Commonwealth of Kentucky
Supreme Court
File No. 2013-SC-000433

GREGORY WILSON **APPELLANT**

v.

Appeal from Kenton Circuit Court
Hon. Gregory M. Bartlett, Judge
Indictment No. 1987-CR-00166

COMMONWEALTH OF KENTUCKY **APPELLEE**

Commonwealth's Brief

Submitted by:

JACK CONWAY
Attorney General of Kentucky

HEATHER M. FRYMAN
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502) 696-5342

Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the record on appeal was returned to the Clerk of this Court and that a copy of the foregoing Brief for the Commonwealth was mailed, first class, U. S. Mail, postage pre-paid to: Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division, Kenton Co. Judicial Center, 230 Madison Ave., Covington, Ky. 41011; and to Hon. Daniel T. Goyette, Hon. Leo G. Smith, and Hon. Bruce P. Hackett, Office of the Louisville Metro Public Defender, Advocacy Plaza, 717-719 W. Jefferson Street, Louisville, Ky. 40202; sent via electronic mail to: Hon. Rob Sanders, Commonwealth's Attorney, on this 27th day of May, 2014.

Heather M. Fryman
Assistant Attorney General

INTRODUCTION

The Appellant, convicted murderer Gregory Wilson ("the Appellant"), remains on death row because he kidnaped, raped, and murdered a young woman from Kenton County, in a brutal and horrific manner, while she begged him to spare her life. Debbie Pooley's family and friends have waited more than twenty-five years for justice. During those years the state and federal courts have refused to disturb the verdict and sentence, despite multiple filings.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant's claims were heard, reviewed, and rejected in federal court. Given this decision, and the Appellant's misstatements concerning the applicability of the Hollon decision, oral argument will not assist the Court in this matter.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellant, convicted murderer Gregory Wilson ("the Appellant"), remains on death row because he kidnaped, raped, and murdered a young woman from Kenton County, in a brutal and horrific manner, while she begged him to spare her life. Debbie Pooley's family and friends have waited more than twenty-five years for justice. During those twenty-five years the state and federal courts have continued to refuse to disturb the verdict and sentence, despite multiple filings. TR V, 734.

The Kenton Circuit Court convicted Wilson for kidnaping, raping, robbing, and killing a young Kenton County woman named Deborah Pooley. Her family and friends called her Debbie. This Court summarized the factual history of the case in its decision, affirming Wilson's death sentence for murdering Ms. Pooley, and affirming the sentence of Wilson's girlfriend and accomplice, Brenda Humphrey.

> On Friday, May 29, 1987 at 11:45 p.m., she left her best friend's house and said she was going straight home. The prosecution presented evidence that she had just parked her car outside of her apartment in Covington when she was abducted by Wilson and co-defendant Humphrey at knife point.
>
> Testimony at trial from various sources, including Humphrey, indicated that the victim was forced into the back seat of her own car. Humphrey drove the car to the flood wall in Covington. Wilson took the victim out of the car and took her up on the flood wall and made her lie down with her eyes closed while Humphrey went to put gas in the car. After

Wilson unsuccessfully attempted to intervene in his co-defendant's post conviction proceedings. Humphrey v. Commonwealth, Not Reported in S.W.3d, 2005 WL 924188 (Ky. 2005).

The Appellant pursued the same claims that he now presents in his federal *habeas corpus* proceeding. In a roughly 150-page opinion, the Federal District Court for the Eastern District of Kentucky refused to disturb the conviction and noted that the evidence of Wilson's guilt was overwhelming. The Sixth Circuit affirmed that decision in Wilson v. Parker, 515 F.3d 682 (6th Cir., 2008). The United States Supreme Court again denied *certiorari*. Wilson v. Simpson, 130 S.Ct. 113, 175 L.Ed.2d 75 (2009). The District Court Opinion is attached to this brief as an appendix.

