude that the sentencing **[*19]** recommendations made by the victim and victims' families in this case were improperly admitted. While KRS 532.055(2)(a)(7) permits testimony on the impact of the crime upon the victim, by including the "nature and extent of any physical, psychological, or financial harm suffered," expanding this discussion of victim impact to permitting the recommendation of a punishment for the defendant constitutes too broad a reading of the statute. Accordingly, we conclude that the trial court abused its discretion in admitting this evidence.

However, while the trial court erred in [**37] permitting the victim and the victims' families to recommend to the jury a punishment for Hilton, we fail to discern any substantial effect upon his sentence. "A non-constitutional evidentiary error is deemed harmless 'if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.'" *Gaither v. Commonwealth*, 521 S.W.3d 199, 205 (Ky. 2017) (*quoting* *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)). In the case at bar, the jury learned of Hilton's serious criminal history which included multiple prior felony convictions and numerous misdemeanor convictions for driving while under the influence of alcohol. Based on Hilton's criminal history and the serious offenses he was convicted of in this case, we can say with fair assurance that the jury's verdict was not swayed by the testimony of Harig and the family members of the victims.

In closing, while the facts of Hilton's case lead us to conclude that the admission of this evidence was error, but not reversible, under different circumstances, reversal could well be the appropriate remedy. Simply put, prosecutors should avoid this type of evidence.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Hardin Circuit Court.

All sitting. All concur.

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Footnotes

[1] For clarity we will refer to Kyle Hilton as Kyle and Michael Hilton as Hilton.

[2] Hilton contends that the trial court's refusal to grant his motion for change of venue violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Seven, and Eleven of the Kentucky Constitution.

[3] The Commonwealth contends that Hilton waived appellate review of the trial court's denial of his motion for change of venue by failing to renew his motion after *voir dire*. However, our review of the record demonstrates that Hilton renewed his motion at the close of *voir dire* and as such this issue is properly before the Court for adjudication. *Cf.* *Johnson v. Commonwealth*, 892 S.W.2d 558, 562, 41 12 Ky. L. Summary 21 (Ky. 1994) ("The appellant did not renew his motion for a change of venue at any time during this process and accordingly he waived any objection as to venue.").

[4] Brice Taylor died in an automobile accident shortly after leaving a memorial service for his sister.

[5] This daily newspaper, which had the most extensive coverage relevant to the case, had a circulation of only 12,000, less than fifteen percent of the county's population.

[6] Hilton contends that the trial court's refusal to grant his motion to exclude Hall's testimony violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

[7] Hilton contends that the trial court's refusal to grant his motions for a continuance violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution.

[8] Based on the wording of the trial court's order granting a continuance, it appears that the Commonwealth either joined Hilton's motion or made a separate request for a continuance.

[9] Hilton contends that the trial court's refusal to strike these jurors violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two, Seven, and Eleven of the Kentucky Constitution.

[10] At that juncture, the *voir dire* was focused solely on pretrial publicity.

[11] Defense—What if you only knew what you had read in the paper or heard on the news and what the prosecutor presents as evidence in this case, but nothing else, do you have an opinion about the case based on that or maybe Mr. Hilton's guilt based on that?

Juror—No, could you repeat that?

Defense—Sure, I apologize.

Juror—That's okay.

Defense—Based on what you know that youVe heard or read in the paper and evidence that [the prosecutor] would present if it supports what you've heard would you have an opinion about his guilt at that point?

Juror—If he proves it?

Defense—If he presents evidence supporting what you heard in the paper but you didn't hear anything else?

Juror—I'm confused . . . don't understand.

[Crosstalk between juror, defense, and trial court. Trial court advises juror that anytime she does not understand a question, she should ask for it to be restated.]

Defense—Here's what I'm asking, the prosecutor has to prove his case beyond a reasonable doubt what if that's all you heard and you didn't hear any other evidence from me the defense attorney? Based on that based about what you know about the case would you have an opinion about his guilt?

Juror—Probably

Defense—What would that be?

Juror—I would say guilty.

Defense—So you would need to hear something (juror interjects yes) from the defense. Would you need to hear Mr. Hilton testify on his behalf?

Juror—Probably

Defense—If he didn't testify would you then be more likely to find him guilty?

Juror—No probably not.

Defense—Probably not more likely to find guilty.

Juror—Probably not.

Defense—What if he didn't testify?

Juror—I think he should testify

Defense—You think he should.

12 *See* John Donne, Meditation No. XVII, Devotions Upon Emergent Occasions (1623) ("[n]o man is an island, entire of itself . . . any man's death diminishes me, because I am involved in mankind[.]").

13 Hilton erroneously contends that evidence of Hilton's incarceration should not have been admitted and therefore the Court should determine whether the trial court abused its discretion in permitting the admission of this evidence. Notably, the trial court did not permit the admission of evidence of Hilton's incarceration, but rather expressly admonished the jury to disregard that testimony. Accordingly, the Court is not reviewing the admission of this evidence, but whether the trial court's denial of Hilton's motion for a mistrial was an abuse of its discretion.

14 Notably, *Matthews* involved testimony during the guilt phase, while here the jury heard the jail reference in the penalty phase, after having already convicted Hilton.

15 Hilton contends that the trial court's admission of this testimony violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections One, Two, Three, Eleven, Seventeen, and Twenty-Six of the Kentucky Constitution.

16 Hilton cites this Court to *Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012), in which the Court noted in dicta that a witness whose testimony was not deemed to be palpable error did not "allude to the pending penalty decision that the jury would soon be called to make, much less provide a recommendation."

