UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action No. 5:06-CV-216-R
Death Penalty Case
Electronic Filing

ROBERT KEITH WOODALL PETITIONER

v.

THOMAS SIMPSON, WARDEN RESPONDENT
Kentucky State Penitentiary

RESPONDENT'S ANSWER AND MEMORANDUM OF LAW OPPOSING PETITION FOR WRIT OF HABEAS CORPUS

Comes the Attorney General of the Commonwealth of Kentucky as counsel for Respondent, Thomas L. Simpson, Warden, Kentucky State Penitentiary, and hereby states for its answer and memorandum of law opposing the Petition for Writ of Habeas Corpus, and requests that the Petition be denied and dismissed with prejudice, as follows[1]:

COUNTERSTATEMENT OF THE CASE

PROCEDURAL FACTS

On January 25, 1997, in Muhlenberg County, Petitioner, Robert Keith Woodall, admittedly kidnapped 16 year old Sarah Hansen, slit her throat twice, raped her, and threw her in a nearby ice cold lake, leaving her to drown.

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[1] Pursuant to Rule 8(a) to the Rules Governing 28 U.S.C. §2254 Cases in the United States District Courts, a motion for summary judgment is not required in habeas corpus cases, unless an evidentiary hearing is conducted or unless the state court record is expanded upon in the habeas corpus proceeding pursuant to court order under Rule 7. Young v. Herring, 938 F.2d 543, 561-562 (5th Cir. 1991); McBride v. Sharpe, 25 F.3d 962, 970 and 973 (11th Cir. 1994)(en banc). Also see, Lonchar v. Thomas, 517 U.S. 314, 325-26 (1996).

Woodall was indicted on March 18, 1997 for one count of capital murder, one count of capital kidnapping and one count of rape in the first degree. Transcript of Record I, 43.[2] On April 10, 1998, Woodall entered a conditional guilty plea to each charge. Transcript of Evidence 3, 405-17.[3] A jury sentencing trial was held July 14th - 20th, 1998. At the conclusion of the penalty phase, Woodall was sentenced to death for the murder of Sarah Hansen. TE 12, 1640. The jury found the aggravating circumstance to be first degree rape committed during the commission of a kidnapping and murder. TR VIII, 1145. The jury fixed Woodall's punishment for the kidnapping and rape at two consecutive life sentences. Id., at 1148. The final judgment of conviction and sentence of death was entered on September 4, 1998. Id. at 1179-82. The court followed all of the jury's recommendations. Woodall directly appealed that judgment.

Woodall's sentence and convictions were upheld by the Kentucky Supreme Court on August 23, 2001, and made final on January 17, 2002. Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2002). Certiorari was denied October 7, 2002. Woodall v. Kentucky, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002). On December 3, 2002, Woodall filed a Motion to Vacate and Set Aside Sentence of Death under RCr 11.42.[4] Collateral Attack Record,[5] II, 144-266. On February 6, 2003, Woodall filed his First Amended Motion to Vacate and Set Aside Sentence of Death Under RCr 11.42. CAR III, 274. On February 17, 2003, the Commonwealth

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[2]The transcript of record will hereinafter he referred to as TR.

[3]The transcript of evidence will hereinafter he referred to as TE.

[4] "RCr" is the abbreviation for the Kentucky Rules of Criminal Procedure. Rule 11.42 is Kentucky's procedure for collateral review of criminal convictions and sentences.

[5]The collateral attack record will hereinafter be referred to as CAR.

filed an objection to Woodall's "Notice" of Filing First Amended Motion Under RCr 11.42.[6] CAR III, 392. On the same date, the Commonwealth also filed its Answer to Woodall's Motion to Vacate and Set Aside Sentence of Death Under RCr 11.42. CAR IV, 398. The court allowed Woodall to reply to the Commonwealth's answer on March 7, 2003. CAR IV, 491.

