No. 24-___

IN THE

Supreme Court of the United States

KENNETH KELLEY,

Petitioner,

v.

WILLIAM S. BOHRER, Acting Warden;
MARYLAND ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 30, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In a Maryland state court, Petitioner pled guilty to a 28-count indictment arising from a drunk driving accident. The indictment charged Petitioner with four distinct vehicular homicide crimes under Maryland law. The state court record showed that before Petitioner entered his plea, no one—not his counsel, not the court, nor the prosecution—explained to Petitioner the *mens rea* element, gross negligence, for the most serious vehicular homicide charge to which he pled. No other source explained this critical element. The United States District Court for the District of Maryland granted habeas relief pursuant to 28 U.S.C. § 2254(d) on the ground that his plea was not intelligent, but the Fourth Circuit reversed, holding that this Court's precedent did not require an explanation or understanding of the *mens rea* element of the most serious charge or the differences among the state vehicular homicide offenses. The question presented is:

Does this Court's clearly established precedent require an explanation and understanding of the elements of each charge to which a defendant pleads guilty for the plea to be valid?

STATEMENT OF RELATED PROCEEDINGS

Circuit Court for Prince George's County, Maryland:

State of Maryland v. Kenneth Kelley, No. CT150626X (Plea: March 27, 2017; Sentencing: July 9, 2017). Post-Conviction Judgment: May 18, 2020.

Court of Special Appeals of Maryland (now Appellate Court of Maryland):

Kenneth Kelley v. State of Maryland, No. CSA-REG-00860-2017. Judgment: October 30, 2017.

Kenneth Kelley v. State of Maryland, No. CSA-ALA-0511-2020. Judgment: November 5, 2020.

United States District Court for the District of Maryland:

Kenneth Kelley v. William S. Bohrer, Acting Warden, Maryland Attorney General, Civil Action No. GJH-20-03697. Judgment: January 25, 2023.

United States Court of Appeals for the Fourth Circuit:

Kenneth Kelley v. William S. Bohrer, Acting Warden; Maryland Attorney General, No. 23-6179. Judgment: February 28, 2024.

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Each year millions of Americans give up an array of constitutional rights—to remain silent; to confront the witnesses against them; to a trial by jury, to name a few—when convicted through entry of a guilty plea. In doing so, however, a defendant's right to due process protected by the Fourteenth Amendment cannot be sacrificed. This Court has long held that a defendant's plea cannot be voluntary under the Fourteenth Amendment as "an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Because today nearly all criminal cases are resolved through a guilty plea—at least 94% in state courts—ensuring such "real notice" is even more important than when *Henderson* and *Smith* were decided.

Here, the record clearly demonstrates there was no real notice concerning a critical element of the most serious offense to which Petitioner pled guilty. Petitioner, who has a tenth-grade education, pled guilty in the Circuit Court for Prince George's County, Maryland, to a 28-count indictment stemming from a drunk driving accident resulting in five deaths. The charges included four distinct vehicular homicide offenses with different elements and penalties along a continuum of culpability. The most serious offense, manslaughter by vehicle under Md. Crim. Law § 2-209 (2002), required "gross negligence," while lesser offenses required "criminal negligence," under Md.

Crim. Law § 2-210 (2011), or "negligence" or "negligence per se" under Md. Crim. Law §§ 2-503, 2-504 (2002). As the Maryland Attorney General explained in a 2011 opinion, "[t]o prove 'gross negligence' under § 2-209, the prosecution must show that the defendant was *conscious of the risk* to human life posed by his or her conduct," and not just a "gross deviation" from the standard of care as required under § 2-210 for criminally negligent manslaughter. 96 Md. Op. Att'y Gen. 128, 138 (Dec. 21, 2011) (emphasis in original). Petitioner's counsel did not explain these differences to Petitioner before entry of his plea; indeed, Petitioner's counsel did not even recognize the distinction between the § 2-209 offense and the offenses with a lesser culpability charged in the indictment, stating that the elements for each vehicular homicide offense were the same. At the plea hearing, the trial court also incorrectly advised Petitioner that all his charges were "the same thing." No other source—including the indictment itself—furnished an explanation of gross negligence or applied the law to the facts.

Even more troubling, the Fourth Circuit held that under this Court's precedent no such explanation of a critical element—the *mens rea*—is required.

After exhausting his state remedies, Petitioner filed a *pro se* petition for habeas relief under 28 U.S.C. § 2254(d) in the United States District Court for the District of Maryland. The district court granted Petitioner's *pro se* petition for habeas relief, concluding that Petitioner's plea could not have been an intelligent admission under this Court's clearly established precedent. Yet, the Fourth Circuit Court of Appeals

reversed, stating this Court's precedent *does not require* that a defendant receive an explanation of or understand "legal terms of art," here, the *mens rea* for each charge to which he is pleading before he can knowingly and voluntarily plead guilty.

The Court should grant review to correct the Fourth Circuit's clear misstatement of an important question of federal law, which conflicts both with this Court's well-established precedent and that of other Circuits concerning what is required to ensure a guilty plea is intelligently and voluntarily entered. S. Ct. R. 10(c). Absent this Court's intervention, the Fourth Circuit's dilution of the standard to waive important constitutional trial rights will seriously undermine the integrity of convictions obtained through guilty pleas in the lower courts within the Fourth Circuit, and potentially in proceedings around the country.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 93 F.4th 749 and reproduced at PA 1a-26a. The opinion of the district court granting habeas corpus relief is unreported but available at 2023 WL 415552 and reproduced at PA 27a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 28, 2024. A petition for rehearing *en banc* was denied on April 2, 2024. On June 25, 2024, Chief Justice Roberts extended the time to file a petition for a writ of

certiorari until August 30, 2024. *Kelley v. Bohrer*, No. 23A1140 (mem.).

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

STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(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 the facts in light of the evidence presented in the State court proceeding.

The following provisions of the Maryland Code, Criminal Law article, in effect at the time of Petitioner's offense, are reproduced in the Appendix:

Md. Crim. Law § 2-209 (2002).

Md. Crim. Law § 2-210 (2011).

Md. Crim. Law § 2-503 (2002).

Md. Crim. Law § 2-504 (2002).

STATEMENT

A. State Court Proceedings

On the night of October 10, 2014, Kenneth Kelley (Petitioner), then 25 years old, was intoxicated and speeding down a two-lane road in Prince George's County, Maryland. Horrifically, he hit a vehicle stopped at a red light killing four of the five passengers in that vehicle and a passenger in his own vehicle. Only Petitioner, his front seat passenger, and the driver of the other vehicle survived.

Petitioner was indicted in the Circuit Court for Prince George's County, Maryland on 28 charges. PA 60a-73a. Counts 1 through 5 charged Petitioner under Md. Crim. Law § 2-209 (2002), Manslaughter by Vehicle or Vessel, a felony with a ten year maximum sentence, as follows:

> THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10TH DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL [NAME OF VICTIM] IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-209 OF THE CRIMINAL LAW ARTICLE

> AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

PA 60a-62a.

The next five Counts, 6 through 10, charged Petitioner under Md. Crim. Law § 2-210 (2011) for causing the death of each individual "as the result of driving a vehicle in a criminally negligent manner." PA 62a-64a. The indictment referred to this charge as "Criminally Negligent Manslaughter Vehicle." *Id.* A first offense conviction under this section is a misdemeanor with a maximum sentence of three years per count. *Id.*

Counts 11 through 15 charged that Petitioner "unlawfully, as a result of his negligent driving, operation, and control of a motor vehicle while under the influence of alcohol per se, did kill" each victim in violation of Md. Crim. Law § 2-503(a)(2) (2002). PA 64a-67a. The indictment identified this charge as "Negligent Homicide Auto Under Influence." *Id.* A first offense conviction under § 2-503 is a felony with a maximum penalty of five years per count. *Id.*

Counts 16 through 20 charged that Petitioner "unlawfully, as a result of his negligent driving, operation, and control of a motor vehicle while impaired by alcohol, did kill" each victim in violation of Md. Crim. Law § 2-504 (2002). PA 67a-69a. This charge was referred to in the indictment as "Neg HMCD[Homicide]-Auto/While Impaired." *Id.* A first

offense conviction under this section is a felony with a maximum sentence of three years per count. *Id.*

And Counts 21 through 28 charged Petitioner with driving under the influence per se, driving while impaired by alcohol, driving unlicensed, reckless driving, negligent driving, failure to control speed to avoid a collision with another vehicle, failure to stop at a steady circular red signal, and driving a vehicle on a highway with an expired license. PA 69a-73a.

The indictment incorporated the statutory language for each crime, but it did not explain or define the varying degrees of negligence; nor did it connect the statutory language to the facts. PA 60a-73a.

On December 17, 2015, the State of Maryland offered a deal: if Petitioner pled guilty to the felony charges in Counts 1 through 5, the State would agree to a sentence of 50 years, suspending all but 30 years. PA 152a, 174a, 180a-181a. Upon advice of his counsel, Petitioner rejected the plea offer and elected to plead guilty to all charges without any agreement. PA 152a.

1. Petitioner Enters His Guilty Plea.

Petitioner's plea hearing was held March 27, 2017. *See generally* PA 78a-93a. Just before the plea hearing, Petitioner signed a generic Waiver of Rights/Guilty Plea Form (the "Waiver Form"), which provided, "I fully understand the charge of indictment and the elements of the offense(s)." PA 74a-77a. The line of the Waiver Form for the maximum penalty was left blank. PA 75a. Petitioner's counsel signed the section affirming that he advised Petitioner of the nature and elements of the charges, but Petitioner himself did not

represent on the Waiver Form that his counsel had explained the nature and elements of the charges to him. PA 77a.

At the plea hearing, Petitioner entered a guilty plea to each charge in the indictment. PA 90a. The Circuit Court undertook a colloquy with Petitioner, who testified that he was 27 years old and had not completed high school. PA 81a. He had a prior conviction for possession with intent to distribute but—according to his counsel—"[n]othing like this." PA 80a. Petitioner testified that he could read English, and the Circuit Court asked whether he had read the indictment, to which Petitioner responded, "Yes." PA 82a.

Then, despite the different *mens rea* elements of the four sets of vehicular homicide charges and their different penalties, the Circuit Court told Petitioner, "they're the same thing."[1] PA 82a. Neither the trial

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[1] The Court: You understand the indictment contains 28 charges?

Mr. Kelley: Yes.

The Court: And those charges range from manslaughter by auto to driving with an expired license with additional counts of manslaughter by vehicle, criminal negligence, neglect [sic] homicide by motor vehicle, homicide by vessel. Many of these merge you understand. *They're the same thing.* DUI per se, driving while impaired, driving without a valid license, reckless driving, negligent driving, failure to control motor vehicle to avoid a collision, failure to stop at a steady red light, and, again, driving with an expired license. Do you understand that?

Mr. Kelley: Yes.

judge, nor Petitioner's counsel, nor the State corrected this misstatement or explained to Petitioner on the record the different *mens rea* elements of the vehicular homicide offenses. *See generally* PA 78a-93a.

The State then provided its proof had the matter gone to trial: Petitioner was driving approximately 35-40 miles per hour above the speed limit; his blood alcohol concentration was above the legal limit; and he hit the victim's car which was stopped at a red light, killing four of its five passengers and a passenger in Petitioner's car. PA 86a-88a. According to the State, "[w]itnesses would have testified that the defendant did not attempt to brake prior to the accident, rather [he] slammed into the victim's vehicle at his full speed of 65 to 70 miles per hour." PA 88a. Petitioner agreed on the record only that he had been speeding and that he had been drinking, and that he did not have any "significant additions or corrections" to these facts. PA 89a.

Finally, the Circuit Court asked Petitioner if he discussed this matter thoroughly with his counsel, to which Petitioner responded affirmatively. *Id.* Petitioner also indicated that he did not have questions for the court or his counsel and that he was "freely, knowingly and voluntarily entering a plea to the entire indictment because in fact [he was] guilty and for no other reason." PA 90a. The Circuit Court found that Petitioner entered his plea knowingly and voluntarily and accepted his plea to all 28 charges. *Id.*

PA 82a (emphasis added).

2. Sentencing.

Petitioner's sentencing hearing was held on June 9, 2017. *See generally* 94a-140a. Petitioner's counsel argued for a sentence based on § 2-503, Homicide By Motor Vehicle While Under The Influence Of Alcohol Per Se, which carries a maximum penalty of five years per count. In doing so, Petitioner's counsel stated "[i]t's undisputed that because he elected to get in the car and drive under the influence of alcohol that was gross negligence." PA 97a. Twice more Petitioner's counsel equated drunk driving with gross negligence. *See* PA 98a ("gross negligence in this case necessary for manslaughter by automobile was the gross negligence of alcohol, which in our view would mean that his exposure should not be 10 years, because homicide by motor vehicle being – while under the influence of alcohol carries a maximum sentence of five years"); *id.* ("the gross negligence was alcohol").

The State argued that Petitioner should be sentenced under § 2-209, the felony manslaughter by vehicle statute with a maximum sentence of ten years per count. PA 129a-130a. The court agreed, and sentenced Petitioner to five ten-year terms to run consecutively, for a total of 50 years. PA 137a-138a. The trial court explained that Counts 6 through 10 would "merge" with Counts 1 through 5 and Counts 11 through 20 "are moot." PA 138a.

3. Direct Appeal and Post-Conviction Proceedings.

On June 29, 2017, Petitioner, proceeding *pro se*, filed a Notice of Appeal on the basis that his sentence was illegal. The Court of Special Appeals of Maryland

dismissed the appeal on October 30, 2017, for failure to transmit the record. On April 15, 2019, Petitioner filed a *pro se* application for post-conviction relief in the Circuit Court for Prince George's County, Maryland, which was amended twice on September 13, 2019 and December 4, 2019 when counsel enrolled. Petitioner's application raised two claims: (1) his plea was not knowing and voluntary because he was not advised of the nature and elements of the offenses; and (2) his plea was not knowing and voluntary because it relied upon counsel's incorrect assertion that a plea to the indictment would result in a more favorable sentence than the plea offer from the State.

A post-conviction hearing was held on February 6, 2020. *See generally* PA 141a-230a. Both Petitioner and his trial counsel, Antoini Jones ("Jones"), testified at the post-conviction hearing concerning what had been explained to Petitioner (or not) and what Petitioner understood (or didn't) about what he was pleading to at the time he entered his guilty plea. Petitioner testified that he did not understand the elements of the offenses to which he pled guilty, and at the time of the postconviction hearing, he was "still unaware of the elements." PA 155a. When asked to describe his understanding of the charges, Petitioner stated: "I don't know. I understand that they was law breaking, that I broke the law." PA 151a. He further testified: "I didn't know what the importance of the elements of a criminal offense was until I went over my case a couple of times … with a dude who worked at the prison library." PA 155a. Petitioner further testified that he pled to the indictment on his counsel's advice because he thought he would receive a sentence of less than 30 years. PA 152a. Petitioner acknowledged that he

signed the Waiver Form. PA 155a-157a. Petitioner also acknowledged that Jones went over the indictment with him—but Petitioner himself did not "sit[]" and "read[] it." PA 173a.

For his part, Jones testified that he was "not sure" how to describe the difference between gross negligence or criminal negligence, though he knew there was a difference which he "somewhat" understood. PA 206a-207a. He was also "not sure" that he explained gross negligence (Counts 1-5) and criminal negligence (Counts 6-10) to Petitioner. PA 207a. When asked if he and Petitioner went over the charges, Jones testified that he explained to Petitioner:

> what would be necessary for the jury to find—for him to be found guilty which in my opinion, the fact that he was the driver, his car was speeding, he ran into the rear of a car, and he was under the influence of alcohol would be enough for him to receive—the maximum sentence he could receive for any of them was ten years, because that's what the issue is. You can't get two convictions on indifferent [sic] theories and be sentenced to both of them. So that's what I told him. So, in my opinion … that would be the elements in this particular case.

PA 208a-209a.

Indeed, Jones testified to this effect a total of *four times* during the post-conviction proceeding. *See also* PA 208a ("[T]he facts in this case he is speeding. He

ran into the rear of and [sic] another vehicle, and he is under the influences [sic] of alcohol. That would augment – that would suffice for all of them."); *id.* ("I explained to him that the fact that he was speeding under the influence of alcohol and ran into the rear of another vehicle was enough for him to have a conviction."); PA 209a-210a ("I don't believe I set up and distinguished each count from – I made it clear to him that in my opinion, all the State would have to prove is that he was speeding, under the influence of alcohol, rear ending a car that was at a red light.").

Not a single explanation from Jones included any discussion of intent or differentiated between the *mens rea* necessary to prove each of the four vehicular homicide counts in the indictment. *See generally* PA 141a-230a. The record is clear Jones did not know himself, much less explain to Petitioner, the differences among the four vehicular homicide charges.

On May 18, 2020, the post-conviction court denied Petitioner's application for relief. PA 231a-245a. On November 5, 2020, the Maryland Court of Special Appeals denied leave to appeal. Petitioner's petition for habeas relief under 28 U.S.C. § 2254(d) followed.[2]

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[2] Under 28 U.S.C. § 2254(d), a petition "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

B. Legal Background

1. The *Mens Rea* Elements of the Vehicular Homicide Charges.

The four vehicular homicide crimes with which Petitioner was charged differ primarily in the standard of culpability and the potential penalty. For the most serious offense (Counts 1-5), Manslaughter by Vehicle under § 2-209,[3] the operation of the vehicle must be in a "grossly negligent manner." As used in § 2-209, "grossly negligent" is a *mens rea* element evincing a "wanton or reckless disregard for human life." *See State v. Kramer*, 318 Md. 576, 590 (1990) (explaining that to sustain a conviction for manslaughter by motor vehicle, "the evidence must be sufficient beyond a reasonable doubt to establish that the defendant was grossly negligent, that is, he had a wanton or reckless disregard for human life in the operation of an automobile. It deals with the state of mind of the defendant driver. Only conduct that is of extraordinary or outrageous character will be sufficient to imply this state of mind."); *Hensen v. State*, 133 Md. App. 156, 169 (2000) (approving jury instruction for manslaughter by automobile stating "[t]he second element the State must prove is gross negligence; that is, that the

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an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

[3] Section 2-209 has been part of Maryland criminal law for more than 80 years, first enacted in Chapter 414, Laws of Maryland 1941, then codified at Annotated Code of Maryland, Article 27, § 436A. It was later recodified as § 388 in the 1957 Code and again in its current location when the Criminal Law Article was enacted. Chapter 26, § 2, Laws of Maryland 2002.

Defendant had a wanton or reckless disregard for human life in the operation of his automobile. … This deals with his—his state of mind, and his conduct has to have been of such an extraordinary or outrageous character to imply that state of mind."); *State v. Thomas*, 464 Md. 133, 153-54 (2019) (criminal gross negligence requires proof of a wanton or reckless disregard for human life). Gross negligence requires "the defendant be conscious of the risk to human life [posed] by his or her conduct." *Dishman v. State*, 352 Md. 279, 299 (1998). Whether "a defendant's conduct rises to the level of gross negligence is a fact-specific inquiry." *Beckwitt v. State*, 477 Md. 398, 433 (2022).

By contrast, criminally negligent manslaughter by vehicle under § 2-210 (Counts 6-10), which was first enacted in 2011, is a misdemeanor with a "lesser degree of culpability." *Dobryznski v. State*, No. 0191, 2015 WL 5885359, at *6 (June 3, 2015). A person acts in a "criminally negligent manner" when he "should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur," and "the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person." § 2-210(c). When the Maryland General Assembly enacted the law that created § 2-210, it stated that "gross deviation from the standard of care" is a separate and distinct standard from the "gross negligence" standard in § 2-209. *See* 96 Md. Op. Att'y. Gen. 128, 134 (Dec. 21, 2011).

The two offenses, § 2-209 and § 2-210, "differ in the defendant's mental state, i.e., his or her consciousness of the risk of his or her conduct." *Beattie v. State*, 216

Md. App. 667, 681 (2014). Indeed, the Maryland Attorney General in 2011 issued a formal opinion that "§ 2-209 states a higher degree of culpability than that required by CR § 2-210." 96 Md. Op. Att'y. Gen. 128, (Dec. 21, 2011). The Maryland Attorney General's opinion explained that "[t]he distinction between the two crimes lies in the defendant's consciousness of the risk associated with his or her conduct." *Id.*; *see also id.* at 132 ("Under [] § 2-210, the prosecution need not establish that the defendant was conscious of the risk posed by his or her conduct … [w]hile [] § 2-209 requires proof of the defendant's 'conscious disregard' of the risk posed by the conduct"). The two crimes are plainly not the "same thing."

The remaining ten homicide counts, charged under two statutory provisions in Subtitle 5—§ 2-503, Homicide by Motor Vehicle or Vessel While Under the Influence of Alcohol or Under the Influence of Alcohol Per Se (Counts 11-15), and § 2-504, Homicide by Motor Vehicle or Vessel While Impaired by Alcohol (Counts 16-20)—are per se crimes for which the negligent driving, operating, or controlling a motor vehicle is established by the defendant's intoxication above the legal limit. *See* §§ 2-501 et seq., Md. Code Ann., Crim Law. These two crimes also plainly differ from the two Subtitle 2 offenses.

2. The Applicable Clearly Established Federal Law.

Under the clearly established federal law as determined by this Court for purposes of § 2254(d), a guilty plea is a waiver of several constitutional rights, including the right to trial by jury, the privilege against

self-incrimination, and the right of a defendant to confront his accusers. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). For this waiver to be valid under the Fourteenth Amendment due process clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). For an intentional relinquishment to occur, this Court has long recognized that "the first and most universally recognized requirement of due process" is the provision of "real notice of the true nature of the charge" against a defendant. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. When a guilty plea "is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *Id.*

For a guilty plea to be knowing or intelligent, the Court's decisions consistently require an explanation of the critical elements of the offense, including the *mens rea*. In *McCarthy*, the Court was tasked with construing the 1966 amendment to Federal Rule of Criminal Procedure 11 which was "designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and "produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *Id.* at 465. The deficiency in *McCarthy*, as in this case, concerned the defendant's understanding of the *men*s *rea* element of the offense to which he pled guilty and the differences between that charge and "one of two closely related

lesser included offenses." *Id*. at 471. In holding that the district judge had failed to comply with Rule 11, this Court suggested that, though the nature of the inquiry must necessarily vary from case to case, "where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge." *Id*. at 467 n.20. In all such inquiries, "matters of reality, and not mere ritual," should control. *Id*. (cleaned up).

In *Henderson v. Morgan*, this Court confirmed that an understanding of the *mens rea* element is a constitutional prerequisite for a valid guilty plea in a state court, where the Rule 11 inquiry was not required:

> We assume, as petitioner argues, that the prosecutor had overwhelming evidence of guilt available. We also accept petitioner's characterization of the competence of respondent's counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder. Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first

> and most universally recognized requirement of due process."

426 U.S. 637, 644-45 (1976)(quoting *Smith*, 312 U.S. at 334). The problem in *Henderson*, as in *McCarthy,* was the absence of an explanation to the defendant of the *mens rea* for the offense before entering the guilty plea. In *Henderson*, the second degree murder charge required a "design to effect the death of the person killed." *Henderson*, 426 U.S. at 645. The state court record showed that no explanation of this *mens rea* standard had been provided to the defendant before he entered his guilty plea. *See id.* at 646. The Court concluded, given these circumstances, it was "impossible to conclude that [defendant's] plea to the unexplained charge of second-degree murder was voluntary." *Id*. This was so even though—if the case had gone to a jury—"a design to effect death would almost inevitably have been inferred from evidence that respondent repeatedly stabbed [the victim]." *Id.* at 645.

In *Bousley v. United States*, 523 U.S. 614 (1998), this Court reaffirmed and applied the constitutional waiver standard to a guilty plea to using a firearm in connection with a drug crime. This Court rejected the argument that the defendant's guilty plea was valid because "he was provided with a copy of his indictment, which charged him with 'using' a firearm." *Id.* at 618. Though including the element in the indictment gave rise to a "presumption that the defendant was informed of the nature of the charge against him," the Court nonetheless agreed with the defendant that if "the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the

crime with which he was charged," (in light of the Supreme Court's intervening decision construing "use" of a firearm), his guilty plea would be "constitutionally invalid." *Id.* at 618-19.

Most recently, in *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005), this Court reaffirmed that a defendant's guilty plea "would indeed be invalid if he had not been aware of the nature of the charges against him, *including the elements* of the aggravated murder charge to which he pleaded guilty." (emphasis added) Although the defendant in *Bradshaw* claimed to have been unaware of the *mens rea* element, the Court held, in accord with *Henderson,* "[w]here a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw*, 545 U.S. at 183. But unlike *Henderson*, in *Bradshaw*, this Court looked to the record and determined that it "accurately reflect[ed]" that the elements of the crime were explained to the defendant by counsel, and the defendant did not offer evidence to the contrary. *Id*.

C. Proceedings Below.

Petitioner filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254(d) in the District of Maryland on December 21, 2020. He asserted the same claims raised in his application for state post-conviction relief: (1) his plea was involuntary because he was not advised of the nature and elements of the offenses, and (2) his plea was involuntary because he relied upon trial counsel's incorrect advice that he

would receive a more favorable sentence by pleading guilty to the indictment instead of accepting the plea offer from the state.

On January 25, 2023, the district court granted Petitioner's *pro se* petition and vacated his state court convictions and sentences because his guilty plea was "involuntary and unknowing, and the judgment of conviction was entered without due process of law." PA 48a. The district court concluded the state post-conviction court's decision was contrary to this Court's clearly established precedent, and an unreasonable application of the law to the facts, under 28 U.S.C. § 2254(d), because the record evidence showed "Petitioner pled guilty to causing the collision under the influence of alcohol and while speeding, but he never admitted that he did so with the requisite mental culpability for a conviction of manslaughter by motor vehicle (§ 2-209)." PA 46a. Significantly, "[b]efore the plea hearing, [Petitioner] never received any explanation of the nature of the charges against him by counsel and during the plea hearing he was misled by the Circuit Court that the nature of the charges against him were 'the same.'" PA 46a-47a. Further "the factual basis read at the plea hearing did not inform nor explain to [him] the elements of the more complex charges of manslaughter by vehicle." PA 48a (internal quotation omitted). In these circumstances the record did not establish Petitioner's plea was voluntary and intelligent. *Id.* The district court thus vacated Petitioner's convictions and sentence and remanded the case to the state court for a new trial. PA 50a-53a.

The State appealed, and on February 28, 2024, the Fourth Circuit reversed. PA 1a-26a; *Kelley v. Bohrer*,

93 F.4th 749 (4th Cir. 2024). After a lengthy critique of the district court for—in its view—having misinterpreted the state court's summary of party positions as an affirmative state court finding that Petitioner had not been advised of the *mens rea* element of the most serious charge, PA 12a-16a; *Kelley*, 93 F.4th at 756-57, the Fourth Circuit held it was reasonable for the state court to conclude Petitioner's guilty plea was valid because Petitioner: (1) stated at his plea hearing that he read the indictment and at the post-conviction hearing that his counsel read the charges to him; (2) and that he had "discussed this matter thoroughly" with his counsel and had no questions for counsel or the court; (3) signed the Waiver Form indicating he understood the elements of the offense; and (4) had no significant corrections to the factual basis for the plea. PA 20a-23a; *Kelley*, 93 F.4th at 759-60. Essentially, the Fourth Circuit applied the *Henderson* presumption that Petitioner was "informed of the elements of the offense." PA. 20a; *Kelley*, 93 F. 4th at 759.

The Fourth Circuit then addressed whether Petitioner had rebutted the presumption. As noted above, the state court record confirmed that—contrary to the usual presumption—Petitioner's lawyer had not explained the *mens rea* requirement, gross negligence, for the most serious charge or distinguished it from the other vehicular homicide offenses which required lesser degrees of culpability; and the trial judge who accepted Petitioner's plea told him incorrectly all the vehicular homicide charges were "the same thing." Notwithstanding this clear record evidence, the Fourth Circuit held that no such explanation was required, stating:

> Kelley suggests his plea was defective because he did not receive a detailed definition of the *mens rea* for each charge or a comparison of the different charges. But that is simply not what *Henderson* and *Bradshaw* require. Nor has Kelley identified any Supreme Court case dictating, or even suggesting, that legal terms of art must be explained to a defendant before he can knowingly and voluntarily plead guilty.

PA 23a; *Kelley*, 93 F.4th at 760-61.

In short, the Fourth Circuit held an understanding of the *mens rea* element was not *required* for a valid plea. Likewise, the Court held, by implication, the inclusion of the legal term of art "grossly negligent" in the indictment sufficed to render the plea knowing, even if what those words actually meant—the law in relation to the facts—would not be clear to a lay person like Petitioner. The Fourth Circuit reversed and remanded to the district court with instructions to deny Petitioner's habeas corpus petition. PA 26a; *Kelley*, 93 F.4th at 761.

Petitioner filed a timely petition for rehearing *en banc*, which was denied on April 2, 2024. PA 54a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit got an exceptionally important legal standard exceptionally wrong. The Fourth Circuit's holding that a defendant does not need an explanation of the *mens rea* element before entering a

valid guilty plea weakens a safeguard against erroneous convictions that is vital to the integrity of the present-day criminal justice system, which "is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 143 (2012).

The Court should grant review because this erosion of the voluntariness standard, even in a single Circuit, can have devastating consequences for thousands of criminal cases. Instructing lawyers that it is unnecessary to explain to their clients "legal terms of art," i.e., the meaning of complex elements like "gross negligence" under Maryland law, or that it is unnecessary to provide advice regarding "detailed definition[s] of the *mens rea*," invites wrongful convictions and post-conviction chaos. It also eviscerates the safeguards articulated by this Court to ensure an accused's waiver of the jury trial right is given intelligently.

Further, while the presumption that counsel has explained the critical elements of the charges, recognized in *Henderson* and *Bradshaw*, resolves most state court guilty plea challenges without a hearing, when the state court record shows, as it does here, that the defendant's lawyer *did not* provide the necessary explanation, the plea is invalid, and any decision upholding such a plea is contrary to and an unreasonable application of clearly established federal law.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND THAT OF OTHER CIRCUITS.

The Fourth Circuit's conclusion that due process does not require a "comparison of the different charges," or even an explanation of the meaning of gross negligence, a legal term of art, stands in direct conflict to this Court's precedent. *See* pp. 16-20 *supra*. What the Fourth Circuit referred to as "a detailed definition of the *mens rea* or a comparison of the different charges," or an explanation of the meaning of gross negligence (a "legal term[] of art"), PA 23a; *Kelley*, 93 F. 4th at 760-61, is precisely what "real notice of the true nature" of the charges means and an understanding of how the law applies to the facts.

The Fourth Circuit's decision also conflicts with the understanding of other Circuits. *See, e.g., U.S. v. Dewalt,* 92 F. 3d 1209, 1211 (D.C. Cir. 1996) ("a defendant's ignorance of the mens rea element of the offense with which he is charged renders his guilty plea involuntary as a matter of constitutional law"); *Nash v. Israel*, 707 F. 2d 298 (7th Cir. 1983) (affirming grant of habeas relief because intent element for crime of aiding and abetting first degree murder was not explained such that the defendant possessed an understanding of the law in relation to the facts); *Sober v. Crist*, 644 F. 2d 807 (9th Cir. 1981) (remanding to determine whether the defendant's attorney explained the elements of the charge in sufficient detail for him to understand them well enough to plead guilty intelligently); *Gaddy v. Linahan*, 780 F. 2d 935, 943-44 (11th Cir. 1988) (remanding for hearing on what

information defendant received about the intent standard for the crime to which he pled guilty, explaining that in order to receive "real notice" under *Henderson*, "the defendant must be informed of the elements of the offense either at the plea hearing or on some prior occasion, *and he must understand them*," and in addition, "the defendant should understand how his conduct satisfies those elements" (emphasis added)).