AOC-445 (Modified) DOC. CODE: JSPG
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Commonwealth of Kentucky
Court of Justice

JUDGMENT AND SENTENCE
ON PLEA OF GUILTY

Case No. 14-CR-00427
Court: CIRCUIT
County: HARDIN

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS.

MICHAEL (FIRST) TODD (MIDDLE) HILTON (LAST) (SUFFIX) — DEFENDANT

Date of Birth	SSN	For Youthful Offender: Provide school name and address
11/27/1979	xxx-xx-8299	

Defendant appeared in open court on August 5, 2014 (_____) without counsel (X) with counsel, Honorable DPA. By agreement with the attorney for the Commonwealth, Defendant **entered his plea of not guilty to the following charges contained in the indictment(s):**
(1) Murder, which offense was committed on or about June 22, 2014, when Defendant was 34 years old;
(2) Assault, First Degree, which offense was committed on or about June 22, 2014, when Defendant was 34 years old;
(3) Assault, First Degree, which offense was committed on or about June 22, 2014, when Defendant was 34 years old;
(4) Operating a Motor Vehicle Under the Influence of Intoxicants, First Offense in a Five Year Period, Aggravated, which offense was committed on or about June 22, 2014, when Defendant was 34 years old;
(5) Persistent Felony Offender, First Degree, which offense was committed on or about June 22, 2014, when Defendant was 34 years old;

On June 8 through June 15, 2015, the case was tried before a jury which returned the **following verdict:**

CHARGE	SENTENCE
(1) Murder	Life
(2) Assault, First Degree (PFO 1st)	35 Years
(3) Assault, Second Degree (PFO 1st)	10 Years
(4) Operating a Motor Vehicle Under the Influence of Alcohol Which Impairs Driving Ability	30 Days
(5) Persistent Felony Offender, First Degree	Guilty

(X) For the purpose of **sentencing,** Defendant appeared in open court on August 11, 2015, (_____) without counsel (X) with counsel, Honorable Heather Gatnarek. The Court inquired of Defendant and counsel whether there was any legal cause why judgment should not be pronounced, and afforded Defendant and counsel the opportunity to make statements in Defendant's behalf and to present any information in mitigation of punishment. The Court informed Defendant and counsel of the factual contents and conclusions contained in the written Presentence Investigation Report (PSI) prepared by the Division of Probation and Parole and provided Defendant's attorney with a copy of the PSI although not the sources of confidential information. Defendant agreed with the factual contents of the PSI (with any corrections, if any, noted). Having given due consideration to the PSI prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, as well as the history, character and condition of Defendant, and any matters presented to the Court by the Defendant or counsel, **the Court finds:**

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(X) the Victim, Brianna Taylor, suffered death; the Victim, Mickayla Harig, suffered serious physical injury; and the Victim, Anthony Kyle Hilton, suffered serious physical injury.
(X) The Defendant is hereby declared to be a "violent offender" as defined in KRS 439.3401 and other applicable law.
(X) imprisonment is necessary for protection of the public because:

(X) there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge, Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony.

(X) Defendant is in need of correctional treatment that can be provided most effectively by the Defendant's commitment to a correctional institution;

(X) probation, probation with an alternative sentencing plan or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;

(X) Defendant is ineligible for probation, probation with an alternative sentencing plan or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401 or KRS 533.060;

(_____) Defendant is eligible for probation, probation with an alternative sentencing plan or conditional discharge as hereinafter ordered on AOC-455.

Insufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that Defendant is **GUILTY** of the following charge(s) (include applicable UOR Code):
1. Murder (Life)
2. Assault, First Degree (PFO 1st)(35 Years)
3. Assault, Second Degree (PFO 1st)(10 Years)
4. Operating a Motor Vehicle Under the Influence of Alcohol Which Impairs Driving Ability (30 Days)
5. Persistent Felony Offender, First Degree

A. **Defendant is sentenced to:**

1. **Court Costs, Restitution, Fees and Fines**

Defendant is ORDERED to pay:
(X) Court Costs/Fees - WAIVED (X) Fine(s) waived – indigent

2. **Imprisonment**

In addition to any monetary amount specified above, Defendant is sentenced to
(X) imprisonment for a maximum term of LIFE in DOC _____ _____ (institution) to run (_____) concurrently (X) consecutively with any other sentence, ~~pursuant to plea agreement.~~ 1of1

B. **It is ORDERED that Defendant's bond:**
(_____) be **released.** If bond was posted by Defendant, bond (_____) shall be (_____) shall not be applied to payment of remaining fines and costs; (_____) other _____.

(_____) is **not released** until (_____) further order of the Court (_____) payment of all fines and costs

(_____) other _____

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C. It is further ORDERED that:

(X) Defendant shall be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

(____) Defendant has requested and the Court orders referral to Substance Abuse Program (SAP).

(X) pursuant to KRS 17.170, Defendant having been convicted of a felony offense, shall have a **sample of blood** taken by the Department of Corrections for DNA law enforcement identification purposes and inclusion in law enforcement identification databases.

(X) any and all seized items are forfeited, except for N/A

(X) Defendant is hereby **credited with time spent in custody prior to sentencing,** namely TO BE DETERMINED BY DEPARTMENT OF CORRECTIONS, KRS 532.

THEREUPON, the Court informed the Defendant of his right to an appeal to the Supreme Court of Kentucky, with the assistance of counsel; and, of his right to a free appeal, including free counsel and free transcript, if he could not afford same.

Date: Aug 11, 2015

Judge's Signature

Copies to: Defendant / Attorney; Prosecutor; Probation & Parole; Sheriff (2 certified copies if Defendant sentenced to death or confinement); Principal, _____ School (if Defendant is youthful offender).