On March 7, 2003, Woodall filed a second amendment to his RCr 11.42 motion along with a request for permission to amend. CAR V, 553; 556. On the same date, Woodall also filed a "Motion to Suspend the RCr 11.42 Petition Pending a Determination of Movant's Competency." CAR V, 529. On April 2, 2003, Woodall filed a Motion to Proceed *Ex Parte*. CAR V, 560. The Commonwealth objected to Woodall's second motion to amend on April 7, 2003. CAR V, 565. On the same date, the Commonwealth also filed an "Objection to Woodall's Motion to Suspend the RCr 11.42 Petition Pending a Determination of Movant's Competency." CAR V, 571. On April 22, 2003, the Caldwell Circuit Court filed an "Order Denying Motion to Amend 11.42." CAR V, 586. The trial court stated on the first page of its opinion that it was denying the amendment because it was an attempt to supplement the record on an issue that had previously been raised in the original RCr 11.42. On April 22, 2003, the trial court also denied Woodall's RCr 11.42 motion without an evidentiary hearing. CAR V, 588. On the same date, the trial court also filed orders denying Woodall the ability to proceed *ex parte* and denying his motion to suspend the RCr 11.42 proceedings. CAR V, 583; 584.

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[6] The Commonwealth has been unable to locate a court order in the record denying leave to amend. It should be noted that in the motion Woodall claimed that the changes made were only "clerical errors." However, upon a reading of the new and improved motion it appears that Woodall rephrased many thoughts in the successive RCr 11.42 motion. The Commonwealth noted in its objection to the notice of filing the first amended motion, that all claims were understandable and answerable without using the amended motion.

On May 1, 2003, Woodall filed a document entitled, "Motion Under CR 59.05 to Vacate RCr 11.42 Judgment and Vacate Orders Denying Stay For Competency Proceedings, Denying Permission to Proceed *Ex Parte*, and Denying Permission to Amend." CAR V, 604. On May 14, 2003, the Commonwealth filed an objection to the motion. CAR V, 631. On May 23, 2003, the trial court entered an order denying: the motion under CR 59.05 to vacate the RCr 11.42 judgment, the motion to vacate the orders denying the stay for competency, permission to proceed *ex parte*, and permission to amend. CAR V, 648. On December 23, 2003, Woodall filed his RCr 11.42 appeal brief with the Kentucky Supreme Court. The Court affirmed the denial of Woodall's RCr 11.42 motion on November 23, 2005. On February 23, 2006, the Court denied a petition for rehearing. Woodall filed a Petition for Certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. Woodall v. Kentucky, 127 S.Ct. 280, 168 L.Ed.2d 214 (2006).

On June 1, 2004, Woodall filed a "motion for relief from judgment and sentence from death pursuant to CR 60.02(f)." Record on Appeal, 5.[7] The Commonwealth responded on July 26, 2004. ROA, 23. In the Commonwealth's response, the Commonwealth did not address Woodall's claims on the merits but argued various procedural bars including, *inter alia*, that Woodall's CR 60.02 motion was untimely. ROA, 23. A hearing was held on August 6, 2004. Woodall filed a hearing brief on the same day as the hearing. ROA, 28. After the hearing, on September 7, 2004, Woodall filed a supplemental hearing brief. ROA, 37. Two days later on September 9, 2004, Woodall filed an additional supplemental hearing brief. ROA, 44. On October 4, 2004, the Caldwell Circuit Court entered an order denying Woodall's motion for

[7] The record on appeal will hereinafter be referred to as ROA.

relief pursuant to CR 60.02. ROA, 51. On April 1, 2005, Woodall filed his brief appealing the Caldwell Circuit Court's order denying his CR 60.02 motion. On October 20, 2005, the Kentucky Supreme Court rendered its opinion affirming the Caldwell Circuit Court's order denying Woodall's CR 60.02 motion for relief. Woodall v. Commonwealth, 2005 WL 2674989 (Ky.). The Court denied a petition for rehearing on February 23, 2006. Woodall filed a Petition for Certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. Woodall v. Kentucky, 127 S.Ct. 266, 166 L.Ed.2d 206 (2006).

On December 28, 2006, Woodall filed this Petition for Writ of Habeas Corpus in the United States District Court, Western District of Kentucky.

