No. 25-5965

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 3, 2026
KELLY L. STEPHENS, Clerk

KENNETH WILBERT BROWN,

Petitioner-Appellant,

v.

JACOB BRUCE, Warden,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

Kenneth Wilbert Brown, a Kentucky prisoner proceeding pro se, appeals the district court's judgment dismissing his habeas petition, filed pursuant to 28 U.S.C. § 2254. Brown has filed a motion for leave to proceed in forma pauperis (IFP) and an application for a certificate of appealability (COA). For the following reasons, his COA application is denied and his motion for leave to proceed IFP is denied as moot.

In 2017, the Commonwealth charged Brown with "intimidating a participant in the legal process . . . and being a second-degree persistent felony offender (PFO)." *Brown v. Commonwealth*, No. 2018-CA-001180-MR, 2019 WL 3367195, at *1 (Ky. Ct. App. July 26, 2019). The intimidation charge was based upon a threat that Brown made against a prosecutor during a pre-trial hearing on three solicitation-to-murder charges. *See id.* A jury convicted Brown of the intimidation offense, and Brown moved to plead guilty to the PFO charge. *Id.* In exchange for his plea, the Commonwealth recommended a five-year prison sentence for the intimidation charge and a two-year enhancement for the PFO charge. *Id.* Before sentencing, Brown moved to withdraw his guilty plea, alleging that counsel failed to properly inform him of the effect that his plea would have on his parole eligibility date. *Id.* The trial court denied that motion and sentenced

Brown to seven years of imprisonment. *Id.* The Kentucky Court of Appeals affirmed, *id.*, and the Kentucky Supreme Court denied leave to appeal, *app. denied* (Ky. Feb. 12, 2020). Brown later sought post-conviction relief, which the trial court denied. *See Brown v. Commonwealth*, No. 2022-CA-0885-MR, 2023 WL 3666456, at *1 (Ky. Ct. App. May 26, 2023). The Kentucky Court of Appeals affirmed. *Id.* at *1, *5.

In January 2024, Brown filed a federal habeas petition, raising four claims: (1) the trial court should have allowed him to withdraw his guilty plea; (2) trial counsel performed ineffectively in six distinct ways; (3) the trial court should have held an evidentiary hearing on his post-conviction motion; and (4) the cumulative effect of these errors deprived him of due process. On March 24, 2025, a magistrate judge recommended denying Brown's habeas petition, finding that some of his claims were meritless and others were procedurally defaulted. The magistrate judge advised Brown that he had 14 days in which to object to the report and recommendation and that, if he did not do so, "further appeal [would be] waived." Brown submitted his objections to prison officials for mailing on April 21, 2025. The district court deemed those objections untimely, found that Brown forfeited his right to object by failing to file timely objections, and adopted the magistrate judge's report and recommendation.

In his COA application, Brown maintains that his objections were timely because he did not receive the magistrate judge's report until April 8, 2025. He also argues that the district court should have granted a COA on his first through third claims.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). If the district court denies relief on a procedural ground, the petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

I. *Untimely Objections to Report & Recommendation & Forfeiture of Appellate Rights*

Reasonable jurists could not debate the district court's conclusion that Brown's objections to the magistrate judge's report and recommendation were untimely. Although Brown contends that he did not receive the report and recommendation until April 8, 2025, under Federal Rule of Civil Procedure 5, service of the magistrate judge's report and recommendation was complete on March 24, 2025—the day that the court clerk mailed the report to Brown's "last known address." Fed. R. Civ. P. 5(b)(2)(C). Brown's 14 days would have expired on April 7, 2025, but three days were added because Brown was served by mail. *See* Fed. R. Civ. P. 6(d). The deadline for filing objections therefore would have been extended to April 10, 2025, rendering Brown's objections, which were submitted for mailing on April 21, 2025, untimely. Still, the forfeiture caused by Brown's untimely filing may be excused "in the interests of justice." *Thomas v. Arn*, 474 U.S. 140, 155 (1985).

Reasonable jurists could debate whether the interests of justice warrant excusing Brown's forfeiture. Brown submitted evidence that he received the magistrate judge's report and recommendation on April 8, 2025, only two days before the extended deadline of April 10, 2025. And he submitted his objections to prison officials for mailing within 14 days of receiving the report. The district court also received Brown's objections, which included his explanation of the untimely filing, long before it adopted the magistrate judge's report and recommendation. Because it is at least debatable that the forfeiture should be excused in the interests of justice, this court will address the merits of Brown's underlying claims to determine whether a COA is warranted. *See Montgomery v. Whidbee*, No. 23-5267, 2024 WL 1478886, at *2 (6th Cir. Jan. 11, 2024) (proceeding to merits where plaintiff did not "receive[] the full 14 days from service within which" to file objections); *Ashley v. Boayue*, No. 22-1295, 2023 WL 2910533, at *3 (6th Cir. Jan. 10, 2023) (excusing forfeiture in the interests of justice where plaintiff filed objections within 14 days of receiving report and recommendation).

II. *Validity of Guilty Plea*

In his first claim for relief, Brown argued that he did not knowingly and intelligently plead guilty to the second-degree PFO charge, because his attorney incorrectly informed him that

accepting the plea deal offered by the Commonwealth "would not extend his parole eligibility date for another sentence he was/is serving time for." The magistrate judge addressed this claim as an ineffective-assistance claim, but Brown did not frame this claim that way: he argued that the trial court should have allowed him to withdraw his plea because it was entered unknowingly and involuntarily. In his second habeas claim, Brown did argue that counsel performed ineffectively by misadvising him about the consequences of his plea on his parole eligibility. That separate claim is addressed below.

Reasonable jurists would agree that Brown's involuntary-plea claim does not deserve encouragement to proceed further, because the Supreme Court has "never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *see McAdoo v. Elo*, 365 F.3d 487, 495 (6th Cir. 2004); *King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1994). The state court's denial of relief on this claim, therefore, is not "contrary to," or based on "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).

III. *Ineffective Assistance of Counsel*

Brown's second claim alleged that defense counsel performed ineffectively in six distinct ways. To obtain habeas relief on these claims, Brown had to show that his attorney's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To the extent that Brown's ineffective-assistance claims involve his guilty plea, the prejudice prong is slightly different: he must show "a 'reasonable probability' that, but for his counsel's error, he wouldn't have pled guilty and instead would have gone to trial." *United States v. Singh*, 95 F.4th 1028, 1033 (6th Cir.) (quoting *Hill*, 474 U.S. at 59), *cert. denied*, 145 S. Ct. 167 (2024).

A. *Failure to Challenge Indictment*

In his habeas petition, Brown argued that his indictment was defective because it did not include "a statement of the facts and circumstances that would have informed [him] of the specific

offen[s]e" with which he was charged. The Kentucky Court of Appeals denied relief on this claim, finding that Brown did not show how challenging the sufficiency of the indictment "would have been useful." *Brown*, 2023 WL 3666456, at *4. Reasonable jurists could not debate the district court's conclusion that the state court's decision is not contrary to, or based on an unreasonable application of, *Strickland*. *See* 28 U.S.C. § 2254(d)(1). Brown argued that he was unable to prepare a viable defense due to the dearth of factual allegations in the indictment, but the Kentucky Court of Appeals found that the indictment was based on a threat that Brown "made in open court[,] . . . a copy of the court proceeding was readily available[, and] Brown's counsel expressed an understanding and knowledge of the threatening words." *Brown*, 2023 WL 3666456, at *4. Brown did not challenge any of these factual findings, much less show that they are clearly erroneous, as required by 28 U.S.C. § 2254(e)(1).