The Fourth Circuit's departure from clearly established federal law is best illustrated by a comparison to the Tenth Circuit's decision in *Hicks v. Franklin*, 546 F. 3d 1279 (10th Cir. 2008). To establish a plea is involuntary, the Tenth Circuit requires a petitioner to: "(1) show that the intent element was a critical element of the charge; (2) overcome the presumption that his attorney explained this element to him at some other time prior to his guilty plea; and (3) demonstrate that, prior to his guilty plea, he did not receive notice of this element from any other source." *Id.* at 1284 (cleaned up).

In *Hicks*, the defendant pled guilty to second degree murder in violation of the applicable Oklahoma statute. *Id.* at 1280. After exhausting his state remedies, the defendant filed a *pro se* federal habeas petition under 28 U.S.C. § 2254 claiming, among other things, that his plea was not knowing and voluntary. *Id*. The district court denied relief. *Id*. On appeal to the Tenth Circuit, the essential facts were undisputed. The defendant had cooked methamphetamine in his bedroom. *Id*. at 1281. Later, the jar containing the post-production fluid was moved by someone else to the kitchen. *Id*. The jar cracked and spilled the flammable

fluid onto a hot plate, causing a flash fire that burned the defendant's wife, who eventually passed away from complications arising from the extensive burns she had suffered. *Id*. Mr. Hicks was charged with first degree felony murder, with first degree arson providing the predicate felony. *Id.* Just before trial began, the parties reached a plea agreement and the prosecutor orally amended in court the first degree murder charge to murder in the second degree on the basis that Mr. Hicks had committed an "imminently dangerous act." *Id*. Under the Oklahoma statute, homicide is murder in the second degree "[w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." *Id*. at 1280 n.1. The court undertook a colloquy with Mr. Hicks before accepting his guilty plea, which omitted the element "evincing a depraved mind." *Id*. at 1285-86.

On review, the Tenth Circuit concluded the state court had unreasonably applied the clearly established federal law as set forth in *Henderson*. *Hicks*, 546 F. 3d at 1284.

First, the court concluded that the requisite *mens rea*, "evincing a depraved mind," was a critical element of the offense to which Mr. Hicks pled guilty. *Id*.

Second, the court found there were sufficient facts in the record to rebut the presumption that defense counsel advised Mr. Hicks of the nature of the offense, even though Mr. Hicks responded in the affirmative when asked by the trial court whether he had discussed the charges with his attorney. *Id*. at 1285. Further, "the

court's explanation [of] the amended charge was patently erroneous, and defense counsel remained silent." *Id*. That silence from defense counsel, when the court affirmatively misstated the law on a critical aspect of the charge, rendered "[the] presumption that defense counsel properly explained the charge to the defendant … unwarranted." *Id*.

Third, the Tenth Circuit found that Mr. Hicks did not receive notice of the "depraved mind" element from any other source and in fact received misleading instruction from the court, which entirely omitted the fact that Oklahoma's second degree murder statute contained a *mens rea* element. *Id*. at 1285-86. By suggesting that "Mr. Hicks was guilty simply because he committed the (assertedly) imminently dangerous act of manufacturing methamphetamine … the court denied Mr. Hicks real notice of the true nature of the charge against him." *Id* at 1286. Thus, there was "simply no indication on the record of the guilty plea proceeding that Mr. Hicks' plea can stand as an intelligent, knowing, and voluntary admission of guilt as to all elements of the crime with which he was charged." *Id*. The Tenth Circuit reversed and remanded to permit Mr. Hicks to withdraw his plea. *Id.* at 1287.

Here, as in *Hicks*, there can be no dispute that gross negligence was a critical element of the most serious offense to which Petitioner pled guilty, Manslaughter by Vehicle under § 2-209, and pursuant to which he was sentenced. Indeed, the *mens rea*, if any, necessary for the four vehicular homicide charges was precisely what differentiated them.

Second, as in *Hicks*, the record clearly rebutted the presumption that Petitioner's counsel explained the true nature of the offense such that Petitioner understood what he was pleading guilty to. Although he too confirmed he had discussed the charges with his counsel at his plea hearing, both Petitioner and his counsel's testimony at the post-conviction hearing made clear that the element of gross negligence for the most serious offense *had not* been explained. Petitioner testified that he only understood that he "broke the law" but not what an element of an offense was. PA 151a, 155a. His counsel testified that he believed the elements for all the offenses for which Petitioner was charged were essentially the same, and that the state only needed to prove Petitioner was speeding, under the influence, and hit the other vehicle killing passengers in both cars. PA 208a-210a. Petitioner's counsel demonstrated no understanding of grossly negligent manslaughter by vehicle or its distinctness from the other offenses. And at the plea hearing, as in *Hicks*, the trial judge also misstated the nature of the charges, erroneously instructing Petitioner that they were "the same." PA 82a.

Third, as in *Hicks*, Petitioner did not receive real notice of the *mens rea* element from any other source. The indictment did not explain it; nor did the factual basis for the plea.

But in *Hicks*, unlike the Fourth Circuit below, the Tenth Circuit recognized that the defendant's guilty plea entered without understanding the *mens rea* element of the offense was invalid. *Id.* at 1285-87.

Instead, the Fourth Circuit, elevating ritual over substance, latched on only to the evidence which supports the *Henderson* presumption: Petitioner signed the Waiver Form; testified he had read the indictment and his counsel read him the charges; and had no corrections to the factual basis.

Reading a bare bones indictment and executing a generic waiver form are not enough for a knowing and voluntary guilty plea under this Court's clearly established law when the ordinary presumption that the defendant's lawyer has explained the charges is refuted by the state court record, as it was in this case.

The Fourth Circuit's holding thus departs from this Court's precedent and that of other Circuits. Petitioner's request for habeas relief should have been affirmed.

II. THE FOURTH CIRCUIT'S DECISION ERODES CONSTITUTIONAL DUE PROCESS PROTECTIONS.

This Court should grant review because an erosion in one Circuit of the standard for a voluntary and intelligent guilty plea has enormous consequences.

In the federal system, only 2% of criminal defendants go to trial. John Gramlich, *Only 2% of federal criminal defendants went to trial in 2018, and most who did were found guilty*, Pew Research Center

(June 11, 2019).[4] Put another way, of the 79,704 federal criminal cases in 2018, only 1,879, or just over 2%, went to trial. *Id*

State courts handle many more criminal cases than the federal system. In 2006, the most recent year for which data is available, an estimated 1.13 million felony convictions occurred in state courts compared to an estimated 72,983 such convictions in federal courts that year. *Felony Sentences in State Courts, 2006–Statistical Tables*, U.S. Dep't of Just. 9 (Dec. 2009; revised Nov. 22, 2010).[5] Like in the federal system, the jury trial in state courts is vanishing, with many states similarly reporting only between 1-3% of cases proceeding to trial. *See* Gramlich, *supra.* Thus, more than 90% of convictions at both the federal and state levels are the result of guilty pleas. *See also Missouri v. Frye*, 566 U.S. 134, 143 (2012) (estimating that 94% of criminal convictions in the state system and 98% in the federal system result from guilty pleas).

The volume of criminal cases puts pressure on courts, prosecutors, and defense counsel to resolve cases—again, almost entirely through guilty pleas—quickly. There is often little appreciation by the judge or lawyers for whether the defendant in fact understood the nature and consequences of pleading guilty. *See, e.g.,* American Bar Association Criminal

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[4] Available at https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[5] Available at https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf.

Justice Section Plea Bargain Task Force Report, Principle Seven, at 22.[6]

But the Constitution does not permit sacrificing rights for speed. Just as "effects like increasing efficiency and reducing public cost" are insufficient reasons to trigger an exception to the Seventh Amendment jury trial right in civil cases, *see Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024), they are not sufficient reasons to jettison the knowing and voluntary waiver standard that protects a criminal defendant's Sixth Amendment jury trial right and other constitutional rights. The Court should not tolerate the Fourth Circuit's dilution of a long-established and fundamental standard that due process commands real notice—an explanation sufficient for the accused to understand the law in relation to the facts to ensure a plea is an intelligent and voluntary waiver.

III. THIS CASE IS AN IDEAL VEHICLE.

This case presents an excellent vehicle to reaffirm clearly established federal law and ensure that there is no confusion about what is required for an intelligent and voluntary plea. There are no Antiterrorism and Effective Death Penalty Act ("AEDPA") complications to get in the way of the constitutional standard. *See* 28 U.S.C. § 2254(d). Petitioner fully exhausted his claims. The relevant facts were established in a state court hearing, and, even accepting the Fourth Circuit's view

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[6] Available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

that the state court did not make explicit findings favorable to Petitioner, the record supports only one possible finding—that Petitioner was not advised about what the *mens rea* element required under § 2-209. Moreover, because Petitioner's plea was to the entire indictment without any promises from the government, there are no potential issues about harmlessness or prejudice lurking in the record. The issue presented here is clean.

Indeed, the legal issue is sufficiently one-sided that all the Court needs to do to eliminate the potential harm from the Fourth Circuit's dilution of the voluntariness standard is to summarily reverse. *See Dunn v. Reeves*, 594 U.S. 731 (2021) (summarily reversing grant of habeas relief); *Shinn v. Kayer,* 592 U.S. 111 (2020) (same); *Wearry v. Cain*, 577 U.S. 385 (2016) (summarily reversing denial of habeas relief). The Fourth Circuit's misstatement and misapplication of the law is just as clear as the Court found it to be in any of those cases, and the systemic consequences of inaction would be far greater.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

August 30, 2024 Respectfully submitted,

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6179

KENNETH KELLEY,

Petitioner - Appellee,

v.

WILLIAM S. BOHRER, Acting Warden; MARYLAND ATTORNEY GENERAL,

Respondents - Appellants.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. George Jarrod Hazel, District Judge. (8:20-cv-03697-GJH)

Argued: January 25, 2024 Decided: February 28, 2024

Before AGEE, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Agee wrote the opinion in which Judge Richardson and Judge Quattlebaum joined.

ARGUED: Andrew John DiMiceli, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants. Mary Claire Davis, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, Morgantown, West Virginia, for Appellee. **ON BRIEF:** Anthony G. Brown, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants.

AGEE, Circuit Judge:

The State of Maryland (the "State") appeals the district court's grant of Kenneth Kelley's petition for a writ of habeas corpus under 28 U.S.C. § 2254. In the petition, Kelley asserts that his state-court guilty plea was not knowing and voluntary because he wasn't informed of the nature and elements of the offenses to which he was pleading guilty and that the state post-conviction court erred in concluding otherwise. The district court agreed with Kelley, but in doing so, it failed to give due deference to the state-court decision. Therefore, we reverse the judgment of the district court and remand with instructions to deny Kelley's petition.

I.

On October 10, 2014, Kelley was driving his vehicle thirty-five to forty miles per hour over the speed limit with a blood alcohol concentration of .14 when he came upon a vehicle that was stopped at a red light. Without braking, Kelley slammed into the rear of the vehicle, which sent it spinning into a pole. Four of the people in that vehicle died as a result of the collision-including two children-and one of Kelley's passengers also died.

A state grand jury indicted Kelley on twenty-eight counts. Counts 1 through 5 charged Kelley with killing each of the five victims in a grossly negligent manner. Counts 6 through 10 charged Kelley with killing each of the victims "as the result of driving a vehicle in a criminally negligent manner." J.A. 58-59. Counts 11 through 15 charged Kelley with killing each of the victims "as a result of his negligent driving, operation, and control of a motor vehicle while under the influence of alcohol per se." J.A. 59-60. Counts 16 through 20 charged him with killing each of the victims "as a result of his negligent driving, operation, and control of a motor vehicle while impaired by alcohol." J.A. 61-62. And Counts 21 through 28 charged Kelley with driving under the influence per se, driving while impaired by alcohol, driving unlicensed, reckless driving, negligent driving, failure to control speed to avoid a collision with another vehicle, failure to stop at a steady circular red signal, and driving a vehicle on a highway with an expired license.

The State offered Kelley a plea deal whereby he would plead guilty to Counts 1 through 5 and receive a

fifty-year sentence with all but thirty years suspended. Kelley rejected the State's offer and chose to plead guilty to the entire indictment so as to remain free to allocute on the sentence.

At the plea hearing, Kelley testified that he was twenty-seven years old and had not completed high school. He had a prior conviction for possession with intent to distribute but-according to his counsel-"[n]othing like this." J.A. 71. The court asked if Kelley could read English and whether he'd read the indictment, to which Kelley responded in the affirmative. The court briefly explained the charges, stating:

> [The] charges range from manslaughter by auto to driving with an expired license with additional counts of manslaughter by vehicle, criminal negligence, neglect [sic] homicide by motor vehicle, homicide by vessel. *Many of these merge you understand. They're the same thing*. DUI per se, driving while impaired, driving without a valid license, reckless driving, negligent driving, failure to control motor vehicle to avoid a collision, failure to stop at a steady red light, and, again, driving with an expired license.

J.A. 73 (emphasis added). The court also noted "that there are statutory penalties with these that could be 60, 70 years," J.A. 73, even though defense counsel and the prosecutor had agreed that the maximum sentence was fifty years' imprisonment.

The State then provided the factual basis for the indictment, which matched the facts given above. Kelley did not have any "significant additions or corrections" to the factual basis. J.A. 79.

Finally, the court asked Kelley if he "discussed this matter thoroughly" with his counsel, to which Kelley responded in the affirmative. J.A. 80. Kelley also indicated that he didn't have questions for the court or his counsel and that he was "freely, knowingly and voluntarily entering a plea to the entire indictment because in fact [he was] guilty and for no other reason." J.A. 80-81. The court therefore found that Kelley entered his plea knowingly and voluntarily.

Kelley signed a waiver of rights related to his guilty plea, in which he acknowledged that he "fully underst[oo]d the charge[s] of [the] Indictment and the elements of the offense(s)." S.J.A. 2. His attorney signed the same form, certifying that he advised Kelley of "[t]he nature of the charge(s)" and "the elements of all of the charges." S.J.A. 3.

The court sentenced Kelley to fifty years' imprisonment. He received ten years' imprisonment for negligent manslaughter-auto on each of Counts 1 through 5, to be served consecutively, and one year for Count 21 (driving under the influence per se), to be served concurrently.[1]

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[1] Counts 6 through 10 merged with Counts 1 through 5; Count 22 merged with Count 21; and Counts 23 through 28 were suspended. Kelley was not sentenced on Counts 11 through 20 because he couldn't be sentenced "for killing the same person

After an unsuccessful direct appeal, Kelley filed a petition for post-conviction relief in Maryland state court, raising (as relevant here) the issue of whether his guilty plea was knowing and voluntary when he allegedly was not advised of the nature and elements of the offenses.

The state post-conviction court held a hearing, during which Kelley testified that his plea counsel read him the charges he faced, that they went over the indictment together, and that he asked no follow-up questions about those charges. When asked to describe his understanding of the charges, Kelley stated: "I don't know. I understand that they was [sic] law breaking, that I broke the law." J.A. 233. He further testified: "I didn't know what the importance of the elements of a criminal offense was until I went over my case a couple of times . . . with a dude who worked at the prison library. . . . I mean, I still haven't found out what the elements to the charge that I pled guilty to are. I'm still unaware of the elements." J.A. 236-37. He also admitted to signing the waiver form. Finally, he indicated that he didn't complete high school, didn't read well, and had never previously been charged with manslaughter.

Kelley's plea attorney also testified at the post-conviction hearing. He stated that he "explained to [Kelley] that the fact that he was speeding under the influence of alcohol and ran into the rear of another

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twice." J.A. 95. Also, Kelley was sentenced to an additional twenty-five days for failure to appear at his first scheduled sentencing.

vehicle was enough for him to have a conviction." J.A. 288-89. And when asked if he and Kelley went over the elements of the charges, plea counsel elaborated that he

> explained to [Kelley] what would be necessary for the jury to find – for him to be found guilty which in my opinion, the fact that he was the driver, his car was speeding, he ran into the rear of a car, and he was under the influence of alcohol would be enough for him to receive – the maximum sentence he could receive for any of them was ten years, because that's what the issue is.
>
> You can't get two convictions on indifferent [sic] theories and be sentenced to both of them. So that's what I told him. So, in my opinion . . . that would be the elements in this particular case.

J.A. 289.[2] He also indicated that he went over the waiver form with Kelley–who he opined was of average

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[2] Plea counsel explained:

> [W]hen I am trying to explain to someone the elements of the case it's more important for them to know how they directly relate to their case. For everybody it might be different. . . . Now, is that necessarily how the reading of the law would indicate? But I try to make it fact sensitive to each case. And in this case that would be what was necessary for the State to prove.

J.A. 291-92.

intelligence—including the provision that said that defense counsel advised the defendant of the nature and elements of the charges.

However, he wasn't sure that he differentiated between the levels of negligence in the charges. See J.A. 287 (Q: "How would you describe the difference between gross negligence and criminal negligence to Mr. Kelley?" A: "I'm not sure – I'm not even sure I did. I may have done that. I'm not sure I did."); J.A. 288 (Q: "[Y]ou're not sure that you described the difference between those levels of negligence to Mr. Kelley. Right?" A: "Yes, but in this, the facts in this case he is speeding. He ran into the rear of . . . another vehicle, and he is under the influence[] of alcohol. That would augment – that would suffice for all of them."); J.A. 290 ("I don't believe I set up and distinguished each count[.]"). He also didn't believe he "ever g[ave] [Kelley] the statute[s]." J.A. 290.

Following the hearing, the state court issued a decision denying the petition for post-conviction relief. Its decision contained a seventeen-paragraph section considering the voluntariness of Kelley's plea based on his purported lack of knowledge of the elements of the charges, as well as two paragraphs in the conclusion on this claim. The state court reasoned that Kelley's plea was knowing and voluntary because, *inter alia*, he told the plea judge that he was "freely, knowingly and voluntarily entering a plea to the entire indictment" because he was in fact guilty; he "clearly acknowledged his guilt and had a sufficient understanding of the nature of the charges"; and "[t]he statement of facts [was] read into the record with little to no changes made which put [Kelley] on notice of his actions while driving

that resulted in the deaths of five people." J.A. 146. The state appellate court then denied Kelley leave to appeal this decision, after which Kelley filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Maryland.

In his federal habeas petition, Kelley claimed, *inter alia*, that his plea was not knowing and voluntary because he wasn't advised of the nature and elements of the offenses. The district court agreed and granted the petition, vacated Kelley's convictions and sentence, and remanded the case to state court for a new trial.[3]

In its interpretation of the state post-conviction court decision, the district court read the first twelve paragraphs on the voluntariness of the plea as containing both Kelley's arguments and the state court's factual findings. Based on this reading of the state court's decision, the district court concluded that the state court "unreasonably applied the facts to the law" because it made findings of fact that, *e.g.*, "counsel failed to explain the critical elements of the charges" to Kelley and "the factual basis read at the plea hearing did not inform nor explain to [him] the elements of the more complex charges of manslaughter by vehicle," *Kelley v. Bohrer*, Civil Action No. GJH-20-03697, 2023 WL 415552, at *8 (D. Md. Jan. 25, 2023) (cleaned up), but then also found that Kelley's plea was knowing and voluntary. The district court stated that:

> Before the plea hearing, Kelley never received any explanation of the nature

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[3] This order is stayed pending the outcome of this appeal.

> of the charges against him by counsel and during the plea hearing he was misled by the [state court] that the nature of the charges against him were "the same." In these circumstances, the record does not establish that his plea was knowing.

Id. The district court further reasoned that the reading of the factual basis at the plea hearing was insufficient to inform Kelley of the elements of the offenses and that the "canned waiver form" was also insufficient in light of plea counsel's failure to explain the elements of the offenses and the plea court's misleading statements. *Id*.

The State timely appealed the district court's order. We have jurisdiction under 28 U.S.C. § 1291.

II.

We review a district court's grant of habeas relief *de novo*, but that review is highly circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *Bowman v. Stirling*, 45 F.4th 740, 752 (4th Cir. 2022). As we have explained, "AEDPA imposes extensive limits on when a federal court is permitted to grant habeas relief to state prisoners and how a federal court is to review claims presented in a § 2254 petition." *Folkes v. Nelsen*, 34 F.4th 258, 267 (4th Cir. 2022). Under AEDPA, once a state court adjudicates a petitioner's claims on the merits, a federal court can't grant habeas relief unless, as relevant here, the state-court decision was "contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if it reaches a different result than the Supreme Court previously reached on a materially indistinguishable set of facts." *Barnes v. Joyner*, 751 F.3d 229, 238 (4th Cir. 2014) (cleaned up). And a state court unreasonably applies federal law when it "identifies the correct governing legal rule" but "unreasonably applies it to the facts of the particular case," "unreasonably extends a legal principle from the Court's precedent to a new context where it should not apply[,] or unreasonably refuses to extend that principle to a new context where it should apply." *DeCastro v. Branker*, 642 F.3d 442, 449 (4th Cir. 2011) (cleaned up); *see Barnes*, 751 F.3d at 238-39 ("[W]e look to whether the state court's application of law was objectively unreasonable and not simply whether the state court applied the law incorrectly." (cleaned up)).

Thus, the AEDPA standard for reviewing claims of legal error by a state court is "highly deferential": a state prisoner must show "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error beyond any possibility for fairminded disagreement." *Burt v. Titlow*, 571 U.S. 12, 18-20 (2013) (cleaned up). When applying this standard, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Further,

the federal court must assume the state court's factual determinations are correct unless there is clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

III.

The State makes two arguments in support of reversal based on the deferential AEDPA standard. First, it contends that the district court erroneously interpreted the state post-conviction court decision in an internally inconsistent way, in violation of the principle that federal courts "should avoid finding internal inconsistencies and contradictions in the decisions of state courts where they do not necessarily exist." *Ferguson v. Sec'y, Fla. Dept, of Corr.,* 716 F.3d 1315, 1340 (11th Cir. 2013). Second, the State asserts that when the state-court decision is properly construed in an internally consistent way, it is clear that the state post-conviction court's decision was not contrary to or an unreasonable application of federal law. We agree with the State on both points and thus conclude that Kelley does not overcome AEDPA's "formidable barrier to federal habeas relief." *Burt*, 571 U.S. at 16. The district court erred in concluding otherwise.

A.

We first address the State's argument regarding the best interpretation of the state post-conviction decision. As explained above, the state-court decision contains a seventeen-paragraph section on the voluntary nature of Kelley's plea based on his

knowledge of the elements of the offenses, as well as two concluding paragraphs on this claim. The State argues that the most reasonable interpretation of the state-court decision is that–of the seventeen-paragraph section–the first twelve paragraphs solely discuss Kelley's arguments because they are copied nearly verbatim from his petition; the next three solely discuss the State's arguments (again, nearly verbatim); and the last two contain the court's actual findings. The State claims that to read the opinion as the district court did–which considers the first twelve paragraphs as containing Kelley's arguments *and* the court's factual findings–creates an inconsistency in the decision because those purported findings contradict the state court's ultimate conclusion that Kelley sufficiently understood the nature and elements of the charges. And, because a federal court reviewing a state-court decision pursuant to AEDPA should avoid unnecessarily finding inconsistencies in the state decision, the State contends that the district court should have read the opinion in the internally consistent way it advocates.

Kelley responds that considering the first fifteen paragraphs as containing factual findings would not conflict with the state court's ultimate decision. In his view, "there is a quite logical way to read the decision: the postconviction court unreasonably applied federal law to those factual findings, resulting in a decision that was contrary to Supreme Court precedent." Response Br. 33.

We agree with the State's interpretation of the state post-conviction court's decision and disagree with Kelley.

A number of the sentences in the first fifteen paragraphs are clearly restatements, often verbatim, of the parties' arguments and begin with statements like "Petitioner's counsel argues" and "Petitioner asserts." J.A. 139. Other sentences are statements of law or basic statements about the facts of the case that the parties don't dispute. Putting those sentences aside, we conclude that the disputed sentences are best and most logically read as describing the parties' arguments rather than as separate state-court factual findings for three reasons.

First, many of the disputed sentences appear to be continuations of immediately preceding argument sentences–meaning that they continue to describe the parties' arguments even though they don't independently signal that they do. *See, e.g.*, J.A. 139 ("Petitioner's counsel argues Petitioner's plea to the indictment was not made knowingly and voluntarily because he was not advised of the elements of the offenses. Petitioner states the trial court asked questions to make sure Petitioner knew his rights to a jury, his right to testify or not to testify, and the sentencing maximum. *However, the trial court did not ask the Petitioner if he understood the nature and elements of the offenses that he pled guilty to.*" (emphasis added)).

Second, most of the sentences closely track the language in Kelley's petition, which provides further support for the conclusion that they are simply restatements of Kelley's arguments. *Compare, e.g.*, J.A. 186 (Kelley's state petition) ("Petitioner entered a plea of guilty to 28 counts. Some of the counts have a logical, understandable meaning listed in the charge itself (for

example: driving while impaired or driving without a valid license). However, in its varying degrees, manslaughter by vehicle is not readily understandable." (cleaned up)), *with* J.A. 140 (state post-conviction decision) ("Petitioner pled guilty to twenty-eight (28) counts. Certain counts are easy to understand and the meaning can be deciphered from the charge itself. For example, driving while impaired or driving without a valid driver's license. Yet, depending on the degree, manslaughter by vehicle is not easy to comprehend.").

Third, reading the disputed statements as factual findings would result in inconsistencies between the facts and the state-court's rationale in denying Kelley's petition. *Compare*, e.g., J.A. 141 ("[T]he proffer did not inform nor explain to Petitioner the elements of the more complex charges of manslaughter by vehicle."), *and* J.A. 142 ("It is also clear the factual basis for the plea does not discuss or explain the nature/elements of the complex charges."), *with* J.A. 146 ("Petitioner clearly acknowledged his guilt and had a sufficient understanding of the nature of the charges. The statement of facts [was] read into the record with little to no changes made which put Petitioner on notice of his actions while driving that resulted in the deaths of five people.").

Stated differently, reading the disputed statements as factual findings would make the state court's conclusion to find Kelley's plea voluntary nonsensical. And so long as there is a reasonable alternative reading, as there is here, that reading would violate the rule that federal courts "should avoid finding internal inconsistencies and contradictions in the

decisions of state courts where they do not necessarily exist." *Ferguson*, 716 F.3d at 1340; *see Holland v. Jackson*, 542 U.S. 649, 654 (2004) (per curiam) (finding that the court of appeals erred when it interpreted a state-court decision to "needlessly create internal inconsistency"); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) ("[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings[.]" (cleaned up)); *Elmore v. Ozmint*, 661 F.3d 783, 869 n.51 (4th Cir. 2011) (giving a state-court order the benefit of the doubt when its decision was ambiguous). Therefore, giving the state-court decision "the benefit of the doubt," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted), we conclude that it should be read as only making factual findings in paragraph seventeen and in the conclusion section.[4]

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[4] For clarity, those findings are as follows:

> Looking at the plea transcript, Judge Northrop found the plea was entered into knowingly and voluntarily when the statement of facts [was] read into the record. Furthermore, no changes or corrections were made to the statement of facts. This is reflected on page 13, lines 2-8. The Judge asked Petitioner whether he had any questions about the plea and Petitioner stated he was pleading guilty to the charge simply because he was guilty. This is reflected on pages 12 and 13 of the plea transcript. On March 27, 2017, Petitioner signed a Waiver of Right/Guilty Plea form where he acknowledges the following statement, "I fully understand the charge of the Indictment and the elements of the offense(s)." This issue is without merit.

B.

Now that we have identified the correct interpretation of the state post-conviction decision, we turn to the State's argument that, properly interpreted, the state decision was not contrary to or an unreasonable application of clearly established federal law. We agree.

1.

"The starting point" in a habeas case "is to identify the clearly established Federal law" that governs the claims. *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (cleaned up). This phrase "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The parties agree that two Supreme Court cases are particularly relevant to this appeal:

J.A. 144 (paragraph 17).

> In the transcript of Petitioner's sentencing page 12, lines 23-25[,] Judge Northrop asks "Are you freely, knowingly and voluntarily entering a plea to the entire indictment because in fact you are guilty and for no other reason?" On page 13, lines 1-8 Defendant said "yes." Petitioner clearly acknowledged his guilt and had a sufficient understanding of the nature of the charges. The statement of facts [was] read into the record with little to no changes made which put Petitioner on notice of his actions while driving that resulted in the deaths of five people.

J.A. 146 (conclusion).

Henderson v. Morgan, 426 U.S. 637 (1976), and *Bradshaw v. Stumpf*, 545 U.S. 175 (2005).

In *Henderson*, a habeas petitioner with "substantially below average intelligence" alleged that his guilty plea to second-degree murder was involuntary because he wasn't aware that intent to cause death was an element of the charge. 426 U.S. at 638-39, 642. The Supreme Court held that the plea was involuntary because the petitioner wasn't advised by counsel or the court that intent to cause death was an essential element. *Id*. at 645-46. The Court explained:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to [the petitioner].

Id. at 647.

The Court also reasoned that the petitioner had never been formally indicted for second-degree murder and therefore wasn't aware of the intent element via the indictment. *Id*. at 645. And the petitioner's

admission to the factual basis–that he stabbed the victim, killing her–didn't necessarily mean that he was admitting to *intending* to kill the victim. *Id.* at 646. Therefore, the Court stated:

> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances, it is impossible to conclude that his plea to the unexplained charge of second-degree murder was voluntary.

Id.

Nearly thirty years later, in *Bradshaw*, the Supreme Court again considered a habeas petitioner who pleaded guilty to a murder charge–this time, aggravated murder–but later claimed he hadn't known that specific intent to cause death was an element of the offense. 545 U.S. at 182. The Court explained that if a defendant pleads guilty without having been informed of the elements of the crime, the plea is not knowing and voluntary. *Id.* at 183. However, the Court found that the petitioner had been informed of the elements of his crime before pleading guilty because "[i]n [the petitioner's] plea hearing, his attorneys represented on the record that they had explained to their client the elements of the

aggravated murder charge; [the petitioner] himself then confirmed that this representation was true." *Id*. The Court elaborated:

> [W]e have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.

Id. (citation omitted).

2.

For purposes of this case, the take-away from *Henderson* and *Bradshaw* is that in order for a guilty plea to be voluntary, the defendant must be informed of the elements of the offense, whether by the court, defense counsel, the indictment, or the agreed-to factual basis. That rule is easily met here.

First, Kelley testified at his plea hearing that he had read the indictment, and he doesn't dispute that the indictment laid out the elements of the offenses to which he pled guilty. He testified similarly at the post-

conviction hearing. *See* J.A. 231-32 (Q: "What do you mean when [counsel] told you what the 28 charges were?" A: "I mean he just pretty much told me what the 28 charges that I was facing [were]." Q: "As in he read you what the charges were?" A: "Right."). "[S]tanding alone, [that] give[s] rise to a presumption that the defendant was informed of the nature of the charge[s] against him." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (involving a defendant who was given a copy of the indictment containing the elements of his offense before his plea); *c.f. Henderson*, 426 U.S. at 645 (finding the plea involuntary in part because the petitioner *had never been indicted* for the charge to which he pled guilty and thus didn't learn of the intent element from the indictment).

Second, at the plea hearing, the judge asked Kelley if he had "discussed this matter thoroughly" with his counsel and was satisfied with his counsel's services, to which Kelley responded in the affirmative. J.A. 80. The court also asked Kelley if he had questions for counsel or the court, to which Kelley responded, "No." J.A. 80. This Court has found that a similar exchange between a defendant and plea judge was sufficient to invoke the *Henderson* presumption that defense counsel explained the nature of the offense to the defendant. *See Harrison v. Warden, Md. Penitentiary*, 890 F.2d 676, 678 (4th Cir. 1989) (explaining that the *Henderson* presumption was appropriate because, *inter alia*, the trial judge asked the defendant "if he had discussed this matter 'entirely' with his counsel" and the defendant responded that he had).

