pursuant to Court order

Supreme Court of Kentucky

Nos. 2013-SC-149-D ~~& 2013-SC-818-D~~

COMMONWEALTH OF KENTUCKY — **APPELLANT/CROSS-APPELLEE**

v.

Appeal from Madison Circuit Court
Hon. Jean Chenault Logue, Judge
Indictment No. 01-CR-110

CHRISTOPHER MCGORMAN, JR. — **APPELLEE/CROSS-APPELLANT**

Brief for the Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify, this 25th day of April, 2014, that the record on appeal has not been removed from the office of the Clerk of this Court and that a copy of the Brief for the Commonwealth has been mailed to Hon. Jean Chenault Logue, Judge, Madison Circuit Court, Madison County Courthouse, 101 W. Main Street, Richmond, Kentucky 40475; and to Hon. Meggan Elizabeth Smith, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031, Counsel for Appellee/ Cross-Appellant; and served *via* e-mail on Hon. David Smith, Madison County Commonwealth's Attorney.

Todd Ferguson
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INTRODUCTION

McGorman, a minor tried as an adult, was convicted of Murder, Burglary in the First Degree, and Defacing a Firearm and sentenced to life imprisonment on September 6, 2001. This appeal concerns the denial, following an evidentiary hearing, of McGorman's several post-conviction motions. The trial court denied relief in several well-reasoned, thoughtful decisions. The Court of Appeals unduly circumscribed, using the perfect lense of hindsight, the deference properly entitled to trial counsel in making strategic decisions in the defense of the defendant.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that oral argument would be helpful in this case and so requests same.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Larry Raney, the victim in this case, was born on July 2, 1985. (Tape; 8/6/01; 12:45:42.) On January 29, 2000, Larry left the home of Pauline Combs, a neighbor of Christopher McGorman (hereinafter McGorman), to go to McGorman's house. (Tape; 8/6/01; 12:46:58.) Larry called the Combses' house later to ask if he could stay longer with McGorman. (Tape; 8/6/01; 12:48:35.)

Daniel Cameron was a neighbor of McGorman. (Tape; 8/6/01; 16:18:15.) McGorman first mentioned killing Larry Raney to Daniel Cameron between Thanksgiving and Christmas of 1999. (Tape; 8/6/01; 16:21:19.) On January 29, 2000, at around 9:45 p.m., McGorman called Daniel and told him that McGorman had done it, that the body was too heavy, and he asked Daniel for help. (Tape; 8/6/01; 16:32:05.) McGorman called back and again asked Daniel to come help him. (Tape; 8/6/01; 16:33:00.) McGorman called back a third time and told Daniel that McGorman had moved the body from the barn to the cornfield and asked Daniel to bring his Durango to the field to help McGorman get rid of the body. (Tape; 8/6/01; 16:34:38.) That last phone call between McGorman and Daniel Cameron was listened to by Deputy Jesse Dawson, of the Clark County Sheriff's Department, who heard McGorman say that he had a body to move, that he had moved it from the barn to the cornfield, but he couldn't move it anymore, and that he wanted Daniel to bring his Durango to help McGorman move it. (Tape; 8/7/01; 09:16:15.)

Detective Arlen Horton, of the Clark County Sheriff's Department, was called to McGorman's house on January 29, 2000, on a missing person call. (Tape; 8/6/01; 12:56:10.) McGorman had been advised of his rights and when asked where Larry

Raney was McGorman said that he wasn't there. (Tape; 8/6/01; 12:58:25.) McGorman even said that Larry had not been there. (Tape; 8/6/01; 12:59:20.)

Det. Horton approached the barn behind McGorman's house and found drag marks in the snow. (Tape; 8/6/01; 13:01:30.) The drag marks led from the barn into the cornfield and ultimately Det. Horton found Larry's body in the cornfield. (Tape; 8/6/01; 13:03:19, 13:08:24.)

The murder weapon, a .22 caliber pistol, was found concealed in McGorman's closet in his bedroom. (Tape; 8/6/01; 13:29:46.) The murder weapon was matched to the bullet taken from Larry Raney's body. (Tape; 8/6/01; 13:47:30.) Blood found on McGorman's pants matched the victim's blood, and the victim's blood would match one person out of 14 trillion. (Tape; 8/6/01; 13:48:45.) Some writings of McGorman, that were found later in his house, included that he felt betrayed by Larry and had plans to kill Larry. (Tape; 8/6/01; 13:50:45, 13:56:54.)