SHERIFF'S RETURN

ENTERED: 8-17-15
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/DIST COURT
BY: _____ D.C.

Served on Defendant named herein on _____

Not served because: Cl: CWPT

PP H. Gatwaker

Date: _____, ____ Officer: HCDC Warden HCSO

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HARDIN CIRCUIT COURT

DIVISION II

CASE NO. 14-CI-00427

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER

MICHAEL TODD HILTON DEFENDANT

* * * * *

After the close of evidence on the second day (June 10, 2015) of the Commonwealth's case in chief (eleven of nineteen witnesses had completed their testimony and were released from their subpoena with agreement of the defense), the Defendant for the first time tendered in open court, outside the presence of the jury, a "Notice of Expert Opinion". The Commonwealth vigorously objected and moved to exclude such expert opinion as not being timely disclosed. The disclosure indicated that Nurse Wendy Milliner would "discuss several issues that arose during [Brianna] Taylor's care that raise concerns and perhaps contributed to her death." (emphasis added) The Court excluded from trial said expert opinion in a ruling on the record the

Appendix J

morning of June 11, 2015. Milliner testified by avowal on June 11, 2015. Milliner's opinions were based solely on her review of Brianna Taylor's medical records. The Court reaffirmed its ruling on the record after the avowal testimony.

The following timeline of relevant events to this issue were stated on the record:

A. At the arraignment of the Defendant on August 6, 2014 the Commonwealth provided to the defense initial discovery including 532 pages of medical records of the victims. Brianna Taylor's medical records (utilized by Milliner) consisted of 230 pages of this initial discovery.

B. At the arraignment of the Defendant on August 6, 2014 the Court entered an Order of Discovery relating to both the Commonwealth and Defendant.

C. On October 7, 2014 the Commonwealth disclosed the Death Certificate issued for Brianna Taylor.

D. On March 24, 2015 the Court entered an Order pursuant to RCr 7.24(3)(a), without objection by the Defendant as follows:

IT IS HEREBY ORDERED that the defendant shall supply the Commonwealth with the identity of any expert they intend to call at trial;

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IT IS HEREBY FURTHER ORDERED that the defendant shall also include a written summary including the expert's opinion, qualifications, and the basis and reasons for those opinions.

IT IS HEREBY FURTHER ORDERED that the above matter shall be tendered to the Commonwealth no later than 30 days prior to the trial date. [Jury trial scheduled to begin on June 8, 2015].

E. Due to the necessity of a Court Order dated March 24, 2015 the parties did not receive the medical records of Mickayla Harig and Anthony Hilton until May 15, 2015.

F. On May 28, 2015 the Defendant made an oral motion to continue the June 8, 2015 trial on the ground that additional time was needed by counsel to review the medical records of Mickayla Harig and Anthony Hilton. For reasons stated on the record, the Court denied the motion but in an ex parte hearing (disclosed by the defense during trial) authorized KRS Chapter 31 funds to retain a medical professional (Milliner) to review said medical records to prepare for trial or as a basis for a renewed motion to continue the trial.

Since the defense was in possession of Brianna Taylor's medical records which formed the basis of Milliner's opinions for ten (10) months prior to trial, the Court held that the Defendant did not establish good cause why he should be excused from compliance with the March 24, 2015 Order.

Additionally, Milliner testified on avowal that she was "not second guessing" Dr. Jason Smith's (U of L Trauma Surgeon)

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testimony as Brianna Taylor's treating physician that she received life threatening injuries as a result of the collision; that she received proper medical care by the emergency responders; and that she died as a result of poly-trauma and blood loss caused by the collision. Thus, as a matter of law, Milliner's testimony did not constitute a defense to legal causation provided in KRS 501.060. See *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2000).

This 17th day of June 2015.

ENTERED: 6-18-15
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/DIST COURT
BY: _____ D.C.

CC: CW
H Gatnarek

Ken M. Howard
Judge, Hardin Circuit Court
Division II

J-4

COMMONWEALTH OF KENTUCKY
HARDIN COUNTY CIRCUIT COURT
DIVISION II
14-CR-427

FILED IN OPEN COURT: PLAINTIFF
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/DIST COURT
BY: D.C.
10·15

COMMONWEALTH OF KENTUCKY

VS.

MICHAEL TODD HILTON DEFENDANT

NOTICE OF EXPERT OPINION

****

Comes now the Defendant, Michael Todd Hilton, and pursuant to RCr 7.24 gives notice of his intention to introduce expert testimony in this matter. Specifically, Mr. Hilton intends to introduce the testimony of Wendy Milliner, a trauma and emergency care nurse, to testify regarding the medical care given to the victims in this case. A summary of her testimony follows:

Brianna Taylor received care that did not comport with the standard of care for emergency medical personnel. Specifically, Ms. Milliner will discuss several issues that arose during Ms. Taylor's care that raise concerns and perhaps contributed to her death. The Hardin County EMS team that initially treated Ms. Taylor did not attempt an oral intubation, and rather immediately nasally intubated her at the scene. Nasal intubation is a contraindication in an individual with severe facial trauma, as Ms. Taylor had. The result of this is that the breathing tube that was placed in Ms. Taylor did not provide oxygen to both lungs. The second concern Ms. Milliner will discuss is that Ms. Taylor was provided fentanyl by the Air Methods flight crew who transported her to the University of Louisville Hospital. This was not reported to the emergency medical personnel at the University of Louisville. Fentanyl is a pain medication, which can have an adverse reaction of lowering blood pressure. Ms. Taylor's blood pressure was

Appendix K -

extremely low; in fact, the flight crew could not get a reading. The administration of fentanyl likely exacerbated this problem. Further, fentanyl was improper under these circumstances, where medical personnel reported that Ms. Taylor was not responding to pain. The flight crew also reported ventilator settings that were inappropriate for Ms. Taylor's condition, and these were most likely detrimental to her survival and were not reported accurately to Emergency Room staff. Finally, at the University of Louisville Hospital, a chest tube was placed in Ms. Taylor, but it was most likely inadvertently pulled out of the lung during transport to the operating room, and the issue was not detected until after a tracheostomy tube was placed.