Third, Kelley signed a waiver–which his attorney testified he reviewed with Kelley–indicating that he understood the elements of the offenses. His attorney also certified that he advised Kelley of the nature and elements of the charges. As *Henderson* explains, "a representation by defense counsel that the nature of the offense had been explained to the accused"–as is contained in the record in this case–is normally sufficient to finding a plea voluntary. 426 U.S. at 647; *see Bradshaw*, 545 U.S. at 183 (denying habeas relief on involuntary plea claim because at the plea hearing, defense counsel represented that they explained the elements of the charge to the defendant, which the defendant confirmed); *id.* ("Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge[.]").[5]

Fourth, the prosecution also read its factual basis into the record at the plea hearing; Kelley confirmed that he had no significant corrections to the facts; and his attorney testified at the post-conviction hearing that he discussed the facts with Kelley and

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[5] Although Kelley contends that "the mere signing of a boilerplate statement to the effect that a defendant is knowingly waiving his rights will not discharge the government's burden," *United States v. Hayes*, 385 F.2d 375, 377 (4th Cir. 1967); *see* Response Br. 41, and even assuming his characterization of the waiver in this case is correct, a "mere" "boilerplate statement" is not the only evidence that Kelley was informed of the nature and elements of the charges. *See, e.g.*, J.A. 72 (Kelley testifying that he read the indictment); J.A. 80 (Kelley confirming that he had "discussed this matter thoroughly" with counsel).

explained that he believed those facts were sufficient for the jury to find him guilty of the counts in the indictment. Kelley thus plainly "possesse[d] an understanding of the law in relation to the facts," without which his guilty plea could not have been "truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Considering all of this evidence collectively, *see Brady v. United States*, 397 U.S. 742, 749 (1970) ("The voluntariness of [a] plea can be determined only by considering all of the relevant circumstances surrounding it."), it was more than sufficient for the state court to reasonably conclude that Kelley's plea was knowing and voluntary. Stated differently, Kelley has failed to show that the state post-conviction court's ruling "was so lacking in justification that there was an error beyond any possibility for fairminded disagreement." *Burt*, 571 U.S. at 20 (cleaned up). Therefore, he is not entitled to the "extraordinary remedy" of habeas relief. *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022) (citation omitted).

3.

In spite of the substantial evidence supporting the state court's determination, Kelley argues–and the district court found–that his plea was involuntary. We address Kelley's arguments and the district court's reasoning in turn.

Kelley suggests his plea was defective because he did not receive a detailed definition of the *mens rea* for each charge or a comparison of the different charges. But that is simply not what *Henderson* and

Bradshaw require. Nor has Kelley identified any Supreme Court case dictating, or even suggesting, that legal terms of art must be explained to a defendant before he can knowingly and voluntarily plead guilty. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error *well understood and comprehended in existing law* beyond any possibility for fairminded disagreement." (emphasis added)).

The district court took issue with the state post-conviction court's decision because "Kelley was provided with *incorrect* information by the [state court] about the nature of the charges." *Kelley*, 2023 WL 415552, at *8. Specifically, the district court determined that the plea court misled Kelley about the maximum penalties he faced and incorrectly told him that many of his charges were "the same." *Id.* But Kelley doesn't bring a claim for an involuntary plea based on any failure to inform him of the penalties he faced, and even if he had pursued such a claim, the state post-conviction court could've reasonably rejected the plea court's error as harmless because the plea court advised him of *higher* statutory penalties than he actually could've received, and he nevertheless chose to plead guilty. Further, although the plea court's statement that "[m]any of [the charges] merge . . . . They're the same thing," J.A. 73, could've been better stated, the court was correct that many of the charges would ultimately merge for purposes of sentencing. *See* J.A. 65-66 (sentencing sheets indicating, e.g., that Counts 6 through 10 merged with Counts 1 through 5);

see also Ferguson, 716 F.3d at 1340 (giving the state court "the benefit of the doubt," as required by AEDPA, even though the state court's word choice "could have been more precise and technically correct"). Therefore, the district court erred in relying on these purported misstatements to grant Kelley's habeas petition.

Next, the district court found that Kelley's signing of the waiver form was insufficient to render the plea voluntary when his counsel didn't explain the elements of the offenses and the court misled him about the nature of the charges. This conclusion is erroneous. First, as explained above, there was sufficient evidence that Kelley was informed of the elements of the offenses. And to the extent the district court relied on the state post-conviction court's purported finding that Kelley's counsel didn't explain the elements of the charges to him, that reflects a misinterpretation of the state court's factual findings. Second, as explained above, the state post-conviction court could have reasonably concluded that the plea court's statements were not misleading or were harmless.

In sum, reviewing Kelley's claims of error under the requisite "highly deferential" standard, there is ample evidence supporting the state court's conclusion that Kelley's plea was knowing and voluntary due to his knowledge of the nature and elements of the charges to which he pleaded guilty. *Burt*, 571 U.S. at 18. In other words, it was erroneous for the district court to conclude "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error beyond any possibility for fairminded disagreement." *Id.* at 19-20 (cleaned up).

IV.

In conclusion, the district court erred in granting Kelley's habeas petition. We therefore reverse and remand with instructions to deny Kelley's habeas corpus petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

Southern Division

KENNETH KELLEY

Petitioner

v **Civil Action No. GJH-20-03697**

WILLIAM S. BOHRER, *Acting Warden,*
MARYLAND ATTORNEY GENERAL

Respondents

MEMORANDUM OPINION

In their Answer to the above-entitled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Respondents assert that Petitioner's claims are without merit. ECF No. 5. No hearing is necessary to resolve the matters pending. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2021); *see also Fisher v. Lee,* 215 F.3d 438, 455 (4th Cir. 2000) (petitioner not entitled to a hearing under 28 U.S.C. §2254(e)(2)). For the reasons set forth below, the Petition shall be granted.

I. Background

A. Guilty Plea

Kelley was charged in a twenty-eight-count indictment in the Circuit Court for Prince George's County Maryland due to five deaths caused by Kelley's operation of a vehicle while impaired by alcohol. ECF No. 5-1 at 20-27. Counts One through Fifteen of the indictment charged Kelley with the five deaths under three different statutes:

Counts One-Five:

> *Manslaughter by vehicle or vessel*
>
> (b) A person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle or vessel in a grossly negligent manner.
>
> Md. Code Ann., Crim. Law § 2-209 (in pertinent part)

Counts Six-Ten

> *Causing the death of another by operation of vehicle or vessel in criminally negligent manner*
>
> (b) A person may not cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner.

> Md. Code Ann., Crim. Law § 2-210 (in pertinent part)

Counts Eleven-Fifteen

> *Homicide by motor vehicle or vessel while under the influence of alcohol or under the influence of alcohol per se*
>
> (a) A person may not cause the death of another as a result of the person's negligent driving, operating, or controlling a motor vehicle or vessel while:
> (1) under the influence of alcohol; or
> (2) under the influence of alcohol per se.
>
> Md. Code Ann., Crim. Law § 2-503 (in pertinent part)

A first offense conviction under § 2-210 was a misdemeanor with a maximum sentence of three years per count.[1] A first offense conviction under § 2-503 was a felony and carried a maximum penalty of five years per count.[2] A conviction under § 2-209 carries a penalty of ten years per count.[3]

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[1] Section 2-210 was amended in 2016.

[2] Section 2-503 was amended in 2016.

[3] The remaining counts of the indictment, Sixteen through Twenty-Eight, charged Kelley with driving under the influence per se, driving while impaired by alcohol, driving unlicensed, reckless driving, negligent driving, failure to control speed and avoid collision with another vehicle, failure to stop at a steady

On December 17, 2015, the state offered Kelley a plea deal to Counts One through Five-manslaughter by vehicle (§ 2-209). The offer was predicated on a criminal history of two convictions and would have resulted in a sentence of fifty years, all but twenty suspended. ECF No. 5-1 at 31. Kelley rejected the state's plea offer and instead elected to plea to the indictment on March 27, 2017. *Id.* at 32-47.

A plea hearing was held on March 27, 2017. ECF No. 5-1 at 32-47. Before the hearing began counsel had a discussion with the judge, agreeing that the maximum sentence was fifty years. *Id.* at 33-34. Soon thereafter, the Circuit Court began a colloquy with Kelley. Despite the different degrees of mental culpability among § 2-209, § 2-210, and § 2-503 and the different penalties, the Circuit Court informed Kelley:

> The Court: You understand the indictment contains 28 charges?
>
> The Defendant: Yes.
>
> The Court: And those charges range from manslaughter by auto to driving with an expired license with additional counts of manslaughter by vehicle, criminal negligence, neglect [sic] homicide by motor vehicle, homicide by vessel. *Many of these merge you understand.*

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circular red signal, and driving vehicle on highway on expired license.

> *They're the same thing*. DUI per se, driving while impaired, driving without a valid license, reckless driving, negligent driving, failure to control motor vehicle to avoid a collision, failure to stop at a steady red light, and, again, driving with an expired license. Do you understand that?

The Defendant: Yes.

Id. at 36 (emphasis added). Also, despite the recent discussion where counsel had agreed the maximum penalty was fifty years, the court informed Kelley:

> The Court: You understand that there are statutory penalties with these that could be 60, 70 years? Do you understand that?

The Defendant: Yes, sir.

Id.

The Circuit Court advised Kelley, *inter alia,* that he had the right to a trial by jury and the state was required to prove the case against him beyond a reasonable doubt. *Id.* at 37. The Circuit Court also advised Kelley that he had the right against self-incrimination and the right to an appeal. *Id* at 38-39. Kelley acknowledged his rights and advised the Circuit Court that he was freely and voluntarily waiving them. *Id* at 38-39. The assistant state's

attorney read the factual basis for the plea into the record:

> On October 10, 2014 at approximately 9:42 p.m., the victim's vehicle, which was a silver Acura TSX, was stopped at a red light in the left lane of the westbound Livingston Road at the intersection with Livingston Terrace in Oxen Hill, Prince George's County, Maryland. The vehicle was being driven by Hadasa Boykin. In the front passenger seat was Tiffany Wilkerson. In the rear right-hand-side seat was Tamika Curtis, also an adult. In the rear center seat was Khadja Ba, the daughter of Hadasa Boykin. She was 13 years old. And in the left rear set in a car seat was the son of Hadasa Boykin. He was one year old.
>
> At that time, the defendant, Kenneth Kelley, who is seated to my right in the white shirt, was driving a silver Mercedes S430 in the left lane of Livingston Road. As the defendant approached the intersection of Livingston Road and Livingston Terrace, he was driving approximately 65 to 70 miles per hour. The speed limit on Livingston Road in that area is 30 miles per hour. When the defendant came upon the victim's vehicle, which was stopped at the red light, he slammed his vehicle into the rear of that vehicle sending it spinning clockwise into a PEPCO pole on the other side of the

intersection. The driver's side passenger door impacted the pole.

Upon impact with the utility pole, the victim's vehicle spun around the pole and came to a final rest on the opposite side of the pole. The defendant's vehicle continued straight 255 feet past the intersection and came to a final rest in front of a gas station. In the defendant's vehicle was the defendant as the driver. The front-seat passenger was Robert Hall, who did survive the accident, and the rear-seat passenger was Dominique Green, and she did not survive the accident.

In the victim's vehicle, the driver, Hadasa Boykin did survive the accident. The other four occupants of the vehicle did not survive the accident. All five victims' autopsies reported their causes of death as multiple injuries and their manners of death as accident.

The defendant was taken to Medstar Washington Hospital Center with non-life-threatening injuries. His medical records show that he had an ethanol level of 173 milligrams per deciliter. Dr. Barry Levine, a forensic toxicologist, interpreted those records and calculated that his blood alcohol content at the time of the crash was a .14. Additionally, the defendant was driving on an expired driver's license. Witnesses would have testified that the

> defendant did not attempt to brake prior to the accident, rather slammed into the victim's vehicle at full speed of 65 to 70 miles per hour.
>
> For the purposes of the plea, Your honor, that would have been the State's case.

Id. at 40-42.

Kelley agreed on the record that he had been speeding and that he had been drinking. *Id.* at 42. However, neither the trial judge nor his counsel explained to Kelley on the record the difference between the statutes charging him with the deaths of the victims. The Circuit Court found that Kelley had freely and voluntarily pled guilty and accepted his plea to all twenty-eight charges in the indictment. *Id.* at 44.

B. Sentencing

Kelley was originally scheduled for sentencing on May 12, 2017, but he failed to appear and was held in contempt. *Id.* at 12. A rescheduled hearing was held on June 9, 2017. *Id.* at 48-99. The assistant state's attorney argued that the Circuit Court should sentence Kelley under manslaughter by vehicle (§ 2-209), with the maximum penalty of ten years per count. *Id.* at 88. Kelley's counsel argued that he should be sentenced under homicide by vehicle while under the influence of alcohol (§ 2-503), with the maximum penalty of five years per count. *Id.* at 52-53. The Circuit Court sentenced Kelly under manslaughter by vehicle (§ 2-209), ten years per count, to run

consecutively, for a total of fifty years incarceration. *Id.* at 97. He received an additional 25 days for contempt of court. *Id.* Kelley's Motion for Reconsideration of Sentence, initially held in abeyance, was denied without prejudice on July 2, 2018. *Id.* at 14; 15-16.

C. Direct Appeal and Post-Conviction

On June 29, 2017 Kelley filed a notice of appeal on the grounds that he received an illegal sentence. ECF No. 8-1 at 8. The Court of Special Appeals issued an order on October 30, 2017 dismissing Kelley's appeal because the record was not filed. *Id.* at 14. On April 15, 2019 Kelley filed a *pro se* application for post-conviction relief, which was subsequently amended when counsel enrolled.[4] ECF No. 8-1 at 23-31. Kelley raised two claims: (1) his plea was involuntary because he was not advised of the nature of the offenses, and (2) his plea was involuntary because it relied upon counsel's incorrect assertion that a plea to the indictment would result in a more favorable sentence than the plea offer from the state. ECF No. 8-1 at 24.

A post-conviction hearing was held on February 6, 2020. ECF No. 9. Kelley testified that his counsel read the charges to him. *Id.* at 9-10. Kelley testified that he had no understanding of the elements of the offenses or the maximum sentence. *Id.* at 12; 14-15.

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[4] At the beginning of the post-conviction hearing, Kelley dismissed the claims raised in his *pro se* petition and elected to proceed only with the two claims raised in his counseled petition. ECF No. 9 at 4-6.

Kelley testified that he only understood that he "broke the law." *Id.* at 11. He testified that he pled to the indictment under counsel's advice because he thought he would get a sentence of less than thirty years. *Id.* at 12. Kelley acknowledged that he signed a waiver of rights form. *Id.* at 15. However, it was pointed out on cross-examination that the signature on the section of the form certifying that the attorney explained the elements to Kelley was not Kelley's signature. *Id.* at 15. Kelley acknowledged that his counsel went over the indictment with him, but he never read it himself.[5] *Id.* at 32.

Kelley's counsel, Antoini Jones, testified that he signed the section of the waiver of rights form acknowledging that he had gone over the elements of the crime with Kelley. *Id.* at 48. Jones also testified that the section on the form intended to state the maximum sentence was left blank. *Id.* at 62-63. Jones admitted he made no objection when the Circuit Court erroneously told Kelley at the plea hearing the potential sentence was up to 60, 70 years. *Id.* at 64. Jones testified that he was "not sure" that he explained the difference between gross negligence and criminal negligence to Kelley. *Id.* at 65-66. Jones testified that it was "arguably" part of the elements of the count. *Id.* at 65-66. Jones testified that the fact that Kelley was speeding, under the influence of alcohol, and ran into the rear of another vehicle "would

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[5] The indictment (ECF No. 5-1 at 20-27) lists the charges but does not include an explanation of the different elements required for a conviction under Counts One-Five, Six-Ten, and Eleven-Fifteen.

augment – that would suffice for all of [the elements]." *Id.* at 66. Jones went on to reiterate that he explained to Kelley that the evidence was sufficient for a jury to find him guilty and for him to receive the maximum sentence of ten years for each count. *Id.* at 67.

Jones testified that it was his opinion that it was in Kelley's best interest to plead guilty to the indictment as opposed to the plea offer because he believed that "the incident wasn't something that was fully [intended] or anything like Mr. Kelley. It was an awful tragic mistake on his part. What he had told me transpired it was clear he had no intent of causing any harm to anyone." *Id.* at 42-43. Jones testified that Kelley would forgo a mitigation case at sentencing if he accepted the state's plea offer. *Id.* at 45.

The Circuit Court issued an order on May 18, 2020 denying Kelley's post-conviction application. ECF No. 5-1 at 100-110. The Court of Special Appeals denied his application for leave to appeal on July 16, 2020. ECF No. 8-1 at 70-71.

D. Petition for Habeas Corpus

Kelley submitted his federal Petition for habeas corpus relief on December 6, 2020. ECF No. 1. He asserts the same claims raised on post-conviction: (1) his plea was involuntary because he was not advised of the nature and elements of the offenses, and (2) his plea was involuntary because he relied upon trial counsel's incorrect advice that he would receive a more favorable sentence by pleading guilty to the indictment instead of accepting the plea offer from the state.

II. Standard of Review

A. Analysis Under 28 U.S.C. § 2254

An application for writ of habeas corpus may be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). The federal habeas statute at 28 U.S.C. § 2254 sets forth a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997); *see also Bell v. Cone,* 543 U.S. 447 (2005). The standard is "difficult to meet," and requires courts to give state-court decisions the benefit of the doubt. *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted); *see also White v Woodall,* 572 U.S. 415, 419-20 (2014), quoting *Harrington v. Richter,* 562 U.S. 86, 103 (2011) (state prisoner must show state court ruling on claim presented in federal court was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.").

A federal court may not grant a writ of habeas corpus unless the state's adjudication on the merits: 1) "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States"; or 2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state adjudication is contrary to clearly established federal law under § 2254(d)(1) where the state court 1) "arrives at a conclusion opposite to that

reached by [the Supreme] Court on a question of law," or 2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams v. Taylor,* 529 U.S. 362, 405 (2000).

Pursuant to the "unreasonable application" analysis under 2254(d)(1), a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington,* 562 U.S. at 101 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). Thus, "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 785 (internal quotation marks omitted).

Further under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen,* 558 U.S. 290, 301 (2010). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question," a federal habeas court may not conclude that the state court decision was based on an unreasonable determination of the facts. *Id.* "[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly." *Renico v. Lett,* 559 U.S 766, 773 (2010).

The habeas statute provides that "a determination of a factual issue made by a State court

shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "Where the state court conducted an evidentiary hearing and explained its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of error on the state court's part." *Sharpe v. Bell,* 593 F.3d 372, 378 (4th Cir. 2010). This is especially true where state courts have "resolved issues like witness credibility, which are 'factual determinations' for purposes of Section 2254(e)(1)." *Id.* at 379.

B. Analysis Under *Strickland*

Ineffective assistance of counsel claims are governed by the settled doctrine of *Strickland v. Washington,* 466 U.S. 668 (1984). It is equally settled that this doctrine applies to ineffective assistance claims asserted in connection with guilty pleas. *Fields v. Att'y Gen. of State of Md.,* 956 F.2d 1290, 1297 (4th Cir. 1992) *citing, Hill v. Lockhart,* 474 U.S. 52, 57 (1985). In *Strickland,* the Supreme Court explained that to show constitutionally ineffective assistance of counsel, Petitioner must show both deficient performance and prejudice – that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Id.* at 687, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

To satisfy the performance part of the *Strickland* standard, Petitioner must demonstrate

that counsel's performance was not "within the range of competence normally demanded of attorneys in criminal cases." *Id.* at 687. Petitioner must show that the attorney's performance fell "below an objective standard of reasonableness," as measured by "prevailing professional norms." *Strickland,* 466 U.S. at 688; *see Harrington,* 562 U.S. at 104; *United States v. Powell,* 850 F.3d 145, 149 (4th Cir. 2017). Judicial scrutiny of counsel's performance must be highly deferential and not based on hindsight. *Stokes v. Stirling,* 10 F.4th 236, 246 (4th Cir. 2021) (citing *Strickland,* 466 U.S. at 689). The central question is whether "an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington,* 562 U.S. at 88 (quoting *Strickland,* 466 U.S. at 690).

Further, Petitioner must overcome the "'strong presumption' that counsel's strategy and tactics fall 'within the wide range of reasonable professional assistance.'" *Burch v. Corcoran,* 273 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland,* 466 U.S. at 689). Under the Sixth Amendment, a defendant "has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1910 (2017) (quoting *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147 (2006)). "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington,* 562 U.S. at 788 (internal citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether

there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

III. Analysis

A. Ground One

In Ground One Kelley claims that his plea was involuntary because he was not advised of the nature and elements of the offenses.[6] When it denied Kelley's post-conviction petition, the Circuit Court found that Kelley's counsel did not state on the record during the plea hearing that he had gone over the nature and elements of the crimes with Kelley. Nor did Kelley state on the record during the plea hearing that he understood the nature and elements of the crimes. ECF No. 5-1 at 103. The Circuit Court made a factual finding that Kelley's counsel did not explain the nuances between the counts of gross negligence, criminal negligence, and negligence per se. *Id* at 105. The Circuit Court also made a factual finding that it

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[6] Kelley uses the term of art "ineffective assistance of counsel" in one section of his pleading describing this claim. ECF No. 1-1 at 3. A holistic review of Kelley's claim leads the Court to the conclusion that he intended to re-assert the same claim that was brought during post-conviction proceedings, which was not an ineffective assistance of counsel claim. Respondents argue that any ineffective assistance of counsel claim is not exhausted and procedurally defaulted. ECF No. 5 at 16. The record reflects that Ground One was presented to the post-conviction court as a due process claim and not as an ineffective assistance of trial counsel claim. However, Ground Two was presented to the Circuit Court as an ineffective assistance of counsel claim and is not procedurally defaulted. ECF No. 8-1 at 30-31.

"is clear that the factual basis for the plea does not discuss or explain the nature/elements of the complex charges." *Id.*

The Circuit Court analyzed the voluntariness of the plea based on the standard set forth in *State v. Daughtry,* 419 Md. 35 (2011). The Circuit Court explained that *Daughtry* directs Maryland courts to consider the "complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." ECF No. 5-1 at 103. The Circuit Court noted the complex nuances between the legal definitions of "gross negligence" and "criminal negligence," concluding that "manslaughter by vehicle" is not easy to comprehend. *Id.* The Circuit Court determined that Kelley, at twenty-seven years old, had not finished high school and had no similar criminal history to inform him of the charges. *Id.* at 104. However, the Circuit Court ultimately concluded that Ground One was without merit because of the content of the statement of facts that were read into the record and because Kelley stated on the record that he was guilty. The Circuit Court was also persuaded by the fact that Kelley signed a waiver form on the day of the plea hearing acknowledging that he understood the elements of the offense.[7] *Id.* at 106-107.

This Court cannot analyze Kelley's claim based on the standard set forth in *State v. Daughtry* because habeas relief is available for violations of federal law.

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[7] The referenced waiver form is not included in the record provided by the state.

See Fletcher v. Wolfe, No. CV TDC-15-0051, 2018 WL 1211535 at *5) (D. Md. Mar. 8, 2018) (citing *Estelle v. McGuire,* 502 U.S. 62, 68 (1991)). *See also Brown v. Maryland,* No. CV ELH-19-2176, 2022 WL 1451627, at *4 (D. Md. May 9, 2022).

A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met, and the plea is invalid. *Bradshaw v. Stumpf* 545 U.S. 175, 182-183 (2005). In *Henderson v. Morgan,* the Supreme Court held that a guilty plea to second degree murder was involuntary when defense counsel did not fully explain to the defendant the intent requirement of the crime. 426 U.S. 637, 646 (1976).

Here, the Circuit Court made a factual finding that Kelley's counsel failed to explain the different mental culpability elements of manslaughter by vehicle (§ 2-209), causing the death of another by operation of a vehicle in a criminally negligent manner (§ 2-210), and homicide by motor vehicle while under the influence of alcohol (§ 2-503). The transcript of the plea hearing reveals that the Circuit Court never asked Kelley if he understood the elements of any of the twenty-eight crimes with which he was charged. In fact, the Circuit Court incorrectly instructed Kelley that many of the crimes in which he was charged were "the same."

The three statutes under which Kelley was charged for the deaths of the five victims are not the same. To prove "gross negligence" under § 2-209, the prosecution must show that the defendant was conscious to the risk of human life posed by his conduct and acted with "wanton and reckless disregard for human life." To prove "criminal negligence" under § 2-210, the prosecution must show that the defendant should have been aware but failed to perceive that his or her conduct created a "substantial and unjustifiable risk" to human life and that this failure was a "gross deviation" from the standard of care of a reasonable person. Section 2-210 states a lesser degree of culpability than § 2-209. *See* 96 Md. Op. Atty. Gen. 128, Dec. 21, 2011.

The *Henderson* court determined that the failure to explain the element of intent and the difference between relevant degrees of crimes rendered a plea involuntary and the conviction a violation of due process. *Henderson,* 426 U.S. at 646. The *Henderson* decision does not require a complete enumeration of the elements of the offense to which a defendant pleads guilty, because "[n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation ... that the nature of the offense has been explained to the accused." *Henderson,* 426 U.S. at 647. The record in Kelley's case contains no such explanation or representation.

Even when the record does not contain an explanation, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the

accused notice of what he is being asked to admit." *Id.* While there is usually a strong presumption that counsel has explained the elements of a charge to a defendant, in Kelley's case the Circuit Court made a finding of fact that Kelley's counsel failed to explain a critical element of the statutes in the indictment. The transcript of the post-conviction hearing support's this conclusion. As in *Henderson,* "[t]here is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that [petitioner] had the requisite intent." *Henderson,* 426 U.S. at 646.

Indeed, Kelley was provided with *incorrect* information by the Circuit Court about the nature of the charges he was facing. Kelley was misled about the maximum penalties and was incorrectly advised that many of his charges were "the same." *See Hicks v. Franklin,* 546 F.3d 1279 (8th Cir. 2008) (Court deprived defendant of real notice of true nature of charge against him by incorrectly advising him the charge contained no *mens rea* requirement). The error was not inconsequential. The Circuit Court did not treat the charges as the same during sentencing when it elected to sentence Kelley under Counts One through Five, manslaughter by vehicle (§ 2-209), which required the greatest degree of mental culpability and carried the highest sentence.

Petitioner pled guilty to causing the collision under the influence of alcohol and while speeding, but he never admitted that he did so with the requisite mental culpability for a conviction of manslaughter by motor vehicle (§ 2-209). Before the plea hearing, Kelley never received any explanation of the nature of the

charges against him by counsel and during the plea hearing he was misled by the Circuit Court that the nature of the charges against him were "the same." In these circumstances, the record does not establish that his plea was knowing.

The last reasoned state court opinion – the opinion denying post-conviction relief, relied on Maryland law to find Kelley's plea voluntary. Federal law dictates a different result. To the extent the post-conviction opinion can be construed to also rely on federal law, its conclusion is contrary to established United States Supreme Court precedent. The Circuit Court's opinion is also an unreasonable application of the law to the facts. The Circuit Court found that the plea was voluntary because of the factual basis that was read into the record and because Kelley said he was guilty. This is contrary to United States Supreme Court precedent. It is not enough for the defendant to understand the facts of the crime. "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States,* 394 U.S. 459, 466 (1969).

Finally, the fact that Kelley signed a canned waiver form is not sufficient to find that his plea was voluntary. Any effect of the waiver form is completely vitiated by the fact that counsel failed to explain the critical elements of the offenses and the fact that the Circuit Court misled Kelley about the nature of the charges during the plea hearing. In sum, the Circuit Court unreasonably applied the facts to the law considering: Kelley's testimony that he did not

understand the elements of the charges (ECF No. 9 at 14-15), the Circuit Court's factual finding that Kelley's personal characteristics could not provide a basis for concluding that he understood the charges (ECF No. 5-1 at 104), the Circuit Court's factual finding that counsel failed to explain the critical elements of the charges *(id.* at 105), the Circuit Court's factual finding that "manslaughter by vehicle is not easy to understand" *(id.* at 103), the Circuit Court's factual finding that the factual basis read at the plea hearing "did not inform nor explain to Petitioner the elements of the more complex charges of manslaughter by vehicle" *(id.),* and the fact that the Circuit Court misstated the nature of the charges during the plea hearing *(id.* at 36). *See Bousley v. United States,* 523 U.S. 614, 618-19 (1998) (plea constitutionally invalid when neither petitioner, nor counsel, nor the court correctly understood the essential elements of the crime, even when the petitioner has received a copy of the indictment). Under these circumstances, reasonable jurists would not disagree that Kelley was not informed of the critical elements of manslaughter by vehicle (§ 2-209) and his guilty plea is invalid.

Kelley's guilty plea was involuntary and unknowing, and the judgment of conviction was entered without due process of law.

B. Ground Two

In Ground Two Kelley alleges that he received ineffective assistance of counsel because his trial counsel advised him to reject the state's plea offer of fifty years, with all but twenty years suspended. Kelley contends that his counsel erroneously advised

him that pleading to the indictment would result in a sentence of less than thirty years. The Circuit Court held that Kelley was not prejudiced by his counsel's advice to reject to the plea offer:

> Petitioner's claim that his guilty plea to the entire indictment was not made knowingly and voluntarily as he relied on trial counsel's incorrect assertion that an open plea would result in a lesser sentence also fails. Petitioner does not deny he was the one that rejected the 30 year plea deal. It is important to note this plea offer would have failed anyway since Petitioner had five prior convictions. Petitioner opted for an open plea in order to mitigate and offer argument for a lesser sentence. He was given the opportunity and based on the facts and circumstances of this case Judge Northrup had the right to render what he felt was an appropriate sentence.

ECF No. 5-1 at 109-110.

In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper,* 566 U.S. 156, 163 (2012) (internal citations omitted). When counsel's advice leads to the rejection of a plea, the petitioner must show "that but for the ineffective advice of counsel there is a reasonable probability that

the plea offer would have been presented to the court *(i.e.,* that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164.

As pointed out by the Circuit Court, the plea offer from the state contained the following caveat: "This offer is predicated upon the belief that [Kelley] has two prior convictions...Any information revealed in the PSI that would increase the Defendant's guidelines may change the terms of this plea." *Id.* at 31. Kelley had five prior convictions. Due to the state's warning in the plea offer about unknown prior convictions, Kelley cannot show that the plea "would not have been withdrawn in light of intervening circumstances" even if counsel had advised him to accept it.

The Circuit Court's dismissal of Ground Two was neither contrary to nor an unreasonable application of federal law. Ground Two is without merit.

IV. CONCLUSION

Because Kelley's guilty plea was involuntary, unknowing, and a violation of due process, the petition of Kenneth Kelley for a writ of habeas corpus is granted. His subject convictions and sentences are vacated and the case is remanded to the Circuit Court of Prince George's County for a new trial. However, this Court's judgment will be STAYED FOR THIRTY (30)

DAYS to allow for an appeal or, absent an appeal, a decision by the Circuit Court of Prince George's County concerning Kelley's continued confinement.

By separate Order which follows, the Petition for Writ of Habeas Corpus shall be granted.

1/24/2023

/s/ George J. Hazel
GEORGE J. HAZEL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Southern Division

KENNETH KELLEY

Petitioner

v **Civil Action No. GJH-20-03697**

WILLIAM S. BOHRER, *Acting Warden,*
MARYLAND ATTORNEY GENERAL

Respondents

ORDER

For reasons stated in the foregoing Memorandum, it is this 24th day of January 2023, by the United States District Court for the District of Maryland, hereby ordered that:

1. The Petition IS GRANTED;

2. Petitioner's conviction and sentence ARE VACATED, and the case is REMANDED to the Circuit Court for Prince George's County for a new trial;

3. Judgment IS STAYED for thirty (30) DAYS pending an appeal, or absent an appeal, a decision by the Circuit Court for Prince George's County concerning Petitioner's continued confinement;

4. The Clerk SHALL SEND a copy of this Order and Memorandum to Petitioner; and

5. The Clerk SHALL CLOSE this case.

1/24/2023

/s/ George J. Hazel
GEORGE J. HAZEL
United States District Judge

FILED: April 2, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 23-6179
(8:20-cv-03697-GJH)

KENNETH KELLEY

Petitioner - Appellee

v.