Det. Horton interviewed McGorman, in his attorney's presence, on Sunday, February 6, 2001, after he was read his rights. (Tape; 8/6/01; 14:33:55.) McGorman stated: he entered a neighbor's house through an unlocked door in hopes of finding a pistol; McGorman found a .22 caliber revolver and took it; McGorman sawed off the barrel of the .22 caliber revolver; McGorman planned Larry Raney's death for about a month beforehand; McGorman planned Larry's death with Daniel Cameron, who offered McGorman some money; Daniel thought that Larry was telling on McGorman and Daniel; Daniel directed McGorman to kill Larry; McGorman and Daniel dug a grave for Larry's body; McGorman decided to get Larry into the barn and shoot him in the back of

the head, execution style; the plan was for Daniel to come over and help McGorman take Larry's body to the grave; McGorman lured Larry to the barn and when Larry looked away McGorman shot him in the back of the head; McGorman called Daniel, but he wouldn't come; McGorman attempted to dig another, closer, grave for Larry, but he hit a pipe or something and stopped; McGorman moved Larry's body to the cornfield; McGorman then went up to the house, took off his clothes, put on a robe, and got his hair wet, so it would look like he had been in the hot tub; McGorman had Larry call Larry's mother to ask if he could stay longer, because McGorman thought he was running out of time and he wanted time to dispose of the body; McGorman put the murder weapon in a trash bag in his closet; McGorman knew that killing Larry was wrong and against the law. (Tape; 8/6/01; 14:38:50-15:26:12.)[1]

McGorman, following transfer from juvenile court, was indicted on February 18, 2000, for Murder. (Transcript of Record Volume 1, hereinafter TR1, 27.) On March 9, 2000, a superceding indictment was issued charging McGorman with Murder, Burglary in the First Degree, and Defacing a Firearm. (TR1 36.)

On August 21, 2000, McGorman filed a notice of intent to introduce evidence of insanity defense/mental illness. (TR1 123.) The trial court found McGorman competent to stand trial on March 14, 2001. (Transcript of Record Volume 2, hereinafter TR2, 202.) On May 21, 2001, McGorman filed a second notice of insanity defense. (TR2 221.)

Following McGorman's request, venue was changed to Madison County on July

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[1]During the playing of McGorman's interview there are no specific times shown. Thus all references to McGorman's interview must be made for the entire span.

31, 2001. (TR2 238. Transcript of Record Volume 3, hereinafter TR3, 305.)

At trial, along with the evidence already set forth, James Fettig, McGorman's next door neighbor, testified that when he went on vacation in September 1999, he left a key with McGorman's parents so they could put the mail inside. (Tape; 8/7/01; 09:03:12, 09:03:30.) Mr. Fettig testified that he kept a gun in his nightstand, and about a week before the crime herein he became aware that he did not know where the gun was. (Tape; 8/7/01; 09:05:05.) Mr. Fettig testified that he had not given McGorman permission to enter the house and take the gun. (Tape; 8/7/01; 09:06:07.)

Officer Brian Barnett, of Kentucky Vehicle Enforcement, testified that on the night of the crime McGorman was calm and matter-of-fact, and did not say anything about hallucinations, hearing voices, or physical abuse. (Tape; 8/7/01; 09:37:16-39:25.) Officer Barnett testified that McGorman seemed extremely competent. (Tape; 8/7/01; 09:37:16-39:25.)

Dr. Greg Davis, the Associate Chief Medical Examiner for Kentucky, testified that Larry Raney was killed by a gunshot wound to the head. (Tape; 8/7/01; 09:53:14.)

During McGorman's presentation, his mother testified that she and her husband had filed a document in the Clark Circuit Court, on February 16, 2001, stating that they had no knowledge or information that McGorman may have been suffering from mental illness at or prior to the time of the crime. (Tape; 8/7/01; 11:03:02.)

Dr. David Shraberg, a licensed medical doctor who is board certified in psychiatry and neurology, testified, in the Commonwealth's rebuttal case, that he had conducted an evaluation of McGorman for criminal responsibility. (Tape; 8/8/01; 09:40:20, 09:43:06.)

Dr. Shraberg testified that McGorman was able to appreciate the criminality of his conduct and could conform his conduct to the requirements of the law, and thus was criminally responsible for this crime. (Tape; 8/8/01; 09:55:41.) Dr. Shraberg testified that McGorman was not mentally ill at the time of the crime, but that he had diagnosed McGorman as being a psychopath. (Tape; 8/8/01; 10:04:17, 10:05:22.)