Brown nevertheless argued in his habeas petition that the indictment failed to allege facts showing that his threat was intended "to cause [a] participant in the legal process to behave in a certain way"—a necessary element of the offense. *See* Ky. Rev. Stat. § 524.040(1)(a)-(b). But because Brown raised this argument in the context of an ineffective-assistance claim, he had to show prejudice—that the outcome of his trial more likely than not would have been different if he had objected to the indictment. *See Strickland*, 466 U.S. at 694. Reasonable jurists would agree that the state court reasonably found that Brown did not make this showing, because he did not explain how his defense would have been different—and more successful—if counsel had objected and the State had amended the indictment.

B. Failure to Discuss Factual Basis

Next, Brown argued that counsel refused to provide him with a copy of the threat that he made in open court. He contended that he made the threat "in an emotional fit of anger" and did not recall the specifics of what he said. According to Brown, if counsel had discussed the threat with him before trial, he would have told defense counsel that the threat "referred to . . . past cases prosecuted by Kristi Gray, . . . not future ones." Reasonable jurists would agree that this claim does not deserve encouragement to proceed further. Brown stated to Gray in open court "[a]nd you . . . I'm gonna have you killed. Since you gonna put cases on me, Imma have you killed for

real." *Brown*, 2023 WL 3666456, at *1. The language of the threat itself references past cases, making it clear that Brown was angry about Gray's involvement in those prior cases. Reasonable jurists therefore would agree that Brown was not prejudiced merely because he was unable to explain to counsel before trial that the threat referenced past cases.

C. Batson[1] Challenge

In his third ineffective-assistance claim, Brown argued that counsel should have raised a *Batson* challenge when the Commonwealth used a peremptory strike to excuse the sole black juror in the jury pool. He contended that "the Commonwealth would not have been able to offer a race-neutral reason for the strike because [the juror] had already established that she would be able to sit in judgment and consider the full range of penalties." But the Commonwealth only would have been required to offer a race-neutral reason for excusing the juror if defense counsel could make out a prima facie *Batson* claim. *See United States v. Hall*, 20 F.4th 1085, 1097 (6th Cir. 2022). And "[e]xcluding one Black juror without any additional allegations of discriminatory intent does not amount to a prima facie *Batson* claim." *Id.* Because Brown provided no facts suggesting that defense counsel could have made out a prima facie *Batson* claim, reasonable jurists would agree that he did not show prejudice and that this claim, therefore, does not deserve encouragement to proceed further. *See Strickland*, 466 U.S. at 694.

D. Recusal

In his fourth ineffective-assistance claim, Brown contended that defense counsel should have asked the judge to recuse herself, because she presided over the pretrial hearing at which he made the threat and, therefore, was a witness to the crime. But Brown himself stated in his habeas petition that counsel twice moved the judge to recuse herself. He nevertheless contended that counsel should have gone further and filed a judicial complaint against the judge or subpoenaed her to appear as a witness. There is no indication that the judge could have offered any testimony helpful to the defense, and reasonable jurists would agree that there is no reasonable probability

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

that filing a judicial complaint would have affected the outcome of the trial. This claim, therefore, does not deserve encouragement to proceed further.

E. Failure to Introduce Evidence

Next, Brown argued that defense counsel should have introduced evidence of "the long courtroom history between A.D.A. Kristi Gray[ ]and Mr. Brown in order to bring his words into context." He contends that Gray's prior involvement as lead prosecutor in several criminal cases against him caused him to become "frustrated" with her. According to Brown, explaining this to the jury would have allowed it to find that his threat was "not referring to future cases." Brown appears to contend that this would negate the element of intent, because Kentucky Revised Statute § 524.040 requires the Commonwealth to prove, in relevant part, that the defendant "attempt[ed] to influence[] the testimony, vote, decision, or opinion of [the victim]." Ky. Rev. Stat. § 524.040(1)(a). But the very nature of the threat—that Brown was "gonna" have the prosecutor killed because she was "gonna put cases on [him]"—refers to future conduct. *Brown*, 2023 WL 3666456, at *1. Brown also made his threat after Gray "stated [that] she was considering bringing additional charges against [Brown]." *Id.* In sum, reasonable jurists could not debate the district court's conclusion that Brown was not entitled to relief on this claim, because there is no reasonable probability that delving further into Brown's history with Gray would have altered the outcome of his trial.

F. Advice on Parole Eligibility

In his final ineffective-assistance claim, Brown argued that trial counsel incorrectly advised him that a "new consecutive sentence would [not] affect his parole eligibility for [a] 24 year sentence [that] he was already serving." He contends that, in the absence of this erroneous advice, he "would have chosen to proceed with the P.F.O. sentencing, and reserved his [r]ight to appeal." But the Supreme Court has never held that providing "erroneous advice as to eligibility for parole" constitutes ineffective assistance. *See Hill*, 474 U.S. at 60 (expressly declining to address the issue); *see Chaidez v. United States*, 568 U.S. 342, 349-50 (2013) (noting that *Hill* expressly declined to address "whether advice about parole (however inadequate and prejudicial) could possibly violate the Sixth Amendment"). Reasonable jurists therefore could not debate the district

court's conclusion that the state court's denial of relief is not "contrary to" clearly established Supreme Court precedent and that habeas relief could be "granted only if the state-court decision unreasonably applied the more general standard for" deficient performance announced by *Strickland* and the prejudice standard announced in *Hill*, which applies to cases involving pleas. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Although Brown alleged that he would not have pled guilty to, and instead would have proceeded to trial on the second-degree PFO charge in the absence of counsel's erroneous advice about his parole eligibility, *Hill*'s prejudice prong "is objective, not subjective," so Brown had to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Shimel v. Warren*, 838 F.3d 685, 698 (6th Cir. 2016) (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)). The Kentucky Court of Appeals found that Brown did not make this showing, *see Brown*, 2019 WL 3367195, at *4, and the district court concluded that this finding was not unreasonable. Reasonable jurists would not disagree. To convict Brown of the second-degree PFO charge, the Commonwealth merely had to prove, in relevant part, that Brown was over 21 years old when he committed the instant offense; had a prior felony conviction, which he committed when he was over 18 years old; and was in custody for the prior felony conviction when he committed the instant felony. Ky. Rev. Stat. § 532.080(2). These elements are straightforward, and Brown did not argue that the Commonwealth would have been unable to prove any of them, meaning that he likely would have been convicted if he had proceeded to trial. If convicted, he would have faced a sentence of up to 10 years of imprisonment. Ky. Rev. Stat. § 532.080(5) (providing that a second-degree PFO "shall be sentenced . . . pursuant to the sentencing provisions of KRS 532.060(2) *for the next highest degree than the offense for which convicted*" (emphasis added)); *see* Ky. Rev. Stat. §§ 524.040(3) ("Intimidating a participant in the legal process is a Class D felony."), 532.060(2)(c) (setting an imprisonment range of "not less than five (5) years nor more than ten (10) years" for a Class C felony offense). By pleading guilty, he received a seven-year sentence, in the middle of the five- to-10-year range. *See* Ky. Rev. Stat. § 532.080(5). Further, Brown was already serving a 24-year sentence for murder, and the Kentucky Court of Appeals suggested that more than one "aggravating factors . . . plague[d]

Brown." *Brown*, 2019 WL 3367195, at *4. This claim does not deserve encouragement to proceed further.

IV. *Denial of Evidentiary Hearing*

Finally, in his third claim, Brown argued that the trial court should have held an evidentiary hearing on several of his post-conviction claims. Reasonable jurists could not debate the district court's conclusion that this claim is not cognizable on federal habeas review. *See Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007).