WILLIAM S. BOHRER, Acting Warden; MARYLAND ATTORNEY GENERAL

Respondents - Appellants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Nwamaka Anowi, Clerk

MD Crim Law § 2-209 (2002)

§ 2-209. Manslaughter by vehicle or vessel

(a) "Vehicle" defined.

In this section, "vehicle" includes a motor vehicle, streetcar, locomotive, engine, and train.

(b) Prohibited.

A person may not cause the death of another as a result of the person's driving, operating, or controlling a vehicle or vessel in a grossly negligent manner.

(c) Name of crime.

A violation of this section is manslaughter by vehicle or vessel.

(d) Penalty.

A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $5,000 or both.

(e) Charging document.

(1) An indictment or other charging document for manslaughter by vehicle or vessel is sufficient if it substantially states: "(name of defendant) on (date) in (county) killed (name of victim) in a grossly negligent manner against the peace, government, and dignity of the State.".

(2) An indictment or other charging document for manslaughter by vehicle or vessel need not set forth the manner or means of death.

MD Crim Law § 2-210 (2011)

(a) In this section, "vehicle" includes a motor vehicle, streetcar, locomotive, engine, and train.

(b) A person may not cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner.

(c) For purposes of this section, a person acts in a criminally negligent manner with respect to a result or a circumstance when:

(1) the person should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur; and

(2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person.

(d) It is not a violation of this section for a person to cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a negligent manner.

(e) A violation of this section is criminally negligent manslaughter by vehicle or vessel.

(f) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both.

MD Crim Law § 2-503 (2002)

§ 2-503. Homicide by motor vehicle or vessel while under the influence of alcohol or under the influence of alcohol per se

(a) Prohibited.

A person may not cause the death of another as a result of the person's negligently driving, operating, or controlling a motor vehicle or vessel while:

(1) Under the influence of alcohol; or

(2) Under the influence of alcohol per se.

In this section, "vehicle" includes a motor vehicle, streetcar, locomotive, engine, and train.

(b) Name of the crime.

A violation of this section is:

(1) Homicide by Homicide by motor vehicle or vessel while under the influence of alcohol; or

(2) Homicide by motor vehicle or vessel while under the influence of alcohol per se.

(c) Penalty.

A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.

MD Crim Law § 2-504 (2002)

§ 2-504. Homicide by motor vehicle or vessel while impaired by alcohol

(a) Prohibited.

A person may not cause the death of another as a result of the person's negligently driving, operating, or controlling a motor vehicle or vessel while impaired by alcohol.

(b) Name of crime.

A violation of this section is homicide by motor vehicle or vessel while impaired by alcohol.

(c) Penalty.

A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both.

STATE OF MARYLAND, Prince George's County, to wit:

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL TYPHANI WILKERSON IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-209 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

COUNT 2

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL TAMEIKA CURTIS IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-209 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

COUNT 3

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE

GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL KHADUA BA IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-209 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

COUNT 4

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL HASSAN BOYKIN IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-209 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

COUNT 5

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID KILL DOMINIQUE GREEN IN A GROSSLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-

209 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT MANSLAUGHTER-AUTO)**

COUNT 6

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID CAUSE THE DEATH OF TYPHANI WILKERSON AS THE RESULT OF DRIVING A VEHICLE IN A CRIMINALLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-210(b) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(CRIMINALLY NEGLIGENT MANSLAUGHTER VEHICLE)**

COUNT 7

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY ON** OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID CAUSE THE DEATH OF TAMEIKA CURTIS AS THE RESULT OF DRIVING A VEHICLE IN A CRIMINALLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-210(b) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE,

GOVERNMENT AND DIGNITY OF THE STATE. **(CRIMINALLY NEGLIGENT MANSLAUGHTER VEHICLE)**

COUNT 8

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID CAUSE THE DEATH OF KHADUA BA AS THE RESULT OF DRIVING A VEHICLE IN A CRIMINALLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-210(b) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(CRIMINALLY NEGLIGENT MANSLAUGHTER VEHICLE)**

COUNT 9

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID CAUSE THE DEATH OF HASSAN BOYKIN AS THE RESULT OF DRIVING A VEHICLE IN A CRIMINALLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-210(b) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE

(CRIMINALLY NEGLIGENT MANSLAUGHTER VEHICLE)

COUNT 10

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID CAUSE THE DEATH OF DOMINIQUE GREEN AS THE RESULT OF DRIVING A VEHICLE IN A CRIMINALLY NEGLIGENT MANNER, IN VIOLATION OF CR-02-210(b) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(CRIMINALLY NEGLIGENT MANSLAUGHTER VEHICLE)**

COUNT 11

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, DID KILL TYPHANI WILKERSON, IN VIOLATION OF CR-02-503(a)(2) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT

AND DIGNITY OF THE STATE. **(NEGLIGENT HOMICIDE AUTO UNDER INFLUENCE)**

COUNT 12

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, DID KILL TAMEIKA CURTIS, IN VIOLATION OF CR-02-503(a)(2) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT HOMICIDE AUTO UNDER INFLUENCE)**

COUNT 13

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, DID KILL KHADUA BA, IN VIOLATION OF CR-02-503(a)(2) OF THE CRIMINAL LAW ARTICLE

AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT HOMICIDE AUTO UNDER INFLUENCE)**

COUNT 14

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, DID KILL HASSAN BOYKIN, IN VIOLATION OF CR-02-503(a)(2) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT HOMICIDE AUTO UNDER INFLUENCE)**

COUNT 15

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, DID KILL DOMINIQUE GREEN, IN VIOLATION OF CR-

02-503(a)(2) OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT HOMICIDE AUTO UNDER INFLUENCE)**

COUNT 16

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE IMPAIRED BY ALCOHOL, DID KILL TYPHANI WILKERSON, IN VIOLATION OF CR-02-504 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEG HMCD-AUTO/WHILE IMPAIRED)**

COUNT 17

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE IMPAIRED BY ALCOHOL, DID KILL TAMEIKA

CURTIS, IN VIOLATION OF CR-02-504 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEG HMCD-AUTO/WHILE IMPAIRED)**

COUNT 18

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH** KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE IMPAIRED BY ALCOHOL, DID KILL KHADUA BA, IN VIOLATION OF CR-02-504 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEG HMCD-AUTO/WHILE IMPAIRED)**

COUNT 19

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE IMPAIRED BY ALCOHOL, DID KILL HASSAN

BOYKIN, IN VIOLATION OF CR-02-504 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEG HMCD-AUTO/WHILE IMPAIRED)**

COUNT 20

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, EN PRINCE GEORGE'S COUNTY, MARYLAND, UNLAWFULLY, AS A RESULT OF HIS NEGLIGENT DRIVING, OPERATION, AND CONTROL OF A MOTOR VEHICLE WHILE IMPAIRED BY ALCOHOL, DID KILL DOMINIQUE GREEN, IN VIOLATION OF CR-02-504 OF THE CRIMINAL LAW ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEG HMCD-AUTO/WHILE IMPAIRED)**

COUNT 2I

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY DRIVE A MOTOR VEHICLE WITHIN THIS STATE WHILE UNDER THE INFLUENCE OF ALCOHOL PER SE, IN VIOLATION OF TR-21-902(a)(2) OF THE TRANSPORTATION ARTICLE AGAINST THE

PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(DRIVING UNDER THE INFLUENCE PER SE)**

COUNT 22

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY DRIVE A MOTOR VEHICLE WITHIN THIS STATE WHILE IMPAIRED BY ALCOHOL, IN VIOLATION OF TR-21-902(b)(1) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE, **(DRIVING WHILE IMPAIRED BY ALCOHOL)**

COUNT 23

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY DRIVE A MOTOR VEHICLE UPON A HIGHWAY IN THE STATE OF MARYLAND WITHOUT HOLDING A VALID DRIVER'S LICENSE, IN VIOLATION OF TR-16-101(a) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(DRIVING UNLICENSED)**

COUNT 24

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY DRIVE A MOTOR VEHICLE IN WANTON AND WILLFUL DISREGARD FOR THE SAFETY OF PERSONS AND PROPERTY, IN VIOLATION OF TR-21-901.1(A) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(RECKLESS DRIVING)**

COUNT 25

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY DRIVE A MOTOR VEHICLE IN A CARELESS AND IMPRUDENT MANNER THAT ENDANGERS ANY PROPERTY AND THE LIFE AND PERSON OF AN INDIVIDUAL, IN VIOLATION OF TR-21-901.1(B) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(NEGLIGENT DRIVING)**

COUNT 26

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID UNLAWFULLY FAIL TO CONTROL THE SPEED OF HIS VEHICLE AS NECESSARY TO AVOID COLLIDING WITH ANOTHER VEHICLE, IN VIOLATION OF TR-21-801(B) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(FAILURE TO CONTROL SPEED TO AVOID COLLISION W/ANOTHER VEHICLE)**

COUNT 27

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT **KENNETH KELLEY** ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID FAIL TO STOP AT THE NEAR SIDE OF THE INTERSECTION WHILE FACING A STEADY CIRCULAR RED SIGNAL ALONE, IN VIOLATION OF TA-21-202(h)(1) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(DRIVER FAIL TO STOP AT STEADY CIRCULAR RED SIGNAL)**

COUNT 28

THE GRAND JURORS OF THE STATE OF MARYLAND FOR THE BODY OF PRINCE GEORGE'S COUNTY ON THEIR OATH DO PRESENT THAT KENNETH KELLEY ON OR ABOUT THE 10th DAY OF OCTOBER, 2014, IN PRINCE GEORGE'S COUNTY, MARYLAND, DID DRIVE A MOTOR VEHICLE ON A HIGHWAY IN THIS STATE AFTER HIS LICENSE HAD EXPIRED, IN VIOLATION OF TA-I6-115(g) OF THE TRANSPORTATION ARTICLE AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(DRIVING VEHICLE ON HIGHWAY ON EXPIRED LICENSE)**

/s/ LaShanta Harris
ASSISTANT STATE'S ATTORNEY FOR PRINCE GEORGE'S COUNTY, MARYLAND

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY MARYLAND

STATE OF MARYLAND

VS. CASE No. CT-15-0626X

KENNTH KELLEY

WAIVER OF RIGHTS /GUILTY PLEA

I understand by pleading guilty, I surrender the following rights:

1. The right to a speedy trial with the close assistance of competent counsel. The right to a - trial conducted by a judge or a jury.

2. The right to a bench or jury trial with a jury composed of twelve (12) individuals selected from the community. The right to have counsel and myself challenge prospective jurors who demonstrated bias or who are otherwise unqualified, and the right to strike a certain number of jurors peremptorily. The right to have the jury instructed that I am presumed innocent and that presumption could only be overcome by proof beyond a reasonable doubt. I understand all twelve (12) persons of the jury, after hearing-the evidence, must be persuaded by the evidence of my guilt beyond a reasonable doubt before I can be found guilty.

3. The right to have witnesses come before me in open Court and present evidence and/or testify.

4. The right to cross-examine all witnesses against me, which means asking those witnesses any reasonable questions about the evidence they are presenting.

5. The right to call witnesses to testify on my behalf and the right to have the Court-issue summonses to require them to come to court.

6. The right to remain silent and not testify.

7. The right to inform the jury that if I choose not to testify, that my decision to do so could not be held against me or considered in any way.

8. The right to take the witness stand and testify on my own behalf.

I acknowledge the following:

1. I understand all the above rights.

2. That by pleading guilty, I am waiving all of the above listed rights, freely and voluntarily.

3. I give up my right to litigate the manner in which the State gathered the evidence against me, to include seizures, identification, confessions, etc. If I have already litigated those motions, they are not preserved for appeal.

4. I fully understand the charge of Indictment and the elements of the offense(s).

5. The maximum penalty for the offense(s) to which I am pleading guilty is _____

(years/months) and the offense(s) is a felony and/or a misdemeanor.

6. That pleading guilty may result in a violation of parole or probation, if I am presently on parole or probation.

7. If I am not a citizen of the United States, a plea of guilty may result in a denial of United States citizenship and/or deportation.

8. I understand that if my plea includes a plea of guilty to a gun offense, I am required to register with the Prince George's County Police in accordance with County Code 14-189. I understand that if I fail to register in accordance with County Code 14-189; I could be charged with a misdemeanor, and upon conviction, I could be sentenced to incarceration and/or a fine. I understand that registration is mandatory, and having acknowledged my understanding, it is my responsibility to ensure I get. the information I need about registration.

9. I was not threatened in any way, through use of physical force, violence or intimidation, to enter this guilty plea. That I was not made any promises, commitments or induced in any way to enter this plea.

10. I am satisfied with the services of my attorney.

11. I will not be able to file a direct appeal in my case, but I can request an Appellate Court to review this plea and that request must be, in writing and

filed within thirty (30) days of today's date. I am aware that the Appellate Court will review my case on the following four (4) grounds: (1) jurisdiction, (2) legality of sentence, (3) voluntariness, and (4) my attorney's competence. I am also aware that if I want my sentence reconsidered, I will have to inform the court within ninety (90) days of today's date.

Defendant:

/s/ Kenneth Kelley Date: 3-27-17

I hereby certify that I am the defendant's attorney and have advised the defendants of:

1. The nature of the charge(s); the elements of all of the charges; all possible defenses to those charges and any and all plea offers.

2. The maximum penalty that defendant faces under this plea; and

3. Any applicable collateral consequences of this plea, including, but not limited to: immigration, parole, probation, and/or gun registration.

Attorney Name: /s/ A. M. Jones
Attorney Email: AMJONESLAW@GMAIL.COM
Date: 3/27/17

[P-1] IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs. CT150626X

KENNETH KELLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Plea hearing)

Upper Marlboro, Maryland
Monday, March 27, 2017

BEFORE:

HONORABLE ALBERT W. NORTHROP,
Associate Judge

APPEARANCES:

For the State:

JENNIFER B. RUSH, ESQUIRE

JOEL PATTERSON, ESQUIRE

For the Defendant:

ANTOINI JONES, ESQUIRE

SUSAN A. MILTON
OFFICIAL COURT REPORTER
P.O. Box 401
Upper Marlboro, Maryland 20773
(301) 952-3461

[P-2] P R O C E E D I N G S

(9:07 a.m.)

THE DEPUTY CLERK: Criminal Trial 150626X, State of Maryland versus Kenneth Kelley.

MS. RUSH: Good morning, Your Honor. Jennifer Rush and Joel Patterson on behalf of the State.

MR. PATTERSON: Good morning, Your Honor.

MR. JONES: Good morning, Your Honor. Antoini Jones on behalf of Mr. Kelley, who is present now.

(Counsel approached the bench, and the following ensued:)

MR. JONES: Your Honor, this is going to be a plea, and he signed the waiver. The plea is going to be we believe to the indictment as opposed to the --

MR. PATTERSON: The defense is not accepting the State's offer in this case. They are pleading to the indictment so as to remain free to allocute.

MR. JONES: That's correct. And then a three-judge panel potential. And I think the State is not opposed to him remaining on his current bond, which is $100,000, and he's on GPS until sentencing.

MS. RUSH: That's correct.

MR. PATTERSON: So long as he remains on the GPS monitoring.

MR. JONES: He's right. And it's five counts, [P-3] which -- well, actually 28 counts, but they merge, but it's 28 counts. I'll just put the indictment right here that he's pleading to for the maximum sentence, but I think they merge. The maximum is 50 years?

MS. RUSH: Fifty.

MR. JONES: Assuming it runs consecutive, but his guidelines are eight to 50 or 40?

MS. RUSH: It's really eight to 61, but the cap is 50. So it's eight and 50.

THE COURT: He has a prior?

MR. JONES: Well, nothing that --

MS. RUSH: He has a possession with intent to distribute.

MR. JONES: Yes. Nothing like this, Your Honor.

THE COURT: Okay. I'll talk about that for

everybody's benefit.

MR. JONES: I understand. Just so the Court can be aware, obviously the overwhelming majority of people here are the family of the victims; however, my client does have substantial family support in here. He has somewhere roughly about 10 people.

MS. RUSH: They have a good number of his family.

MR. JONES: His community support.

[P-4] (Counsel returned to the trial tables, and the proceedings resumed in open court.)

THE COURT: Okay. Mr. Jones, my understanding is Mr. Kelley is wishing to plead to the indictment today; is that correct?

MR. JONES: Yes, Your Honor.

THE COURT: Mr. Kelley, please give me your full, true and correct name.

THE DEFENDANT: My name is Kenneth Kelley.

THE COURT: How old are you?

THE DEFENDANT: Twenty-seven.

THE COURT: How far have you gone in school?

THE DEFENDANT: The eleventh.

THE COURT: And you read, write and understand the English language?

THE DEFENDANT: Yes.

THE COURT: You've read the indictment in this case?

THE DEFENDANT: Yes.

THE COURT: I understand you wish to enter a plea of guilt to the indictment; is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand the indictment contains 28 charges?

THE DEFENDANTS: Yes.

[P-5] THE COURT: And those charges range from manslaughter by auto to driving with an expired license with additional counts of manslaughter by vehicle, criminal negligence, neglect homicide by motor vehicle, homicide by vessel. Many of these merge you understand. They're the same thing. DUI per se, driving while impaired, driving without a valid license, reckless driving, negligent driving, failure to control motor vehicle to avoid a collision, failure to stop at a steady red light, and, again, driving with an expired license.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand that there are statutory penalties with these that could be 60, 70 years?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you in good health both mentally and physically?

THE DEFENDANT: Yes.

THE COURT: Are you currently under the influence of any drugs, alcohol or medication?

THE DEFENDANT: No.

THE COURT: Are you currently on parole or [P-6] probation in this or any other jurisdiction?

THE DEFENDANT: Yes.

MR. JONES: Yes, Your Honor, but it --

THE COURT: It occurred subsequent to this?

MR. JONES: Yes.

THE COURT: So these charges would not result in a violation of your probation; is that correct?

MR. JONES: That's my understanding.

THE COURT: And I must advise you if you are not a citizen of the United States, a plea in this case could adversely affect your status in this country.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You also understand that a plea in this case could affect your right to own or possess a firearm?

THE DEFENDANT: Yes.

THE COURT: You understand you don't have to enter this plea. You could make the State go to trial and prove its case beyond a reasonable doubt. That would be either before me or before a jury; and if before a jury, the jury would consist of 12 members of the community, all 12 of whom would have to find you guilty beyond a reasonable doubt. You would aid in the selection of that jury to be sure that it was fair and [P-7] impartial, but if there is no trial, there is no jury. Are you freely, knowingly and voluntarily waiving your right to a trial by jury?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, you give up the right to challenge the manner in which the State gathered its evidence against you as well as the right to challenge any defects in the charging document.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If this matter were to go to trial, the State would be required to prove its case beyond a reasonable doubt. In order to do that, they would call witnesses and present evidence. You'd have the opportunity to cross-examine those witnesses and to challenge the admissibility of that evidence.

You also have the opportunity to call your own witnesses and present your own evidence. Once again, if there is no trial, there are no witnesses and the only evidence is going to be a statement read to me in a few moments by the State.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, you give up your right to remain silent or the right against [P-8] self-incrimination. That's a very valuable right. No one can make you give that up.

If you were to exercise your right to remain silent, the State would derive no benefit and I would draw no adverse inference against you. If the matter were tried before a jury, not only would the jury be instructed to disregard the fact that you had exercised your right to remain silent, they would be specifically instructed not to even discuss it. But when you say I'm guilty, you've given that right up.

Are you freely, knowingly and voluntarily waiving your right to remain silent?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, you give up your right to an automatic appeal to the Court of Special Appeals. You'll have 30 days within which to seek leave to appeal. And if the Court of Special Appeals grants that leave, they will consider any one or all of four things. Those four things are the voluntariness of your plea, the competence of your attorney, the jurisdiction of this Court, and the legality of any sentence imposed.

Do you understand your appeal rights?

THE DEFENDANT: Yes.

THE COURT: Before I can accept your plea, I [P-9] have to be satisfied that there's a factual basis for the plea. For that reason, I'll ask the State to give me that factual basis at this time.

Have a seat, but listen carefully to what Ms. Rush has to say. When she's finished, I will ask if you have any significant additions or corrections.

MS. RUSH: Thank you, Your Honor.

Had this matter gone to trial, the State would have proved beyond a reasonable doubt that on October 10th, 2014 at approximately 9:42 p.m., the victim's vehicle, which was a silver 2007 Acura TSX, was

stopped at the red light in the left lane of the westbound Livingston Road at the intersection with Livingston Terrace in Oxon Hill, Prince George's County, Maryland. The vehicle was being driven by Hadasa (phonetic) Boykin. In the front passenger seat was Tiffany Wilkerson, an adult. In the rear right-hand-side seat was Tamika Curtis, also an adult.

In the rear center seat was Khadija Ba, the daughter of Hadasa Boykin. She was 13 years old. And in the left rear seat in a car seat was the son of Hadasa Boykin. He was one year old.

At that time, the defendant, Kenneth Kelley, who is seated to my right in the white shirt, was driving a silver 2000 Mercedes S430 in the left lane of [P-10] Livingston Road. As the defendant approached the intersection of Livingston Road and Livingston Terrace, he was driving at approximately 65 to 70 miles per hour. The speed limit on Livingston Road in that area is 30 miles per hour.

When the defendant came upon the victim's vehicle, which was stopped at the red light, he slammed into the rear of that vehicle sending it spinning clockwise into a PEPCO pole on the other side of the intersection. The driver's-side rear passenger door impacted the pole.

Upon impact with the utility pole, the victim's vehicle spun around the pole and came to a final rest on the opposite side of the pole. The defendant's vehicle

continued straight 255 feet past the intersection and came to a final rest in front of a gas station.

In the defendant's vehicle was the defendant as the driver. The front-seat passenger was a Robert Hall, who did survive the accident, and the rear-seat passenger was Dominique Green, and she did not survive the accident.

In the victim's vehicle, the driver, Hadasa Boykin, did survive the accident. The other four occupants of the vehicle did not survive the accident All five victims' autopsies reported their causes of [P-11] death as multiple injuries and their manners of death as accident.

The defendant was taken to Medstar Washington Hospital Center with non-life-threatening injuries. His medical records show that he had an ethanol level of 173 milligrams per deciliter. Dr. Barry Levine, a forensic toxicologist, interpreted those records and calculated that his blood alcohol content at the time of the crash was a .14.

Additionally, the defendant was driving on an expired D.C. driver's license. Witnesses would have testified that the defendant did not attempt to brake prior to the accident, rather slammed into the victim's vehicle at his full speed of 65 to 70 miles per hour.

For the purposes of the plea, Your Honor, that would have been the State's case. All events did occur in Prince George's County, Maryland.

THE COURT: Any significant additions or corrections?

MR. JONES: Nothing significant, although he agrees that he was speeding. He agrees he was speeding and he agrees he had been drinking alcohol; however, I think when they took his blood alcohol level, that was after he had himself received significant injuries.

Although they were not life-threatening, he was [P-12] in the hospital for about a month and a half. So, I mean, it's not like he walked away from the accident, but he does, Your Honor, accept all the other references. So it's nothing significant, but those minor.

THE COURT: Thank you.

Mr. Kelley, you've discussed this matter thoroughly with Mr. Jones?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his services up to this point?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions of Mr. Jones or of the Court?

THE DEFENDANT: No.

THE COURT: Aside from the plea agreement, has anybody promised you anything to get you to enter this plea?

THE DEFENDANT: No.

THE COURT: Has anybody threatened you in any way to get you to enter this plea?

THE DEFENDANT: No.

THE COURT: Are you freely, knowingly and voluntarily entering a plea to the entire indictment because in fact you are guilty and for no other reason?

[P-13] THE DEFENDANT: Yes.

THE COURT: I find the defendant has freely, knowingly and voluntarily waived his right to a trial by jury; he has freely, knowingly and voluntarily waived his right to remain silent; and he has freely, knowingly and voluntarily entered a plea to the indictment in this case including all 28 charges. The Court will enter that verdict at this time.

When do you want to come back?

MR. JONES: I think a PSI has to be done. I think the State wants a long PSI.

THE COURT: A long form?

MS. RUSH: Yes, Your Honor.

THE COURT: How about the 12th or 19th of May? Does either one of those look good?

MR. JONES: Those probably are good for me.

MS. RUSH: You said May?

THE COURT: I could do the 5th of May.

MR. JONES: The 19th of May is good.

MS. RUSH: The only thing I'll say actually, Your Honor, is I anticipate this taking a somewhat significant period of time because of the number of people involved. We want to maybe set it not on a Friday if you can. That's not possible?

THE COURT: Well, the problem is at this [P-14] moment, I have two trials that take up the entire month of May. There's a reasonable expectation that one of those will fall out, but I'd hate to come in here in the middle of one of them thinking we were going to do this and it didn't fall out. I can pick any day, the 5th, 12th or 19th, and tell Assignment that this is going to be a couple of hours.

MR. JONES: Or we could set it for the afternoon time period. That way, you can be blocked off that whole afternoon.

THE COURT: In the p.m. on one of those days?

MR. JONES: Right. That way, we won't have to worry about --

THE COURT: I'll be happy to do that.

MS. RUSH: Can you give us one second, Your Honor? Either is fine, Your Honor.

THE COURT: Pardon me?

MS. RUSH: Either is fine.

MR. JONES: The 19th is better for me, Your Honor. I could do the week before the 12th, but the 19th is better for me.

THE COURT: I've already got some things on the 19th. If we're going to block off a half a day --

MR. JONES: I could do the 12th, I just have a matter, but I think I could be done by the afternoon. [P-15] It's here. That's why I think it's not as bad.

THE COURT: Let's do that. We're going to block off the afternoon of the 12th.

MS. RUSH: And just for scheduling, when we say afternoon, are we saying 1:30?

THE COURT: Yes. I've made a note here we'll block off the entire afternoon of the 12th of May.

MS. RUSH: Thank you, Your Honor.

THE COURT: Okay. Bond will remain the same as well as the GPS monitoring pending disposition. We'll have a presentence investigation.

Mr. Jones is going to take you down to Parole and Probation at this point. Okay. You can get that started.

MR. JONES: Thank you, Your Honor.

THE COURT: Thank you.

(The proceedings concluded at 10:00 a.m.)

[P-16] REPORTER'S CERTIFICATE

I, Susan A. Milton, an Official Court Reporter of the Circuit Court for Prince George's County, Maryland, do hereby certify that I stenographically recorded the proceedings in the matter of State of Maryland vs. Kenneth Kelley, CT150626X, in the Circuit Court for Prince George's County, Maryland, on March 27, 2017, before The Honorable Albert W. Northrop, Associate Judge.

I further certify that the pages numbers P-one through P-fifteen constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter.

In Witness Whereof, I have affixed my signature this 16th day of May, 2017.

_____

SUSAN A. MILTON
OFFICIAL COURT REPORTER

[S-1] IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND,

vs. Criminal Trials No. 150626X

KENNETH KELLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)

Upper Marlboro, Maryland
Friday, June 9, 2017

BEFORE:

THE HONORABLE ALBERT W. NORTHROP,
Associate Judge

APPEARANCES:

For the State:

JENNIFER H. RUSH, ESQ.

JOEL T. PATTERSON, ESQ.

For the Defendant:

ANTOINI M. JONES, ESQ.

DANNY O. ENGELBRETSON
Official Court Reporter
P.O. Box 401
Upper Marlboro, Maryland, 20773

[S-2] P R O C E E D I N G S

THE DEPUTY CLERK: Criminal Trials Number 150626X, State of Maryland verse Kenneth Kelley.

MR. JONES: Good afternoon, Your Honor.

MS. RUSH: Jennifer Rush and Joel Patterson on behalf of the State.

MR. PATTERSON: Good afternoon.

MR. JONES: Good afternoon, Your Honor. Antoini Jones on behalf Mr. Kelley, who is in the back. Should be with us momentarily.

THE COURT: Good.

(The defendant was brought into the courtroom at 1:48.)

MR. JONES: For the record, Mr. Kelley is now with us.

THE COURT: Okay. Mr. Jones, I think you're first.

MR. JONES: Your Honor, we're here today for a sentencing, as the Court is aware, a sentencing in a case that's clearly tragedy, and one of the few times in the word tragedy is an understatement. Five lives were lost. Five lives are lost that shouldn't be lost. And Mr. Kelley understands that.

I've spoken with him numerous times. We discussed this case numerous times. We discussed a [S-3] lot of things about the case. And the Court recalls there wasn't a trial, and there wasn't a trial because Mr. Kelley did not wish to have the families relive the horrors of the incident by having people testify, listening to it.

He didn't think that was good for society as a whole. And as the Court is aware, we pled guilty to the entire indictment. There was no plea offer with respect to this case. There was he has, at all times, at least in discussions with me, accepted full responsibility. And he's at all times has been remorseful.

As the Court is aware, this is our second sentencing date. And the first date, as the Court knows, Mr. Kelley did not appear. And to dispel some of the rumors, it wasn't that; he didn't appear because he was afraid of this date in court; he didn't appear because he was having some major internal struggling, and struggling about the fact that he himself have cost the lives of five individuals, two children. He has a history of alcohol and drugs abuse, Your Honor.

And I don't have it signed by him, but before this sentencing is over, I expect to present the Court with a request for 8-505. I mean, I have it [S-4] prepared, I just didn't have an opportunity to have him sign it.

Your Honor, his drug and alcohol problems date early in his life when he was a young teenager, and he's been having these demons affect him throughout his life, short life, really, speaking.

And on the day in question, the night of this incident, it's undisputed that alcohol was involved. It's undisputed his blood alcohol was above the legal limit. It's undisputed that because he elected to get in the car and drive under the influence of alcohol that was gross negligence. I believe the State admits that. I think we agree with that. I don't think any party disagrees with that. And but for that gross negligence, five individuals perished.

We believe that the Court should treat this as being a single act. It was a single act in getting behind the wheel of a car, a single act in striking the vehicle. It wasn't multiple different acts. It wasn't that he had a weapon and turned it and pointed it at several different people or anything of that nature. It was a single act from being under the influence of alcohol and causing this tragedy. I say that because we believe, whatever sentence the Court [S-5] fashions, that sentence should be concurrent as a single, as one single act.

Alternatively, if the Court is not inclined to do that, we believe the Court should, we would ask the Court, to treat the two vehicles as the Court recognized one vehicle four people perished, one people that he was in -- one person perished as -- if the Court is not inclined to run everything concurrent, to run the two individual charges, concurrent -- well I'm -- consecutive, everything else concurrent. I'm sorry.

We also believe that it's undisputed and widely accepted and widely known that the gross negligence in this case necessary for manslaughter by automobile was the gross negligence of alcohol, which in our view would mean that his exposure should not be 10 years, because homicide by motor vehicle being -- while under the influence of alcohol carries a maximum sentence of five years.

Now, we know, and it's undisputed, manslaughter by vehicle, Title 209, carries a maximum sentence of five years. However, if we look at the elements of the two offenses, we would argue that homicide by motor vehicle while under the influence of alcohol is the greater. And assuming, arguendo, the [S-6] Court doesn't accept that, it's clear in this case that the gross negligence is alcohol. So at a minimum the Court can see through the doctrine of lenity with respect to the statute.

And I would submit that in this case, since the gross negligence was alcohol, the Court of Special Appeals opinion, 555 Atlanta 2nd, Maryland App. 65, indicates that gross negligence could be found by being

over the legal limit when one drinks. I would argue that that would mean in this case that the maximum he could receive per count would be five years as opposed to ten.