On September 6, 2001, McGorman was convicted of Murder, Burglary in the First Degree, and Defacing a Firearm and sentenced to life imprisonment. (TR3 364.)

On appeal to this Court, McGorman's conviction was affirmed on May 22, 2003. (Transcript of Record Volume One, hereinafter TR One, 9.)

McGorman filed a RCr 11.42 motion on December 9, 2004. (TR One 32.) On January 30, 2007, McGorman filed a CR 60.02 motion as an alternative to his RCr 11.42 motion. (TR One 102.) McGorman then moved to join the two post-conviction motions on March 14, 2007. (TR One 123.) On April 30, 2007, the Commonwealth filed a joint response to the two post-conviction motions. (TR One 144.) McGorman filed a reply on May 16, 2007. (Transcript of Record Volume Two, hereinafter TR Two, 181.)

On March 10, 2008, McGorman filed a supplemental RCr 11.42 motion. (TR Two, 239.) The Commonwealth responded on April 17, 2008. (TR Two 301.) Five days later McGorman filed a reply. (TR Two 310.) On July 14, 2009, the trial court entered an extensive, 27 page order denying McGorman's motions in part and setting a hearing on certain issues. (Transcript of Record Volume Three, hereinafter TR Three, 387.)

The first witness at the evidentiary hearing was McGorman's first attorney, Hon. Alex Rowady. (DVD; 12/7/09; 9:25:50.) Mr. Rowady, who has practiced law since

1988, began representing McGorman in January 2000 - he was called the morning (a Sunday) after the crime occurred. (DVD; 12/7/09; 9:26:19.)

Mr. Rowady stated that McGorman gave his statement to the police the first Sunday of February, eight days after the crime. (DVD; 12/7/09; 9:27:39.) In the week between the crime and the statement, Mr. Rowady had at least six, but probably more, contacts with McGorman, beginning the morning after the crime. (DVD; 12/7/09; 9:28:35.) These contacts included a juvenile detention hearing on Wednesday and a number of visits to the jail to speak with McGorman. (DVD; 12/7/09; 9:28:35.)

Mr. Rowady was sure that he told McGorman to tell the truth in the statement - by that point McGorman had told Mr. Rowady that he had committed the murder, and McGorman's confession was confirmed by a substantial amount of physical evidence. (DVD; 12/7/09; 9:29:56.) They had talked about what they could do to mitigate the situation; there had been a lot of discussion with McGorman, his parents, and Mr. Rowady's investigators about Daniel Cameron's role in the crime. (DVD; 12/7/09; 9:29:56.) It was clear to Mr. Rowady when he talked with McGorman on the Saturday before the police statement that McGorman had shot Larry Raney and that Daniel appeared to play a substantial role in the events leading up to the shooting. (DVD; 12/7/09; 9:29:56.) Mr. Rowady told McGorman to tell the truth, because the Commonwealth already had a pretty good amount of evidence about what occurred, and to be clear about how Daniel was involved. (DVD; 12/7/09; 9:31:30.)

Mr. Rowady felt, from information from McGorman and his parents and from the investigation, that Daniel Cameron had probably played a significant role in the events.

(DVD; 12/7/09; 9:32:35.) Mr. Rowady also had reason to believe that the police did not know the extent of Daniel's involvement. (DVD; 12/7/09; 9:32:35.)

Mr. Rowady contacted Det. Horton because the investigation of the Clark County Sheriff's Department and Mr. Rowady's investigation had uncovered/revealed parallel discoveries of physical evidence - he believed that both sides had similar views of what had occurred. (DVD; 12/7/09; 9:33:40.) Mr. Rowady had discussed the case several times with Det. Horton throughout the week - the first time was the Sunday morning after the crime occurred. (DVD; 12/7/09; 9:35:05.) Mr. Rowady received daily updates from Det. Horton about the progress of the investigation and knew well the physical evidence which had accumulated early in the investigation. (DVD; 12/7/09; 9:38:38.) McGorman's statement to the police was made after McGorman had taken and passed a polygraph exam which had confirmed that Daniel Cameron had played a significant role in the events. (DVD; 12/7/09; 9:33:40.)