FACTS

In January of 1997 Sarah Hansen was 16 years old. TE 10, 1340. She was a high school cheerleader, an honor student, an "incredible trumpet player," a member in both the National Honor Society and the Beta Club, and a medalist in swimming and diving. TE 9, 1192. On January 25, 1997, at 5:30 a.m., Sarah's parents drove her to a cheerleading competition in Louisville, Kentucky. TE 10, 1341. She and her family returned home to Greenville at 4:30 p.m. Id.

Sarah had plans that evening to watch a video with her boyfriend, Kyle Lovell. TE 9, 1193. She headed for the local Minit Mart to rent a movie. Id. Sarah left her house between 7:30 and 8:00 that evening. TE 10, 1341. Sarah's mother walked her to the door, saying, "Bye bye, I love you." Id. That was the last time Sarah's mother saw her alive.

Sylvester Johnson, who worked at the Minit Mart, talked to Robert Keith Woodall when he was in the Minit Mart at 7:30 p.m. on the same night. TE 9, 1197-98. Woodall was

upset because his girlfriend, Amanda Duncan, was having a "ladies night out." Id. at 1199. By 7:50 p.m., Sylvester noticed Woodall was gone. Id. at 1200. Sylvester, who also knew Sarah, saw her at about 7:55 p.m. in the Minit Mart. Id. She said she and Kyle were going to watch a movie. Id. She got the movie and left by 8:00 or 8:05 p.m. Id. at 1200, 1203.

Kyle returned home from a swim meet around 8:30 p.m. Id. at 1193. He changed clothes and went right to Sarah's house. When he got to Sarah's, Julie Hansen, Sarah's mother, told Kyle that Sarah had just left to get a video and should be back any time. Id. Sarah's brother Robert was also there. Id. Sarah's father was at church. Id. Kyle talked to Sarah's mother for 40 minutes. Id.

After that, Kyle started getting tired and decided to go to the Minit Mart to look for Sarah. Id. at 1193-94. He drove to the Minit Mart. When he didn't see her, he drove to McDonald's and then checked back at her house. Id. Still, no Sarah. Kyle continued looking for Sarah until 10:00 p.m. Id. at 1194. When he got home, Sarah's mother called him, upset, because it wasn't like Sarah to change plans and not call home. Id. Kyle then headed back out to look for Sarah. Id. at 1195. By this time, several people were out looking for her. Id.

At 10:42 p.m., Officer Duane Harvey was dispatched to Sarah's home. Id. at 1206. He and another officer, Officer West, began searching for Sarah. Id. at 1207. Officer West found the 1990 blue Safari mini-van that Sarah had been driving. Id. at 1208. The van was in a ditch at Luzerne Lake approximately 1.5 miles from the Minit Mart. Id. at 1206, 1209. The door was partially cracked; there were large amounts of blood in the ditch just under the driver's door and large amounts of blood everywhere inside the van. Id. at 1209. There was also a bloody orange box cutter on the ground 10 to 15 feet away from the van. Id.

Officer Harvey then began following a trail of blood on a gravel road to the left of the van. Id. at 1210. The bloody trail continued for approximately 400-500 feet before it trickled out. Id. There were then drag marks from that point out to the dock of the lake. Id. The drag marks went out over the edge of the dock. Id. Officer Harvey shined his light into the water and saw the unclothed body of Sarah floating there.[8]

Sarah's throat had been deeply slashed twice. Id. at 1221. Each cut was approximately 3.5 to 4 inches long. Id. at 1222. Her trachea was totally severed. Her injuries were consistent with having been caused by a box cutter. Id. at 1227. When Sarah's trachea was severed she could no longer have spoken. Id. at 1222. Multiple muscles that supported her head and neck were also severed. Id. at 1223. There were bruises and abrasions all over the rest of Sarah's body. Id. at 1221.