I anticipate -- the State indicating that Mr. Kelley was not remorseful, that months after this incident in October of 2014 Mr. Kelley in January of 2015 was involved in an incident in Virginia, a fleeing and alluding. We acknowledge that's true, but we also know that on the scene of the instant case of the tragedy in this case Mr. Kelley himself was rushed to the hospital suffering from very serious injuries.

Understanding that at that time he couldn't consciously grasp what had transpired with respect to the accident. The Court also knows that Mr. Kelley wasn't charged with this offense until sometime either July, August of -- or, I'm sorry, May in 2000. He [S-7] wasn't arrested in the August of 2015. And it wasn't that he was hiding, because he was going home every day. He just wasn't arrested. After he was arrested, the realities of things set in.

Your Honor, he's -- because of that Virginia case, he's been subjected to supervision. And while he was on supervision and supervision ended up being in, he lives in the District of Columbia, it's a Virginia case, was transferred to the District of Columbia.

During his supervision he was routinely tested for controlled dangerous substances and different things of that nature and routinely tested positive.

And so much so they were recommending that he be put into an inpatient treatment, which was problematic because when he was released in Virginia, they were talking about that. He had this since. So he could not go into inpatient treatment, and he has not received any necessary treatment thus far.

I say that to segue to what he, when he was apprehended by the sheriff's department, he put forth no resistance, and he put forth no resistance because at the time he was under the influence of mind-altering substances; it's my understanding that [S-8] at that time he was trying to commit suicide.

As a result, when he finally went into the jail, he was on suicide watch at the jail.

I cannot imagine no sleeping, one night waking up one hour, waking up one minute, knowing that I caused five people -- not necessarily fair -- that alone extremely, extremely taxing on any normal human being. I say Mr. Kelley is a normal human being.

Your Honor, I -- we do -- he does have -- the Court did receive our memorandum?

THE COURT: Yes.

MR. JONES: And he does have two people that would like to speak on his behalf. I'm not sure if the Court -- or how the Court proceeds.

THE COURT: We're going to hear from the victim and then we're going to come back.

MR. JONES: Right. And that's --

THE COURT: And just to follow up on that, you had a chance to go over the PSI with your client, I assume?

MR. JONES: Yes, Your Honor, I have gone over the PSI --

THE COURT: Okay.

MR. JONES: -- with my client via -- have gone thoroughly over the PSI. And with that, Your [S-9] Honor, at least for this portion.

THE COURT: Okay. Thank you.

MS. RUSH: May we approach?

THE COURT: Come on up.

(Counsel approached the bench and the following ensued:)

MS. RUSH: I Just wanted to clarify a couple of things. First as to Mr. Jones' contention he didn't want to put this out in front of everybody about the driving under the influence, homicide while driving under the influence, that is a 10-year offense. I did bring it up on Lexis if you wanted to look at it.

MR. JONES: I agree.

MS. RUSH: I did, is a ten year.

MR. JONES: I said it's a five year driving under the influence.

MS. RUSH: Five is the DWI. The DUI is ten.

MR. PATTERSON: There is subsequent six if you ever been convicted under the -- then it goes up to 15. But 10 is the starting point.

MR. JONES: 209.

MR. PATTERSON: Yes.

MS. RUSH: Oh, shoot, I'm sorry, your right, I take that back.

[S-10] MR. JONES: Okay.

MS. RUSH: You're right. I was reading the subsequent -- I apologize. We'll take that part back. The other thing we wanted to do was we actually have, you can do it part over the time.

MR. PATTERSON: Your Honor, with respect to count running -- there are a multiple set of counts for manslaughter. Eleven through 15 are the homicide by DUI and 16 through 20 are the homicide by DWI. I believe under the case law a person cannot be both convicted of the manslaughter by motor vehicle and by those other offenses. I don't believe that they can merge.

So because of that I think we would move then to dismiss the 11 through 15 and 16 through 20, just

because I think that there is conflict, the laws there, and that it would be an illegal sentence if you sentenced on both.

MR. JONES: That's what the merger would be.

MS. RUSH: No, so --

MR. PATTERSON: I think the Counts 1 through 5 and Counts 6 through 10 all merge.

MS. RUSH: Six through 10 merge into 1 through 5, because they're the criminally negligent, merge in the gross negligence. However, the case law [S-11] says because it's the -- essentially you can't be convicted of killing the same person twice.

MR. JONES: Right.

MS. RUSH: And so because of that we will leave Counts 1 through 10, but 11 through 19 -- through 20.

MR. JONES: I think that the doctrine of lenity applies.

MS. RUSH: So doesn't have to be nol-prossed as long as he's not sentenced. He just can't be sentenced on it.

MR. JONES: We just won't be.

MR. PATTERSON: Can't be sentenced for killing the same person twice.

MR. JONES: Right.

THE COURT: Got it.

MS. RUSH: Just wanted to clear that up.

(Counsel returned to the trial tables and the following ensued:)

MS. RUSH: Okay. Thank you, Your Honor. Your Honor, this case is about cause and affect. It's about the choices you make and the consequences of your choices. And specifically, the choice that the defendant made on October 10th, 2014, and the consequences of those choices. He chose to drink, and [S-12] everyone knows drinking causes you to get drunk. He chose to drive. And everyone knows driving drunk can cause accidents. He drove all the way from the Friday's in Forestville in which they were drinking and eating. It's six point seven miles from there to the site of the crash. It takes 16 minutes in no traffic. It was a rainy Friday night, so probably much longer than that.

He had, we'll see, 16 minutes from giving him the benefit of the doubt. He had 16 minutes to choose all that time to stop driving, to pull over, to switch seats with somebody who was sober in the car, if there was somebody sober in the car.

He not only chose to drive, but he chose to flee from Corporal Lane. And I'm going to talk to you about that in a little bit. This is not just a driving drunk case as Mr. Jones indicated, it's also a fleeing and alluding.

And that's the cause of the accident. And that is why we are here today. I want to talk a little bit about the victims of this case.

The first -- and Mr. Patterson is going to bring you up some pictures. First is Khadija Ba. She is the thirteen-year-old that was in the victim's vehicle. She was the only daughter of Amadou Ba. She was a smart and talented young lady with a very bright [S-13] future. She began reading at the age of four, playing piano at the age of five, was a dancer, and member of a dance troop, was a straight-A student in forth grade. She had the highest math score of all the student in her grade in the entire school district. She was trilingual. She spoke English, French and Wolof, is the local Senegal language. She spent two years studying abroad. She lived in Katar for four years. She was an over all world traveler. And at the age of 7 she began doing charity work with the American and Lakota Indian children as well as the children in West Africa.

The second victim was Hassan Boykin. Hassan was only one year and three-and-a-half months old. He was the only son of Haddassah Boykin. And they refer to him as a miracle due to Haddassah's age. When he was born, was a charismatic little boy and, frankly, he was just a baby.

The next victim was Typhani Wilkerson. She was 32 years sold. She was the mother of two children. One of her children was one year old, the other was two years old. She was known to her friends and family as the protector.

The fourth victim, Tameika Curtis, she was 35 years old. She was the mother of eight children. She [S-14] was Typhani Wilkerson's sister. Her children ranged in age from six weeks old to 15 years old, and they include a set of twins. Her friend and family described her as silly and the life of the party. Her children were her life and her -- and her sister Typhani who was killed, her and Tameika were inseparable.

Our final victim was Dominique Green. Was a lady in the car with the defendant. She was 21 years old, a graduate of Frederick Douglas High School. She always wanted to make you laugh. She liked having fun. Her friends and family described her as getting along with everyone. She loved fashion making and spending time with family.

Your Honor, Mr. Patterson is going to bring up a map of the area just so you have an idea of where this accident occurred and really what happened. It was at Livingston Road and Livingston Terrace in Oxon Hill. The defendant was driving south down Livingston road. And down towards that intersection is not only down hill but around a curve. The speed limit on that road is 30 miles an hour; and for good reason, and because your coming down the hill and around a curve, and you are coming up at a light on a intersection, you need time to be able to stop. And that night it [S-15] was raining and the ground was wet.

That night, was a Monday evening of running errands for Haddassah Boykins and Tameika Curtis and the children. And that night turned into a tragic

evening that turned their world upside down. They wanted to go to Home Depo that evening. They needed something for her apartment; but they're closed at 9:00, and they got there at 9:06.

Instead, they went to the Shoppers Food Warehouse, living around Oxon Hill Road, Tameika and Typhani went in and Haddassah stayed in the car with the kids. Tameika and Typhani came back out, they put the stuff in the trunk. They headed on the way. Turned left on the Livingston Road. Haddassah said -- told me something, told her that not to go that way, but she did. She remembers pulling up to the light and thinking it was strange to get stopped at the light because she never gets stopped there. And that's the last thing that she remembers.

Now, Your Honor, our witness Arlancia Williams, she was on the scene of the accident that night. She was on Livingston Road, stopped at the red light, facing the opposite of Haddassah's vehicle. She was in the left-hand turn lane waiting to turn left onto Livingston Terrace.

[S-16] She saw, facing her, Haddassah's car, and all of sudden she saw a Mercedes coming down the hill, fast; crashed back into the back of Haddassah's car. She would have told you, as would have another witness that we would have had, that the Mercedes, the defendant's car, did not skid, it did not break, there was no noise or sound whatsoever from that vehicle at all --

Upon impact, Haddassah' vehicle started twisting out of control. It went up on the curb and wrapped itself around the telephone pole. And Mr. Patterson is passing up to you some photos from the accident scene.

Miss Williams would have told you that she got out of her car and went over to try to help, help the people in the accident. She saw a woman lying face down on the ground, she was bleeding. She tried to assist her, but from what she could tell she appeared to have already have passed. That was Tameika who was ejected from the accident -- from the vehicle, excuse me. She then went to the driver. She went to Haddassah, and Haddassah was up over the vehicle but alive, and Haddassah's words were, don't worry about me, worry about my baby.

Miss Williams then went to try and find the [S-17] baby who had also been ejected from the vehicle. She found Hassan under the rubish of the vehicle, and to her it was clear that he had already passed as well. His tongue was sticking out, his eyes were opened, both of his arms appeared to be broken and he was lifeless.

The next thing that Haddassah remembers from this accident is waking up and seeing cracks in the glass. She remembers feeling cold. She kept going in and out of consciousness. She's noticed the green light on the radio, for some reason, that stuck out to her. She also felt like she remembered waking up screaming but that her screams weren't loud enough and her chest felt tight.

She then next remembers waking up at the hospital and an officer was there and, to her, he looked sad, but no one would tell her what happened. She kept asking where her kids were, and all they would say was that her mom was on the way down. Her parents live in New Jersey.

That night and into the next morning she was just in and on the consciousness, heavily medicated. And her mom indicated in the morning and explained to her what happened, and, of course, that ended her world.

[S-18] Typhani Wilkerson was Haddassah's good friend, and I'd mentioned that Tameika Curtis's sister, they were both, all three of them, were very good friends. The last time Haddassah saw Typhani was after she woke up during the accident -- or right after the accident, excuse me -- and she looked over at Typhani and they were looking at each other. And it was sort of, "what the heck?" kind of look, "What just happened?"

That was the last time she saw her friend. The last time she saw Tameika was when the two ladies came out of the Shoppers Food Warehouse and they were putting the items in the trunk, and after that she didn't look back at Tameika, because Tameika was in the back seat.

The last time she saw her daughter Khadija was while they were in the Shoppers Food Warehouse parking lot. She had turned around to look at her the

last time she heard her daughter was while they were stopped at the light right before the accident, because she was singing. And her son, Hassan, the last time she saw him again was in the Shoppers Food Warehouse parking lot when she turned around to look at him, Khadija, she was sleeping, and she said no, and then Haddassah turned and saw she saw had a [S-19] pacifier in his mouth and his eyes were just wide opened.

As I mentioned, Your Honor, this case happened not just because of driving drunk, but because of fleeing and alluding. Corporal Lane, who would have testified at the trial, was doing stationary traffic patrol a few miles up from the accident which occurred on Livingston Road. He pulled out behind the defendant. And we have the cruiser cam, which we'll bring up to you now. Your Honor, do you want us to go up?

(Document taken to the Court.)

MS. RUSH: You see him pull out behind the defendant.

(Counsel approached the bench and the following ensued:)

(The video was played before the Court on a laptop computer at the bench the following ensued:)

MS. RUSH: You'll see the next time you see the defendant, after he goes past, at the intersection and it

is already happened. The defendant was going so fast that Corporal Lane would never catch up to him.

MR. PATTERSON: The intersection you can see him approaching. Here that's Livingston Terrace and [S-20] Livingston Road. He is the first responder on scene.

Your Honor, I am going to turn it up here just as far as some conversation.

A moment here, Your Honor, Corporal Lane is going to approach Tameika in the street, and you can hear her in the background, first asking for help and then claiming that she can't move.

MS. RUSH: Mr. Patterson is going to fast forward a minute, Your Honor, but at that point when Corporal Lane encountered Tameika on the ground, he told us that he knew that she was pleading for her life, but he also knew that there was nothing that could be done to save her and he told us walking away from her is the hardest thing he ever had to do.

MR. PATTERSON: Your Honor, couple of minutes has gone by now. Fireboard is on scene. Corporal Lane is going to move his vehicle so that fireboard can get past him. And Ms. Arlancia Williams will be able to be seen walking in front of the cruiser's camera, carrying Hassan, Judge, as she carries him over to fireboard. Hassan again. Thank you.

(Counsel returned to the trial tables and the following ensued:)

MS. RUSH: Your Honor, we would have also [S-21] heard from Corporal Tyler. He's a reconstructionist.

And he would have told you that he calculated the speed that the defendant was driving that evening as 65 to 70 miles an hour, and he would have -- he told us that was a conservative estimate. They always do the estimate in their favor, in the Defendant's favor, so as to not be able to have any argument about it. That's 65 to 70 in a 30 mile per hour zone.

And as you know, from the statement of facts, we had the defendant's DNA that was recovered from the driver's side air bag. The defendant also, as you remember from motions, admitted to Corporal Tyler in the hospital that he was the driver. And then we have the defendant's blood from his medical records that show that his blood alcohol content was point one four. And again that is also in a conservative estimate. That, again they do to estimate in their favor.

At this time, if Your Honor is willing, we would like to have some representatives of the victims speak.

MR. JONES: May we approach one minute?

THE COURT: Sure.

THE COURT: Mr. Jones, does your client have any desire did he want to see the video?

[S-22] MR. JONES: He's seen it, Your Honor.

THE COURT: Okay.

MR. PATTERSON: Victim impact statement, we received it this morning.

MR. JONES: Just for the record, I've seen this.

(Counsel approached the bench and the following ensued:)

MR. JONES: I want to reserve on our doctrine of lenity with our dismissal. Already pled on with respect to dismissal on that.

THE COURT: Can't sentence I think is where we --

MR. JONES: No, we can't sentence them, but I would argue those are the ones that should be.

THE COURT: I understand.

My inclination is to allow two persons per victim.

MS. RUSH: And we only have five that want to speak total.

THE COURT: Okay.

MS. RUSH: And two have asked me could they read their statements out.

THE COURT: We could.

MR. JONES: And two people.

[S-23] MS. RUSH: Your Honor, Haddassah Boykin, she is the surviving victim from the accident, of course, the mother of the two children.

(Counsel returned to the trial tables and the following ensued:)

MS. RUSH: State your name.

MS. BOYKIN: My name is Haddassah Boykin. This is still unbelievable.

I was the type of mom that was totally into her children. My baby, Hadda (phonetic), AKA Khadija Ba was a great child. She spoke multiple languages, studied her country ethnics, always was number one in her classes and loved by many.

An obedient child. Raising her took little effort because she was born ready for life, just like somebody said, and you a could see her bright future. Sometime she was my mother and friend, always my daughter. My family lost a great one. The world lost a great one.

My son Hassan, he was just a baby. Everybody felt good and was good about him. Losing him changed my life's course, my mind set and my heart completely. Your babies give you purpose and significance throughout life. Raising Hadda (phonetic) and Hassan was a serious goal for me. This [S-24] life means nothing since they transcended. I deal daily with how I lost them. How they died seems so senseless. Just some

young, careless dude riding through the hood at a highway speed. Why didn't he turn into the woods? Why didn't I see this maniac coming? Questions go on and on in my brain as I learn to cope with the loss of my whole legacy, Khadija and Hassan. People say the pain gets better. Seems worse to me as I watch Hadda and Hassan's siblings, cousins and friends grow up and mature while Hadda and Hassan are forever 13 and 1.

No remorse from this dude or his family, none. They're gone forever. I'll never see them again, as I hope you never see freedom again.

THE COURT: Thank you, ma'am.

MS. RUSH: Your Honor, next we have Say Everston-Berry, Khadija' and Hassan's grandmother.

THE COURT: Start with your name, please.

MS. EVERSTON-BERRY: Say Everston-Berry. I was the children's grandmother. And I believe that we needed both those children here. Who knows what they would have been? Maybe find cures for cancer or longevity. They were children. Hadda was absolutely a loving, smart, giving human being. She had more patience in that little girl than some grownups I [S-25] know.

And I say to the Court we cannot bring them back, those five beautiful humans, but surely do not let their destruction go unpunished.

And I beg Your Honor to consider that not only five lives but maybe a thousand have been affected by his willful act. I have many grandchildren and great grandchildren. But I only have one Khadija Ba that and Hassan Boykin.

So, Your Honor, please give us some peace on this issue. Let us feel that their deaths are not going unpunished, because they meant so very much to all of us. Thank you, Your Honor. Thank the Court.

THE COURT: Thank you, ma'am.

MS. RUSH: Your Honor, next is Michael Wilkerson. This is Typhani and Tameika's father.

THE COURT: State your name.

MR. WILKERSON: Michael Wilkerson. This is directed to Mr. Kelley. Your deliberate actions on November 10th of 2014 attributed to the death of five individuals, two of which were my oldest and youngest daughters. I pray you're given a sentence that holds you accountable for our senseless action. You have been trying to duck this responsibility for three years. Today is the day we have family members of the [S-26] dead see if you receive anything close to what you deserve, and we chose to do this and bring a close to this horrific event.

THE COURT: Thank you, sir.

MS. RUSH: Your Honor, Kineo Glasco is Dominique Green's sister -- I'm sorry, she's decided she

doesn't want to speak. And, Your Honor, two of the family members have asked me if I could read their statements. The first is Kimberly Barrett. She was Khadija's stepmother. She says this letter is in an attempt to describe the truly special person Khadija was and express her loss and devastation to others. Let me start by saying words cannot begin to describe the complete and total loss we experience every day since Khadija was taken from us, nor can they accurately or vividly describe the amazing young lady we all love, but lost so tragically. Khadija was a beautiful person inside and out. She was caring, compassionate and respectful. She was wise beyond her years and always thought about the people she cared about first.

She had so much potential, so much life to live. She was extremely intelligent, always at the top of her class. She loved to read just for fun, and very, very talented artist. You could always catch [S-27] her reading a book, drawing a picture or crafting little keepsakes. She was such a unique and special person. She had big dreams.

I remember her saying that she wanted to become a lawyer or a dentist when she grew up. I had no doubt in my mind that she could do anything she put her mind to. She would have done great things and deserved to have had those dreams fulfilled, but now she will never get that chance.

October 10th of 2014 was the absolute worst day of my life. But it constantly replays in a loop on my mind. It is like a constant nightmare that you can't

escape from. The last time I saw my daughter alive was the morning of October 10th when she peaked in her father's and I room when I was getting ready to leave and went by her and she wanted to go to the mall that day. The last time I spoke to her was later on that day after she had gotten out of school, she left, called to me to share any plans for the weekend. We only spoke briefly because I was at work, but would do anything to get those few precious moments back. The next time I saw her she was laying lifeless, covered in a white sheet alone, flat cold and empty hospital room.

That night my heart broke, shattering in a [S-28] million pieces, never to be truly whole again. Even though I was completely broken, I knew that my husband was even more so crushed, so I had to stay strong for him and our other children. In the days that followed, I had to plan my daughter and her brother's funeral, something no parent should ever have to do. There is no word in the English language to describe when a parent loses their child, and rightfully so, because it is incomprehensible, the pain indescribable, unimaginable and paralyzing.

Since the accident I feel like there is a hole in my heart and in my family that will never be filled. I miss her every second of every day. I morne the fact that her sister will never have memories of how amazing her big sister was and that her step-brothers personal memories will become few and far between because we lost her so young. Every time I'm reminded of the fact

that she is gone and will never hear her sing, watch her blossom.

I know she was destined to be -- she was not only my daughter but my partner in crime, mostly just plotting against her dad, and my best friend. I miss her so much, and this emptiness will never go away. I look forward to the day that I will be able to see her again. Until then, I keep her forever in my heart and [S-29] always on my mind.

Given all the fact and circumstances surrounding this case, I am asking that the person responsible be sentenced to the full extent of the law. He does not deserve to see the light of day, let alone walk free among us. His actions have caused unspeakable agony and pain for many families and friends.

This monster made the conscious decision to get behind the wheel of a car while he was fully intoxication; so he should be able to suffer the consequences. Throughout this horrific ordeal he has not shown any remorse and has, in fact, gotten into more trouble with the law following this accident.

Please do not be lenient. He rightfully deserves to be sentenced to the maximum time allowed under the law. Knowing that he would not be able to hurt anyone else because he is serving his full time would, hopefully, bring a small ounce of peace to all of the families. Thank you for your time.

MS. RUSH: Finally, Your Honor, a statement from Kanayo Brown. He was Typhani's fiancee. He has not been present at any of these proceedings from the beginning of this case. He said it was too painful to be involved, to be present. And he has just asked us [S-30] to keep him updated by phone, which, of course, we have. But he did submit this and ask that we read it to Your Honor:

I am the fiance of Typhani Wilkerson, the father of kids. I am the brother-in-law of Tameika Curtis, older cousin of Haddad and Hassan. On the 9th of 2014 my sister-in-law came to my house to ask my fiancee would she like her to go to the store with her. She wanted Tameika to rent a carpet cleaner to clean some parts on her carpet. The funny thing is she asked if I wanted her to go, too. If I had a small thought that would happen, I would have told them not to go. The funny thing about it all was the fact she left her phone, which never happens due to the fact that she loves Facebook and Candy Crush. And she even made me play it in order to send her extra lives.

And hour passes, and then two hours. And I called, and at that second I realized that she had left her phone, because I heard it ringing. It was by her son, who was breast feeding at the time. I unlocked the phone to see if anyone else called her beside me. No one had called. I called her sister Tameika to see what was taking them so long, but she didn't answer her phone. Tameika also had her phone, [S-31] because she has

eight kid, so I thought to myself that there may be a sale at Shoppers or something.

I put Typhani's phone down and I went upstairs to check on the kid. I came back in the living room to check the phone. Had three missed calls. But a number that wasn't programmed into her phone, the number call back, and it was United Medical Hospital.

A woman asked if she could speak to Tameika Curtis, the big sister of Typhani. I had a bad feeling. I stated to the woman over the phone her sister is with her, and she asked if I was related to Miss Curtis.

Said that I'm her brother-in-law, I'm her younger sister's finance. Said I need to get in contact, we are family, and tell them to come to the hospital ASAP. The bad feeling dropped my stomach and I started to feel sick and weak.

I asked the lady if she could give me more information, but she said she didn't. I started to panic. I called -- and then I called Haddassah Boykin to ask her what was going on, but she also didn't answer her phone. I was terrified then. So I called Typhani and Tameika Curtis's Aunt Lizzy. They loved her as if she was their mother. I gave her the [S-32] information the woman gave me. Called one of my good friends and asked if they could do me a favor and take me to the hospital to find out what was going on.

I got to the hospital, and they had most of the family in the room in the back of the hospital.

None of the hospital staff was giving information to us, which made us nervous, which was strange, because they called us.

So I started walking around the hospital to find out more information. They told me to go back in the room and the doctor would be out shortly to give you the more information.

So we waited, and the doctor came and gave us the worst news I ever received in my life. Tameika was ER because of a car accident and most likely wouldn't make it. My soul fell to my feet and my mind started racing, how could something like this happen. Where are the kids at? Where is the driver? Where's my fiancee?

I kept asking the question over and over and until an officer came and asked me to calm down and he would try to get me some more information on the accident. They said that other people were getting returned to other hospitals in the area.

So I called every hospital in the DMV area [S-33] near the site, and I still couldn't find my fiancee. One of the family must have gotten some information and told me everyone was still at the scene on Livingston Road. I asked my buddy to take me to that area. We barely got there, there was so much flashing lights and emergency vehicles in the area and no traffic could move. I began to walk the worst walk of my life.

I started to walk over to the crash site, and an officer asked me not to go any further. I told that them my fiancee and some of my family were in the ambulance and I wanted to make sure they were okay, but he said his sergeant would come talk to me. It started to rain a little, and then he walked over and said that a drunk driver had hit the car and killed most everyone on impact.

On October 9th of 2014, at 11:49 p.m. my heart died. Why would you attempt to drive under the influence? Why would you drive drunk with your friends and family in the car? Why would you drive with drugs in your system? Why are you driving with an expired license or revoked license? Why would you drive a car with no insurance? How could you post on Facebook "only the strong survive"? How could you post bail, and you not have proper insurance?

[S-34] How could you get out on bail and then get another charge in Virginia, do your time there and get transferred back to Maryland and then post bail again? How do you feel when you sleep? How do you feel when awake? Do you think about the people you have affected? Do you think about the pain that you have caused?

I am now a single father. My son wakes up out of his sleep looking for his -- to this day my mother is traumatized and still can't function right because she misses her mom. I can't give her what her and her mother had, and you can't give back her, Mr. Kelley. She asks about it daily. Do you know how hard it is to

talk about her mom without me breaking down while I tell her? You destroyed so many people. I feel as if I failed Typhani because I couldn't save her and her sister and the babies. They didn't get to enjoy their life as you have these last three years.

I hope this will help the judge see what a monster you are. I can't even come to court to face you because I might make a mistake that I can't take back, and I won't let you take both of their parents. I don't want you to die or anything, I just want you to do the same time that you took. Typhani Wilkerson was three years old, Tameika Curtis was 36 years old, [S-35] Khadija was 14 years old. Hassan was two. And the young lady in your vehicle was 21 years old. And that's a grand total of 106 years, and that sounds good.

Your Honor, you have the PSI. We saw the defendant's history. We know he has two possession with intent to distribute convictions. And he has a fleeing and alluding. We're bringing up, and we did share with Mr. Jones, this is, I believe, the PSI, the flee and alluding in Virginia. This incident occurred January 7th of 2015. This was about three months after the accident. Three months after the defendant drove drunk, fled from the police, and killed five people, he got back in the car, still with an expired or revoked license, and fled from the police again.

In that case the officer was trying to stop him because the registration plates on his car were bad. Instead of stopping, he fled. This, the fleeing, he ran multiple red lights. He got up on to 95. On 95 he

weaved in and out of every lane and including driving on the shoulder. Eventually I think at Glebe Road decided to get off 95, and in the process of that almost struck several police vehicles.

He was eventually stopped and taken into custody. And at that point told the police that he [S-36] ran because his license was bad. In there you'll see, Your Honor, he gave a statement as to why this incident happened -- I'm sorry, it's on page 2, Your Honor. The only thing on page 2 where it says defendant's version, you'll notice it's somewhat similar to what is in the defense's sentencing memorandum, where he talks about how remorseful he is and how sorry he is that he did it and, I shouldn't have done it. And, oh, it also was a failure to appear. Because if you remember, he has said this occurred in January of 2015, and it wasn't until, I think, 2016 that he was actually sentenced on this. And that's when he then was given the sentence in Virginia for ten months and why he couldn't come to our trial day in May.

But in his statement he said, you know, again he was remorseful, but you'll notice, Your Honor, he's only remorseful when it suits him. He's only remorseful when he's about to be sentenced and he's trying to get a lenient sentence.

These statements of being remorseful don't match up with his actions. If he was so remorseful in this case, he should have come to his sentencing date on May 12th. This case was not just an accident. It was another bad decision that the defendant made. I'm [S-

37] sorry, I apologize, it was not just a bad decision that the defendant, as many of these cases are, most of the driving drunk cases that result in accidents result in death is just that the driver made a bad decision to get behind the wheel that night, and otherwise they leave very peaceful lives. But that's not what we have here. This was another deliberate choice in a long history of the defendant disregarding the law.

He got one possession with intent to distribute and then he got another. This case happened where he killed five people and then he went out and he fled from the police again. In this case, he was fleeing from the police. Corporal Lane had pulled up behind him, turned his lights on, the defendant was gone, as you saw from the cruiser cam.

What you haven't seen and what you haven't heard yet, Your Honor, is that the front passenger of the defendant's vehicle, he had 34 mini zip-lock baggies and six clear, knotted plastic baggies of heroin, which turned out to be weighing 6.6 grams.

The defendant was engaging in the same behavior again. He didn't have the drugs on him but his passenger did. He was fleeing from the police because he didn't want to get caught with the drugs in [S-38] his car. This was not an accident. And while it wasn't murder, the defendant's actions were intentional. He intended to drink that night, he intended to get behind the wheel and drive. And when Corporal Lane got behind him on Livingston Road, he intended to flee from Corporal Lane.

It was that fleeing, the fact that he was going 65 to 75 miles an hour in a 30 mile an hour zone, on a wet road, down hill, on a curb, that caused this crash. The defendant's intentional actions caused this crash, and he should be held fully accountable.

In the sentencing memorandum today Mr. Jones mentioned that how remorseful the defendant is and how this changed him so much and that he pled guilty because he wanted to keep the family from reliving the horror of that night. Nothing will keep the family from reliving the horror of that night.

He pled guilty, yes, but the morning of trial, he had -- yes, we didn't charge him right away, We were waiting for the DNA to come back. We were waiting for his medical records that had his blood alcohol content in it.

So it happened in October and we didn't charge until May. But he had from May. And, okay, [S-39] the warrant wasn't served on him until August, but he had from August of 2015 until our trial date, which was March of this year, to take responsibility, to show he was remorseful, to spare the families of this case.

The horribleness that was reliving this case every single time, but he didn't the morning of trial. So what did that mean? That meant that in the weeks prior to trial I had to call every single one of those family members and make them relive this.

I had to prepare them for testifying, to mentally prepare them for coming here to testify or to sit and listen to the trial. He didn't spare them anything.

He talks about how he's so concerned about the families feelings and what they have to do, but he wasn't concerned when he posted bond initially. That was painful for the family. He wasn't concerned when he got his fleeing and alluding charge, which then caused him to be locked up in Virginia, miss a trial date and prolong this case even further.

He wasn't concerned when he waited until the morning of the trial date to take responsibility for this case. And then he only took responsibility because it suited him. They pled guilty, they pled to [S-40] the indictment, because they did not like our plea offer and they thought the best chance that they had to get a lenient sentence from Your Honor was to say we take responsibility, please, please be lenient. That's the only reason they pled guilty.

And he's only remorseful now, just like in his case in Virginia, because he knows he has to, to throw him on your mercy to get the most lenient sentence possible.

Mr. Jones' sentencing memorandum mentioned the goals of sentencing. One of the goals of sentencing, obviously, yes, is punishment, and we are asking for punishment here. One of the goals is rehabilitation. The defendant has failed in his attempts at rehabilitation multiple times. His first distribution

conviction was in February of 2011, and he violated that probation. He was then again convicted of possession with intent to distribute in 2015.

Another goal of sentencing is protection of the public. And in this case I think that is the strongest goal, the reasons why you should give the defendant the maximum sentence in this case. It is clear the only way to protect the public from this defendant is to lock him up, is to give him the full [S-41] amount of time. He's a danger to this community. We would wholly object to any kind of sentence under 8-505, Your Honor. We would also object and we will put to you that this is not appropriate to consider this as a single act and to sentence him concurrently at all.