Mr. Rowady testified that he still believes McGorman concerning Daniel Cameron's involvement. (DVD; 12/7/09; 9:45:30-48:21.) After McGorman gave his statement, Mr. Rowady continued investigating the case based upon information from McGorman concerning Daniel. (DVD; 12/7/09; 9:45:30-48:21.) It appeared to Mr. Rowady that Det. Horton was also concerned about Daniel's involvement because he devoted much time to investigating said involvement. (DVD; 12/7/09; 9:45:30-48:21.) Mr. Rowady believed that if he could show Daniel was the puppeteer controlling McGorman, then he could greatly help McGorman's case. (DVD; 12/7/09; 9:45:30-48:21.)

When asked what consideration he had given to having the Commonwealth's Attorney present for the statement, Mr. Rowady answered by way of saying that when McGorman, whom they had been keeping apprised of the mounting evidence, informed one of Mr. Rowady's investigators on Friday that he had shot Larry Raney, then Mr. Rowady, an investigator or two, and a law partner went to McGorman's house to inform the parents. (DVD; 12/7/09; 9:53:50-57:00.) The evidence at that point was pretty clear to Mr. Rowady that Daniel Cameron was involved. (DVD; 12/7/09; 9:53:50-57:00, 10:22:51.) They met with McGorman's parents for a couple of hours and it was agreed that if McGorman passed a polygraph examination, then McGorman would give a statement to the police and McGorman's mother would make a statement in the media about what a tragedy the whole situation was for two families. (DVD; 12/7/09; 9:53:50-57:00.) The strategy was that this would hopefully bring Daniel in as a suspect and take some of the spotlight off of McGorman. (DVD; 12/7/09; 9:53:50-57:00.) Mr. Rowady thought this was a pretty good strategy. (DVD; 12/7/09; 9:53:50-57:00.) Mr. Rowady stated that his advice to give the statement to the police was supported by the investigators, McGorman's father, and McGorman's mother. (DVD; 12/7/09; 10:00:14.) Part of Mr. Rowady's reasoning concerning giving a statement to the police was that McGorman was credible to Mr. Rowady, and he believed McGorman would be credible to a jury as well. (DVD; 12/7/09; 10:05:00.)

Mr. Rowady felt that time was of the essence, felt that if they waited the effect of the information would not be as strong, felt like they should get the information out quickly so that it seemed fresh, uncontrived, and would have indicia of reliability because of the recency of the events. (DVD; 12/7/09; 9:57:30.)

Mr. Rowady testified that McGorman's parents knew that the Saturday polygraph examination was upcoming, because they paid for it. (DVD; 12/7/09; 9:58:32.) They also knew that the statement to the police was upcoming, because that was the purpose for getting the polygraph. (DVD; 12/7/09; 9:58:32.)

Mr. Rowady also testified that the practice in the Madison Circuit is that the Commonwealth's Attorney does not participate in proffers. (DVD; 12/7/09; 10:01:03.)

Mr. Rowady had two to three investigators involved by the Monday after the crime; they met with McGorman's parents and surveyed the property where the crime occurred. (DVD; 12/7/09; 10:08:40.) The investigators were also aware of what the police were doing. (DVD; 12/7/09; 10:08:40.)

By the time of the juvenile detention hearing at midweek, Mr. Rowady described the evidence against McGorman as extremely strong. (DVD; 12/7/09; 10:13:53.) Mr. Rowady believed it was important to bring Daniel Cameron into the case because he was an 18-year-old who had McGorman under his control. (DVD; 12/7/09; 10:03:55.) He felt like McGorman and his parents believed the same thing. (DVD; 12/7/09; 10:03:55.) As it became crystal clear that McGorman had shot and killed Larry Raney, Mr. Rowady felt like a jury, hearing about Daniel's influence over McGorman, would recognize the impact of the relationship of the older boy with the younger boy - felt like it would give

the jury an idea of who was the real mastermind of this crime. (DVD; 12/7/09; 10:16:13.) The evidence against McGorman was overwhelming and Mr. Rowady believed that if he could get Daniel involved/indicted, then the jury might find their (Daniel's and McGorman's) relative positions mitigating for McGorman. (DVD; 12/7/09; 10:24:00.)

It was clear to Mr. Rowady that there had been some real discussions/planning before the crime. (DVD; 12/7/09; 10:16:13.) This opinion was strengthened when the shallow graves, which Daniel admitted helping McGorman dig, were found. (DVD; 12/7/09; 10:16:13.) The shallow graves were first found by Mr. Rowady's investigators. (DVD; 12/7/09; 10:17:43.)