The Appellant's Petition for *Habeas Corpus* raised twenty-three claims including, "Claim 21: Petitioner was denied effective assistance of counsel on the direct appeal of his convictions to the Kentucky Supreme Court." And, "Claim 22: Petitioner's rights were violated because he was denied a state court forum in which to raise a claim that he received ineffective assistance of counsel on appeal." Memorandum Opinion and Order Denying Petition for Writ of Habeas Corpus, Eastern District of Kentucky, filed September 30, 2004 (Attached as Appendix). Contrary to the Appellant's assertion that he has never had the chance to litigate his current arguments, the Appellant was, in fact, granted an evidentiary hearing in federal court to develop his claim of ineffective assistance of appellate counsel ("IAAC"). That hearing was held on October 25, 2001. Memorandum Opinion and Order, p. 121. The allegations that the Appellant now makes concerning DPA employee Gail Robinson, who is alleged to have "ghost written" the

Appellant's direct appeal brief, come from the testimony at that evidentiary hearing. However, notably, the Appellant has failed to inform this Court that the purpose of that hearing was to litigate the exact claims that he now raises - and that the claims were rejected by the federal court.

The Eastern District's Opinion and Order also rejected the Appellant's argument alleging that ineffective assistance of trial counsel ("IAC") can never be raised on direct appeal. The Court's Opinion noted that

> Kentucky courts have recognized a right to pursue ineffectiveness of trial counsel claims on direct appeal. *See* Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998) (claims of ineffective assistance of counsel are not always precluded from review on direct appeal) In fact, in those cases where the trial court has developed some sort of a record on the ineffectiveness issue, direct appeal may be appropriate. Thus, even if Petitioners criticism of the decision to raise the issue on direct appeal was tactically correct, such conduct falls short of the high standard required by Strickland to show objectively unreasonable conduct of counsel.

Memorandum Opinion and Order, p. 127.

The federal court also rejected claims that Ms. Robinson's actions in "ghost writing" at least portions of the Appellant's direct appeal could result in IAAC. Notably, the Court explained that such an argument presented a legal impossibility because Ms. Robinson was not Wilson's counsel on direct appeal. Id. at 128. Wilson had nationally recognized counsel that presumably reviewed the ghost writing, if the ghost writing occurred, before they put their names on the briefs. The Court should also note that this

type of ghost writing is routine in the world of law - where clerks write for judges and associates write for partners. It would not be unexpected that those that took an interest in the trial, as Ms. Robinson evidently did, would have had ideas about the direct appeal and would have submitted those ideas to the counsel of record. Counsel of record was free to accept or reject those ideas.

The federal court also discussed the assertion that DPA lawyers pursued their own agenda by advising Wilson without representing him. The Court noted that Wilson was free to listen to the advice of anyone that he chose, and such voluntary action by Wilson could not support a claim of ineffective assistance, nor justify disturbing his conviction. Memorandum Opinion and Order, p. 126 -128. Defendants often consult with individuals that are not their counsel, and they should be free to make those choices. In fact, infringing on that right would raise its own set of constitutional issues. However, when a defendant chooses to consult with someone other than counsel, they cannot then assert that such consultation interfered with counsel's representation.

The Appellant now attempts to again litigate the issues under the guise of Hollon v. Commonwealth despite the fact that the issues were heard and rejected by the federal courts. The Appellant filed this successive post conviction pleading on February 17, 2012. TR Box 8, Vol. I, p. 1 The Kenton Circuit Court denied the motion on June 18, 2013. TR Box 8, Vol. V, p. 608. In its Order the Kenton Circuit Court noted that the claims had been rejected during the *habeas corpus* proceeding in the federal District Court. Thus, the trial court found that the claims had been "previously asserted and adjudicated." Id. at 608-609.

ARGUMENT

The Appellant's arguments were never appropriately before the Kenton Circuit Court because those claims had already been asserted, heard, and adjudicated in the federal district court. The decision of that court was appealed to the Sixth Circuit and affirmed. The U.S. Supreme Court then refused to review the Appellant's *writ of certiorari*.

Further, the Hollon Opinion states that it does not retroactively apply. Thus, the claims that were previously adjudicated cannot be re-heard in the state court.

I.

HOLLON DOES NOT RETOACTIVELY APPLY

The Appellant incorrectly bases his current arguments on Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2010). However, Hollon is not retroactive and is not applicable to this case. The Hollon case specifically stated that the opinion "is to have prospective effect only. It applies to this case, to cases pending on appeal in which the issue has been raised and preserved, and to cases currently in or hereafter brought in the trial court in which the issue is raised." Hollon, 334 S.W.3d at 439. Here, Wilson's direct appeal and original post conviction case have been final for many years. The case, in no way, post-dates the decision in Hollon.