Mr. Jones mentioned only gross negligence. Here is the alcohol. And that's why you should sentence him under the DUI negligence -- I'm sorry, DUI homicide statue which only carries five years, but not the only gross negligence here because we have alcohol, we have speeding, we have fleeing from the police. Gross negligence is gross negligence, which is what this is. This is motor vehicle manslaughter.

Each count carries 10 years, and we would ask Your Honor that you sentence the defendant to 10 years for each victim and run each sentence consecutive for a total of 50 years. We would also ask, Your Honor, if you are not inclined to give the defendant the full 50 years, that you do, whatever portion you suspend, that you do place him on probation and that you give him five years of probation

so that he has the maximum amount of time we can give him to be monitored by parole and probation.

There are additionally -- there is a driving [S-42] under the influence charge that you do have to sentence -- I just -- can I tell you what count it is. No, I can't because my computer went to sleep.

MR. PATTERSON: Your Honor, I believe it's 26.

MS. RUSH: Your Honor, it does carry one year.

MR. PATTERSON: I'm sorry, 21.

MS. RUSH: We would ask that you give him that one year, and this is the driving without a license or driving on an expired license, which does carry sixty days. We would ask for that as well.

Thank you, Your Honor.

THE COURT: Thank you. When he was originally charged and subsequently made the posted bond, do you know how much time there was there?

MS. RUSH: We did.

MR. JONES: Yes, we gave it to the clerk, Your Honor.

THE DEPUTY CLERK: 129 days.

THE COURT: So 129 days, does that include since --

MR. JONES: I think they includes from May 15th to today, Your Honor.

THE DEPUTY CLERK: We broke it up. We [S-43] didn't --

THE COURT: Does that include from May 15th?

THE DEPUTY CLERK: We did from August 31st to November 14th. That's 2015. From October 12th, 2016 to November 10th, 2016, and then from May 15th that Monday and to today, and that equals 129.

THE COURT: You have two people.

MR. JONES: Your Honor, may I say something briefly?

THE COURT: Sure.

MR. JONES: Your Honor, I just want to clarity as far as the chronology, how events were placed, because I don't want anyone to misunderstand, too, Mr. Kelley was out on bond when he picked up the Virginia case. That's not the case. He was not on bond at that particular time because he hadn't been charged with this offense yet. And, chronologically, after he went to -- after that case was resolved, he actually served his sentence in Virginia. That's what caused him to miss a earlier court date. It wasn't as if he had time to resolve this matter. He was actually serving his sentence in the State of Virginia, so that contributed to the delay. It wasn't as if --

THE COURT: I understand.

[S-44] MR. JONES: -- the picture was made out that he had all that time. And finally, State is correct, I did go asking, try to resolve this matter short of trial, before trial, and I do agree that the offer that the State made was much higher than what the guidelines even say in this particular case, Your Honor, and because of that offer, I did think it was in Mr. Kelley's best interest to plea to the indictment, because I believe that the guidelines will reflect a lower potential sentence and that the State was binding us to because it was going to be an ABA plea with respect to the State. And I wanted to have an opportunity to argue, and potentially a motion for reconsideration at a later date, which is not available with the ABA plea, Your Honor.

So for those reasons, legal reasons, not that Mr Kelley waited until the last minute, it was because the State and I could not reach an agreement. It has nothing to do with Mr. Kelley. I just want that to be clear. He had nothing with respect to that.

THE COURT: Okay. And just once again 129 days does not include the period of time he was incarcerated in Virginia?

MR. JONES: No, Your Honor.

[S-45] THE COURT: Not at all?

MR. JONES: That's the only time. And the Department of Corrections here in Prince George's County.

THE COURT: Okay.

MR. JONES: Your Honor, the two people that I would like to speak is Veronica Carter, is one of them.

Veronica, indicate what your name is.

MS. CARTER: Hello, Your Honor, how are you? I'm Veronica Carter. I've been a great friend of the family for over seven years. I'm going to speak on behalf of Ken. Ken is a most beautiful person.

The State does not know Kenny the way his family knows Kenny. Don't like the word that he killed five people intentionally. I look at it as he didn't wake up that morning, Your Honor, and say I'm going to get in the car, I'm going to drive -- I'm going to get in the car, I'm going to see this car, I'm going to intentionally hit this car.

That's not what he did. So the intention he killed, I can't grasp that. His smile is out of this world. That could have been the same smile he could have given to the little girl. He loved children. He had his own son. He loved my children. I have three [S-46] daughters and a son.

When he picked the child up and give them his smile, they automatically smile and just there was joy. I have never known Ken to get in trouble.

I didn't know about those two things that she spoke of, honestly. You would have to catch him red-handed. That's our family. And I understand that the family says that we show no remorse. I -- understandably. So that there was a car accident. Five people got hurt. They were upset, they were angry.

How could the man continue that was driving reach out to a family that is already angry that their family is gone. If we had tried, I'm quite sure we wouldn't have got a positive energy back if the family were here. We love children. We love people. If the family could hear his mother, if the family can hear us, we are absolutely sorry. You're not supposed to have to say sorry or anything, you're supposed to say I apologize. We are absolutely sorry.

If it was anything we could do, if there was anything that he could do different he would have, we would have.

I'm not showing up all of -- on that day we were all here. Who wouldn't say that a black young [S-47] man that is about to face some years in jail wouldn't be afraid to be away from his son and be away from his mom on Mother's Day, be away from his sister, be away from his cousin.

Your Honor, as the lawyer said, he was in the hospital for four weeks. He had got rehabilitated to go back to walking. He had plates in his body. We're sorry. We apologize. We don't speak.

MR. JONES: The next person I have is Ray (phonetic) Kelley.

I'm Kenneth Kelley's older cousin. This is to all the families of the victims on behalf of Kenneth Kelley and his entire family. Our family would like to express our sincerest condolences and offer our deepest sympathies to you and your loved ones.

There are no words that anyone can say to express how horrible and senseless this was. Our thoughts and prayers are with you. May God give the comfort and peace that you seek and may the parties loved ones finally rest in piece. Thank you.

MR. JONES: I think the only people -- one of the little comments the State made, a comment about there being controlled dangerous substances in the car, maybe there was, maybe there wasn't. I know Mr. [S-48] Kelley was never charged with anything present for DNA or anything from him being charged. He's never been charged.

And I think the State alluded to it and the passenger's pocket.

So no indication at all that would even be aware of anything of that nature. I ask the Court not to consider that at all. And at this time, Your Honor, I've spoken to Mr. Kelley and he would like to address the Court.

THE COURT: Mr. Kelley, you have an absolute right to tell me anything you feel would be appropriate before I impose sentence, if you choose to say, knowing it will in no way effectively impact anything that happens here today. If you do wish to speak, this is your opportunity.

THE DEFENDANT: Your Honor, I want to say for Khadija Ba, Hassan Boykin, Typhani Wilkerson, Tameika Curtis and Dominique Green, I absolutely apologize for my stupidity of drinking and driving. I can't even imagine what you all are going through. But ever since October 10th of 2014 just wish it was my life and not your little ones.

I also want to address not coming to sentence on May 12th. That morning I woke up and [S-49] couldn't live with the weight that was upon me. After the 72 hours before was apprehended, consumed, using many drugs to take my own life. I want to ask you all and God to forgive me for those lives that was taken from my stupidity. That's it.

THE COURT: Thank you, sir.

MR. JONES: And if the Court is inclined to want to sign it, I do have a document that I want to pass up to the Court.

(Document handed to the Court.)

That would be our official petition for 8-505, a sentence under 8-505.

THE COURT: Okay. Mr. Kelley, stand. I'm not sure what else I can say that hasn't already been said here in the last hour-and-a-half. There's not a person in room that doesn't recognize the tragedy, not just it's lives lost, but lives ruined, affected, so many people affect by this. I came to work in this courthouse in September -- well, working with the government, in September of 1969, and this is one of the saddest moments of my career. I have to retire November of this years, and this isn't the easiest way to finish up. This is a terrible tragedy. No one can bring these people back.

And when I looked at your attorney's very [S-50] nicely done sentencing memorandum and reviewed the various theories of sentencing and punishment and retribution and protection of the families, protection of the public, a lot of that hit home. Bottom line is in this case, despite an indictment or charge, you're going to carry 28 counts; really comes down to essential five counts. And I feel having read the PSI and everything else I have -- do need to look at -- I had the unfortunate duty to impose this sentence.

It's not something I take lightly by any stretch. And it's not something that, despite its harshness, that I regret in any way.

For each of the first five counts, manslaughter by auto, the sentence will be ten years. You will serve each of those counts consecutively. That will be 50 years. For Count 21, the driving under the influence,

the sentence will be one year that will be concurrent to the 50 years. On May 25th I believe it was.

MR. JONES: May 12th.

THE COURT: May 12th you failed to appear, I find in direct contempt of this Court. You inconvenienced all these people. For that contempt I will sentence you to an additional 25 days. I'll give you credit for the 25 days you served since being [S-51] picked up. That leaves about a balance of 104 days credit for time served that will be applied to the 50 years that you will serve on Counts 1 through 5. Counts 6 through 10 merge. Counts 11 through 15 and 16 through 20 are moot. I will merge all other counts with that sentence.

You have ten days to seek a new trial. In the confines of that procedure, given that this was a plea, you have 30 days to appeal. You have 30 days to ask for a three-judge panel to review your sentence. They can increase or decrease the sentence. And you have 90 days to ask for a reconsideration sentence. On a reconsideration sentence I can only decrease the sentence.

I have your request for an evaluation under health general 8-505 and 8-507. I will take that under consideration. I will take a chance to read that and make a decision at a later date.

MR. JONES: Your Honor.

THE COURT: I believe that concludes this proceeding.

MS. RUSH: Thank you, Your Honor.

THE COURT: And I would like to thank everybody that was able to be here.

(The proceedings were concluded.)

[S-52] REPORTER'S CERTIFICATE

I, Danny O. Engelbretson, an Official Court Reporter of the Circuit Court of Prince George's County, Maryland, do hereby certify that I stenographically recorded the proceedings in the matter of State of Maryland vs. Kenneth Kelley, in the Circuit Court for Prince George's County, Maryland, Criminal Trials Number 15-0626X, on Friday, June 9, 2017, before the Honorable Albert W. Northrop, Associate Judge.

I further certify that the pages numbered one through 51 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter in a complete and accurate manner to the best of my skill and ability.

In Witness Whereof, I have affixed my signature this 14th day of August, 2019.

/s/ Dan Engelbrtson
DANNY O. ENGELBRETSON

OFFICIAL COURT REPORTER

[H-1] IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

THE STATE OF MARYLAND

vs. Criminal Trial 15 0626X

KENNETH KELLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Post Conviction Hearing

Upper Marlboro, Maryland
Thursday, February 6, 2020

BEFORE:

THE HONORABLE BEVERLY J. WOODARD, Associate Judge

APPEARANCES:

For the State:

MATTHEW I. LYNN, Attorney-At-Law

For the Defendant:

BRITTANY VAN RITE, Attorney-At-Law

MARGARET REAMS MILLER, CCR
OFFICIAL COURT REPORTER
P.O. Box 401
Upper Marlboro, MD 20773

[H-2] PROCEEDINGS

THE DEPUTY CLERK: Case number one on the docket, CT 15 0626X, State of Maryland versus Kenneth Kelley.

MR. LYNN: Good morning, Your Honor. Matthew Lynn, L-y-n-n on behalf of the State.

MS. VAN RITE: Good morning, Your Honor Brittany Van Rite, spelled V-a-n, R-i-t-e here with petitioner Mr. Kelley.

THE COURT: Thank you.

MR. LYNN: Your Honor, just preliminarily, the State has one witness to call. That's Antoini Jones. Mr. Jones checked in. He stepped out to go to another courtroom.

He will come back, and I know Ms. Van Rite wants to call him also as well.

MS. VAN RITE: That's correct. I have one witness and that would be Mr. Kelley.

THE COURT: All right, you can begin.

If you would like to make an opening, that's up to you.

MS. VAN RITE: Briefly, as the posture of this case, Your Honor, on March 27th, 2017 Mr. Kelley entered a guilty plea to the entire 28 count indictment before the Honorable Judge Albert [H-3] Northrop. The trial counsel for Mr. Kelley was Antoini Jones.

Mr. Kelley was sentenced on June 9th, 2017. He received a sentence of fifty years. That sentence was made up from counts one through five each receiving ten years consecutive to one another for manslaughter by auto, count 21 was one year concurrent, count six through ten and 22 the Court ruled as merged.

Counts 11 through 20 the Court ruled for moot. And all other remaining counts the Court ruled were either moot or merged.

Mr. Kelley filed a motion for modification on October 28th which was held sub curia. There was a notice of appeal to be filed by Mr. Kelley although the fee wasn't properly paid and the documents weren't properly filed, so it resulted in a dismissal on October 30th, 2017.

There were several requests for a hearing on modification which were all denied and two requests for an 8-505 evaluation both of which were denied.

Mr. Kelley filed a pro se petition for post conviction relief on April 15th, 2019 alleging one error

that his sentence was illegal. [H-4] It was double jeopardy, and there was a duplication of the charges.

I as his counsel filed a supplemental petition on September 11th, 2019 alleging two additional errors that Mr. Kelley's plea was not knowing and voluntary due to not being advised of the nature and elements for those 28 counts and also that the plea was not knowing and voluntary because Mr. Kelley was not advised of the risk he was facing under that 28 count plea.

Mr. Kelley is going to proceed with the two supplemental claims, and he is prepared to withdraw his pro se claim today.

Would Your Honor like me to qualify in order to do that?

THE COURT: (Indicating.)

MS. VAN RITE: Mr. Kelley, if you would like to stand up, please?

THE DEFENDANT: (Indicating.)

MS. VAN RITE: You and I have had a chance to discuss your case today as well through letters and on one occasion in the department of corrections. Is that true?

THE DEFENDANT: Yes.

MS. VAN RITE: You had filed a petition [H-5] of error for a post conviction relief. After discussing that

with me did you decide that you wanted to withdraw that today?

THE DEFENDANT: Yes.

MS. VAN RITE: And today you had enough time to talk to me. Is that true?

THE DEFENDANT: Yes.

MS. VAN RITE: That you're sober today. You're feeling well. You're not having any issues understanding what's going on.

Is that true?

THE DEFENDANT: Right.

MS. VAN RITE: And you understand if there were any other claims you wanted to bring in post conviction in this case they would have to be brought today. You are not going to get an opportunity to bring them again.

Do you understand that?

THE DEFENDANT: Yes.

MS. VAN RITE: And this is how you want to proceed by proceeding on the two claims, that your plea was not knowing and voluntary. Is that true?

THE DEFENDANT: Yeah.

MS. VAN RITE: Do you have any other [H-6] requests for either me or the Court involving what is happening today?

THE DEFENDANT: Yes.

MS. VAN RITE: Okay, is that sufficient?

THE COURT: That is sufficient on those two claims only?

MS. VAN RITE: Yes, Your Honor.

THE COURT: All right. You may have a seat for right now.

MS. VAN RITE: Your Honor, before we get started, would the Court like to take judicial notice of the transcripts or shall I mark them as exhibits?

THE COURT: Let me find them.

Okay, yes. I have the transcripts. I have the indictment. I have everything --

MS. VAN RITE: Wonderful.

THE COURT: -- so I will take judicial notice.

MS. VAN RITE: Thank you very much. Would the Court like Mr. Kelley to --

THE COURT: Well, he didn't get to his opening.

MR. LYNN: No. I don't feel the need to make an opening, Your Honor, quite frankly.

[H-7] THE COURT: No. I'm just saying that I had to ask.

MR. LYNN: I pretty much said everything I need to say factually of the posture of the case in the response.

THE COURT: Okay.

MR. LYNN: Thank you.

MS. VAN RITE: And just a brief opening, Your Honor. This was a complex resolution. This is not the average resolution of pleading guilty to an entire 28 count indictment.

This I think is obviously crafted as is evident. It says in the sentencing transcript by Mr. Jones. There is quite a bit of back and forth and dialogue in both the sentencing and the plea transcript about what the exposure was.

Mr. Jones at one point makes a question of the exposure is 50 years in right before the plea goes in.

The Court when advising Mr. Kelley of his rights that he will be waiving prior to accepting his guilty plea says, Mr. Kelley, you're aware that your exposure could be 60, 70 years.

Your Honor, I point this out to show that this with the merger with the concurrent with [H-8] the possibility of consecutive sentences under the -- specifically allowed by that statute for the charges of one through five, this was complex.

A layman would need a lot of explanation of what is going on. And I feel that did not happen.

We will relying on the transcripts and testimony to show, Your Honor, that Mr. Kelley had no idea what he was getting himself into and that this plea was not open and voluntary. Thank you.

THE COURT: All right. Now you may --

MS. VAN RITE: If I may call Mr. Kelley? Would Your Honor like him to testify right from here or --

THE COURT: On the witness stand. Thank you.

KENNETH KELLEY,

the Defendant, having first been duly sworn, was examined and testified in his own behalf as follows:

THE DEPUTY CLERK: Would you please spell and state your first and last names for the record?

THE WITNESS: My first name is Kenneth, K-e-n-n-e-t-h. My last name is Kelley, K-e-l-l-e-[H-9]y.

DIRECT EXAMINATION

BY MS. VAN RITE:

Q Thank you, Mr. Kelley. We're here about your case that you pled guilty to on March 27, 2017.

How did Mr. Jones come to be your attorney in that case?

A Hum, family reached out to him. And he came to see me after I got a bond, bonded out.

We met a couple of times, and we basically talked about pleading guilty and getting between 20, 30 years.

Q So, I want to back up a little bit. During those meetings what sort of documents if any did you review with Mr. Jones?

A Well, I mean evidence that they had filed as me being a driver. He showed me some footage of a camera from a gas station. And --

Q Mr. Jones had told the Court that the two of you went through an indictment. Do you recall doing that?

A I recall him telling me what the 28 charges were that I was facing.

Q Tell me about that. What do you mean [H-10] when he told you what the 28 charges were?

A I mean he just pretty much told me what the 28 charges that I was facing.

Q As in he read you what the charges were?

A Right.

Q Did you ask any or what if any follow-up questions did you ask about what those 28 charges involved?

A No.

Q No as you didn't ask any follow-up questions?

A No, I didn't.

Q Mr. Kelley, how far did you go in school?

A Ninth grade.

Q What sort of if any legal training or training about the law have you had?

A None.

Q How many times prior had you been charged with manslaughter?

A Never.

Q What do you understand the term gross negligence to mean?

MR. LYNN: Objection.

[H-11] THE COURT: Sustained.

BY MS. VAN RITE:

Q How would you describe your understanding of those 28 charges against you?

MR. LYNN: Objection.

THE COURT: Basis?

MR. LYNN: I withdraw the objection.

THE COURT: Excuse me?

MR. LYNN: I will withdraw the objection.

THE COURT: All right. Okay, you may answer.

THE WITNESS: Can you ask me again?

BY MS. VAN RITE:

Q How would you describe to the Court what your understanding of those 28 charges that you pled guilty to?

A I don't know. I understand that they was law breaking, that I broke the law.

Q That's about as far as it goes?

A Yeah.

Q Mr. Kelley, what if any discussions did you have with Mr. Jones about the offer that was dated December 17th, 2015 in this case?

A I mean, he told me that -- at one time [H-12] it wasn't a offer. Maybe, like, the fourth, fifth occasion I had met with him he told me they had a offer for 30 years.

And he told me we wasn't taking the 30 years. We -- we was going to plead guilty to the entire indictment. And that's what I did.

Q What did -- what did you understand the benefit of not accepting that offer for 30 years and pleading guilty to all 28 counts instead to be?

A Taking his advice. I thought it was going to be beneficial.

Q In what way?

A In me getting less than what the plea was that he said was 30 years.

Q And again what did you understand was the possibility you faced to serve in prison by pleading guilty to all 28 counts?

A Say that again please.

Q What did you understand was the time that you could serve in prison that the Judge could give you, the most?

What was the most time the Judge could give you under your plea to the 28 counts?

A I didn't have a understanding.

[H-13] Q Now, as you're serving 50 years as we sit here today, what if anything would you have done differently?

MR. LYNN: Objection. Calls for speculation.

THE COURT: Sustained.

BY MS. VAN RITE:

Q Mr. Kelley, did you attempt to file an appeal in this case?

A Yes, I did.

Q What was that? What were you attempting to appeal?

A Fifty years.

Q When did you realize there was a problem in your case?

MR. LYNN: Objection. I didn't understand the question.

THE COURT: You don't understand the question?

THE WITNESS: It sounded like the problem was -- the problem was the plea, the sentence. You know what I'm saying?

BY MS. VAN RITE:

Q Sure. You said you were going to appeal the 50 years. When did it occur to you that that [H-14] 50 years was problematic?

A Hum, right after I was sentenced.

Q What contacts did you have with Mr. Jones after you were sentenced?

A I talked with him right after I got sentenced.

Q When you were still in the courthouse?

A Yes.

Q And what did you say to him?

A I thought he was going to get me less than 30 years.

Q Did the two of you ever have discussions about filing an appeal?

A He told me he was going to file for a few things he told me he was going to file for.

Q Mr. Kelley is there anything else you want to tell the Court about your post conviction claims?

A Hum, I -- I -- I didn't know what the importance of the elements of a criminal offense was until I went over my case a couple of times and with a dude who worked at the prison library.

Q What did you then find out?

A I mean, I still haven't found out what the elements to the charge that I pled guilty to [H-15] are. I'm still unaware of the elements.

Q Okay, thank you.

CROSS EXAMINATION

BY MR. LYNN:

Q Mr. Kelley, do you recall signing a waiver of rights form in this case?

Could you answer my question yes or no?

A Yes.

Q Okay.

MR. LYNN: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. LYNN: Okay.

BY MR. LYNN:

Q Let me show you a waiver of rights form that was filed in the Circuit Court.

THE COURT: Do you want to mark it? What are you doing?

MR. LYNN: It's attached to my response.

THE COURT: I know it is, but you're using it now in the courtroom.

MR. LYNN: Let's have it marked.

THE COURT: Isn't that correct? It's completely different. Isn't that correct, Madam Clerk?

[H-16] THE DEPUTY CLERK: Yes, ma'am.

State's Exhibit 1 marked for identification.

BY MR. LYNN:

Q Let me show you what's been marked as State's Exhibit 1 for identification. It's a two page document dated 3/27/17 that was signed by -- let me show you this, State's Exhibit Number 1.

Take a look at it. Look at the last page of that three page document. On the top of the page is that your signature?

A Yes, sir.

Q Okay. Is that a yes? Try to keep your voice up.

A Yes.

Q Okay. And what's the date of that?

A 3/27/17.

Q Okay. Can I have it back for a moment?

A (Indicating.)

Q Let me show you on the third page, right beneath your signature can you read how -- can you read -- all right, let me read it to you.

It says, I hereby certify that I am the defendant's attorney and have advised the defendant of the nature of the charges, the [H-17] elements of all the charges, all possible defenses of those charges, and any and all plea offers.

And did you read that before you signed this document, sir?

A No.

Q Okay, but you signed that document, though. Correct?

A (Indicating.)

MR. LYNN: Okay, move this into evidence.

MS. VAN RITE: No objection. Thank you.

THE COURT: Received.

BY MR. LYNN:

Q Now, sir, do you recall when you entered into your plea that there was a reading into the record a statement of facts by the State? Do you recall that?

A Unh-unh.

Q You don't recall being at the plea?

Do you recall Judge Northrop advising you to listen to the statement of facts in support of the plea?

Do you recall that?

A (Indicating.)

Q Okay, if this was in the transcript was [H-18] there any reason to deny that Judge Northrop said that?

A Say what?

Q I'm sorry. If the transcript says Judge Northrop advised you to listen to the statement of facts in support of the plea is there any reason to deny that?

A (Indicating.)

Q Okay. And the facts read into the record established that you were driving a motor vehicle on October 10th, 2014 at approximately 65 to 70 miles per hour in a speed zone of 30 miles per hour on Livingston Road at the intersection with Livingston Terrace and Oxon Hill in Prince George's County when the vehicle you were operating rear ended a motor vehicle operated by Hadasa Boykin stopped at a traffic light at the intersection causing the death of Dominique Green, Tiffany Anderson, Tamika, T-a-m-i-k-a, Curtis. This next name is K-h-a-d-i-j-a, last name B-a in the vehicle impacted by the vehicle you were operating.

The action of petitioner caused the death of those five aforementioned individuals. And the statement of facts in support of the plea [H-19] establishes that you slammed into the vehicle of the victim at full speed, 65 to 75 miles per hour and that petitioner's medical records show that you had an ethanol level of 173 milligrams per deciliter that was quantified by a forensic toxicologist to present a blood alcohol content of point one for at the time of the crash satisfying the requirements of driving under the influence of alcohol.

So, are you saying you did not listen to what the Judge told you to listen to?

A I'm not saying I didn't listen to him. I'm saying --

Q Does that refresh your recollection?

A Yes.

Q Okay. All right.

Now, you said here today -- and I don't want to quibble. But you said you had a ninth grade education.

A Yeah.

Q Okay. Did you have a chance to look at your presentence investigation report?

A No.

Q You never -- did your attorney ever show it to you or discuss it with you?

[H-20] A Not that I recall.

Q Do you recall meeting with somebody with regard to that presentence investigation report?

A Yes.

Q Do you recall telling that person you met with you had completed the tenth grade?

A I made it to the tenth. I didn't complete the tenth.

Q So, if it says he reports completing the tenth grade that would be wrong. Right?

A Yes.

Q Okay. Now, you were 27 years of age at the time of this crime or at the time of the plea.

A Yes.

Q Okay. And you met with Mr. Jones numerous times. I believe you said about four times.

A Yes.

Q Four or five occasions. And you keep talking about a 30 year plea. Do you have any documents to show that the State offered you 30 years in this case?

A No.

Q Okay. Now, is it fair to say that you [H-21] were scheduled after the plea to come to court for a sentencing hearing in May? Is that fair to say?

A Yes.

Q All right. I believe it was May 17th. Does that sound about right?

A I don't remember the exact date.

Q Okay, it was a date in May. Correct?

A Yes.

Q Okay. You were aware of that hearing date at the conclusion of your plea. Is that fair to say?

A Yes.

Q It's a yes or no or I don't know.

A Yes.

Q What's your answer?

A Yes.

Q And you were out on bail. Correct, even after the plea?

A Yes.

Q Okay. You remained out on bail. Correct?

A Yes.

Q But you didn't show up at the plea -- I'm sorry.

You didn't show up to the sentencing [H-22] hearing that was scheduled in May. Is that fair to say?

A Yes.

Q You ultimately showed up at a sentencing hearing in June. Correct?

A Yes.

Q June 9th?

A Yes.

Q Okay. Do you recall sitting through the sentencing hearing?

A Say that again.

Q Do you recall sitting through a sentencing hearing?

A Yes.

Q Okay. If I told you the sentencing transcript was 52 pages and that the Judge or someone at the sentencing hearing marked that the sentencing took about an hour and a half does that refresh your recollection about how long the sentencing hearing was?

A Um-hum.

Q And you articulated -- you spoke at the sentencing hearing. Isn't that correct?

A Yes.

Q Okay. Asking -- asked for mercy. [H-23] Correct?

A Yes.

Q Do you recall whether or not Mr. -- do you recall Judge Northrop imposing additional separate

sentences for contempt of court for your failing to show up at the original sentencing hearing?

A Yes.

Q Okay. Do you recall reviewing a memorandum prepared by Mr. Jones --

MS. VAN RITE: We object to the relevance.

THE COURT: Basis?

MS. VAN RITE: Relevance.

THE COURT: As to the memorandum prepared by Mr. Jones for the sentencing?

MS. VAN RITE: Yes.

THE COURT: Why would it not be relevant if he shared it. I mean, I'm not really sure --

MS. VAN RITE: Relevance to claim that this was a knowing and voluntary plea. The memorandum is very brief and has nothing to do with the --

THE COURT: Well, how do we know based on your conversation? I mean, that could be part [H-24] of the conversation. It could have been part of the conversation when they discussed the memorandum.

So, no. You're overruled.

You can ask the question about the memorandum.

MR. LYNN: Let's have the defendant's memorandum in aid of sentencing marked as State's Exhibit Number 2 for identification.

THE DEPUTY CLERK: State's Exhibit 2 marked for identification.

BY MR. LYNN:

Q Just for the record this memorandum in aid of sentencing was sent to both Judge Northrop and to the State by Mr. Jones. Certificate of service shows May 11th, 2017.

So that was before the date that you had -- were supposed to show up at sentencing. Do you recall -- do you recall, sir, whether or not Mr. Jones ever discussed with you prior his filing this May 11, 2017 memorandum in aid of sentencing, did you ever discuss certain things that he was going to put in that memorandum?

A No.

Q You don't? Did you meet with him at [H-25] all between the time of the plea and the time of sentencing?

A Can't remember.

Q You can't remember if you had no meeting whatsoever between the time of the plea and time of sentencing?

A (Indicating.)

Q You were out on bail. Correct?

A Right.

Q Well, in looking at the paragraph with the heading introduction, Mr. Jones writes, as an initial matter, the defendant fully accepts responsibility for his involvement in the criminal conduct at issue.

Without hesitation or reservation the defendant determined it would be in his best interest if he plead guilty to the entire indictment because he fully accepts responsibility for his actions.

That's what Mr. Jones says. Do you agree with that or disagree with that?

A I disagree that's what he recommended me to do.

Q Okay. So you -- so, what he says here you're saying is incorrect?

[H-26] A I did what he told me to do.

Q Okay, you went along with that. Correct?

A Right.

Q You fessed up early on. Right?

A Right.

Q You spoke to the police and you admitted your responsibility even before you were represented by counsel. Is that fair to say?

A Yes.

Q Okay. And in the next to last paragraph on page one it says, defendant also desired to spare the family of some of the victims vividly reliving this tragedy in the courtroom.

Do you recall whether or not that was a true and correct statement?

A Yes.

Q It was?

A (Indicating.)

Q And in page two, first full paragraph, it says that the back seat passenger in your vehicle died. Correct?

A Yeah.

Q Okay. And it says immediately and without hesitation you admit to the drive of the [H-27] automobile. Correct?

A Correct.

Q Okay. And this is what Mr. Jones fully intended to present to the Court had you shown up at sentencing in May. Is that correct?

It's dated -- court's indulgence, May 11th. You were scheduled to be sentenced the next day. Correct?

A Correct.

Q But you didn't show up. Correct, even though you were remorseful?

MR. LYNN: Move this into evidence.

THE COURT: That's number two. Any objection?

MS. VAN RITE: No, thank you.

THE COURT: It's received.

BY MR. LYNN:

Q Now, you talked about certain pleadings that Mr. Jones was filing for you at the time of sentencing, shortly thereafter.

Does that include a motion for reconsideration of sentence?

A Yes.

Q Okay. Is it fair to say that Mr. Jones at the time of sentencing gave Judge Northrop a [H-28] note and formal general letter under 8-505 and 8-507?

A Yeah.

Q Even though it's not stated in the statement of facts isn't it correct that immediately prior to the time that you impacted into the vehicle of Ms. Boykin you were fleeing from police?

A Yes.

Q Is that yes?

A Yes.

Q Okay. And why were you fleeing from police?

MS. VAN RITE: Objection, relevance.

THE COURT: Sustained.

MR. LYNN: Court's indulgence.

BY MR. LYNN:

Q Now, you testified earlier on direct examination that you thought you would be getting 20 to 30 years on a plea.

A Yes.

Q Okay. Did Mr. Jones show you the letter from December 17, 2015 or at least discuss the letter of December 17, 2015 with you from the State?

[H-29] A Can't remember.

Q You can't remember? You can't remember if he discussed it with you?

A I don't recall him discussing it with me.

MS. VAN RITE: If I may object. This seems unclear. If you would show him what you are speaking of?