As the week progressed, it seemed to Mr. Rowady that Det. Horton was more focused on McGorman than on Daniel Cameron, and he also learned that Daniel was pointing the finger at McGorman and minimizing his own role. (DVD; 12/7/09; 10:18:19-20:32.) Mr. Rowady believed they needed to change the focus from McGorman to Daniel. (DVD; 12/7/09; 10:18:19-20:32.) Mr. Rowady discussed the strategy of refocusing the case with his investigators, others in his firm, and McGorman's parents and everyone believed it was a good strategy. (DVD; 12/7/09; 10:18:19-20:32.)

McGorman knew on Saturday that he was going to meet with Det. Horton. (DVD; 12/7/09; 10:29:00.) McGorman agreed with the strategy. (DVD; 12/7/09; 10:30:37.)

Mr. Rowady testified that there was no indication of any mental problem with McGorman when they first met, and McGorman's parents gave no indication of such. (DVD; 12/7/09; 10:32:28.) Concerns for McGorman's mental state started to surface in

the spring of 2000 as the case continued on after indictment. (DVD; 12/7/09; 10:34:30.) McGorman's mental status was deteriorating - it appeared that the enormity of the case and the reality that he was not going to just be allowed to go home began to weigh heavily on McGorman. (DVD; 12/7/09; 10:34:30.)

Mr. Rowady testified that it was his belief that they needed to avoid dancing around the idea of what happened physically in the case - there was no doubt in his mind, even if McGorman did not ever utter a word, that a jury would believe that McGorman committed the act. (DVD; 12/7/09; 10:42:05.) So Mr. Rowady believed that the better course was to accept that responsibility, but also tell the jury in a very frank, unchoreographed way that there was another major player in the crime. (DVD; 12/7/09; 10:42:05.)

Finally, Mr. Rowady stated that he consulted with several renowned experts in this type of case about the strategy, and felt like, in consulting with these experts, that they were on the right track. (DVD; 12/7/09; 10:43:17.)

Professor William Fortune, of the University of Kentucky School of Law, was the second witness at the evidentiary hearing. (DVD; 12/7/09; 10:56:25.) Prof. Fortune testified that it was rare that a defense lawyer would have a client give a statement to the police, and if it were to occur, it should only happen after the lawyer had obtained discovery and investigated the case so that the lawyer would be aware of the facts and the prosecutor's proof. (DVD; 12/7/09; 10:58:45-11:00:29.) He stated that the method by which such a statement should be done is for the lawyer to make a proffer to the prosecutor of what the defendant would say, so that it would be part of plea negotiations,

and then if the prosecutor agreed to a disposition which was agreeable to the defendant, then the defendant could make a statement. (DVD; 12/7/09; 10:58:45-11:00:29.) Prof. Fortune's opinion was that competent defense counsel, particularly in a serious case like this one, would never allow his client to speak to the police without the prosecutor's involvement. (DVD; 12/7/09; 10:58:45-11:00:29.)

On cross-examination, Prof. Fortune testified that he had been employed by the Department of Public Advocacy for roughly a year (the 1991-92 academic year) and had also had a criminal practice from 1964 to 1969 in Kentucky state courts. (DVD; 12/7/09; 11:08:55.) He also had been employed as a federal public defender for two and one-half years. (DVD; 12/7/09; 11:08:55.)

Further, Prof. Fortune testified that he had not reviewed McGorman's statement, had not looked at the case report, and had not talked to Mr. Rowady about his strategy. (DVD; 12/7/09; 11:12:13.) He also stated he was not aware that the Commonwealth's Attorney for the Madison Circuit does not engage in proffers (although the Commonwealth explained that this was not to say that the Commonwealth would not talk with a defense attorney during plea bargaining about what a defendant might say). (DVD; 12/7/09; 11:12:33.)

Prof. Fortune opined that it would be reasonable to hire a private investigator to verify information received from the police, reasonable to investigate independently, and reasonable to consult with experts in this type of case about strategy. (DVD; 12/7/09; 11:15:27.)

The third, and final, witness at the evidentiary hearing was Hon. Andrew

Stephens, McGorman's trial attorney[2]. (DVD; 12/7/09; 11:32:30.) Mr. Stephens stated that the trial began with a difficult voir dire because there was a young boy who was dead and they weren't disputing guilt. (DVD; 12/7/09; 11:39:57-42:20.) During voir dire, Mr. Stephens made an admission that McGorman committed the act - McGorman was uncomfortable, everyone in the courtroom was uncomfortable. (DVD; 12/7/09; 11:39:57-42:20.)