A copy of Ms. Milliner's CV is attached.

Respectfully submitted,

Heather Gatnarek
Department of Public Advocacy
207 Parker Dr., Suite B
LaGrange, Kentucky 40031
(502) 222-2662
heather.gatnarek@ky.gov

ATTORNEY FOR MR. HILTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been emailed to Hon. Chris McCrary, Assistant Commonwealth Attorney, cmccrary@prosecutors.ky.gov, 54 Public Square, Elizabethtown, KY 42702, this 10th day of June, 2015.

Heather Gatnarek

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20-CV-00769-RGJ-HBB

MICHAEL TODD HILTON — PETITIONER

VS.

DANIEL AKER, WARDEN — RESPONDENT

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR HABEAS CORPUS

Comes Petitioner, Michael Hilton, pro se, pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.) 15, and moves this Honorable Court for leave to supplement his petition for habeas coprus. As grounds, Petitioner states as follows:

INTRODUCTION

Petitioner is not intending for this supplement to replace his petition for habeas corpus, but to be considered in conjunction with his petition and objections to Magistrate Judge Brennenstuhl report and recommendation. The purpose of this supplement is to request application of de novo review as governed by pre AEDPA standards and deny deference to the state courts determinations on his claims governed by the Strickland standard. Petitioner makes this request due to the recent case of Ford v. Commonwealth, 2021 Ky. LEXIS 299, 2021 WL 3828505 (Ky. August 26, 2021) (attached) which exemplifies the long standing policy of Kentucky to quote Strickland as the appropriate standard in which to review claims of ineffective assistance of counsel (IAC) but in practice to apply a more stringent standard of review. This same practice can be seen in the Kentucky Court of Appeals denial of Petitioner's claims. Hilton v. Commonwealth, 603 S.W.3d 864 (Ky. App. 2020).

Appendix L

PROCEDURAL HISTORY

Petitioner filed his petition for habeas corpus pursuant to 28 U.S.C. § 2254 on April 14, 2021, and the Attorney General's Office submitted a response. On May 20, 2021, Magistrate Judge Brennenstuhl filed his Report and Recommendation (R & R) to deny Petitioner's six claims for relief and to deny a certificate of appealability (COA). Petitioner submitted his objections to Magistrate Judge Brennenstuhl's R & R on July 07, 2021. The Respondent has not submitted any objections the R & R, nor a response to the objections submitted by Petitioner.

LEAVE TO SUPPLEMET

A petition for habeas corpus may be amended or supplemented as provided in the rules of procedure applicable to civil actions. 28 U.S.C. § 2242; Mayle v. Felix, 545 U.S. 644, 655 (2005) (providing that Rule 15 is "made applicable to habeas proceedings by § 2242, Federal Rules of Civil Procedure 81(a)(2), and Habeas Corpus Rule 11").

Rule 15(d), governs the submission of supplemental pleadings. This Rule provides that upon the motion of a party, "the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d); Cooper v. Bower, 2017 U.S. Dist. LEXIS 122981, *3, 2017 WL 3389521, *1 (W.D. Ky. 2017). The standard for granting leave to supplement under Rule 15(d) is the same as the standard governing leave to amend under Rule 15(a)(2). Id. Ultimately the decision of whether to permit a supplemental pleading is within this Court's discretion. Id. As explained in Cooper, "[i]n every instance, the exercise of this discretion must be guided by the animating principle behind Rule 15(d), which is to make pleadings a means to achieve an orderly and fair administration of justice.'" Van Hayes v. Mich. Dep't of Corr., 2021 U.S. Dist. LEXIS 141525, *13, 2021 WL 3231736 (E.D. Mich. 2021).

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ARGUMENT

In his R & R, Magistrate Judge Brennenstuhl found the state courts identified the correct legal standard and the determinations were not an unreasonable application of the Strickland standard. Because Kentucky has implemented a long standing policy of reciting the correct words of Strickland but in practice to apply a standard contrary to the United States Supreme court's clearly established precedent, the state courts judgments by de facto cannot be a reasonable application of the Strickland standard.

No differently the recitation of Strickland in Petitioner's case is undercut by the court's lack of prejudice finding key testimony would not have exonerated him. Hilton v. Commonwealth, 603 S.W.3d 864, 871 (Ky. App. 2020) (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). The Strickland standard neither requires acquittal nor exoneration. Tinsley v. Million, 399 F.3d 796, 807 (6th Cir. 2005) (a state's court use of a "would have compelled acquittal" formulation is "contrary to" federal law).

Strickland and its progeny have clearly established the two prong test used for review of claims of IAC and ineffective assistance of appellate counsel (IAAC). Chavez v. United States, 568 U.S. 342, 348 (2013) (Strickland "provides sufficient guidance for resolving virtually all claims of ineffective assistance"). A petitioner must demonstrate (1) deficient performance by counsel, and (2) counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

> To show constitutionally-ineffective assistance, a defendant must first show that his attorney's conduct fell below an objective standard of reasonableness. Counsel's conduct is objectively

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> unreasonable under Strickland if, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.
>
> Second a defendant must demonstrate that counsel's professionally unreasonable errors prejudiced his defense. In other words, he must show that there is a reasonable probability that but for counsel's errors, the jury would have found reasonable doubt. A reasonable probability does not mean that it is more likely than not that the outcome would have been different.