Further, the Court in Hollon considered the Appellant's likely argument that prospective application is somehow unfair. The Court noted that "the federal courts have provided a forum through habeas review" to have claims heard. Id. Indeed, the Appellant presented his claims to the federal court on *habeas* review, and the court decided the claims.

The Appellant's assertions concerning Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2011) are replete with inaccuracies. Hollon does not authorize the filing of this Motion. In fact, Hollon expressly states that attempts to apply it retroactively, as the Appellant attempts here, are not proper. As previously explained, the Appellant raised his lack of a procedural vehicle to raise IAAC before the state court as a claim in the Federal District Court. The Federal Court rejected that argument, but gave the Appellant an evidentiary hearing in order to develop his claims of IAAC, which were also rejected. Memorandum Opinion and Order, 130.

Kentucky defendants have not been deprived of review of IAAC claims. The Hollon Court noted that before the decision, Kentucky defendants sought review of IAAC claims through *habeas* petitions in federal courts. The Court stated, "Kentucky defendants have not, therefore, been denied an opportunity to vindicate their right to effective appellate counsel, and there is thus no need for our decision today to reach back and operate retroactively." Hollon v. Commonwealth, 334 S.W.3d 431, 439 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). In fact, Wilson sought review of the issues that he now raises as claims twenty-one and twenty-two of his *habeas corpus* petition.

The Appellant implicitly recognized that Wilson's claims had already been reviewed in federal court, but asks this Court to render a holding contrary to that Court's conclusions, because he argues that Hollon did not establish a new right. That is true. Hollon did not create a right. Hollon created a procedural vehicle to address prospective IAAC claims in state court. The Appellant's conclusion that this somehow entitles him to retroactive application is, however, legally inaccurate. The Appellant misstates and misconstrues

RCr 11.42(10)(b) by asserting that the rule would allow this type of claim to be raised in an improper second RCr 11.42 Motion. The constitutional right was established in 1985 and the proper procedural vehicle for raising the claim was the *habeas* petition, as occurred here.

In a decision addressing a similar attempt to use Hollon to retroactively pursue IAAC claims, this Court again stated that Hollon would not retroactively apply, even in a capital case. The Court stated as follows:

> Because Appellant's RCr 11.42 proceeding, the sanctioned method for bringing an ineffective assistance of direct appeal counsel claim, has long since been decided and become final, he is barred by the retroactivity provisions of Hollon from prosecuting the claim in the present CR 60.02 proceeding. As such, the trial court properly denied Appellant's claims based upon ineffective assistance of direct appeal counsel. As noted in Hollon, however, Appellant may not retroactively assert his claim of ineffective assistance of appellate counsel in state court. Since he has therefore now exhausted his remedies for that claim in state court, we presume consideration of the claim remains available through federal habeas review.

Sanders v. Commonwealth, 339 S.W.3d 427, 435 (Ky. 2011) *cert. denied*, 11-5941, 2012 WL 986861 (U.S. Mar. 26, 2012).

Because the Appellant has misconstrued the holding of Hollon, the Kenton Circuit Court correctly denied the Appellant's successive post conviction motion.

II.

THE CLAIMS WERE HEARD AND DENIED BY THE FEDERAL COURTS

The Appellant agrees that his claims were heard in the federal courts upon review of his petition for *habeas corpus*. However, despite the Federal District Court's rejection of his claims, and later the Sixth Circuit's rejection of the claims, the Appellant argues that the Sixth Circuit's review was flawed. However, it is not appropriate for this Court to sit in judgment of the federal court's review. Such arguments violate the principles of federalism on which our government is built.

Here, the suit is barred by *res judicata* because it is a repetitious action involving the same claim. Both the principles of claim preclusion and issue preclusion apply. Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998). Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. Yeoman, 983 S.W.2d at 465.

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III.