For the foregoing reasons, this court **DENIES** Brown's application for a COA and **DENIES** as moot his motion for leave to proceed IFP.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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KELLY L. STEPHENS, Clerk

No. 25-5965

KENNETH WILBERT BROWN,

Petitioner-Appellant,

v.

JACOB BRUCE, Warden,

Respondent-Appellee.

Before: GRIFFIN, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Kenneth Wilbert Brown for a certificate of appealability.

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

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. 3:24-CV-000062-CRS-HBB

KENNETH W. BROWN PETITIONER

v.

CRAIG HUGHES, WARDEN RESPONDENT

MEMORANDUM OPINION

Petitioner, Kenneth W. Brown, instituted this action by filing a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2254 (DN 1). The Court referred this matter to Magistrate Judge H. Brent Brennenstuhl (DN 6). Thereafter, Respondent, Craig Hughes, responded to Brown's Petition (DN 13) to which Brown filed a reply (DN 14). On March 24, 2025, Magistrate Judge Brennenstuhl issued his Findings of Fact, Conclusions of Law and Recommendation (DN 15) (the "Report"). In his Report, the magistrate judge advised the parties that objections to the Report must be filed within fourteen (14) days. Report, DN 15 at PageID# 287. The magistrate judge also advised that a party's failure to timely object would constitute a waiver of the right to further appeal. *Id.* (citing *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984)). Although Brown was allotted an additional three (3) days because he was served by mail, Brown did not file Objections until April 21, 2025 – 28 days later – well past his deadline.

The calculation of Brown's deadline for Objections is governed by Federal Rule of Civil Procedure 6. Under FED. R. CIV. P. 6(a)(1), every day is counted, except for the day of the event and except for the last day of the time period if the last day falls on a Saturday, Sunday, or a legal holiday. Additionally, under FED. R. CIV. P. 6(d), three days must be added to the fourteen-day period because Brown was served with the magistrate judge's Report by mail. As a result, Brown had seventeen (17) days from date of the magistrate judge's Report and the date on which it was

mailed in which to file his Objections, making his deadline Thursday, April 10, 2025. Under the "mailbox rule," Brown's Objections are deemed filed on the date he placed them in the prison mailbox. *Thompson v. Chandler*, 36 F. App'x 783, 784 (6th Cir. 2002) (citing *Towns v. U.S.*, 190 F.3d 468, 469 (6th Cir. 1999)). Brown put his Objections in the prison mailbox on April 21, 2025. Brown Declaration, DN 16, at PageID# 29 ("Today, 4-21-25, . . . I am depositing the Petitioner's Objections to Magistrate's Report and Recommendations in this case in the institutional mail system.") (emphasis in original). His Objections were eleven days too late. By failing to timely object, Brown has waived his right to do so. *Thomas,* 782 F.2d at 814-15. Therefore, the Court will adopt the magistrate judge's Report in its entirety. A separate order and judgment will be entered this date in accordance with this Memorandum Opinion.

September 16, 2025

Charles R. Simpson III, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. 3:24-CV-000062-CRS-HBB

KENNETH W. BROWN PETITIONER

v.

CRAIG HUGHES, WARDEN RESPONDENT

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion entered this date, is it **ORDERED AND ADJUDGED** as follows: Petitioner Brown's Objections **(DN 17)** are **OVERRULED**. The Report and Recommendation of Magistrate Judge Brennenstuhl **(DN 15)** is **ADOPTED** in its entirety. Petitioner Kenneth W. Brown's Petition for Writ of Habeas Corpus is **DENIED**. Further, for the reasons stated in the magistrate judge's Report and Recommendation, a reasonable jurist could not conclude that dismissal of the Petition is in error or that Petitioner should be permitted to proceed further. Accordingly, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from its decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b).

This is a final and appealable order and judgment, there being no reason for delay. The Clerk of Court is hereby directed to strike this matter from the Court's active docket.

IT IS SO ORDERED.

September 16, 2025

Charles R. Simpson III, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. 3:24-CV-00062-CRS

KENNETH BROWN PETITIONER

v.

CRAIG HUGHES, DEFENDANT
Warden

ORDER

Petitioner/Appellant Kenneth Brown filed a Notice of Appeal in this action on October 20, 2025 (DN 20). At the same time, he filed a Motion for Record on Appeal (DN 23) and a Motion for Leave to Appeal *in forma pauperis* (DN 21). Those Motions are now before the Court.

To appeal *in forma pauperis* in a 28 U.S.C. § 2254 case, an appellant must seek permission from the district court under Federal Rule of Appellate Procedure 24(a), which provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the appellant must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a)(4)-(5).

For the same reasons that the Court dismissed the petition and denied a certificate of appealability, *see* DNs 18 and 19, the Court **CERTIFIES** that an appeal in this matter would not be taken in good faith. Accordingly, **IT IS ORDERED** that the motion to proceed on appeal *in forma pauperis* **(DN 21)** is **DENIED**.

Within thirty (30) days from the date of service of this Order on him, Brown must either **pay the $605.00 appellate filing fee to the Clerk of the District Court or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Sixth Circuit** in

accordance with Fed. R. App. P. 24(a)(5). *See Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997). Should Brown choose to pay the $605.00 appellate filing fee, payment must be made payable to **Clerk, U.S. District Court** and sent to Office of the Clerk, United States District Court, Western District of Kentucky, 601 West Broadway, Ste. 106, Louisville, KY 40202-2249.

Failure to pay the $605.00 filing fee or to file an application to proceed on appeal *in forma pauperis* in the United States Court of Appeals for the Sixth Circuit within the time and allowed **may result in dismissal of the appeal.** A copy of this Order is being sent to the parties and to the United States Court of Appeals for the Sixth Circuit. *See* Fed. R. App. P. 24(a)(4).

Brown's Motion for Record on Appeal is a motion to certify the record. The Court will hold that Motion **(DN 23)** in abeyance until such time as Brown either pays the requisite $605.00 filing fee or the United States Court of Appeals for the Sixth Circuit resolves any motion for leave to appeal *in forma pauperis* that Brown may file with that court.

IT IS SO ORDERED.



Charles R. Simpson III, Senior Judge
United States District Court

cc: Counsel for Petitioner/Appellant
Clerk, Sixth Circuit (No. 25-5965)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:24-CV-00062-CRS-HBB

KENNETH W. BROWN **PETITIONER**

VS.

CRAIG HUGHES, WARDEN **RESPONDENT**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

I. BACKGROUND

Petitioner Kenneth W. Brown filed, *pro se*, his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (DN 1).[1] Respondent Craig Hughes filed a response to Brown's petition (DN 13). Brown filed a reply in support of his habeas petition (DN 14). For the reasons set forth below, the undersigned **RECOMMENDS** that Brown's habeas petition (DN 1) be **DENIED** and **DISMISSED**. Additionally, the undersigned **DOES NOT RECOMMEND** issuance of a Certificate of Appealability for the claims set forth in Brown's Petition.

II. FINDINGS OF FACT

A. Proceedings Before the Oldham Circuit Court

On January 13, 2017, a grand jury in Oldham County, Kentucky, issued a two-count indictment that charged Brown with intimidating a participant in the legal process and being a second-degree persistent felony offender ("second-degree PFO"). *Brown v. Commonwealth*, No.

1 The District Judge referred this matter to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(A) and (B), for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter (DN 6 PageID # 53).