After the evidentiary hearing, McGorman filed a motion to supplement on January 8, 2010. (TR Three 417.) Following that, McGorman filed a post-hearing memorandum, the Commonwealth filed a response, and McGorman replied. (TR Three 438. Transcript of Record Volume Four, hereinafter TR Four, 488, 537.) On August 17, 2010, the trial court entered an order denying McGorman relief on the remaining issues. (TR Four 542.) McGorman then filed a motion to reconsider on August 26, 2010. (TR Four 547.) On September 27, 2010, the trial court denied McGorman's motion to reconsider. (Transcript of Record Volume Five, hereinafter TR Five, 675.)

On appeal, the Court of Appeals faulted Mr. Rowady's investigation, his failure to have McGorman evaluated, and failure to speak with the prosecutor before the interview with the police. (Opinion pp. 20-21.)

The Commonwealth asked this Court to grant discretionary review of the Court of Appeals's decision and this Court allowed such. Additional facts shall be developed, as needed, in the Argument section of this brief.

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[2]Mr. Stephens's testimony was largely not related to the issue raised in this brief and so will not be extensively set forth at this point.

ARGUMENT

Ineffective Assistance of Counsel Standard

A criminal defendant has an extremely heavy burden to satisfy as to an allegation of ineffective assistance of counsel. The standard he must satisfy to show the ineffective assistance of counsel has been stated as follows:

> . . . the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland v. Washington, 466 U.S. 668, 14 S.Ct. 2052, 80 L.Ed.2d 674, 692 (1984).

A defendant must show both that his attorney made an error so serious that he was not functioning as counsel for purposes of the Sixth Amendment and that the error was such that the defendant was deprived of a fair proceeding whose result is reliable. *Id.* 80 L.Ed.2d at 693. By "reliable" the Court means 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. 80 L.Ed.2d at 698 (emphasis added).

Review of counsel's performance is to be highly deferential. *Id.* 80 L.Ed.2d at 694. Counsel's action is strongly presumed to have been within the wide range of reasonable, professional assistance. *Id.* Counsel's action is also presumed to be a part of sound trial strategy. *Id.* 80 L.Ed.2d at 694-95. The totality of the evidence in the case must also be considered. *Id.* 80 L.Ed.2d at 698. The Strickland standard has been

recognized in Kentucky. Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky., 1986), cert. denied, 478 U.S. 1010, 92 L.Ed.2d 724, 106 S.Ct. 3311 (1986).

In discussing claims of ineffective assistance of counsel, the Supreme Court of Kentucky has held:

> The standards which measure ineffective assistance of counsel are set out in Strickland v. Washington, 466 U.S. 66, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Sanborn, supra. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6th Cir.1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. Morrow, supra. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).
>
> In considering ineffective assistance, the reviewing court must focus on the totality of the evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. See Morrow; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).
>
> A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997). Strickland notes that a court must indulge a strong presumption that counsel's conduct falls within the wide

> range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

Haight v Commonwealth, 41 S.W.3d 436, 441-42 (Ky., 2001). The Court expounded further in Hodge v Commonwealth, 116 S.W.3d 463, 469 (Ky., 2003):

> As noted earlier, it is the responsibility of Hodge to identify specific errors by his defense counsel and demonstrate that those errors were objectively unreasonable under the circumstances existing at the time of the trial. A careful study of the proceedings indicates that the actions of the defense counsel were the result of trial strategy and the alleged errors did not prejudice Hodge in his right to a fair trial. See Strickland; Taylor v. Commonwealth, Ky., 63 S.W.3d 151(2001). As noted in Strickland , no particular set of detailed rules for counsel's conduct can satisfactorily take into account the variety of circumstance faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
>
> > A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Strickland.
>
> Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect. Cf. Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152

L.Ed.2d 914 (2002).

Kentucky's High Court has stated:

> We have previously pointed out, in what we believe to be forceful language, that this court absolutely will not turn back the clock and retry these cases in an effort to second-guess what counsel should have or should not have done at the time. To follow such proceeding would be to deprive the judgments of our courts of any finality. The appellant is entitled to a fair trial under the law. He is not entitled to try the court and his lawyer and the law. Penn v. Commonwealth, Ky., 427 S.W.2d 808. The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by a post-conviction proceedings provided in RCr 11.42. Again, we wish to emphasize the word extraordinary. Commonwealth v. Campbell, Ky., 415 S.W.2d 614.

Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky., 1968). *Cf.*, Simmons v. Commonwealth, 191 S.W.3d 557, 561 (Ky., 2006); Sanders v. Commonwealth, 89 S.W.3d 380, 388 (Ky., 2002); Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky., 1999); Hibbs v. Commonwealth, 570 S.W.2d 642, 644 (Ky. App., 1978).

The Sixth Circuit held in McQueen v. Scroggy, 99 F.3d 1302, 1313-15 (6th Cir., 1996):

> Whenever an attorney loses a case or suffers some adverse result, he may be ineffective in the colloquial sense of the word. However, 'ineffective assistance of counsel' is a constitutional term of art. Because the sole basis for the presence of an attorney is not to turn the courtroom into a jousting arena, but to insure systemic fairness an attorney's merely losing, being wrong, or miscalculating is not enough to free every person convicted of a crime. As Fretwell makes clear, even proving that the outcome would have been different, standing alone is not enough.

Moreover, Kentucky's High Court stated:

> RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court.

Penn v. Commonwealth, 427 S.W.2d 808, 809 (Ky., 1968).

"[B]ecause counsel's conduct is presumed reasonable, for a [defendant] to show that the conduct was unreasonable, a [defendant] must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315(11th. Cir., 2000) (En Banc).

Recently, the Supreme Court of United States stated:

> Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624, 642-43 (2011).

Finally, the United States Supreme Court in Strickland v. Washington, 80 L.Ed.2d at 695, stated, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Cf.*, Brown v. Commonwealth, 253

S.W.3d 490, 501 (Ky., 2008)(A court reviewing an ineffective assistance of counsel claim must keep in mind that "counsel's strategy may be influenced by what his client says.").

I.

MCGORMAN RECEIVED REASONED, EFFECTIVE ASSISTANCE OF COUNSEL FROM MR. ROWADY CONCERNING MAKING A STATEMENT TO THE POLICE. TRIAL COUNSEL IN THE HEAT AND PRESSURE OF A CASE HAS WIDE LATITUDE IN MAKING STRATEGIC DECISIONS WHICH ARE ENTITLED TO STRONG DEFERENCE ON REVIEW. COURTS ARE NOT TO UNDULY SECOND-GUESS COUNSEL; THE CRITICAL QUESTION IS WHETHER A DEFENDANT RECEIVED A FAIR TRIAL.

McGorman seeks to turn back the clock and question Mr. Rowady's reasoned, strategic decisions with all the benefits of hindsight. The trial court viewed McGorman's claims with a skeptical eye in both of its extensive orders in this case. (TR Three 390-91. TR Four 543-44.) The trial court specifically stated:

> Hon. Alex Rowady testified as to the facts and circumstances surrounding the defendant's confession, which is made eight days after the murder. Mr. Rowady testified that the defense team, which consisted of Mr. Rowady, his associate, Hon. Kimberly Blair, the defendant, the defendant's parents, and three private investigators, believed that there was another major culpable actor involved in the events took place. Daniel Cameron, an older teen, was believed to have been the mastermind who devised the scheme to murder Lee Raney, and that Cameron had manipulated the younger defendant into acting upon that scheme. Mr. Rowady and the defense believed that Cameron had orchestrated the plan which resulted in the murder, and that the authorities at that time were unaware as to the extent of Cameron's involvement in the crime. Mr. Rowady testified that the purpose behind the decision for the defendant to give the confession was to show the authorities that Cameron was the mastermind, and

> to get the investigation pointed in Cameron's direction with the ultimate objective being to mitigate the consequences for the defendant despite the overwhelming physical evidence against him.
>
> Mr. Rowady further testified that the most convincing way to present this evidence was directly from the defendant himself in a statement "un-distilled, from his own mouth, and very credible." (DVD beginning 10:04). Given the overwhelming evidence against the defendant that had already been collected by the authorities, Mr. Rowady indicated that it was essential to get the information about Cameron out as quickly as possible, which was a determining factor behind the timing of the confession. According to Mr. Rowady's testimony, the quick timing of the confession was to ensure that the information involving Cameron did not appear to be contrived or fabricated over a long period of time, but rather was reliable information based upon the recent events.
>
> Finally, Mr. Rowady testified that he consulted with the defendant, the defendant's parents, and the entire defense team about the decision to advise or encourage the defendant to give the confession, and that he explained how the confession would factor into the overall trial strategy.
>
> Based on the testimony, the court finds that Hon. Alex Rowady's decision to advise or encourage the defendant to give his confession was a defense strategy; a tactical decision made in his client's best interest given the defendant circumstances at the time, and did not amount to ineffective assistance of counsel under the Strickland standard. See Strickland v. Washington, 466 U.S. 668 (1984). The court is not convinced that the defendant has established that there is a reasonable probability the result of the proceeding in this case would have been any different, but for Hon. Alex Rowady's decision to advise or encourage the defendant to make the confession at issue. Id.