Sarah had numerous bruises and abrasions across her face and head. Id. at 1223-24. There were at least four bruises on the top back of her head. Id. at 1223. Her sternum and the right side of her breast were also bruised, as well as were her left arm and left abdomen. Id. at 1224. There were linear scrape marks on the front of Sarah's right thigh. Both of her thighs, her upper legs and her upper inner legs had multiple linear bruises on them. There were scrape marks on her knees and a contusion on her right ankle. There were scrape marks on her left ankle and a drag mark on the lateral back side of her left ankle and calf area. Id.

When the police investigated the van that Sarah had been driving, they found that blood covered several areas of the van. All of the blood swabs from both the exterior and the interior of the van, and from the bloody box cutter, indicated that all of the blood was consistent

[8]Although Sarah's throat had been slit, she actually drowned to death. TE 9, 1225.

with the blood of Sarah Hansen. Id. at 1257; 1265.

There was a very heavy and saturated stain on the front part of the back of the middle bench seat in the van. Id. at 1272-73. That stain was one inch deep and 3-11/16 inches wide. Id. It was 12-1/2 inches high, and it was consistent with the shape and the size wound on Sarah's throat. There was also blood on the floor in front of the seat. Id. at 1280.

In addition, there was a lot of blood on the driver's seat and around the seat area. Id. at 1279. Blood was smeared on the steering wheel, the gearshift lever, and the ignition switch. Id. at 1281. Blood was even spattered on the backside of the brake pedal. This evidence is consistent with someone who had been struggling or flailing about in the seat area. Id.

The clothing Sarah had on that night was still in the van. Id. at 1292 and TE 10, 1342. Her jeans, shorts and panties were intertwined together in a heap. TE 9, 1292. This was consistent with them having been pulled off together. Id. There was blood on the inside of her clothes indicating that the blood would have gotten on them after they had been pulled off. Id. The loop wire on the back of Sarah's bra was straightened out. Id. at 1293.

When the police learned that Woodall had been in the Minit Mart on Saturday night, they brought him in for questioning on Monday night, two nights after Sarah's murder. Id. at 1246. Woodall gave two conflicting statements about what he had done after work on the night of the murder. Id. at 1236-37. The police noticed that Woodall was wearing Rawling's brand tennis shoes. Id. The tennis shoe imprint on the pier next to Sarah's body was that of a Rawling's brand tennis shoe. Id. at 1233.

The next day, two of Woodall's fingerprints were identified as being on the van Sarah was driving. Id. at 1240. Woodall's apartment was then searched. On the first search,

blood was found on Woodall's front door. Id. at 1237-38. On the second search, muddy and wet clothing was found under Woodall's bed. Id. at 1241. Blood on Woodall's door, jeans, and sweatshirt was found to be consistent with the blood of Sarah Hansen. Id. at 1264. The DNA on the vaginal swabs of Sarah Hansen was consistent with Woodall's DNA. Woodall's fingerprints were identified on the window glass and door frame, the driver's side interior door jam and the door handle. Id. at 1307-11.

On April 10, 1998, Woodall pled guilty to each of the crimes he was charged with, including the aggravators. TE 3, 406-17; TR VI, 884-86; and Transcript of Guilty Plea,[9] attached as Appendix B. Specifically, Woodall pled guilty to the capital murder, capital kidnapping and rape in the first degree of Sarah Hansen. TGP, 6-7. Woodall specifically answered the questions of the court regarding the voluntariness of the plea in the affirmative three separate times. TGP, 6, 11. Woodall indicated that he understood the motion to enter a guilty plea and that he understood all of the consequences of his plea. TGP, 7-12. Counsel made it clear that he had discussed the case with Woodall, and stated that he believed the plea to be voluntary. TGP, 12. The trial court found, based upon what Woodall told the court, that he was competent to enter the plea, that he understood his rights, and that he understood the ramification of those rights. Id. The court found that Woodall knowingly waived his rights and that his plea of guilt was entered voluntarily of his own free will and accord. Id. See also TR VI, 1-4.

The jury sentencing trial was held in July of 1998. During the mitigation phase, Woodall's trial counsel called 14 witnesses - two of Woodall's former teachers, his employer, his landlord, the jailer, five family members, and four psychologists.