2018-CA-001180-MR, 2019 WL 3367195, at *1 (Ky. Ct. App. July 26, 2019) ("*Brown II*"). The intimidation charge arose from Brown's threat to kill prosecutor Kristi Gray ("Prosecutor Gray") during a pretrial hearing in a separate criminal action before the Oldham Circuit Court. *Id.* During that pretrial hearing Prosecutor Gray announced that she may bring additional charges against Brown. *Brown v. Commonwealth*, No. 2022-CA-0885-MR, 2023 WL 3666456, at *1 (Ky. Ct. App. May 26, 2023) ("*Brown III*"). Brown responded, "[a]nd you . . . I'm gonna have you killed. Since you gonna put cases on me, Imma have you killed for real." *Id.* Disturbingly, in this separate criminal action, Brown was facing three charges of solicitation to murder and being a second-degree PFO. *Brown II*, 2019 WL 3367195, at *1. Equally disturbing, when Brown made this threat, he was already serving a twenty-four-year sentence as a result of a jury convicting him on charges of murder, first-degree wanton endangerment (two counts), tampering with physical evidence, and trafficking in marijuana five pounds or more while in possession of a firearm.[2] *Brown v. Commonwealth*, No. 2017-CA-001051-MR, 2018 WL 3602783, at *1 (Ky. Ct. App. July 27, 2018) ("*Brown I*"). Prosecutor Gray was the lead prosecutor in that Jefferson Circuit Court case (DN 1 PageID # 10).

Returning to the Oldham Circuit Court case that involved the charges of intimidating a participant in the legal process and second-degree PFO:

> Brown pled not guilty to the two-count indictment and the action proceeded to trial on December 1, 2017. The jury found Brown guilty of intimidating a participant in the legal process. Brown, prior to the penalty phase of his trial, entered a motion to enter guilty plea regarding the second-degree PFO charge. In exchange for Brown's guilty plea, the Commonwealth recommended Brown serve five

2 Essentially, two individuals robbed Brown at gun point when he showed up to sell them eight pounds of marijuana. *Brown v. Commonwealth*, No. 2017-CA-001051-MR, 2018 WL 3602783, at *1 (Ky. Ct. App. July 27, 2018). As they fled from the scene in a car, Brown reached for his own pistol and began shooting at the vehicle. *Id.* Brown fired all fifteen rounds in the magazine as the car fled the scene. *Id.* at *2. Bullets from Brown's pistol not only struck one of the individuals in the car, they also entered a nearby house. *Id.* at *1. The individual that Brown hit in the car later died at the hospital. *Id.*

> years for intimidating a participant in the legal process, enhanced with an additional two years by the second-degree PFO charge. The agreement also stipulated that Brown relinquish his right to all appeals associated with the case, and Brown agreed.
>
> During the colloquy preceding the trial court's acceptance of the guilty plea, there was confusion about how the plea would affect Brown's parole eligibility date [on the 24-year sentence imposed by the Jefferson Circuit Court]. Defense counsel advised Brown that his parole eligibility date would not change from its current status of twenty years as a result of the guilty plea. Brown also asked the trial court if the plea would affect his parole eligibility date and the court did not directly answer the question. Defense counsel allegedly assured Brown that he would ask someone before sentencing.
>
> In response to the trial court's questioning, Brown stated he was not suffering from a mental disease or illness, he was not ill or under the influence of drugs or alcohol, and acknowledged that he had consulted with his attorney about the plea and was satisfied with counsel's advice. The trial court reviewed Brown's constitutional rights with him and informed him that, by pleading guilty, he was waiving those rights. Brown affirmed that he understood his sentence would be seven years and admitted that he committed the underlying crimes. He also affirmed that no threats or promises had been made to him or that he had been pressured to plead guilty. Thus, after finding the plea was knowing, intelligent and voluntary, the trial court accepted the plea.
>
> On January 26, 2018, Brown wrote a letter to the court requesting to withdraw his guilty plea prior to being sentenced. He alleged his counsel was ineffective for failing to explain how the plea agreement would affect his parole hearing eligibility date. According to Brown, his parole eligibility date would not remain at twenty years as he previously believed. The trial court treated the letter as a motion to set aside the guilty plea pursuant to RCr 8.10 and, following a hearing, denied the motion. . . .

Brown II, 2019 WL 3367195, at *1. The trial court found that Brown received incorrect legal advice from his attorney about the effect that the plea deal would have on his parole eligibility on the 24-year sentence, "but concluded that any error was not so gross nor were the consequences so dire so as to amount to ineffective assistance of counsel." *Id.* at *2.

B. Direct Appeal

Brown appealed the order of the Oldham Circuit Court denying his motion to withdraw his guilty plea pursuant to Ky. R. Crim. P. 8.10. *Id.* at *1. Brown alleged that he was denied his right to effective assistance of counsel when his attorney provided incorrect advice concerning when he would become parole eligible. *Id.* at *1, *3. In an order issued on July 26, 2019, the Kentucky Court of Appeals affirmed the trial court's denial of Brown's motion to withdraw his guilty plea because it concluded that the trial court did not abuse its discretion. *Id.* at *1, *3-4.

Brown filed a motion for discretionary review (DN 11-5). The Kentucky Supreme Court denied the motion in an order entered on February 12, 2020 (*Id.*).

C. State Postconviction Relief Proceedings

On May 20, 2021, Brown filed, *pro se*, a motion to vacate, set aside or correct sentence pursuant to Ky. R. Crim. P. 11.42 ("Rule 11.42 motion") in the Oldham Circuit Court (DN 11-6 PageID # 116-31). Essentially, Brown claimed that he received ineffective assistance as a result of errors by trial counsel during the pre-trial/investigation phase, the jury voir dire phase, the guilt phase of trial, the second-degree PFO/guilty plea phase of trial, and the sentencing phase of trial (*Id.* at PageID # 118-31).[3] In his motion to supplement, Brown added two additional claims of

3 Brown claimed that his trial counsel: (1) impaired Brown's trial strategy by failing to provide Brown with the official court recording of Brown's threat to the prosecutor; (2) impaired Brown's opportunity to call the trial judge as a witness during the guilt phase of trial because counsel failed to vigorously pursue recusal of the trial judge who witnessed Brown's threat to the prosecutor; (3) failed to raise a *Batson* objection to the Commonwealth's use of a peremptory strike to remove the only black juror left in the jury pool; (4) did not inform the jury of the long courtroom history between the prosecutor Kristi Gray and Brown which would have provided jurors with the context necessary to conclude that Brown's threat was made in a fit of anger as a result of Ms. Gray's incessant persecution of him, as opposed to the special prosecutor's claim that Brown made the threat in an attempt to dissuade Ms. Gray from bringing additional charges; (5) misadvised Brown to accept the Commonwealth's plea offer—which involved a guilty plea on the second-degree PFO charge and relinquishing the right to appeal—and enter a guilty plea to the second-degree PFO charge because the trial judge's refusal to recuse made reversal on appeal imminent; and (6) if the preceding claims of trial counsel's deficient performance do not satisfy the standard for relief individually, then collectively the claims do rise to the level of cumulative errors that warrant relief (DN 11-6 PageID # 118-31).

ineffective assistance of trial counsel (DN 14-1 PageID # 251-53).[4] In an order entered on April 19, 2022, the Oldham Circuit Court denied Brown's request for an evidentiary hearing and his Rule 11.42 motion (DN 11-7 PageID # 132-38). The trial court found, as to each claim of ineffective assistance of trial counsel, Brown had not demonstrated that counsel's performance was deficient and Brown was prejudiced (*Id.*) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Brown filed, *pro se*, an appeal to the Kentucky Court of Appeals. *Brown III*, 2023 WL 3666456, at *1. In his brief, Brown argued: (1) the trial court erred in denying his motion for an evidentiary hearing; and (2) trial counsel was ineffective because: (a) he failed to challenge the indictment as deficient and file a motion for bill of particulars, (b) he failed to provide Brown a copy of video recording of the threat, (c) he failed to raise a *Batson* challenge, (d) he failed to pursue the trial judge's refusal to recuse, (e) he failed to present evidence of the long history of persecution by prosecutor Kristi Gray to bring the threat into context, (f) he misadvised Brown to accept the plea agreement and plead guilty to the second-degree PFO charge, and (g) cumulative error (DN 11-8 PageID # 150-63). Following a discussion of the applicable standards of review, the Kentucky Court of Appeals addressed each of Brown's claims and affirmed the trial court's order. *Brown III*, 2023 WL 3666456, at *2-5.