(TR Four 543-44.)

McGorman's argument, and the decision of the Court of Appeals, amounts to a claim that every attorney should have practiced this case in exactly the same way, and that

is simply not the law. McGorman's counsel was very well aware, both through his investigators and the police, about the overwhelming evidence that McGorman had shot Larry Raney. Counsel had no reason to believe, at this point, that McGorman was suffering mental issues. And counsel had every reason to believe that a more culpable actor remained largely unscrutinized by the police, and was actually attempting to place blame on McGorman.

Mr. Rowady made a reasoned, deliberate, strategic decision that was not outside of the realm of appropriate courses of action. Counsel's strategy was designed to shift some of the intense scrutiny off of McGorman and onto Daniel Cameron. It had the added advantage of providing a way to get McGorman's version of the events before a jury without McGorman having to take the stand, and did so in a way that could have possibly made McGorman seem less culpable (i.e., putting forth the idea that McGorman had been manipulated/led in this crime by the older Daniel). Moreover, the efficacy of this strategy is supported by the fact that McGorman ultimately did not contest his guilt at trial. And finally, Mr. Rowady's strategy was agreed with by McGorman, McGorman's parents, and by his law partner - they essentially all agreed that it was the best strategy under the circumstances. Other counsel may have practiced this case in a different manner, but that is not the standard for judging ineffectiveness. Compare Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). The trial court gave proper deference to Mr. Rowady's strategic decisions and the Court of Appeals did not. The decision of the Court of Appeals should be reversed.

Moreover, McGorman completely failed to carry his burden to show that

counsel's action in any way affected the result in this case. This was a case of overwhelming evidence, even excluding McGorman's statement, and there is no reason to believe that the result would have changed absent McGorman's statement. It must be remembered that McGorman, through a second attorney, chose not to contest his guilt at trial. And it should be noted that, on top of all the physical evidence, on the day of the crime Deputy Jesse Dawson, of the Clark County Sheriff's Department, heard McGorman tell Daniel Cameron that he had a body to move, that he had moved it from the barn to the cornfield, that he couldn't move it anymore, and that he wanted Daniel to bring his Durango to help McGorman move it. (Tape; 8/7/01; 09:16:15.) There is simply no possibility that the jury would have viewed this case in a different manner if they had not heard McGorman's statement to the police. McGorman has failed to meet the prejudice prong of the Strickland test. The decision of the Court of Appeals should be reversed.

Finally, the finding of prejudice by the Court of Appeals is based on McGorman's statement affecting his ability to have a fair trial. This position is problematic in that the statement should still be available for the Commonwealth's use upon retrial. Statements are suppressed because of some wrong-doing on the part of the Commonwealth - we see this all the time where the Commonwealth violated a defendant's rights. They are suppressed for deterrence purposes. In this case, however, the Commonwealth had no part in any alleged error concerning McGorman's statement. McGorman was simply following the advise of his attorney when he gave his statement to the police. The Commonwealth is not aware of any statutory or case law which would prevent the Commonwealth from using McGorman's statement upon retrial of the case. That being

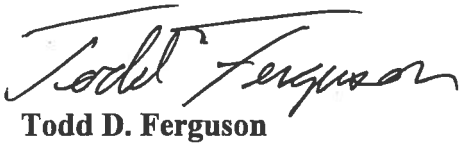
the case, McGorman's retrial will contain the same evidence as was presented at his first trial. Given that, the Commonwealth fails to see how McGorman suffered any prejudice as recognized under Strickland. The decision of the Court of Appeals should be reversed.

CONCLUSION

Based upon the foregoing, the Commonwealth respectfully urges this Court to reverse the decision of the Court of Appeals and affirm the judgment of the Madison Circuit Court.

Respectfully submitted,

Jack Conway
Attorney General of Kentucky



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