United States v. Arny, 137 F. Supp. 3d 981, 987, 990-91 (E.D. Ky. 2015).

A reasonable probability has been determined to mean an outcome of which the confidence has been undermined. Strickland, 466 U.S., at 694. During the guilt phase of a trial to undermine the confidence of the outcome means a reasonable probability to show that at least one juror would have struck a different balance. Wiggins, 539 U.S. 510, 537 (2003); Ramonez v. Berghuis, 490 F.3d 482, 491 (6th Cir. 2007). "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).

In contrast Kentucky has deemed satisfying the Strickland standard is not stringent enough to justify the "extraordinary relief" afforded by the post-conviction proceedings provided in RCr 11.42. Bratcher v. Commonwealth, 406 S.W.3d 865, 877 (Ky. App. 2012) citing Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968). The Dorton Court emphasized the controlling precedent of extraordinary relief must do more than raise a doubt about the regularity of the proceedings. Id. 433 S.W.2d at 118 ("Again, we wish to emphasize the word extraordinary"), citing Commonwealth v. Campbell, 415 S.W.2d 614 (Ky. 1967)). This precedent in Campbell propelled through time and applied in Bratcher, did not contemplate the reasonable doubt

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enunciated in Strickland but rather the "shock the conscience of the court or render the proceedings a farce and a mockery of justice" Campbell, 415 S.W.2d at 516.

The defiance by Kentucky to follow the Strickland standard cannot be more pronounced than in the recent case of Ford v. Commonwealth, 2021 Ky. LEXIS 299, 2021 WL 3828505 (Ky. August 26, 2021) (To be published).

Immediately after citing Strickland, the Court in Ford intermingles how the standard will be applied with Kentucky's RCr 11.42 proceedings. Id., at *17. While saying the right words the authority cited renders a different meaning. Id., citing Bratcher and Dorton, supra. The Court then sets all pretense aside and recites the harshness of the true Kentucky standard.

> As we have previously explained,
>
> setting aside a conviction just because counsel's error may have caused a different outcome gives the defendant too great of an advantage. . . . 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, at *18-19 quoting Brown v. Commonwealth, 253 S.W.3d 490, 499 (Ky. 2008).[1]

The Ford and Brown Courts are expressively clear, the reasonable probability standard of Strickland gives the defendant to great an advantage. The defendant must prove he lost what would have been won and that his freedom was snatched from the hands of victory. The language

1 Other published cases since 2000 requiring IAC may only be granted upon showing the defendant to lose what he otherwise would probably have won and that defeat was snatched from the hands of probable victory include: Simmons v. Commonwealth, 191 S.W.3d 557, 561 (Ky. 2006); Commonwealth v. Tarrance, 83 S.W.3d 465, 470 (Ky. 2002); Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000); Vincent v. Commonwealth, 584 S.W.3d 752, 768-69 (Ky. App. 2019); Fegan v. Commonwealth, 566 S.W.3d 234, 238 (Ky. App. 2018); Cherry v. Commonwealth, 545 S.W.3d 318, 323 (Ky. App. 2018); Bratcher v. Commonwealth, 406 S.W.3d 865, 869 (Ky. App. 2012); Fegley v. Commonwealth, 337 S.W.3d 657, 659 (Ky. App. 2011).

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of the Ford Court is identical to the wording used by the Ohio court of appeals which was condemned by the Sixth Circuit. Vasquez v. Bradshaw, 345 Fed. Appx. 104, 110-12 (6th Cir. 2009) cert., denied 562 U.S. 946 (2010) (The Ohio Court of Appeals, to be sure, cited Strickland and identified a two-part test, but stated that prejudice occurs only when the result would have been different. It framed its rejection of Vasquez's appeal in terms of a changed-outcome. This formulation puts a greater burden on the petitioner.)

Interpreting §2254(d), the Supreme Court explained as a paradigmatic example of an application of law contrary to clearly established federal law:

> A state court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law . . . . Take, for example, our decision in Strickland. If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to the Court's clearly established precedent because it held in Strickland that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.'

Williams v. Taylor, 529 U.S. 362, 405-06 (2001) (internal citations omitted).

Even though a state court correctly delineates the Strickland standard, its decision is contrary to federal law when the court applies an incorrect burden of proof. West v. Bell, 550 F.3d 542, 552 (6th Cir. 2008). "Different standards make for different outcomes." Vasquez, 345 Fed. Appx., at 112. Habeas Courts are unconstrained by the AEDPA when the state court applies an incorrect burden of proof and de novo review is appropriate. Fulcher v. Motley, 444 F.3d 791, 799 (6th Cir. 2006).

Two claims presented by Petitioner in his request for habeas relief are governed by the

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Strickland standard. (Claim I – IAC, and Claim II – IAAC). The Kentucky Court of Appeals chose not to address the performance of counsel, and instead disposed of the claims based on lack of prejudice suffered. Hilton, 603 S.W.3d at 870.[2] In the opinion rendered the Kentucky Court of Appeals recited the text book standard pronounced in Strickland. Hilton, 603 S.W.3d at 868-69. However the wording and tone of the opinion demonstrate review under Kentucky's harsher standard which is contrary to Strickland. The culmination of the appellate court's prejudice determination rested on the "exoneration" of Petitioner. Hilton, 603 S.W.3d at 871. In the literal sense exoneration is a higher standard than acquittal. Both require the burden of a change in outcome. Neither follow the reasonable probability standard which includes the possibility of one juror striking a different balance. Wiggins, 539 U.S., at 537.