D. The Habeas Petition

On January 31, 2024, Brown filed, *pro se*, his habeas petition (DN 1). Ground One in the habeas petition asserts that the trial court violated Brown's constitutional rights when it refused to allow him to withdraw his guilty plea (*Id.* at PageID # 5-6). Ground Two alleges that Brown was

4 Specifically, Brown claimed that trial counsel rendered ineffective assistance because he failed to: (1) challenge the indictment under the due process clause because it lacked the specifics required to meet the elements of KRS 524.020; and (2) file a motion for bill of particulars, pursuant to Ky. R. Crim. P. 6.22, to correct any deficiency in the indictment (DN 14-1 PageID # 251-53).

denied his right to effective assistance of counsel when trial counsel failed to: (1) challenge the validity of the indictment; (2) provide Brown with a copy of the threat made in court; (3) raise a *Batson* challenge; (4) ensure that Judge Karen Conrad recused herself from the case; (5) properly inform the jury of prosecutor Kristi Gray's long courtroom history of persecuting Brown to rebut the special prosecutor's distorted representations about Brown; (6) give Brown correct legal advice concerning the impact of the plea deal on his parole eligibility and right to appeal (*Id.* at PageID # 8-10). Ground Three contends that Brown was denied his rights under the constitution when he was denied an evidentiary hearing on his claims of ineffective assistance of counsel (*Id.* at PageID # 11-12).

In response, Hughes acknowledges that Brown seeks relief on the basis of a claim presented on direct appeal and several claims raised in the Rule 11.42 motion (DN 13 PageID # 194-202). He argues that the Kentucky Court of Appeals opinion on direct appeal was not contrary to or an unreasonable application of clearly established precedent of the Supreme Court of the United States (*Id.* at PageID # 194-97). Concerning the collateral attack appeal, Hughes asserts that the Kentucky Court of Appeals found that Brown procedurally defaulted all six claims of ineffective assistance of counsel raised in his Rule 11.42 motion (*Id.* at PageID # 198-200). Alternatively, he contends that the Kentucky Court of Appeals opinion addressing the merits of all six claims did not unreasonably apply clearly established United States Supreme Court precedent or unreasonably determine facts in denying Brown's claims (*Id.* at PageID # 200-02).

In reply, Brown challenges Hughes' position that the Kentucky Court of Appeals opinions addressing his direct and collateral appeals did not unreasonably apply clearly established United States Supreme Court precedent or unreasonably determine facts in denying Brown's claims (DN 14 PageID # 206-19).

II. CONCLUSIONS OF LAW

A. Standard of Review

Because Brown filed his habeas petition on January 31, 2024, review of the state court decisions is governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") (DN 1). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, as to each claim asserted by Brown, the Court must first determine whether it alleges that a federal constitutional right has been violated. *Williams v. Taylor*, 529 U.S. 362, 367 (2000). If the answer is in the affirmative and the state court adjudicated the federal constitutional claim on its merits, then this Court must employ the standard of review set forth in 28 U.S.C. § 2254(d) to determine whether to grant the petition. *Id.* at 367, 402-03, 412-13.

As amended by Chapter 153 of AEDPA, § 2254(d) provides as follows:

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

28 U.S.C. § 2254(d).

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

on a question of law; or (b) the state court decides a case differently than the Supreme Court "has on a set of materially indistinguishable facts." *Id.* at 412-13.

Under the "unreasonable application" clause of § 2254(d)(1), the Court may grant the writ if the state court identifies the correct governing legal rule from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 407-08, 413. When the Court makes the "unreasonable application" inquiry it "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. The state court's application of clearly established federal law must be more than simply erroneous or incorrect, it must be objectively unreasonable. *Id.* at 409-11. Consequently, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

A petitioner may obtain relief under § 2254(d)(2) "only by showing" the state court "conclusion to be 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*") (quoting 28 U.S.C. § 2254(d)(2)).[5] This "unreasonable determination" standard in § 2254(d)(2) applies to state-court decisions and "the granting of habeas relief." *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003) ("*Miller-El I*"). By contrast, the "clear and convincing" evidence standard found in § 2254(e)(1) "pertains only to state-court determinations of factual issues, rather than decisions." *Id.* at 342. Thus, in making an assessment under § 2254(d)(2), the Court presumes the

5 The Supreme Court has instructed, "[w]e may not characterize . . . state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Moreover, "§ 2254(d)(2) requires that we accord the state trial court substantial deference." *Id.* at 314. This means that if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's [factual] determination.'" *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341-42 (2006)).

state court's factual findings to be sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." *See Miller-El II*, 545 U.S. at 240 (quoting § 2254(e)(1)).[6] The "unreasonable determination" standard in § 2254(d)(2) "is demanding but not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Id.* (quoting *Miller-El I*, 537 U.S. at 340).

B. Ground One

Ground One asserts that the trial court violated Brown's federal constitutional rights when it refused to allow him to withdraw his guilty plea to the second-degree PFO charge (DN 1 PageID # 5-6). Hughes responds that Brown cannot establish that the Kentucky Court of Appeals' decision as contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent (DN 13 PageID # 194-97). In his reply, Brown disputes both Hughes' interpretation of *Hill* and his assertion about the potential outcome if Brown had gone to trial on the second-degree PFO charge (DN 14 PageID # 206-08).

1. Applicable Law

As the Kentucky Court of Appeals' opinion on direct appeal involved an adjudication of Brown's constitutional claims the on the merits, § 2254(d) applies to federal review of his claim. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). This means that the Court may not grant federal habeas relief, which is subject to 28 U.S.C. § 2254(d), unless Brown demonstrates that State court adjudication of his claim "was contrary to" federal law then clearly established in the holdings of the Supreme Court of the United States, § 2254(d)(1); or that it "involved an unreasonable application" of such law, § 2254(d)(1); or that it "was based on an unreasonable determination of

6 The Supreme Court has yet to define the "precise relationship between § 2254(d)(2) and § 2254(e)(1)[.]" *Burt v. Titlow*, 571 U.S. 12, 18 (2013). Further, it has "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under §2254(d)(2)." *Wood*, 558 U.S. at 300.

the facts" in light of the record before the state court, § 2254(d)(2). *Id.* When the Court conducts a review under either clause of 28 U.S.C. § 2254(d)(1), it must look only to the clearly established precedent of the United States Supreme Court. *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003).

In *Andrade*, the Supreme Court explained:

> Section 2254(d)(1)'s "clearly established" phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In other words, "clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. *See id.*, at 405, 413, 120 S.Ct. 1495; *Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). In most situations, the task of determining what we have clearly established will be straightforward.

Id. at 71-72. Accordingly, a petitioner cannot meet his burden by merely showing that a state court's decision conflicts with federal circuit court precedent. 28 U.S.C.§ 2254(d)(1); *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012).