MR. LYNN: Let me show you what's -- let's have this marked as State's Exhibit 3 for identification.

THE DEPUTY CLERK: State's Exhibit 3 marked for it identification.

BY MR. LYNN:

Q Okay, I'm going to show you a letter dated December 17th, 2015 that was referenced by your attorney, Ms. Van Rite.

Do you recall ever seeing this letter?

Do you recall one way or the other?

A No.

Q Do you ever recall having a discussion with Mr. Jones regarding a plea offer in a letter that was provided to him dated December 17th, 2015?

A No.

[H-30] Q Where did you get the number 20 to 30 years?

A That's what he came out his mouth and said and in one of the meetings that I met with him.

Q Do you remember what meeting that was?

A No.

MR. LYNN: Okay move this into evidence.

THE COURT: Any objection?

MS. VAN RITE: No, thank you.

BY MR. LYNN:

Q You had multiple prior convictions prior to entering into the plea in this case. Is that fair to say?

A Yes.

Q Okay. If I told you I added them up to be five is there any reason to disbelieve that?

A No.

Q Okay. Do you recall what benefits fits Mr. Jones told you you may have by taking an open plea rather than an A. B. A. combining plea?

A No.

Q Do you recall him saying anything to you about the -- about the -- why he recommended you to take an open plea?

[H-31] A No.

Q Okay. When you met -- you said you met with him four to five times. Do you recall what intervals you met with him during these four to five times, what the beginning versus the last time you met with him?

A No.

Q Okay.

MR. LYNN: No further questions of the witness.

THE COURT: Redirect?

MS. VAN RITE: Yes, thank you.

REDIRECT EXAMINATION

BY MS. VAN RITE:

Q Mr. Kelley, do you read well?

A No.

Q Tell me about your ability to read.

And I don't mean to embarrass you but tell me about your ability.

A I can read.

Q When you say I don't read well what do you mean?

A I mean I be able to, certain words.

Q How much of that indictment did you understand when you read it?

[H-32] MR. LYNN: Objection. I don't think he said he read it.

THE COURT: Overruled.

You can answer the question.

THE WITNESS: Say that again, please.

BY MS. VAN RITE:

Q Did you read the indictment? Did Mr. Jones give you the indictment to read or did he read it to you?

A I think we went over it together. He went over it with me.

Q So, you weren't just the one sitting reading it.

A No.

Q Okay.

MS. VAN RITE: If I may approach and retrieve the exhibits, please?

THE COURT: (Indicating.)

BY MR. VAN RITE:

Q Mr. Kelley, I'm showing you what has been marked and accepted as State's Exhibit 3. This is the letter dated December 17th, 2015.

Did you ever read this letter prior to your guilty plea?

A No.

[H-33] Q How did you come to know of the 50 suspend all but 30 offer from the State?

A Never knew about that.

Q So, you never knew about the offer?

A When I met with Antoini he just told me that the State was offering 30 years. And he said we wasn't taking that.

Q So, you never read this letter?

A No.

Q I want to show you what's been marked as State's Exhibit 2 and accepted.

We're going to turn to the third page. Mr. Lynn was asking you questions here about it says I hereby certify that I am the defendant's attorney and have advised the defendant of the nature and elements of those charges.

And then, there is a signature. Whose signature is that?

A I don't know.

Q Is it your signature?

A No.

MS. VAN RITE: Thank you. Nothing further.

RECROSS EXAMINATION

BY BY MR. LYNN:

[H-34] Q Mr. Kelley, your ability to read or is it limitations regarding --

THE COURT: I didn't know you were going to ask some more questions. You just keep going on.

MR. LYNN: Just one question.

THE COURT: Go ahead, one.

BY MR. LYNN:

Q Does your ability or limited ability to read have any impact on your ability to listen and -- I'm not being snide about that.

A Maybe.

Q When Judge Northrop told you to listen to the statement of facts being read into the record you didn't. And the Judge afterwards asked if the statement of facts he read into the record, if there was a question as to any additions or corrections.

And you didn't step up and say anything. Correct?

A Correct.

MR. LYNN: Okay, no further questions.

The State needs to locate Mr. Jones and see if he -- he was here earlier.

THE COURT: Thank you very much, sir, [H-35] Mr. Kelley.

(The witness was excused from the witness stand.)

ANTOINI JONES,

a witness produced on call of the State, having first been duly sworn, was examined and testified as follows:

THE DEPUTY CLERK: Could you please state and spell your first and last name for the record?

THE WITNESS: Antoini, A-n-t-o-i-n-i, Jones, J-o-n-e-s.

DIRECT EXAMINATION

BY MR. LYNN:

Q Mr. Jones, what's your occupation?

A I'm an attorney.

Q Do you recall representing Kenneth Kelley seated to the right of his counsel?

A Yes, I do.

Q In CT 15 0626X?

A Yes.

Q Okay. And just preliminarily when were you admitted to the Maryland Bar?

A Some time in 1990. I'm not sure of the exact date.

[H-36] Q So about 30 years ago?

A Yes.

Q And as of the time you entered your appearance for the defendant, you have been practicing law for a significant period of time?

A Yes.

Q Okay. And at the time of your representation of the defendant in this case what was your primary focus of your law practice?

A The majority of my law practice was criminal.

Q When you say the majority, could you say what per cent?

Q Over my career I'd say maybe 70 per cent over the span of, like, litigation.

Q At the time you first met with Mr. Kelley in this case it was about 70 per cent at that point?

A Yes. I would imagine. It may have been a little higher then, because I do less criminal now.

Q Do you recall when the defendant was indicted in this case?

A Hum, I don't recall when he was indicted. I know it was in Circuit Court. I'm [H-37] not sure if it was on an information or indictment.

Q If I told you there was 28 count indictment would that refresh your recollection?

A Yes. I recall it being a multiple count indictment, multiple count charges. I'm not sure if it was an information or an indictment.

Q You don't have any of your files here today. Do you?

A No, I don't.

Q Do you recall when you looked at your file?

A Months ago, but I have seen some documents since then.

MR. LYNN: Let's have this marked as -- I believe it would be State's Exhibit 4.

THE DEPUTY CLERK: State's Exhibit 4 marked for identification.

BY MR. LYNN:

Q Let me show you what's been marked State's Exhibit Number 4 for identification. Ask you to take a look at that.

A Yes. I'm familiar with it.

Q Does that refresh your recollection as to whether or not the defendant was indicted in a [H-38] number of counts for which he was indicted?

A Yes.

MR. LYNN: Move that into evidence.

THE COURT: Any objection?

MS. VAN RITE: No, thank you.

THE COURT: Received.

BY MR. LYNN:

Q Now, do you recall whether or not you received a letter from the State regarding a possible plea offer?

A Yes. I think Ms. Rush was --

Q Jennifer Rush?

A Yes. I --

Q And it's Joel Patterson also?

A Yes.

MR. LYNN: And I'll get the December 17th, 2015 letter that was been move into evidence.

THE DEPUTY CLERK: (Indicating.)

BY MR. LYNN:

Q Let me show you what's been marked as State's exhibits regarding the December 17th, 2015 letter. Do you --

A I'm familiar with the letter.

Q Do you recall getting that letter?

[H-39] A Yes.

Q And do you recall discussing that letter with Mr. Kelley here?

A Yes.

Q Okay. And do you recall how long that discussion took with Mr. Kelley regarding that letter?

A Multiple discussions. One with his family members and we met at the conference room. I remember him. We talked multiple times.

Q Okay. And that letter talks about a number of things. Didn't it, a split sentence?

A Well, when you say split sentence I think it was 50 suspend all but 30.

That was the offer, and it was supposed to be an agreed upon sentence which is A. B. A.

Q So, one of the benefits of an A. B. A. plea, one -- what are the differences of accepting an A. B. A. plea?

A The benefit of the A. B. A. plea if the Judge accepts it is that will be the sentence. The Judge

agrees to bind himself. The State would -- the Judge said that would be the sentence that's proscribed.

That's the benefit because you know what [H-40] you are being sentenced to.

Now, in my opinion, in some cases what would be considered the downside of A. B. A. pleas is you can't do -- you can't mitigate the sentence or argue for leniency, because you have agreed to what is sentence was.

But more importantly at least what I consider to be very important is you only can file the motion of reconsideration with the State's consent. So, the State doesn't have to consent to a motion for reconsiderations. You can file it, but nothing can be done with it because it would be the State's consent to have the reconsideration of your -- the sentence.

BY MR. LYNN:

Q Okay. And were you aware at the time you discussed this letter with Mr. Kelley what his past criminal record was?

A I knew what -- at the time I knew what he had told me his past criminal record was. I did not do any background check or N. C. I., because we don't have access to that.

Normally that will the State who is the one who tells us or indicates what the background is on

time as the P. S. I. comes back. This is [H-41] something that you may not have been aware of.

But in this case -- well, that's the answer.

Q And in this case, on -- under the agreed upon sentence of 50 years, suspend all but 30, upon release the defendant will be placed on five years supervised probation?

A Correct.

Q With the special conditions of drug and alcohol testing, evaluation and treatment as deemed appropriate.

And in a second paragraph it says, this offer is predicated upon the belief that your client last two prior convictions and was on probation.

MS. VAN RITE: May I object to relevance and it's leading if it's a question.

THE COURT: Yes. Is there a question in there, what you're reading?

BY MR. LYNN:

Q Did your client tell you how many convictions he had when you met with him?

A I'm sure he did, because we have a form and discussed that.

Q Okay. And he -- and how long did your [H-42] meeting with Mr. -- and I don't want to know about family members, because Mr. Jones was an adult at the time.

How long was your meeting with Mr. Kelley regarding this letter?

A Well, it's more, because in talking with Ms. Rush, her position was his guidelines were actually eight to 60 or 61, something along those lines.

Q Do you want me to show you the letter so you can refresh your recollection?

A N. That's what she said his guidelines were actually. However, because of the amount of the sentence would be 50 years that's why the offer was 50 suspend all but 30 because ten years per count was five individuals unfortunately who passed away.

So, that's why it was. The offer ended up being 50 suspend all but 30, but her position was the guidelines were above the 50. She and I talked about that. And after that I talked with Mr. Kelley then.

And after consulting with him and his family members, I believed the best course would be to plead to the indictment instead of --

[H-43] Q And for the reasons you have stated?

A I believed that this incident wasn't something that was fully intent or anything like Mr. Kelley. It was an awful and tragic mistake on his part.

What he had told me transpired it was clear he had no intent of causing any harm to anyone.

Sadly, he was -- from what he had told me he had left Friday and had been drinking a little, not an exorbitant amount and was driving. And the police were chasing him and they were fleeing from the police. And I think they lost the police or couldn't find the police.

And he was turned around looking for the police, and unfortunately in looking back his car struck a vehicle with like -- and that's how the incident occurred. It was tragic in every way. In fact, the individual died in his car, and multiple individuals died in the car he struck.

Q So, when you explained to Mr. Kelley why you thought it would be better to enter into an open plea, did he give you any push back?

A We discussed that with his family. When you say push back, when you say [H-44] push back, at the end he agreed. We discussed it now. Exactly what he said I cannot tell you. I don't know whether initially he was agreeable with it or after we talked he was more agreeable, but he had discussions with his family.

And at the end they agreed that would be the best course of action, because a trial wouldn't have been good. Our options were to accept the State's plea offer and go to trial or go to trial, which I believe the clear -- the evidence would have been that he would have been found guilty or pleading to the indictment which in essence is accepting full responsibility.

And in my mind it could have been in a better position at sentencing after going to trial. And in my mind it was actually better than the offer that was given.

Q Okay. Mr. Kelley testified earlier this morning, and he said you had met with him and that you told him he was going to get between 20 to 30 years. Did you ever tell him that?

A I can't -- I couldn't have told him exactly what time he would get because I had no idea exactly what time he would get.

Q But you never told him 20 to 30. Did [H-45] you?

A No. I can't imagine that. I can't recall telling him that, and I can't imaging saying that.

I may have told him if he entered the A. B. A. plea he would get 30 years because that was the agreement.

Q Okay, and did you tell him if he violated what his back-up time would be?

A I would have told him if he violated his probation his back-up time could be the 20 years that was suspended.

Q Okay. And that being said, he would not have had the -- you testified that he wouldn't have the benefit of the open ended plea. Correct?

A Correct. He wouldn't have the benefit of giving mitigation to the Court for the Court to determine.

Q Do you recall that he was scheduled for sentencing on May 17th, 2017?

A I don't remember the date, but I do know he was scheduled for sentencing.

Q Okay. Did he show up for sentencing?

A No, he didn't.

Q He was on bail at the time. Right?

[H-46] A Yes. He was on some type of pre-trial.

Q Didn't the -- do you know whether or not Judge Northrop issued a bench warrant for him?

A Yes. Originally, we -- Judge Northrop was patiently waiting until seeing if we could get him to come to court, because I had been communicating with him. And I was trying to get him to come to court.

So, he put himself in the worse position by not showing up.

Q Do you have any opinion to a reasonable degree of legal experience that it was not that quantum at the time of sentencing?

MS. VAN RITE: Objection.

THE COURT: Sustained.

BY MR. LYNN:

Q Let me show you what's been moved into evidence as defendant's memorandum in aid of sentencing signed by you and sent to the State's Attorney's office on May 11, 2017.

Take a look at it. Take your time and review it.

A Yes.

Q What if any discussion did have with Mr. Kelley before preparing that memorandum in aid [H-47] of sentencing?

A We talked prior to that. And in preparation for him going to sentencing as well.

Q Okay. And that's the memorandum that you would have argued to Judge Northrop had defendant Mr. Kelley showed up in court for his original sentencing hearing. Correct?

A Correct.

Q Okay. Let me next show you the State's exhibit dealing with the waiver of rights guilty plea form. Take a look at that.

A (Indicating.)

Q Now, this was dated March -- filed March 27th in the court clerk's office. And it appears to be signed by Mr. Kelley on 3/27/17.

Do you recall going over this form with Mr. Kelley?

A Yes.

Q And how much time did you take with Mr. Kelley going over this form?

A Going over the form is probably -- that was probably done in the courtroom prior to accepting the plea.

Q Okay. And in the page three under Mr. Kelley's signature and date can you read the next [H-48] full paragraph into the record starting with I hereby certify?

A I hereby certify that I am the defendant's attorney and have advised the defendant of the nature of the charge, the elements of all charges, all possible defenses to those charges, and any and all plea offers, the maximum penalty that the defendant has under

the plea, and any applicable consequences of the plea including but not limited to immigration, parole, or probation and / or gun registration.

Q And did you discuss those paragraphs with Mr. Kelley before you signed your name and dated your name?

A I'm not sure if I discussed the gun registration but the others I did.

Q Okay, thank you. Let me show you -- this is page S-3 of the sentencing transcript.

MR. LYNN: Let's have this marked as the next exhibit.

THE DEPUTY CLERK: State's Exhibit 5 marked for identification.

BY MR. LYNN:

Q Showing you -- so, I have underlined lines eight to nine on page S-3. Just read it to [H-49] yourself and I will ask you a question.

A You mean lines eight and nine?

Q I believe so. Do it where it's underlined.

A Okay.

Q Okay. Can you read what that said?

A Out loud?

Q Yeah.

A There was no plea offer with regard respect to this case.

Q Is that a mis-statement to your part?

A I'm not sure if it was a mis-statement on my part or it was the court reporter's part. I believe I would have said there was no plea agreement in this particular case, because I was pleading to the indictment.

I think in context if you read more of that, it think it's very clear. I think it was clear at the plea. We indicated that we generally rejected the plea offer, and I think in sentencing I indicated that he was pleading to the indictment and not to the offer.

Q And the plea offer we were referring to is in December 17, 2015 letter to you in this case from Jennifer Rush and Joel Patterson.

[H-50] A. That's correct.

Q And there is no -- is there any doubt in your mind that you discussed the contents of that letter with Mr. Kelley?

A I'm a hundred per cent confident. There is no way I would ever plead someone to the indictment unless there was a reason for it.

In this particular case --

MS. VAN RITE: Objection. Non-responsive.

THE COURT: Sustained.

You can ask the question, but you just have to narrow it down there, Mr. Jones.

BY MR. LYNN:

Q You read the letter to Mr. Kelley?

A (Indicating.)

Q Did you discuss the December 17th, 2015 letter?

A I doubt that I personally read it to him. Either I showed it to him or I explained it to him.

Q You explained it to him?

A Right.

Q You explained the contents of that letter?

[H-51] A Right.

Q And did you explain the implication of taking that plea?

A Yes.

Q And you explained to him why you thought an open plea would be more beneficial?

A Correct. And I believe I said it at sentencing.

Q Okay. Now, isn't it fair to say that one doesn't actually know what the sentencing guidelines are until a P. S. I. report comes back with a guidelines work sheet?

A It's generally the -- and

MS. VAN RITE: I object to that. It's leading and also possibly a mis-statement of fact.

THE COURT: I don't know what you are talking about. One doesn't generally know? You can ask him about his experience.

BY MR. LYNN:

Q In your experience does one know at the time when entering a plea either when one enters a plea what the sentencing guidelines are going to be?

A No. There are factors, things that you may not be aware of. Someone's criminal history [H-52] may impact the guidelines considerably.

There have been times and I in my experience had believed the guidelines were one thing and when we received the P. S. I. back it was different than what we anticipated. Either it was higher than we anticipated or sometimes it was lower than we anticipated.

And I have had occasion when we received them back that we disagreed with what the P. S. I. writer had said. And we ultimately based on that as well.

Q Are you aware that the Court -- well, what's your knowledge as to whether or not a Court has to impose a sentence within the sentencing guidelines?

MS. VAN RITE: Objection.

THE COURT: Sustained.

MR. LYNN: Court's indulgence.

THE COURT: You said that's it?

BY MR. LYNN:

Q Did you have any motions with Mr. Kelley between the time of the plea and the time of sentencing?

A Yes.

Q Okay. Do you recall how many motions [H-53] you may have had?

A I don't recall how many.

Q Was it more than one?

A Yes.

Q Was it more than two?

A I'm not sure if I physically met with him more than two times. I could have. I know I talked to him telephonically.

Q But your testimony was you met with him twice.

MS. VAN RITE: May I also object to the relevance here?

THE COURT: It goes to how many times he talked to him, yes.

MR. LYNN: It goes to credibility of the witness.

MS. VAN RITE: The plea would have already been in the dispos.

THE COURT: I understand but it would always -- as far as discussions could include what occurred before the plea.

MS. VAN RITE: I'm just saying it was -- it wasn't necessary prior to sentencing.

THE COURT: He already said he doesn't recall, so let's move on.

[H-54] BY MR. LYNN:

Q Do you recall whether or not you mitigated on behalf of -- well, did you mitigate on behalf of Mr. Kelley at this sentencing?

A Yes.

Q Do you recall if Mr. Kelley mitigated or allocuted on his own behalf at the time of sentencing?

A I don't recall.

Q Okay?

A I believe we had letters and I'm thinking we had testimony from people. I believe. That's my recollection.

I believe.

MR. LYNN: No further questions of the witness.

THE COURT: You're up.

MS. VAN RITE: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. VAN RITE:

Q Mr. Jones, how would you describe Mr. Kelley's intelligence level?

A Average intelligence.

Q Excuse me?

A I would describe it as being average [H-55] intelligence.

Q You're aware he hasn't completed even high school. Right?

A My grandmother didn't complete the eighth grade, but I thought she was fairly above average intelligence.

I believe Mr. Kelley has average intelligence.

Q That he was an average intelligence, what would you classify as his sophistication with legal concepts?

A I never tested him but he appeared to me to understand.

Q You testified that on page S-3 of the sentencing transcript, line eight, this is you talking where it says there was no plea offer with respect to this case, that that was a court reporter error?

A I believe that it was either a mis-statement by me or the court reporter. I believe I should have said there was no plea agreement.

Clearly there was a plea offer, and I believe in the transcript which I have not read --

Q Could it have been --

MR. LYNN: Objection.

[H-56] THE COURT: Let him finish.

THE WITNESS: There was a plea offer. There is no dispute it was a plea offer. There was no dispute that the plea offer was 50 to 30 years.

It was an A. B. A. There is no dispute with respect to that. I knew it. I let Mr. Kelley know it. His family knew it. That did happen. And I am confident we talked about it at the plea when it was originally given and we indicated we rejected it or the State may have indicated we rejected it.

It may have been something along those lines, and I'm confident that I said something else because I recall saying something to the fact that the plea that they give or offering was A. B. A. or something along those lines.

He pled to the indictment instead of the offer. I'm confident if you plead -- let me see the transcript.

I am confident that there is some reference to a plea offer in there. Let me see the plea transcript and let me see the sentencing transcript.

There was a plea. Mr. Kelley was fully [H-57] aware of it. His family was fully aware of it, and I have not an inkling of any thought on my part that he didn't know, because he knew.

BY MS. VAN RITE:

Q Could it have been rather than a court reporter error that you were indicating it just wasn't a

good offer even worth considering so you said there was no offer in this cases?

A No. I was saying it wouldn't have been a plea agreement.

At sentencing I'm confident I was talking about the -- preparing him for sentencing, telling the Court that we don't have an agreement. We're going to sentencing on the indictment.

So, the Judge can give him zero years or the Judge can give him 50 years or anywhere in between.

Q Would it be fair to say -- so you had said you have not reviewed this.

A No.

Q If I told you no where in this document does it say this is an A -- we want to avoid an A. B. A. plea? Would you agree with me?

A No. I would have to see it.

MS. VAN RITE: May I approach?

[H-58] THE COURT: Wait. Hold on. What are you showing him, first of all?

MS. VAN RITE: This is what the Court has already taken judicial notice. The State did not offer

their S-3 page of the sentencing transcript. I would ask that we either admit the entire transcript --

THE COURT: Remember, I took judicial notice of the whole thing.

MS. VAN RITE: Very good.

THE COURT: No. I'm asking you what is it you want him to read right now? I'm just asking.

MS. VAN RITE: Let's move on.

THE COURT: Huh?

MS. VAN RITE: We're going to move on.

THE COURT: Oh.

BY MS. VAN RITE:

Q You had said that you're unable to find someone's criminal history. That's not true –

MR. LYNN: Objection.

THE WITNESS: That's not what I said. I'm saying we could actually find it.

I don't have access to N. C. I. C. so that would mean someone could have. I can look at [H-59] another case server in Maryland to find out what the convictions will be, but that doesn't mean they didn't have a charge in anyway.

It doesn't mean they have a charge in Florida or somewhere else. I don't have access to someone's complete or accurate complete record.

BY MS. VAN RITE:

Q So, you do have access to his Maryland criminal history.

A Right, but I wouldn't have access to -- and I believe he had a charge in Virginia. I believe it was Virginia. I wouldn't have access to that.

Well, Virginia you could find, but Virginia you have to go to each county. Maryland, their case search is the whole State. Virginia you have to go to each county individually.

So, some states have access and some states don't. But that would be virtually impossible to get everyone after asking -- if you're asking for criminal.

Q Fair to say these facts in this case were horrendous?

A I agree.

Q Fair to say Mr. Kelley had a bad [H-60] record.

A I think the State was saying that he had maybe two or three convictions.

Q Did you review the P. S. I.?

A I'm confident I reviewed it, but do I recall what it says specifically now? No.

Q Do you recall they rated his criminal record as quite bad in the P. S. I.?

If I may directly quote it, he is considered to have a major prior criminal record.

A I don't dispute what it said. I just don't recall. But -- well.

Q Is it fair to say there wasn't much in the way of mitigation in this case?

A I would defer with you in this sense. If I remember right his blood alcohol level wasn't extremely high although it was an illegal level. Don't misunderstand me.

I believe the doctrine of lenity was a plausible argument. Now, hence, that's why the guideline range was as broad as it was.

I don't in my recollection that Mr. Kelley had any similar crime -- well, afterwards he did. He had a fleeing and eluding. But he didn't have any similar crimes before this [H-61] particular incident.

And in my opinion, I believe given the 30 year sentences or a 50 year sentence is Draconian. Not

to minimize what happened, because it's horrendous any time someone loses their life. that's unfortunate.

But one incident I think it's much different if he had taken the car and rolled over five individuals individually. One hit, another hit, and then hit another one as opposed to one incident where five people -- in my opinion the balance of the scale was a bit different.

Q Do you recall his blood alcohol content came in at point one four?

A I believe when I first started practicing it was a point one five for a D. U. I. Then, it came to a point one.

Q Mr. Jones, will you just answer my question, please?

A Yes. Well, I know it was above the legal limit, yes.

Q Nearly double.

A And that's what I was going to say. Now you asked me my opinion.

Q I didn't ask you your opinion.

[H-62] A Well the first question -- oh, yes. Okay, it's nearly double what it is now.

MS. VAN RITE: Now may I retrieve the exhibits, please, and approach?

BY MS. VAN RITE:

Q Mr. Jones, I'm showing you what's been pre-marked and accepted as State's Exhibit 2. This is the waiver of rights.

A Yes.

Q You're saying you reviewed this with Mr. Kelley?

A Well, yes.

Q He reviewed it?

MR. LYNN: Objection.

THE WITNESS: When you say he reviewed, what do you mean?

BY MS. VAN RITE:

Q Did you go over this line by line with Mr. Kelley?

A Did I read it to him? No, but I had already gone over it with him as is his right. The waiver of rights were prior to him signing it.

Q Will you read paragraph five for the Court, please?

A The maximum penalty for the offenses to [H-63] which I am pleading to blank in the offense is felony and or -- or under or misdemeanor.

Q So, you said blank. Would you agree that blank was to be filled in by you of what the maximum penalty Mr. Kelley faced under the plea agreement?

A I thing I filled out everything other than Mr. Kelley's signature. His name on the front I think I filled in.

Q So, yes, you would agree that that blank was for you to fill in what the maximum penalty to the offenses Mr. Kelley was pleading guilty to?

A Yes.

Q And did you fill it out?

A Given the fact that it's empty I must not have.

Q Mr. Jones, would you state that it's fair that there was confusion about what the maximum penalty was?

A Absolutely not. It was clear. The maximum was 50 years.

Q Do you recall -- I'm going to draw your attention to the plea hearing. And if you don't recall let me know, and I will show you the [H-64] document.

I'm on page five, line 14 if you want to for anyone to follow along with what the Court said.

Prior to qualifying Mr. Kelley before his plea said -- this is the Court talking to Mr. Kelley -- I understand that there are statutory penalties with these that could be 60, 70 years. Do you recall that?

A If I recall it? No. Could the Court have said it? Possibly.

Q Could you agree that you did not make any clarifications or objections to that?

A Nope. Didn't make any clarification or objection to it.

Q Would you agree that at sentencing yourself, the State's Attorney, and Judge Northrop were still talking about and necessarily not seemingly agreeing on what counts merged and what doesn't merge?

A Yes. We were doing that. You want me to explain why or not?

Q No, thank you.

Q You know that Mr. Kelley was charged with five counts of manslaughter by automobile. [H-65] That required gross negligence. Right?

A Yes.

Q Are you in familiar that in 2011 the Legislature created a new manslaughter by motor vehicle statute that required gross negligence in addition to the one that was already there which was criminal negligence? Are you familiar with that?

A That's -- there is a difference. Yes, somewhat.

Q Are you familiar with gross negligence is a factual determination that needs to be done on a case by case basis?

A There is no specific definition. If you mean specific definition exactly of gross negligence --

Q (Indicating.)

A It's {inaudible}.

Q How would you describe the difference between gross negligence and criminal negligence to Mr. Kelley?

A I'm not sure -- I'm not even sure I did. I may have done that. I'm not sure I did.

Q You would agree that would be part of ten elements, five for gross negligence and five [H-66] for criminal negligence. Right?

A Arguably, yes.

Q Arguably?

MS. VAN RITE: May I approach, please? I would like to retrieve the exhibit. I think it's number four.

BY MS. VAN RITE:

Q This is State's Exhibit 4. Can you tell me do you agree that counts one through five would be gross negligence, counts six through ten would be criminal negligence, and counts 11 through 15 would be per se negligence?

A Yep. Sure would.

Q And like you said, you're not sure that you described the difference between those levels of negligence to Mr. Kelley. Right?

A Yes, but in this, the facts in this case he is speeding. He ran into the rear of and another vehicle, and he is under the influences of alcohol. That would augment -- that would suffice for all of them.

Q Does your opinion or reduction release you from the responsibility of explaining the elements to Mr. Kelley?

A I explained to him that the fact that [H-67] he was speeding under the influence of alcohol and ran into the rear of another vehicle was enough for him to have a conviction. The facts in this case were enough for him to sustain a conviction.

Q So, that would be a conclusion. But did you explain the elements of 28 counts, 15 of which are -- are nuanced levels of negligence to Mr. Kelley?

A I explained to him what would be necessary for the jury to find -- for him to be found guilty which in my opinion, the fact that he was the driver, his car was speeding, he ran into the rear of a car, and he was under the influence of alcohol would be enough for him to receive -- the maximum sentence he could receive for any of them was ten years, because that's what the issue is.

You can't get two convictions on indifferent theories and be sentenced to both of them. So that's what I told him. So, in my opinion --

MR. LYNN: Let him finish answering the question.

THE WITNESS: -- that would be the elements in this particular case.

[H-68] BY MS. VAN RITE:

Q But you never went through and defined to him gross negligence means one drives a motor vehicle in a way that creates a high degree of risk and shows a reckless disregard for human life, et cetera. That defines what it means to be guilty of manslaughter by motor vehicle gross negligence.

A I don't believe I have ever given him the statute if that's what you're asking me.

Q And you had testified at the plea hearing -- I believe that you went through the indictment with Mr. Kelley.

A I believe -- I mean, did I? I don't remember. I don't know if I testified to that, but yeah. We could go over the indictment, but I'm not sure I testified to that.

Q Beyond going over the indictment did you do anything else to pick apart the elements of all of these counts, how they differed from each other?

A I'm not -- I don't believe I set up and distinguished each count from -- I made it clear to him that in my opinion, all the State would have to prove is that he was speeding, under the [H-69] influence of alcohol, rear ending a car that was at a red light. That would be enough for him to be found guilty and receive and be exposed to ten years for each count.

And in the five counts I am of confident I told him that they could not give him two different counts for one particular person. And I'm saying 20 years because they were all --

Q So, it sounds like you spent quite a bit of time on the facts of the case. Right?

A Correct.

Q Not so much or maybe no time specifically on the elements.

A Well --

Q -- divorced from the facts?

A It's my experience when I am trying to explain to someone the elements of the case it's more important for them to know how they directly relate to their case.

For everybody it might be different. If someone is charged with possession with intent to distribute a controlled dangerous substance I would tell them that and they have, let's say, five full bags of something or twenty multiple bags, I would say given that one can infer that [H-70] that's possession with intent to distribute.

Now, is that necessarily how the reading of the law would indicate? But I try to make it fact sensitive to each case.

And in this case that would be what was necessary for the State to prove.

Q You agree that this case was unique in the sense of pleading guilty to 28 counts?

A This case was unique in pleading guilty to 28 counts, yes. Yes, I would agree.

Q This was a complicated case.

A I understanding that the maximum exposure he would have is 50 years, understanding

that the alternatives were to go to trial or accept the State's offer which was an A. B. A. offer.

Hum, at that time, given the time it was our decision -- his obviously -- that it was in his best interests to plead to the indictment as opposed to taking the State's offer.

Clearly pleading to the indictment was better than going to trial and losing, because we have five victims on the stand that would relive everything. And if you put them through that and one could argue that he hasn't accepted [H-71] responsibility.

Whereas if one pleads one can argue that he has accepted responsibility. Mr. Kelley was extremely remorseful, but that doesn't come across well in trial after a trial.

With a plea it does. In my opinion, the plea to the indictment placed him potentially in a better position than the State's plea offer.

Now, I believe had he showed up on time, and at the first sentencing the Judge would not have sentenced him to the max. I think that right there was his major problem. And --

Q It was your idea to plead only to the indictment. Correct?