In Petitioner's case Kentucky's belief it is following the reasonable probability of Strickland is predicated on a cite to the out of context quote from Harrington v Richter, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable"). Hilton, 603 S.W.3d at 868. The same quote originating in Strickland was addressed in context with the reasonable probability of a different result simplest by the First Circuit.

> 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. See *Strickland, 466 U.S. at 693* (explaining that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case").

Ouber v. Guarino, 293 F.3d 19, 25-26 (1st Cir. 2002).

However, Kentucky has rationed out the "substantial" to mean prejudice requiring an affirmative showing of a different result. "To establish Strickland prejudice, the claimant must

2 Claim I is based on counsel's failure to meet a pretrial filing deadline imposed by the court. The non-discussion of counsel's deficient performance makes the standard used to judge prejudice all the more important.

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initially allege and ultimately show that absent counsel's error a meaningfully different result was a substantial likelihood, more likely than not or very nearly so." Commonwealth v. Pridham, 394 S.W.3d 867, 880 (Ky. 2012).[3] The departure from the true Strickland standard is accentuated by the court requiring Petitioner's exoneration. The use of exoneration was not a slip of the pen or a misstep in citing to Strickland, it is a core belief held by Kentucky and the panel presiding over Petitioner's case. (Judges Acree, Dixon, and Jones). Writing for the panel, Judge Dixon also wrote the opinion in Gray[4] requiring a justification for extraordinary relief, and Patton[5] requiring that defeat was snatched from the hands of probable victory. The same disposition is found in Judge Jones' writing for the court in Baker[6], and Judge Acree's writing in Jenkins[7].

The Kentucky Court of Appeals required Petitioner to demonstrate prejudice in terms of changed outcome, i.e. that he would have been acquitted. The court's cite to Pridham and the panel's other written opinions clearly establish a requirement to make a showing of prejudice in excess of that required by Strickland. The circumstances of Vasquez in which the Sixth Circuit

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3 Pridham is another example of how Kentucky intermingles the Strickland standard in its opinions but departs during its analysis. c.f. Pridham, 394 S.W.3d at 875 "This does not require a showing that counsel's actions more likely than not altered the outcome" with above quoted in the prejudice analysis.

4 Gray v. Commonwealth, 2019 Ky. App. Unpub. LEXIS 99, *4. 2019 WL 643969 (Opinion by: Dixon) "On a motion for postconviction relief pursuant to RCr 11.42, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify . . . extraordinary relief . . ." *Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968)*).

5 Patton v. Commonwealth, 2021 Ky. App. Unpub. LEXIS 486, *10, 2021 WL 3686371 (Opinion by: Dixon) (caused the defendant to lose what he otherwise would probably have won and whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Quoting Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001)*).

6 Baker v. Commonwealth, 2021 Ky. App. Unpub. LEXIS 435,*4 & 8, 2021 WL 3685380 (Opinion by: Jones) ("the Defendant raises some arguable points as to counsel's performance, but none rise [sic] to the level of affording the Defendant the extraordinary relief of which [sic] he asks." Id., *4. "[C]ounsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Brown v. Commonwealth, 253 S.W.3d 490, 499 (Ky. 2008)*. Id., at *8).

7 Jenkins v. Commonwealth, 2019 Ky. App. Unpub. LEXIS 669, *4 (Opinion by: Acree) ("To establish . . . prejudice, the claimant must . . . show that absent counsel's error a meaningfully different result was a substantial likelihood, more likely than not or very nearly so." *Pridham, 394 S.W.3d at 880 (Ky. 2012)*." (attached per Sixth Circuit Rule 32.1).

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discusses Ohio's citation to "reasonable probability" and Strickland but actually described and applied a different standard is indistinguishable from Petitioner's case. Vasquez, 345 Fed. Appx., at 112. Consequently Kentucky applied law that is contrary to clearly established federal law.

CONCLUSION

Binding precedent in Kentucky is clear, to prove prejudice from ineffective assistance of counsel the petitioner must prove beyond a shadow of a doubt the outcome of the proceeding would have been different. Only then may the extraordinary relief indicative of post conviction proceedings be granted. The Kentucky Court of Appeals applied the binding precedent requiring Petitioner to substantiate exoneration before prejudice could be found. The Kentucky Courts practice to apply a more stringent standard than that required by Strickland substantially affected its analysis and conclusions of Petitioner's claims. Fundamental fairness demands denying the state deference and reviewing Petitioner's claims de novo.

WHEREFORE, Petitioner respectfully requests this Honorable Court grant him leave to file this supplement. Further Petitioner request the Court conduct a de novo review his ineffective assistance of trial and appellate counsel claims as presented in his petition, objections, and this supplement; reject Magistrate Judge Brennenstuhl's Report and Recommendation, and enter an order finding Petitioner was convicted in violation of his rights as protected by the United States Constitution, and grant him relief through issuance of a writ of habeas corpus.

Respectfully Submitted,
On this ____ day of September, 2021.

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

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2010 KRS § 189A.010

Copy Citation

2010 Kentucky Code Archive

KENTUCKY REVISED STATUTES ANNOTATED TITLE XVI Motor Vehicles CHAPTER 189A Driving Under the Influence

189A.010. Operating motor vehicle with alcohol concentration of or above 0.08, or of or above 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 test results -- Presumption -- Penalties -- Aggravating circumstances.