In *Tollett v. Henderson*, the Supreme Court articulated the following principle concerning claims of ineffective assistance of counsel that arise out of the plea process:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

411 U.S. 258, 267 (1973). In *McMann v. Richardson*, the Supreme Court held that counsel's advice must be within the range of reasonable competence demanded of attorneys in criminal cases. 397 U.S. 759, 770-71 (1970). For a plea to be voluntary and intelligent a defendant must

be fully aware of its direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel. *Brady v. United States*, 397 U.S. 742, 755 (1970). Only when the evidence demonstrates that a defendant was not fairly apprised of the plea's consequences can it be challenged under the Due Process Clause. *Marbry v. Johnson*, 467 U.S. 504, 509 (1984). Thus, a defendant who attacks the voluntary and intelligent character of the guilty plea must show the advice he received from counsel regarding the plea's consequences fell outside the range of reasonable competence demanded of attorneys in criminal cases. *Tollett*, 411 U.S. at 267.

Approximately eleven years after *Tollett*, the Supreme Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel in a trial setting. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first or performance part of the standard, consistent with the standard in *McMann*, the Supreme Court held "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Concerning the second or prejudice part of the standard, the Supreme Court observed that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Thus, the Supreme Court held "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[7]

Two terms later, the Supreme Court addressed a habeas petitioner's claim "that his plea was 'involuntary' as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous." *Hill v. Lockhart*, 474 U.S. 52, 56

7 The Court need not conduct the two-prong inquiry in the order identified above or even address both parts of the test if the defendant makes an insufficient showing on one. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). For example, if the Court determines the defendant fails to satisfy the prejudice requirement, then it need not determine whether counsel's performance was deficient. *Id.*

(1985). It ruled that the two-part *Strickland* test applies when a defendant challenges the voluntariness of his guilty plea based on ineffective assistance of counsel. *Id.* at 58. The Supreme Court explained that the first part of the *Strickland* test is a restatement of the standard of attorney competence set forth in *Tollett* and *McMann*. *Id.* at 58-59. The second, or prejudice, part of the test instead "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59. Thus, to satisfy "the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The test is objective, not subjective, so Brown must convince the Court that his "decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

The petitioner in *Hill* alleged that defense counsel provided him with incorrect advice about his parole eligibility under the plea offer.[8] *Hill*, 474 U.S. at 54-55, 60. But he failed to allege prejudice from the attorney's error. *Id.* at 60. In pertinent part the opinion reads:

> We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice."

Id. By declining to address the performance prong in *Hill*, the Supreme Court avoided the categorical question: "whether advice about parole (however inadequate and prejudicial) could possibly violate the Sixth Amendment." *Chaidez v. United States*, 568 U.S. 342, 349-50 (2013). The Supreme Court subsequently acknowledged that its non-decision in *Hill* left the state and

8 Counsel advised if Hill accepted the plea offer and pled guilty to the murder and theft charges, he would become eligible for parole after serving one-third of the thirty-five-year prison sentence. *Hill v. Lockhart*, 474 U.S. 52, 54-55 (1985). As Hill previously had been convicted of a felony in Florida, he was, however, classified under Arkansas law as a second offender and required to serve one-half of the sentence before becoming eligible for parole. *Id.* at 55.

lower federal courts to deal with the issue, and they almost unanimously concluded the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, which would include parole eligibility and deportation. *Id.* at 350-52.

While the Supreme Court in *Padilla v. Kentucky*, addressed the categorical question concerning advice about deportation, 559 U.S. 356, 364-65 (2010),[9] it has yet to do so with regard to advice about parole eligibility. *Chaidez*, 568 U.S. at 350-51; *Plumaj v. Booker* 33 F. Supp. 3d 897, 909-10 (E.D. Mich. 2014) (observing that the Supreme Court has not decided whether erroneous advice about parole eligibility violates the Sixth Amendment). Consequently, there is no clearly established Supreme Court precedent addressing the circumstances under which counsel's erroneous advice as to parole eligibility may satisfy the performance part of the *Strickland* test.

In the absence of such a standard, habeas relief under § 2254(d)(1) may be granted only if the Kentucky Court of Appeals decision is contrary to or an unreasonable application of the more general standard for assessing counsel's performance established in *Strickland*. *See Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). Specifically, the appropriate standard is whether "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

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9 In *Padilla v. Kentucky*, the Supreme Court of the United States addressed the threshold question concerning whether advice about deportation could possibly violate the Sixth Amendment. 559 U.S. 356, 364-65 (2010). It responded as follows:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

Id. at 366. The scope of the holding in *Padilla* is so narrowly tailored it cannot be construed as clearly established Supreme Court precedent on the question of whether advice about parole could violate the Sixth Amendment.

By contrast, *Hill* sets forth clearly established precedent addressing the appropriate test for assessing whether counsel's purported error affected the outcome of the plea process. 474 U.S. at 59. Specifically, the standard is but for counsel's error, there is a reasonable probability that defendant would not have pleaded guilty and would have insisted on going to trial. *Id.*

2. Discussion

The Kentucky Court of Appeals found the trial court did not abuse its discretion when it "concluded that any errors by defense counsel were not so gross nor were the consequences so dire as to amount to ineffective assistance of counsel." *Brown II*, 2019 WL 3367195, at *3. In the context of assessing both parts of the *Strickland* test, the state appellate court indicated as defense counsel's advice about parole eligibility concerned a collateral consequence of the plea it did not affect the voluntariness of Brown's plea. *Id.* at *3-4. Further, it noted that Brown was already serving a 24-year murder sentence. *Id.* at 4. This was an oblique reference to the overwhelming probability of conviction on the second-degree PFO charge.[10] The state appellate court also observed that Brown faced up to ten years if he had gone to trial on that charge.[11] *Id.* This was an implicit acknowledgment that Brown could have received a sentence three years longer than what he actually received, which means Brown would have to serve an additional seven months before being eligible for a parole hearing. Tellingly, the Kentucky Court of Appeals commented,

10 The second-degree PFO proceeding is essentially a status determination. *See Barbour v. Commonwealth*, 204 S.W.3d 606, 615-16 (Ky. 2006). The prosecutor would have introduced evidence showing Brown was older than 21 years of age, had previously been convicted of murder (one previous felony), received a 24-year sentence on that conviction (sentence to a term of imprisonment of one or more years), was over the age of 18 at the time he committed the offense of intimidation, and he was serving the 24-year sentence at the time he committed the offense of intimidation. *See* KRS 532.080(4). Thus, contrary to Brown's assertion, the jury would have found him guilty of second-degree PFO.

11 As the jury convicted Brown on the charge of intimidating a participant in the legal process, he faced a penalty range on this class D felony conviction of not less than one-year nor more than five-years (DN 11-1 PageID # 75) (*see* KRS 524.040(2)(3); KRS 532.020(1)(a); KRS 532.060(2)(d)). An unfavorable outcome on the second-degree PFO charge would mean that Brown's class D felony conviction would be enhanced to a class C felony conviction with a penalty range of not less than five-years nor more than 10-years (*Id.*) (*see* KRS 532.080(5); KRS 532.060(2)(c)).