THE COURT: What's your question?

MS. VAN RITE: It was his, it was Mr. Jones' idea to plead only to the indictment.

THE WITNESS: I made that suggestion, yes.

MS. VAN RITE: Nothing further.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. LYNN:

Q You didn't coerce Mr. Kelley. Did you, sir?

[H-72] A Absolutely not.

Q Okay.

A He wanted to go to trial. We could have done to trial.

Q You didn't coerce him into rejecting the binding A. B. A. plea.

A He wanted to accept the binding A. B.A. plea. No. It has no effect on me one way or the other.

MR. LYNN: Okay, no further questions of this witness.

THE COURT: Thank you so much, Mr. Jones. You're excused from the witness stand.

THE WITNESS: Thank you, Your Honor.

(The witness was excused from the witness stand.)

THE COURT: Is that the end of the State's case?

MR. LYNN: Correct.

THE COURT: Any rebuttal?

MS. VAN RITE: No, thank you.

THE COURT: Who's ready for closing?

MS. VAN RITE: Your Honor, may I remain seated, please?

Your Honor, Mr. Kelley respectfully asks [H-73] this Court for relief through this post conviction because his plea was not knowing and voluntary.

First, of course the Court knows a guilty plea is only constitutionally valid if the defendant understand the nature and elements to which he is pleading guilty. The Court of Appeals in Daughtry rejected the recommendation that just because one is represented by an attorney that that was accomplished, that they have gone through the nature and elements.

There needs to be something of support in the record. Your Honor, in this case you will only see that Kelley responded that, yes, indeed, he did review the indictment with Mr. Kelley when asked as a precursor to the guilty plea and also that he signed the document which wasn't even fully filled out which is State's

Exhibit 2, the waiver of rights which for the record of course is a stock form that the Court provided.

There was nothing specific to Mr. Kelley's case in this waiver of rights.

This is a complicated case which has complicated terminology. Gross negligence, criminal negligence, negligence per se are nuanced terms that are cloudy and murky. They arguably [H-74] can somewhat overlap in certain cases.

You heard the testimony of the level of care that Mr. Jones took to describe those to Mr. Kelley.

One of -- the Court does say in Daughtry that this must be done by a case by case basis. They do urge the Court to look at, one, the complexity of the case and the elements involved.

Your Honor, here I think we hit a home run that these are difficult terms to understand. Even as learned counsel, the definitions are hard to understand. And it's hard to differentiate between the levels of negligence involved.

The next that the Court has to look at would be the sophistication or the qualities of the defendant. Here, Mr. Kelley has somewhere between a ninth and tenth grade education. Although his attorney Jones would describe it as average intelligence I would ask the Court to use the Court's own perception of him

today as he took the stand saying he doesn't read particularly well and is not overtly sophisticated.

Your Honor, regarding the maximum penalty, to be a knowing and voluntary waiver of one's rights in order to be a valid guilty plea [H-75] Mr. Kelley needs to know what he is getting himself into. It is clear. It's clear on the record that Mr. Jones was the brain child behind pleading guilty to an open indictment.

He testified the same today. Even at sentencing and Mr. Jones agreed the parties argued and disagreed about what was going to merge, what wasn't going to merge, what was going to become moot.

Mr. Kelley had no way of being certain of these concepts. There was nothing about his exposure because Mr. Jones didn't know.

Nobody seemed to have the --

THE COURT: And so in the totality, what was the exposure maximum?

MS. VAN RITE: The parties had decided that the maximum exposure was 50 years.

THE COURT: So, that was what Mr. Jones conveyed.

MS. VAN RITE: Mr. Jones -- if we look to page three on the transcript P-1, this would be lines one through four. Mr. Jones said I will just put the indictment right here that he's pleading to the

maximum sentence, but I think they merge. The maximum is 50 years, 50.

[H-76] And then the Court, as I said, goes on --

THE COURT: I'm just trying to understand the significance of what you are saying, that he didn't know. Because if it was in fact higher than 50 I could see where that would be critical or important. But in actual reality it was 50?

MS. VAN RITE: I think in order for Mr. Kelley to make an informed decision regarding that plea, how good the plea offer was, even though I would ask the Court to find Mr. Jones' credibility -- and I don't mean to be disparaging to another counselor.

I would ask to find his credibility wavered when he said the court reporter erred in that transcript, when he -- when he said --

THE COURT: No. I'm not going to do that, because he always is clear that he conveyed the plea offer. He didn't accept it.

And I do believe that there was, as you call it, a nuance or whatever. But not that his credibility is in question on that.

MS. VAN RITE: I would argue to the Court that that statement was Mr. Jones essentially saying this is not a good plea offer. [H-77] It wasn't even --

THE COURT: Well, he didn't accept it, so therefore I would say anyone who doesn't accept the plea offer with their client obviously doesn't think it's a good win. You know, ipso facto, it's not a good win and he shouldn't take it.

I'm not clear on how that's unusual or odd in any respect.

MS. VAN RITE: I could say it's more egregious to say there isn't even one to consider here.

THE COURT: Okay.

MS. VAN RITE: In order for Mr. Kelley to put that plea offer into perspective and make a knowing decision about it he has to know where the -- where the range is.

Clearly Mr. Jones had counseled him that he was likely to do better than that plea offer. It's not before the Court to decide the soundness of that counsel nor am I going to bring that on up today.

But I'm asking the Court, once the Court reviews the transcripts in conjunction with today's testimony to find these natures and elements were difficult. They were not fully [H-78] explained to Mr. Kelley, therefor his plea cannot be knowing and voluntary.

And further, with all the confusion about merger, consecutive, concurrent, what becomes moot, what the maximum was, that Mr. Kelley did not know what he -- what range the 28 count guilty plea exposed

him to. And that therefor we're asking for the guilty plea to be vacated. Thank you, Your Honor.

THE COURT: I will hear you.

MR. LYNN: Your Honor, with regard to the issue of the nature and the elements which is really the first claim of the petitioner's counsels, the factual bases proffered to support the plea may describe the offense in sufficient detail to pass muster under Maryland Rule 4-242(c) and in Smith versus State, 443 Md. 572 at 651, 2015.

Maryland Rule 4-242(c) requires that the petitioner understands the nature of the charge but does not require a recitation of the elements to the charge to which he is pleading guilty.

The statement of facts read into the record by the State in support of the plea to the manslaughter counts and driving while intoxicated [H-79] after Judge Northrop advised the petitioner to listen carefully to the statement of fact in support of the plea sufficiently satisfied the requirement of Rule 4-242(c) and Smith versus State, apprising petitioner of the nature of the charges to which he was pleading guilty.

The facts read into the record establishes that petitioner was driving a motor vehicle on October 19, 2014 at approximately 65 to 70 miles an hour in a thirty mile an hour speed zone on Livingston Road at the intersection with Livingston Terrace.

When the vehicle he was operating rear ended a motor vehicle operated by Hadasa Boykin stopped at a traffic light at the intersection causing the death of Dominique Green, Tiffany Anderson, Tamika Curtis, Khadija Ba, and a fourth individual -- a fifth individual.

The actions of the petitioner caused the death of those aforementioned five individuals.

The statement of facts also established that the petitioner slammed into the victim's vehicle at full speed of 65 to 75 miles an hour. And the medical records of the petitioner show that he had a blood alcohol level quantified by a [H-80] forensics toxicologist of point one four at the time of the crash, satisfying the requirements of driving under the influence of alcohol.

These facts set forth -- these sets of facts read into the record certainly places the petitioner on notice of his grossly negligent conduct in slamming into the rear of the victim's motor vehicle, stopped in abeyance of a red traffic control sign.

In State versus Daughtry, 419 Md. 35 at page 71, 2011 the Court of Appeals reiterated the test for voluntariness of a plea and cited to Priet, P-r-i-e-t, versus State, 289 Md. 267 at 276, a 1981 case, whether the totality of the circumstances reflect that the defendant knowingly and voluntarily entered into the plea.

And I cited to Priet at page 287 and 288.

And also the Rule 4-242 does not impose any ritualistic or fixed procedure to guide the trial Court in determining whether a plea is knowing and voluntarily entered into.

Priet at page 288 simply required that the explanation of the nature of the charge afforded the defendant a basic understanding of [H-81] the essential substance of the automobile by manslaughter charge to which he was pleading to.

It's irrefutable that the petitioner at age 25 having a grade school education as well as any other similarly situated individual having listened to the statement of facts read into the record in support of the plea would have a basic understanding of the charge for which he has entered into the guilty plea.

I have also cited to Tate, T-a-t-e, versus State, 259 Md. 687, indicates where the Court of Appeals set the legal standard continues to be after Daughtry whether the plea Court could have found under the totality of the circumstances considering that totality of the record that the defendant entered into the plea knowingly and voluntarily.

And in Mr. Kelley's plea transcript Judge Northrop made a finding on page 13, lines two to eight that the plea was entered into knowingly and voluntarily after the statement of facts were read into

the record in support of the plea with no substantive changes or corrections.

And after petitioner upon questioning by Judge Northrop stated on page 12 that he had no [H-82] questions about the plea and he further answered on pages 12 and 13 of the plea transcript that he was pleading guilty to the indictment because he was guilty and for no other reason.

Finally he signed a waiver of rights form on March 27 where he acknowledged on paragraph four that he fully understands the charging indictment and the elements of the offense.

Even if he didn't sign it, even if he denies that -- obviously Judge Northrop tells him to listen to the statement of facts. That puts him on notice what is he pleading to.

And he doesn't say, Judge, I don't understand what's going on here. He answers yes, yes, yes to questions that Judge Northrop asked him. And there we go with the issue of knowing and voluntariness of the plea.

Regarding the issue two, that the plea to the indictment was not entered knowingly and voluntarily as he relied on trial counsel's alleged, quote, incorrect assertions, end quote, that the plea offer would result in a lesser sentence than the offered plea agreement, the State asserts that that lacks merit factually and

[H-83] that Mr. -- I believe Mr. Jones testified to that, that he never made such an assertion.

We have to look at the credibility of the witnesses here today. And the Court has to make a determination as to who's the more credible witness, Mr. Kelley or Mr. Jones.

Mr. Kelley talks about a plea offer of 20 to 30 years. There is no mention whatsoever of a 30 year plea offer. He mentioned to Mr. Kelley to Mr. Jones after the sentencing, you know what about that 30 year plea offer. There was never a 30 year, straight 30 year plea offer.

So, his credibility leaves much to be desired quite frankly whether or not there was a discussion between Mr. Jones and Mr. Kelley between the time of the plea and the time of sentencing.

We need to factor in the fact that this defendant conscientiously decided not to make the sentencing date. He's not going to show up for the sentencing. So, that certainly was, I would think, a factor, certainly a factor in Judge Northrop giving the sentence that he did. Whether or not it's certainly mere speculation that what sentence he would have gotten had he showed up at [H-84] sentencing on that May date.

But with regard to the benefit for the open plea, it was never any statement from Mr. Jones that an open plea would result in a lesser sentence than the

offered plea agreement. He never made such an assertion.

As a result of the plea, petitioner received the benefit of an open plea as opposed to a binding plea that allowed trial counsel to submit the two page memorandum in aid of sentencing asserting his, petitioner's remorse as well as other mitigating arguments. That would not be available in an A. B. A. plea.

There wouldn't be any need to have a memorandum in aid of sentencing because the Judge would have down -- assuming for argument's sake if the Judge would have agreed with the A. B. A. plea we don't know if he would or would not. It's mere speculation. That doesn't mean the Judge is bound to do that.

And you know, Mr. Kelley got up at the second scheduled sentencing and expressed his remorse. We have the memorandum in aid of sentencing as to Mr. Kelley's desire not to put the victim's family through any heartache. And [H-85] so, that was his -- that was his mitigation arguments.

At sentencing Mr. Kelley mitigated. At sentencing Mr. Jones mitigated.

And additionally after sentencing it was an A. B. A. binding plea under Chertkov, C-h-e-r-t-k-o-v. That case says, well, even in a binding plea one could have

the opportunity to file a motion for reconsideration of sentence.

In a binding plea in Chertkov the State would have to agree to allow Judge Northrop to give a lesser sentence. That states in an open ended plea that is not required.

State can -- you know, they can't bind Judge Northrop not to reduce the sentence.

Also we have here on the day of sentencing Mr. Jones did present to the Court the 8-507 motion on behalf the defendant. And Judge Northrop said at the conclusion of the hearing, I will give it consideration.

Ultimately what happened is the Judge gave -- you know, the Judge gave a 50 year sentence. Well, we can't be clairvoyant to know what the Judge is going to do at an open ended plea.

[H-86] And so, when one looks -- I would ask the Court to look at Hill versus Lockhart which is cited by petitioner's counsel. That case is not factually applicable to the facts of this case.

Under Hill, to satisfy the prong of the Strickland context of the guilty the plea, the petitioner has a heavy burden of showing that there is a substantial probability but for any alleged trial counsel errors he would not have entered into the plea, but it would have gone to trial to its conclusion and verdict as well as post sentencing.

Hill states at that time of the initial analysis of Strickland is measured against an objective standard without the idiosyncracies of the particular decision made there. See Yaswick versus State, 347 Md. 228 at 245 to 247.

And so, one of issues in this case is what is the -- what were the sentencing guidelines? And one knows that one can never be assured of what the actual sentencing guidelines are until the P. S. I. report is done and the sentencing guidelines work sheet is attached.

But even assuming, even under Teasley versus State, a trial Judge is not obligated to [H-87] sentence within the sentencing guidelines, regardless of what number that comes up to.

Petitioner's counsel, Mr. Jones made vigorous appropriate litigation arguments on behalf of the petitioner. And it's the State's position that since the petitioner had five prior convictions before the guilty plea in this case establishes the petitioner as an individual highly unlikely to avoid the terms of his probation, to avoid violating the terms of his probation and exposing himself to the balance of the 50 year sentence with no opportunity for sentence reconsideration and mitigation had he entered into the binding plea.

And the petitioner had a horrific prior criminal history recorded in the P. S. I. report.

Also I just want to point out to the Court that paragraph two of the plea offer of December 17th, 2015 states that this offer is predicated on the belief that your client has two prior convictions. In reality he had five prior convictions.

The fact that the petitioner was successful in persuading Judge Northrop to give him a sentence less than what he received does not [H-88] constitute ineffective assistance of counsel.

Counsel cited two cases. One is Gilliam versus State and Yarborough versus Gentry in my response. And the Court should not aided by hindsight in second guessing counsel's advice to the defendant.

In order to be deficient, counsel's action and / or omission must be, quote, outside the wide range of specially competent assistance. Strickland at page 690.

The prejudice prong of Strickland required a showing of deficiency prejudice to the defense. It is not enough for the petitioner to show that the errors had some conceivable effect on the outcome of the proceeding. The State asserts that petitioner cannot establish either prong of Strickland. And the State requests that the Court deny all relief.

MS. VAN RITE: Just briefly. Your Honor, Hill, Strickland, Gilliam and Yarborough have no place here. I don't have an ineffective assistance claim. It's a knowing and voluntary claim.

The only final word I would say is this claim does not waive the State v. Rich. That's a [H-89] coram nobis case that says if it waives to that it's the correct venue essentially because the Court can take evidence and look at things out of the record. Thank you.

THE COURT: Okay, thank you. That'sit?

MS. VAN RITE: If I may approach with the exhibits to give the Clerk?

THE COURT: Yes.

(Proceedings concluded.)

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[H-90] CERTIFICATE OF REPORTER

I, Margaret Reams Miller, an Official Court Reporter for the Circuit Court of Prince George's County, Maryland, do hereby certify that I stenographically reported the proceedings in the matter of The State of Maryland v. Kenneth Kelley, CT 15 0626X, in the Circuit Court of Prince George's County, Maryland, on February 6, 2020, before the Honorable Beverly J. Woodard, Associate Judge.

I further certify that pages H-1 through H-89 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten pages in a complete manner to the best of my knowledge and belief.

In witness whereof I have affixed my signature this 9th day of September, 2020.

/s/
Margaret Reams Miller, CCR
Official Court Reporter

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CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

KENNETH KELLY,
PETITIONER

v. CT150626X

STATE OF MARYLAND
RESPONDENT

MEMORANDUM AND ORDER

This matter came before this Court on Kenneth Kelly's (Petitioner) petition for Post Conviction relief pursuant to the Post Conviction Procedure Act, Md. Code – (2001) §§7-101 through 7-109, and Maryland Rules 4-401 through 4-408.

ISSUES PRESENTED

I.) Whether Petitioner was illegally sentenced due to principles of double jeopardy?

II.) Whether Petitioner's plea to the indictment was not made knowingly and voluntarily as he was not advised of the nature and elements of the offenses.

III.) Whether Petitioner's guilty plea to the entire indictment was not made knowingly and voluntarily as he relied on trial counsel's incorrect assertion that the open plea would result in a lesser sentence than the offered plea agreement.

FACTS/PROCEDURAL HISTORY

On March 27, 2017, Petitioner was represented by trial counsel Antoini Jones before Judge Northrop of the Prince George's County Circuit Court and entered into a plea on the entire twenty-eight (28) count indictment. On June 9, 2017, Petitioner was sentenced to ten (10) years for each of the five counts of manslaughter by auto and they were to run consecutively. In addition, the court added a one year sentence for driving under the influence of alcohol and a 25 day sentence for contempt of court for not appearing at the May 12, 2017 sentencing both to run concurrent to the manslaughter convictions. The court concluded counts eleven through twenty (11-20) were moot, so the remaining counts were merged. The total aggregate sentences imposed was 50 years.

On June 20, 2017, Petitioner filed a notice of appeal that was dismissed due to his failure to comply with Maryland Rule 8-201 and 8-412. On June 28, 2017, Petitioner filed a motion for modification of sentence that was ordered to be held sub curia. On October 17, 2017, June 25, 2018, and February 6, 2019, Petitioner requested a hearing on his sub curia motion to modify; however all of his motions were denied.

On April 25, 2019, Petitioner filed a pro se petition for post-conviction relief. In the aforementioned petition, Petitioner claimed he was illegally sentenced due to principles of double jeopardy. On December 4, 2019, Petitioner now represented by counsel, submitted a supplemental petition.

Standard of Review

"[A] guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *State v. Demetrius Daughtry*, 419 Md. 35, 31-32 (2010) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). In determining whether a guilty plea was validly entered, circuit courts have "focused always on whether the defendant, based on the totality of the circumstances, entered the plea knowingly and voluntarily." *Id.* at 50. In looking at the totality of the circumstances, rule 4-242(c) requires a court to examine the defendant on the record in open court. *Id.*

"[T]he required determination can only be made on a case-by-case basis, taking into account, among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." *Id*. at 55 (quoting *State v. Priet,* 289 Md. 267, 277 (1981)).

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland. Declaration of Rights guarantee the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S 668, 684-685 (1984). In Strickland, the Court held that in order to prove ineffective assistance of counsel, a petitioner must show: This constitutional right is violated when "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the

proceedings against the defendant." *Strickland,* 466 U.S. at 687. In order to satisfy the "deficiency-prong", a Petitioner must show that the attorney's actions were outside the wide range of professionally competent assistance. *Walker v. State,* 391 Md. 233, 261 (2006), *citing Strickland,* 466 U.S. at 690. To satisfy the "prejudice-prong," a Petitioner must show that, "but for counsel's unprofessional errors, the result would have been different" *Id.* at 694.

I.) Whether Petitioner's plea to the indictment was not made knowingly and voluntarily as he was not advised of the nature and elements of the offenses.

Petitioner's counsel argues Petitioner's plea to the indictment was not made knowingly and voluntarily because he was not advised of the elements of the offenses. Petitioner states the trial court asked questions to make sure Petitioner knew his rights to a jury, his right to testify or not to testify, and the sentencing maximum. However, the trial court did not ask the Petitioner if he understood the nature and elements of the offenses that he pled guilty to. Petitioner asserts that neither the judge nor trial counsel discussed and explained the elements of the crimes to Petitioner on the record. Furthermore, trial counsel did not state on the record that he had gone over the nature and elements of the crimes to Petitioner. Most importantly, Petitioner did not state

on the record he understood the nature and elements of the crimes.

A guilty plea is constitutionally valid only if a defendant understands the nature and elements of the charges to which he or she is pleading. In *Bradshaw v. Stumpf,* 545 U.S. 175, 182-83 (2005), the Supreme Court explained:

> A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences' *Brady v. United States,* 397 U.S. 742, 748 (1970). Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid. *Henderson v. Morgan,* 246 U.S. 637 (1976).

Petitioner contests that he never discussed the nature and elements of any of the twenty-eight (28) counts. The record is void of any presumption that trial counsel explained and elaborated upon the elements of the twenty-eight (28) charges to Petitioner.

In *Daughtry,* the court concluded that "the required determination can only be made on a case by-case basis, taking into account . . . among other factors, the complexity of the charge, *the personal characteristics of the accused, and the factual basis*

proffered to support the court's acceptance of the plea." 419 Md. at 72 (quoting *State v. Priet*, 289 Md. 267, 277 (1981) (italics and ellipses in original)). Petitioner argues the aforementioned three factors supports the notion that Petitioner simply did not understand the elements.

Petitioner pled guilty to twenty-eight (28) counts. Certain counts are easy to understand and the meaning can be deciphered from the charge itself. For example, driving while impaired or driving without a valid driver's license. Yet, depending on the degree, manslaughter by vehicle is not easy to comprehend.

Manslaughter by vehicle – gross negligence means to cause the death of another as a result of the person's driving in a grossly negligent manner. Criminal Rule 2-209(b). Petitioner argues gross negligence needs to be defined more clearly than from just merely looking at the definition. Gross negligence is a term of art or legal jargon that the general public is unaware. Gross negligence is the wanton or reckless disregards of human life. See *Blackwell v. State,* 34 Md. App. 547 (1997).

Manslaughter by vehicle criminal negligence is to cause the death of another as a result of the person's driving in a criminally negligent manner. Criminal Rules 2-210(b). Criminal negligence is when a person should have been aware but failed to perceive that his or her conduct created a substantial and unjustifiable risk to human life and the failure to perceive the risk was a gross deviation from the standard of care that a

reasonable person would exercise. Criminal Rules 2-210(b). Petitioner pled guilty to very complicated crimes and the definitions within the crimes contain legal verbiage.

The "personal characteristics of the accused" does not provide a basis to find that Petitioner understood what he was pleading to. He was twenty seven (27) years old and had not finished high school. Furthermore, it was stated at the plea hearing that Petitioner had "nothing like this" in his history.

The proffer in support of the plea mentioned there was adequate evidence to sustain a conviction for all 28 counts. However, the proffer did not inform nor explain to Petitioner the elements of the more complex charges of manslaughter by vehicle.

Petitioner entered an intersection while speeding and hit a stopped vehicle. Petitioner did not attempt to hit the breaks in his own vehicle, his blood alcohol content after the accident was 0.14, and five people died from the car collision. Petitioner argues this simple factual basis for the plea does not interpret or define what negligence or gross negligence means. Furthermore, there is no statement that clarifies what action Petitioner took while driving that was "grossly negligent" or "criminally negligent" or "negligence per se." Trial counsel also admitted at the Post Conviction hearing he did not discuss the nuances between the counts of gross negligence, criminal negligence, or negligence per se. It is also clear the factual basis for the plea does not discuss or explain the nature/elements of

the complex charges. Consequently, this is a clear violation of Md. Rule 4-242(c)2. Petitioner argues there was not sufficient understanding or comprehension of the nature of the charges, which is a constitutional requirement.

Petitioner also argues the claim is not waived since Petitioner did not knowingly and intelligently fail to raise it before the amended petition was filed. Section 7-106 of the Criminal Procedure Article states "there is a rebuttable presumption that the Petitioner intelligently and knowingly failed to make the allegation." The Court of Appeals has stated that Petitioner's burden in rebutting the presumption is minimal. *See Smith v. State,* 443 Md. 572, 606 (2015). A claim that implicates a fundamental right is not simply waived by no action at all.

Petitioner was not aware that his failure to understand the plea proceedings generated a viable issue to bring on appeal. As a result, the court cannot arrive to the conclusion that Petitioner intelligently and knowingly failed to raise the issue. Finally, Petitioner was not advised by trial counsel and he was not aware that he could bring this issue on appeal. So, Petitioner not raising these issues before the post-conviction filing does not constitute an intelligent and knowing failure.

State believes Defendant's claim is without merit. State argues no specific litany is required regarding an explanation of the elements and charges of every crime. Some complex crimes mandate an explanation. State asserts the nature of some crimes are

ascertainable by the crime itself. *Smith v. State,* 443 Md. 572, 651 (2015). The factual basis used to support the plea can describe other crimes adequately to meet the standard of Md. Rule 4-242(c). *Id.* State argues Md. Rule 4-242(c) requires Petitioner to understand the nature of the charge but not a specific recitation of the elements of the offense to the crime that Petitioner pled guilty to.

State argues the statement of facts that was read into the record by the State concerning the manslaughter by vehicle and driving while intoxicated meets the standard of Md. Rule 4-242(c) and *Smith v. State.* Furthermore, Judge Northrop told Petitioner to listen to the statement of facts that was used to support the plea.

That statement of facts read into the record illustrate the following facts. On October 14, 2014, Petitioner was driving a motor vehicle going roughly 65-70 mph in a 30 mile zone in an intersection in Oxon Hill, Prince George's County, Maryland. While operating the motor vehicle, Petitioner rear ended a vehicle driven by Hadassah Bokyin, whom was stopped at a traffic light. This collision at the intersection resulted in the deaths of Dominque Green, Tiffany Anderson, Tamika Curtis, Khadija Ba, and a one year old child. The medical records show Petitioner had a blood alcohol content of .14 at the time of the car crash, which clearly shows Petitioner was driving under the influence of alcohol. Petitioner caused the deaths of all the victims. The statement of facts that support the

plea demonstrate Petitioner collided into the victims' vehicle at a speed of 65-75 mph.

The Court Appeals stated the test for voluntariness of a plea under Md. Rule 4-242(c) is a totality test. The totality test determines if the defendant voluntarily and knowingly entered into the guilty plea. *State v. Daughtry,* 419 Md. 35, 71 (2011). Furthermore, the Court of Appeals stated Md. Rule 4-242(c) does not require any ritual or procedure to inform the judge in navigating whether a guilty plea was voluntarily and intelligently entered into. *Priet v. State,* 289 Md. 267, 276 (1981). The aforementioned case merely mandates an explanation for the charge that gives Petitioner a basic understanding of the automobile manslaughter charge that Petitioner pled guilty to.

Looking at the plea transcript, Judge Northrop found the plea was entered into knowingly and voluntarily when the statement of facts were read into the record. Furthermore, no changes or corrections were made to the statement of facts. This is reflected on page 13, lines 2-8. The Judge asked Petitioner whether he had any questions about the plea and Petitioner stated he was pleading guilty to the charge simply because he was guilty. This is reflected on pages 12 and 13 of the plea transcript. On March 27, 2017, Petitioner signed a Waiver of Right/Guilty Plea form where he acknowledges the following statement, "I fully understand the charge of the Indictment and the elements of the offense(s)." This issue is without merit.

III.) Petitioner's guilty plea to the entire indictment was not made knowingly and voluntarily as he relied on trial counsel's incorrect assertion that the open plea would result in a lesser sentence.

Petitioner states trial counsel did not advise him properly pertaining to pleading guilty on his indictment. The Supreme Court concluded that "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' *Id.* at 369 (citing *McMann v. Richardson,* 90 S.Ct. 1441, 1449 (1970)). Petitioner argues trial counsel informed him the State had offered thirty (30) years and he decided, not to take it.

Petitioner was sentenced to 50 years in jail. Petitioner argues that trial counsel stated that his sentence would be on the lower end of the spectrum of the potential 8-50 year range with an open plea. Petitioner argues this advice was beneath the objective standard of reasonableness. Petitioner would never have plead guilty if he knew he would obtain twenty (20) years above the plea offer of thirty (30) years. Petitioner's plea was not knowingly and voluntarily. Petitioner requests his conviction be vacated.

State asserts the allegations lack merit factually. Petitioner had an open plea and not a binding

plea, which allowed trial counsel to submit a detailed two page, single spaced memorandum to aid Petitioner in sentencing and other mitigating arguments. This benefit is not available to binding pleas. On page 2, lines 15-17 of the plea transcript, the State mentioned, "the defense is not accepting the State's offer in this case. They are pleading to the indictment so as to remain free to allocute."

At sentencing, Petitioner's counsel argued on Petitioner's behalf. In the argument, he again stated he rejected the plea offer because Petitioner wanted an opportunity to argue for a lower sentence. At the Post-Conviction hearing he stated that he did not recall telling Petitioner he would get 20-30 years.

Looking at the State's plea offer, the letter is very instructive. The letter states the plea to "five counts of motor vehicle manslaughter results in an agreed upon sentence of 50 years suspending all but 30 years, with a period of five years of supervised probation with conditions of probation being drug and alcohol testing, evaluation, and treatment as deemed appropriate by Parole and Probation." The letter states the offer is based on Petitioner having two prior convictions and an offense score of (6). This leads to guidelines being 8-50 years for Petitioner. However, the plea letter stated that if any additional information is revealed, then this could change the terms of the plea offer. Clearly, the State did not realize Petitioner had five prior total convictions. It should be noted Defendant in all likelihood knew of his previous convictions.

State argues simply because Petitioner was not successful in persuading Judge Northrop to consider the arguments presented at sentencing does not make the decision to opt for an open plea as opposed to a binding plea an indication of ineffective assistance of counsel under the deficiency prong of *Strickland v. Washington,* 466 U.S. 668 (1984). State argues that in order for trial counsels actions to be considered deficient it has to be "outside the wide range of professionally competent assistance". *Strickland,* supra at 690. "The prejudice prong of Strickland requires a showing that the deficiency prejudiced the defense." The State argues Petitioner cannot establish either prong of Strickland.

CONCLUSION

Petitioner argues his plea was not knowingly and voluntarily made because neither the judge, trial counsel, nor State discussed and explained the nature and elements of the crimes to Petitioner on the record. Furthermore, trial counsel testified that he did not explain prior to the plea the elements of each crime to Petitioner. Moreover, Petitioner did not state that he understood the nature and elements of the crimes. In Maryland, the courts use the totality of circumstances test to resolve whether a trial judge could fairly determine that the defendant understood the nature of the charge to which he pled guilty knowingly and voluntarily. *Prier v. State,* 289 Md. 291 (1981).

In the transcript of Petitioner's sentencing page 12, lines 23-25, Judge Northrop asks "Are you freely,

knowingly and voluntarily entering a plea to the entire indictment because in fact you are guilty and for no other reason?" On page 13, lines 1-8 Defendant said "yes". Petitioner clearly acknowledged his guilt and had a sufficient understanding of the nature of the charges. The statement of facts were read into the record with little to no changes made which put Petitioner on notice of his actions while driving that resulted in the deaths of five people.

Petitioner's claim that his guilty plea to the entire indictment was not made knowingly and voluntarily as he relied on trial counsel's incorrect assertion that the open plea would result in a lesser sentence also fails. Petitioner does not deny he was the one who rejected the 30 year plea deal. It is important to note this plea offer would have failed anyway since Petitioner had five prior convictions. Petitioner opted for an open plea in order to mitigate and offer argument for a lesser sentence. He was given the opportunity, and based on the facts and circumstances of this case, Judge Northrop had the right to render what he felt was an appropriate sentence.

Therefore, upon consideration of the Petitioner's, Kenneth Kelly, Application for Post-Conviction Relief and Respondent's, State of Maryland, Opposition thereto, and the evidentiary hearing held February 6, 2020; it is this 18 day of May 2020, by the Circuit Court for Prince George's County, Maryland, hereby,

ORDERED, that the Petitioner's Motion for Post-Conviction Relief is DENIED.

/s/ Beverly J. Woodard
Honorable Beverly Woodard
Circuit Court for Prince
George's County

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