(1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:

(a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

(b) While under the influence of alcohol;

(c) While under the influence of any other substance or combination of substances which impairs one's driving ability;

(d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

(e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or

(f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).

(2) With the exception of the results of the tests administered pursuant to KRS 189A.103(7), if the sample of the person's blood or breath that is used to determine the alcohol concentration thereof was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(a) or (f) of this section. The results of the test or tests, however, may be admissible in a prosecution under subsection (1)(b) or (e) of this section.

(3) In any prosecution for a violation of subsection (1)(b) or (e) of this section in which the defendant is charged with having operated or been in physical control of a motor vehicle while under the influence of alcohol, the alcohol concentration in the defendant's blood as determined at the time of making analysis of his blood or breath shall give rise to the following presumptions:

(a) If there was an alcohol concentration of less than 0.05 based upon the definition of alcohol concentration in KRS 189A.005, it shall be presumed that the defendant was not under the influence of alcohol; and

(b) If there was an alcohol concentration of 0.05 or greater but less than 0.08 based upon the definition of alcohol concentration in KRS 189A.005, that fact shall not constitute a presumption that the defendant either was or was not under the influence of alcohol, but that fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant.

The provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the questions of whether the defendant was under the influence of alcohol or other substances, in any prosecution for a violation of subsection (1)(b) or (e) of this section.

Appendix M

(4)

(a) Except as provided in paragraph (b) of this subsection, the fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.

(b) A laboratory test or tests for a controlled substance shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice.

(5) Any person who violates the provisions of paragraph (a), (b), (c), (d), or (e) of subsection (1) of this section shall:

(a) For the first offense within a five (5) year period, be fined not less than two hundred dollars ($200) nor more than five hundred dollars ($500), or be imprisoned in the county jail for not less than forty-eight (48) hours nor more than thirty (30) days, or both. Following sentencing, the defendant may apply to the judge for permission to enter a community labor program for not less than forty-eight (48) hours nor more than thirty (30) days in lieu of fine or imprisonment, or both. If any of the aggravating circumstances listed in subsection (11) of this section are present while the person was operating or in physical control of a motor vehicle, the mandatory minimum term of imprisonment shall be four (4) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(b) For the second offense within a five (5) year period, be fined not less than three hundred fifty dollars ($350) nor more than five hundred dollars ($500) and shall be imprisoned in the county jail for not less than seven (7) days nor more than six (6) months and, in addition to fine and imprisonment, may be sentenced to community labor for not less than ten (10) days nor more than six (6) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be fourteen (14) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(c) For a third offense within a five (5) year period, be fined not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000) and shall be imprisoned in the county jail for not less than thirty (30) days nor more than twelve (12) months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than ten (10) days nor more than twelve (12) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be sixty (60) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(d) For a fourth or subsequent offense within a five (5) year period, be guilty of a Class D felony. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be two hundred forty (240) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of release; and

(e) For purposes of this subsection, prior offenses shall include all convictions in this state, and any other state or jurisdiction, for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(f) of this section. A court shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction.

(6) Any person who violates the provisions of subsection (1)(f) of this section shall have his driving privilege or operator's license suspended by the court for a period of no less than thirty (30) days but no longer than six (6) months, and the person shall be fined no less than one hundred dollars ($100) and no more than five hundred dollars ($500), or sentenced to twenty (20) hours of community service in lieu of a fine. A person subject to the penalties of this subsection shall not be subject to the penalties established in subsection (5) of this section or any other penalty established pursuant to KRS Chapter 189A, except those established in KRS 189A.040(1).

(7) If the person is under the age of twenty-one (21) and there was an alcohol concentration of 0.08 or greater based on the definition of alcohol concentration in KRS 189A.005, the person shall be subject to the penalties established pursuant to subsection (5) of this section.

(8) For a second or third offense within a five (5) year period, the minimum sentence of imprisonment or community labor shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a fourth or subsequent offense under this section, the minimum term of imprisonment shall be one hundred twenty (120) days, and this term shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a second or subsequent offense, at least forty-eight (48) hours of the mandatory sentence shall be served consecutively.

(9) When sentencing persons under subsection (5)(a) of this section, at least one (1) of the penalties shall be assessed and that penalty shall not be suspended, probated, or subject to conditional discharge or other form of early release.

(10) In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered.

(11) For purposes of this section, aggravating circumstances are any one (1) or more of the following:

(a) Operating a motor vehicle in excess of thirty (30) miles per hour above the speed limit;

(b) Operating a motor vehicle in the wrong direction on a limited access highway;

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(c) Operating a motor vehicle that causes an accident resulting in death or serious physical injury as defined in KRS 500.080;

(d) Operating a motor vehicle while the alcohol concentration in the operator's blood or breath is 0.15 or more as measured by a test or tests of a sample of the operator's blood or breath taken within two (2) hours of cessation of operation of the motor vehicle;

(e) Refusing to submit to any test or tests of one's blood, breath, or urine requested by an officer having reasonable grounds to believe the person was operating or in physical control of a motor vehicle in violation of subsection (1) of this section; and

(f) Operating a motor vehicle that is transporting a passenger under the age of twelve (12) years old.

(12) The substances applicable to a prosecution under subsection (1)(d) of this section are:

(a) Any Schedule I controlled substance except marijuana;

(b) Alprazolam;

(c) Amphetamine;

(d) Buprenorphine;

(e) Butalbital;

(f) Carisoprodol;

(g) Cocaine;

(h) Diazepam;

(i) Hydrocodone;

(j) Meprobamate;

(k) Methadone;

(l) Methamphetamine;

(m) Oxycodone;

(n) Promethazine;

(o) Propoxyphene; and

(p) Zolpidem.