"[c]onsidering the aggravating factors that plague Brown (*i.e.* prior convictions), there is no definitive way to ascertain that the mistakes made by defense counsel were so gross as to impact Brown's parole hearing date in such a way that would violate the Sixth Amendment." *Id.* Additionally, the state appellate court agreed with the trial court's determination that rejecting the plea bargain would not have been rational considering Brown's circumstances. *Id.*

Because the restrictive standard of review set out in § 2254(d)(1) applies to Brown's ineffective assistance of counsel claim, federal habeas relief may not be granted unless he demonstrates adjudication of this claim by the Kentucky Court of Appeals "was contrary to, or involved an unreasonable application of," the clearly established precedent in *Strickland* and *Hill*. *See Harrington v. Richter*, 562 U.S. 86, 100-101 (2011). This is different from what Brown seeks. He is asking for a review of the state court record to determine whether he satisfied his burden under the clearly established precedent in *Strickland* and *Hill*. *See id.* at 101. Stated another way, the issue before the Court is not whether Brown has demonstrated his guilty plea was involuntary as a result of ineffective assistance of counsel. *See id.* Rather, it is whether the decision of the Kentucky Court of Appeals—answering that inquiry in the negative—was "was contrary to, or involved an unreasonable application of," the clearly established precedent in *Strickland* and *Hill*. *See id.* at 100 (quoting 28 U.S.C. § 2254(d)(1)).

Concerning the "contrary to" clause of § 2254(d)(1), Brown has not attempted to demonstrate, nor has the undersigned found, that the Kentucky Court of Appeals arrived at a conclusion opposite to that reached by the Supreme Court on a question of law *or* that it decided Brown's case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Accordingly, Brown has not met his burden under the "contrary to" clause of § 2254(d)(1).

Regarding the "unreasonable application" clause of § 2254(d)(1), Brown has not attempted to demonstrate, nor has the undersigned found, that the Kentucky Court of Appeals' application of the clearly established precedent in *Strickland* and *Hill* was objectively unreasonable. *See Williams*, 529 U.S. at 409-11. Instead, Brown merely claims that both parts of the *Strickland* test are satisfied because the state courts found counsel's advice was incorrect and he has asserted that he only took the plea deal because of that advice (DN 1 PageID # 5-6; DN 14 PageID # 207). The mere fact that Brown disagrees with the outcome is not sufficient. He must show that the Kentucky Court of Appeals decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Accordingly, Brown has not met his burden under the "unreasonable application" clause of § 2254(d)(1). Notwithstanding, the decision of the Kentucky Court of Appeals is not "an unreasonable application of" the clearly established Supreme Court precedent set forth in *Strickland* and *Hill*.

Finally, Brown has not demonstrated, nor has the undersigned found, that adjudication of his claim by the Kentucky Court of Appeals "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)(2). In reaching this conclusion, the undersigned notes the state courts have not disputed that Brown's decision to take the plea deal was contingent on counsel's incorrect advice about his parole eligibility. *See Brown II*, 2019 WL 3367195, at *3. Instead, the Kentucky Court of Appeals reasonably determined as Brown's parole eligibility is a collateral consequence of the plea there is no evidence in the record that indicates he was unaware of the direct consequences of the guilty plea or entered his guilty plea involuntary. *Id.* Additionally, what Brown fails to appreciate is he failed to convince the trial court and the Kentucky Court of

Appeals that a decision to reject the plea bargain would have been objectively rational under the circumstances. *Id.* at *4. For the above reasons, Brown has not demonstrated he is entitled to relief on this ineffective assistance of counsel claim under AEDPA.

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

C. Ground Two

Brown raises six claims of ineffective assistance of counsel (DN 1 PageID # 8-10). Specifically, counsel failed to: (1) challenge the indictment as too vague to provide adequate notice of the charges under the Fourteenth Amendment and Kentucky statutory law; (2) provide Brown with a copy of the death threat he made to the prosecutor during the pretrial hearing; (3) raise a *Batson* challenge to the Commonwealth's peremptory strike of the only black juror; (4) take appropriate steps to ensure that Circuit Court Judge Karen Conrad did not preside over the criminal proceedings because she witnessed Brown make the death threat during the pretrial hearing; (5) "properly inform the jury of the long courtroom history between" the prosecutor and Brown to counter the Commonwealth's theory of the case; and (6) give Brown correct legal advice concerning the plea deal (*Id.*).

In response, Hughes asserts the Kentucky Court of Appeals found that Brown procedurally defaulted all six claims (DN 13 PageID # 198-200) (citing *Hodge v. Haeberlin*, 579 F.3d 627, 638-39 (6th Cir. 2009)). Alternatively, Hughes posits that the Kentucky Court of Appeals did not unreasonably apply both parts of *Strickland* test when it found, as to all six claims, Brown failed to show deficient performance by counsel and establish any prejudice (*Id.* at PageID # 200-02).

In reply, Brown denies the Kentucky Court of Appeals determined that his six claims were procedurally defaulted (DN 14 PageID # 209-18). He asserts that the Kentucky Court of Appeals considered the merits of his claims and came to erroneous conclusions (*Id.*).

1. *Discussion*

The Kentucky Court of Appeals explained that it reviews the trial court's denial of Brown's Ky. R. Crim. P. 11.42 motion for an abuse of discretion. *Brown III*, 2023 WL 3666456, at *3. Further, it described the performance and prejudice parts of the *Strickland* test. *Id.* In pertinent part the state appellate court's opinion reads:

> Here, Brown alleges his trial counsel was deficient seven ways to Sunday, but we are not sufficiently persuaded. Brown fails to establish that his counsel's performance was not reasonable and that he was deprived of some substantial right which would justify extraordinary relief.
>
> Brown argues his counsel (1) failed to challenge the sufficiency of the indictment nor request a bill of particulars, and (2) failed to obtain a copy of the threat. He argues that these "mistakes" left him unprepared to mount a defense. However, Brown does not establish how these "failures" represented an error by counsel, nor how they negatively affected his defense. It is unclear from Brown's argument how a more specific indictment and/or a bill of particulars would have been useful in this situation; nor does Brown give insight into how failing to request these documents was unreasonable or an error. Additionally, Brown made the threat himself in open court, and he was indicted for making the threat. Even if his memory failed him and he forgot what he said specifically, the statements were made in open court and a copy of the court proceeding was readily available. In fact, throughout the

trial, Brown's counsel expressed an understanding and knowledge of the threatening words. There is nothing in the record to suggest counsel was uninformed as to the threat or unprepared as a result of the indictment. Brown did not establish any deficiency by counsel on this point, nor how such "failures" fell below an objective standard of reasonableness.

Next, Brown alleges his counsel was ineffective for (3) failing to raise a *Batson* challenge when the Commonwealth excused an African American woman from the jury panel. Again, Brown does not show how his attorney's failure to make a *Batson* challenge was unreasonable or affected his defense. "Conclusory allegations that counsel was ineffective [–] without a statement of the facts upon which those allegations are based [–] do not meet the rule's specificity standard and so warrant a summary dismissal of the motion." *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (internal quotation marks and citations omitted). Brown offered nothing to support his assertion that counsel's performance fell below the objective standard of reasonableness, nor that the outcome of the trial would have been different but for the absent *Batson* challenge.

Next, Brown argues counsel was (4) "ineffective in the way he handled the court's refusal to recuse itself" because "the court's refusal robbed [Brown] of the opportunity to present another witness in his defense." However, as discussed above, Brown does not explain why or how the judge would be helpful to his defense; Brown does not argue that the judge had any special knowledge beyond witnessing the threat. Also, Brown seems to argue that the judge could not be impartial because she witnessed the threat. However, he presents no evidence to support that contention. As the trial court stated, other than his conclusory argument, Brown "failed to demonstrate what possible testimony the [j]udge may have offered that would have changed the outcome of his trial." Again, "[c]onclusory allegations do not suffice to prove a claim of ineffective assistance of counsel." *Commonwealth v. Crumes*, 630 S.W.3d 630, 639 (Ky. 2021) (citation omitted).