HOLLON DID NOT CREATE A NEW CONSTITUTIONAL RULE

The Appellant goes on to suggest that his claim would be allowed by RCr 11.42. However, he then agrees that the right discussed in Hollon was established well before his own trial. The Appellant is correct that Hollon did not create a new right. Hollon created

a new procedure that does not retroactively apply. It does not create a new rule of law. The Appellant had the opportunity to pursue his claim through the *habeas* petition in federal court. The federal court rejected the claim. Hollon does not, under any circumstance, grant the Appellant the opportunity to have his federal case reviewed by the state courts.

IV.

KENTUCKY REVIEWS TRIAL ATTORNEY PERFORMANCE ON DIRECT APPEAL IN CAPITAL CASES

In addition, Kentucky has not limited the review of ineffective assistance of counsel to post conviction claims in capital cases. In this Commonwealth, alleged errors in a capital trial that are not properly preserved for appellate review are still reviewed by this Court under a heightened standard as set out in Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1991). The first inquiry under this heightened standard of review is whether the failure to object was ineffective, otherwise stated as "whether there is a reasonable justification or explanation for defense counsel's failure to object[.]" Id. at 668. Also see Perdue v. Commonwealth, 916 S.W.2d 148, 154 (Ky. 1996); Tamme v. Commonwealth, 973 S.W.2d 13, 21 (Ky. 1998); Mills v. Commonwealth, 966 S.W.2d 473, 479 (Ky. 1999); Soto v. Commonwealth, 139 S.W.3d 827, 848 (Ky. 2004). Thus, even if this Court were inclined to consider the performance of appellate counsel the Appellant cannot demonstrate prejudice as required by Strickland.

V.

THE APPELLANT MAY NOT HOLD CLAIMS IN RESERVE

To the extent that the Appellant argues that he is raising claims that have evaded review for more than twenty years, it is not appropriate to raise new claims that could have been included in prior actions - such as the prior post conviction motion or the federal habeas petition. Such efforts to sit on a known issue in order to raise it later have been uniformly rejected by state and federal courts. In McCleskey v. Zant, 499 U.S. 467 (1991), the U.S. Supreme Court upheld denial of a successive habeas petition in a death penalty case. The Court explained, "[i]f what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant." Also see McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997); Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); Commonwealth v. Gross, 936 S.W.2d 85, 88 (Ky. 1996); Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999), applying these same principles to deny a CR 60.02 motion. Thus, the court should consider the doctrine of laches in weighing this issue.

The Doctrine of Laches is a well-settled rule of equity:

> Laches in its general definition is laxness; an unreasonable delay in asserting a right. In its legal significance, it is not merely delay that results in injury or works a disadvantage to the adverse party. Thus there are two elements to be considered. As to what is unreasonable delay is a question always dependent on the facts of the particular case. Where the resulting harm or disadvantage is great, a relative brief period of delay may constitute a defense while a similar period under other circumstances may not. What is the equity of the case is the controlling questions. Courts of chancery will not become active except on the call of conscience, good faith and reasonable diligence. 10

> R.C.L. 395. The doctrine of laches is, in part, based on the injustice that might or will result from the enforcement of a neglected right. 21 C.J. 212; Glock's Adm'r v. Weikel, 149 Ky. 170, 147 S.W. 89.

Denison v. McCann, 303 Ky. 195, 197 S.W.2d 248 (1946), quoting City of Paducah v. Gillespie,et al, 273 Ky. 101, 115 S.W.2d 574, 575 (1938). The defense of laches is available even in situations where the statute of limitations has not expired, or where there is no statute of limitations. P.V. & K. Coal v. Kelly, 301 Ky. 180, 191 S.W.2d 231 (1945); Preece Coal Co. v. Island Creek Coal Co., 111 F.3d 132 (6th Cir. 1997).

The defense of laches applies in post-conviction proceedings. It applies in RCr 11.42 actions. Hayes v. Commonwealth, 837 S.W.2d 902 (Ky.App. 1992). The doctrine of laches applies in federal habeas corpus actions. Spalding v. Aiken, 460 U.S. 1093 (1983).

CONCLUSION

Wherefore, for the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the ruling of the Kenton Circuit Court.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

HEATHER M. FRYMAN
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502)696-5342

Counsel for Commonwealth