History

(Enact. Acts 1984, ch. 165, § 1, effective July 13, 1984; 1991 (1st Ex. Sess.), ch. 15, § 2, effective July 1, 1991; 1996, ch. 198, § 10, effective October 10, 1996; 1998, ch. 124, § 8, effective July 15, 1998; 1998, ch. 606, § 171, effective July 15, 1998; 2000, ch. 467, § 2, effective October 1, 2000; 2002, ch. 183, § 19, effective August 1, 2002; 2010, ch. 149, § 17, effective July 15, 2010.)

2016 KRS § 189A.010

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Michie's TM Kentucky Revised Statutes TITLE XVI Motor Vehicles CHAPTER 189A Driving Under the Influence

189A.010. Operating motor vehicle with alcohol concentration of or above 0.08, or of or above 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 test results -- Presumption -- Penalties -- Aggravating circumstances.

(1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:

(a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

(b) While under the influence of alcohol;

(c) While under the influence of any other substance or combination of substances which impairs one's driving ability;

(d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;

(e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or

(f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).

(2) With the exception of the results of the tests administered pursuant to KRS 189A.103(7), if the sample of the person's blood or breath that is used to determine the alcohol concentration thereof was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(a) or (f) of this section.

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blood as determined at the time of making analysis of his blood or breath shall give rise to the following presumptions:

(a) If there was an alcohol concentration of less than 0.05 based upon the definition of alcohol concentration in KRS 189A.005, it shall be presumed that the defendant was not under the influence of alcohol; and

(b) If there was an alcohol concentration of 0.05 or greater but less than 0.08 based upon the definition of alcohol concentration in KRS 189A.005, that fact shall not constitute a presumption that the defendant either was or was not under the influence of alcohol, but that fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant.

The provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the questions of whether the defendant was under the influence of alcohol or other substances, in any prosecution for a violation of subsection (1)(b) or (e) of this section.

(4)

(a) Except as provided in paragraph (b) of this subsection, the fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.

(b) A laboratory test or tests for a controlled substance shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice.

(5) Any person who violates the provisions of paragraph (a), (b), (c), (d), or (e) of subsection (1) of this section shall:

(a) For the first offense within a ten (10) year period, be fined not less than two hundred dollars ($ 200) nor more than five hundred dollars ($ 500), or be imprisoned in the county jail for not less than forty-eight (48) hours nor more than thirty (30) days, or both. Following sentencing, the defendant may apply to the judge for permission to enter a community labor program for not less than forty-eight (48) hours nor more than thirty (30) days in lieu of fine or imprisonment, or both. If any of the aggravating circumstances listed in subsection (11) of this section are present while the person was operating or in physical control of a motor vehicle, the mandatory minimum term of imprisonment shall be four (4) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(b) For the second offense within a ten (10) year period, be fined not less than three hundred fifty dollars ($ 350) nor more than five hundred dollars ($ 500) and shall be imprisoned in the county jail for not less than seven (7) days nor more than six (6) months and, in addition to fine and imprisonment, may be sentenced to community labor for not less than ten (10) days nor more than six (6) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be fourteen (14) days, which term shall not be

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may, in addition to fine and imprisonment, be sentenced to community labor for not less than ten (10) days nor more than twelve (12) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be sixty (60) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(d) For a fourth or subsequent offense within a ten (10) year period, be guilty of a Class D felony. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be two hundred forty (240) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of release; and

(e) For purposes of this subsection, prior offenses shall include all convictions in this state, and any other state or jurisdiction, for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(f) of this section. A court shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction.

(6) Any person who violates the provisions of subsection (1)(f) of this section shall have his driving privilege or operator's license suspended by the court for a period of no less than thirty (30) days but no longer than six (6) months, and the person shall be fined no less than one hundred dollars ($ 100) and no more than five hundred dollars ($ 500), or sentenced to twenty (20) hours of community service in lieu of a fine. A person subject to the penalties of this subsection shall not be subject to the penalties established in subsection (5) of this section or any other penalty established pursuant to KRS Chapter 189A, except those established in KRS 189A.040(1).

(7) If the person is under the age of twenty-one (21) and there was an alcohol concentration of 0.08 or greater based on the definition of alcohol concentration in KRS 189A.005, the person shall be subject to the penalties established pursuant to subsection (5) of this section.

(8) For a second or third offense within a ten (10) year period, the minimum sentence of imprisonment or community labor shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a fourth or subsequent offense under this section, the minimum term of imprisonment shall be one hundred twenty (120) days, and this term shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a second or subsequent offense, at least forty-eight (48) hours of the mandatory sentence shall be served consecutively.

(9) When sentencing persons under subsection (5)(a) of this section, at least one (1) of the penalties shall be assessed and that penalty shall not be suspended, probated, or subject to conditional discharge or other form of early release.

(10) In determining the ten (10) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered.

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(c) Operating a motor vehicle that causes an accident resulting in death or serious physical injury as defined in KRS 500.080;

(d) Operating a motor vehicle while the alcohol concentration in the operator's blood or breath is 0.15 or more as measured by a test or tests of a sample of the operator's blood or breath taken within two (2) hours of cessation of operation of the motor vehicle;

(e) Refusing to submit to any test or tests of one's blood, breath, or urine requested by an officer having reasonable grounds to believe the person was operating or in physical control of a motor vehicle in violation of subsection (1) of this section; and

(f) Operating a motor vehicle that is transporting a passenger under the age of twelve (12) years old.

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