Next, Brown argues his counsel erred by (5) not informing the jury "of the long courtroom history" between himself and Prosecutor Gray. On this claim, we refer to and adopt the Commonwealth's argument:

> This claim is absurd. [Prosecutor Gray] had successfully prosecuted Brown for murder and he had been indicted on three charges of solicitation of murder. *Brown v.*

> *Commonwealth*, No. 2018-CA-01180-MR, 2019 WL 3367195, at *1 (Ky. App. July 26, 2019). It would have been highly detrimental to Brown's case had the jury heard about his prior courtroom experience with [Prosecutor Gray], so trial counsel was not deficient in failing to introduce such evidence.
>
> Next, Brown argues his trial counsel was ineffective (6) in advising him to enter a guilty plea in which he waived his right to appeal. Brown appears to argue that he had appealable issues that he was prevented from pursuing, but he does not state what those may have been. Again, without any argument to support his contention, there is no tangible ineffectiveness by counsel. Brown does not state how his counsel's effectiveness was inadequate by advising him to enter into a valid[12] guilty plea.
>
> Finally, Brown argues that (7) the cumulative effect of his counsel's "errors" warrant extraordinary relief and that his counsel's performance fell below a reasonableness standard. For the reasons stated herein, we disagree. Brown failed to demonstrate, under *Strickland*, how counsel's "failures" were deficient, or how they deprived him of a fair trial. As such, the trial court did not abuse its discretion in denying Brown's motion pursuant to RCr 11.42.

Id. at *4-5. Notably, Brown's sixth claim of ineffective assistance of counsel is a rehash of part of the argument he unsuccessfully raised on direct appeal.

Because the restrictive standard of review set out in § 2254(d)(1) applies to Brown's ineffective assistance of counsel claims in Ground Two, federal habeas relief may not be granted unless he demonstrates adjudication of this claim by the Kentucky Court of Appeals "was contrary to, or involved an unreasonable application of," the clearly established precedent in *Strickland*. *See Richter*, 562 U.S. at 100-101. This is different from what Brown seeks. In each instance, he requests a review of the state court record to determine whether he has satisfied his burden under the clearly established precedent in *Strickland*. *See id.* at 101. Stated another way, the issue is not whether Brown has demonstrated as to each claim that he received ineffective assistance of

12 In the footnote, the Kentucky Court of Appeals explains while the state Constitution guarantees the right to appeal that right may be waived. *Brown III*, 2023 WL 3666456, at *5 n.5.

counsel. *See id.* Rather, it is whether the decision of the Kentucky Court of Appeals—answering that inquiry in the negative as to each claim—was "was contrary to, or involved an unreasonable application of," the clearly established precedent in *Strickland*. *See id.* at 100 (quoting 28 U.S.C. § 2254(d)(1)).

Concerning the "contrary to" clause of § 2254(d)(1), as to each of the six claims Brown has not attempted to demonstrate, nor has the undersigned found, that the Kentucky Court of Appeals arrived at a conclusion opposite to that reached by the Supreme Court on a question of law *or* that it decided Brown's case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Accordingly, Brown has not met his burden under the "contrary to" clause of § 2254(d)(1).

Regarding the "unreasonable application" clause of § 2254(d)(1), Brown has not attempted to demonstrate, nor has the undersigned found, that the Kentucky Court of Appeals' application of the clearly established precedent in *Strickland* to each claim was objectively unreasonable. *See Williams*, 529 U.S. at 409-11. Instead, Brown merely argues that both parts of the *Strickland* test are satisfied (DN 1 PageID # 8-10; DN 14 PageID # 209-18). The mere fact that Brown disagrees with the outcome is not sufficient, he must show that the Kentucky Court of Appeals decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 102-03. Accordingly, Brown has not met his burden under the "unreasonable application" clause of § 2254(d)(1).

Finally, Brown has not demonstrated, nor has the undersigned found, that adjudication of his claims of ineffective assistance of counsel by the Kentucky Court of Appeals "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)(2). For the above reasons, Brown has not demonstrated he is entitled to relief on these ineffective assistance of counsel claims under AEDPA.

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

D. Ground Three

Brown argues his rights under the United States Constitution were violated when the Kentucky state courts denied his request for an evidentiary in connection with the claims of ineffective assistance of counsel raised in his Ky. R. Crim. P. 11.42 motion (DN 1 PageID # 11-12). In his reply, Brown points out that Hughes failed to respond to this claim (DN 14 PageID # 218).

Brown cannot use his § 2254 petition to challenge errors or deficiencies in state post-conviction proceedings because such claims are collateral to whether he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Kirby v. Dutton*, 794 F.2d 245, 246-248 (6th Cir. 1986). Stated differently, the failure of the state post-conviction relief court to conduct an evidentiary hearing cannot support relief as errors in state post-conviction proceedings "are outside the scope of federal habeas corpus review." *Cress*

v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007). Consequently, Brown's claim that the state trial court erred in denying his request for an evidentiary hearing is not cognizable under § 2254. *Caraway v. Fitz*, No. 2:24-cv-02263-SHL-atc, 2025 WL 489883, at *4 (W.D. Tenn. Feb. 13, 2025).

In *Slack*, the Supreme Court established a two-pronged test that is used to determine whether a Certificate of Appealability should issue on a habeas claim denied on procedural grounds. 529 U.S. at 484-85. To satisfy the first prong of the *Slack* test, Brown must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Id.* at 484. To satisfy the second prong, Brown must show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[13] *Id.* Notably, the Court need not conduct the two-pronged inquiry in the order identified or even address both parts if Brown makes an insufficient showing on one part.[14] *Id.* at 485. For example, if the Court determines Brown failed to satisfy the procedural prong, then it need not determine whether the constitutional prong is satisfied. *Id.* As jurists of reason would not find it debatable whether Brown has raised a valid constitutional claim, the Court should not issue a Certificate of Appealability as to Brown's claim in Ground Three.

[13] "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[14] "Each component of the § 2253(c) showing is part of a threshold inquiry, and a Court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue of whose answer is more apparent from the record and arguments." *Slack*, 529 U.S. at 485.

III. RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** that Brown's habeas petition under 28 U.S.C. § 2254 (DN 1) be **DENIED** and **DISMISSED**. Additionally, the undersigned **DOES NOT RECOMMEND** issuance of a Certificate of Appealability for the claims set forth in Grounds One, Two, and Three in Brown's habeas petition.

March 24, 2025

H. Brent Brennenstuhl
United States Magistrate Judge

IV. NOTICE

Under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b)(1), the undersigned magistrate judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). If a party has objections, such objections must be timely filed, or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985).

March 24, 2025

H. Brent Brennenstuhl
United States Magistrate Judge

Copies to: Kenneth W. Brown, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:24-CV-00062-CRS-HBB

KENNETH W. BROWN **PETITIONER**

VS.

CRAIG HUGHES, WARDEN **RESPONDENT**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, no objections having been filed thereto, and the Court having considered the same:

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

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

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

Copies to: Kenneth W. Brown, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:24-CV-00062-CRS-HBB

KENNETH W. BROWN **PETITIONER**

VS.

CRAIG HUGHES, WARDEN **RESPONDENT**

ORDER

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

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

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

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

Copies to: Kenneth W. Brown, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:24-CV-00062-CRS-HBB

KENNETH W. BROWN **PETITIONER**

VS.

CRAIG HUGHES, WARDEN **RESPONDENT**

JUDGMENT

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

(1) The motion to vacate, set aside or correct sentence (DN 1) is **DISMISSED** with prejudice, and judgment is entered in favor of Respondent/Plaintiff.

(2) A Certificate of Appealability is **DENIED** as to each claim asserted in the motion to vacate; and

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

Copies to: Kenneth W. Brown, *pro se*
Counsel of Record