[9]The transcript of the guilty plea will hereinafter be referred to as TGP.

Woodall's third grade teacher testified that he was well disciplined, a normal child, and an average student. TE 10, 1346. She testified that the other kids liked him. Id. She also stated that two to three times per week, Woodall had a bowel movement (in his pants) and would have to go home. Id., 1349. She stated that the other kids did not notice. Id., 1350.

Woodall's tenth grade teacher testified that Woodall was withdrawn, didn't take notes, and fell asleep in class. Id., 1358-59. She referred Woodall for testing. She testified that there was no bizarre behavior on the part of Woodall. Id., 65.

Woodall's employer testified that Woodall was a good worker and never acted abnormal or different. Id., 1379; 82. The deputy jailer in the Muhlenberg County Jail testified that he had no problems with Woodall; that Woodall had never caused a fight. He testified that Woodall was a cooperative prisoner. Id., 1492.

Woodall's aunt, Lori Ann Wood, testified that Woodall had been a good baby and had received lots of attention. TE 10, 1404. She stated that Barbara Woodall, his mother, had gained weight and that her house was very dirty. Id., 1409. She also stated that sometimes they had no heat, and that there were roaches and mice in the house. Id., 1410. She also described Woodall's colon problem and told the jury that Woodall's little brother had Tourette's Syndrome. Id., 1412, 1415. She also told the jury that Woodall had sexually abused both of her daughters and her sister's daughters. Id., 1422-23.

Woodall's grandmother, Liz Mayes, testified that Woodall's father had been a poor provider and that they had no water, electricity or gas. Id., 1435. She stated that Woodall had a colon problem, and that he never knew when he was going to have to use the bathroom. Id., 1436.

Woodall's father, Robbie Woodall, confirmed the fact that he had not been a good provider and that his wife had lost interest and gained a lot of weight. TE 11, 1476-77. He stated that their trailer was very dirty. Id., 1478. He also said that he never paid child support, and that he was behind $27,000. Id. He told the jury that he loved his son and did not want him to die. Id., 1749. Susan Woodall, Woodall's stepmother, testified that Woodall had been a quiet child and did what he was told, and that he liked to color and draw. TE 11, 1485.

Woodall's mother, Barbara Woodall, testified that Woodall had bowel problems. TE 10, 1451-52. She explained they had been on welfare. Id., 1455. She further told the jury that she loved Woodall and didn't want him to die and that Woodall also had a son of his own. Id., 1460-61.

The psychological testimony put on by Woodall included, but is not limited to, the following:

Dr. Kay Willey evaluated Woodall in 1991. She administered standard placement tests for placement in special needs or special programs. Id., 1370-71. Dr. Willey testified that she found no diminished capacity and no emotional or neurological problems and that no emotional or neurological problems were suggested by the testing. Id., 1376.

In October of 1991, Woodall was referred to Dr. Harry Robe for testing because of Woodall's poor performance in school. TE 11, 1499-1500. Dr. Robe found Woodall's I.Q. to be 74. Id., 1505-06. He stated that this was in the educably mentally handicapped range. Id. Dr. Robe testified that Woodall was not mentally retarded. Id., 1511. He further stated that the tests did not suggest either emotional or neurological problems. Id. He said that in some categories, Woodall was actually an over achiever, and in others he was an under achiever. Id.

Dr. Richard Johnson, the psychologist at the Kentucky Correctional Psychiatric Center (KCPC), testified that Woodall was in KCPC from February 3, 1998, through February 17, 1998. Id., 1519-20. Dr. Johnson evaluated Woodall during this period. Dr. Johnson reviewed school records, Dr. Robe's reports, interviewed Woodall, and reviewed the Department of Correction records. Id., 1523.

Dr. Johnson found no organic or brain impairment. Id., 1530. Dr. Johnson gave Woodall three tests designed to look at neuropsychological memory performance. Id., 1523-31. All of Woodall's scores were adequate, if not better than adequate. Id. Woodall's I.Q. score was 78. Id., 1526.

Dr. Johnson also performed personality tests on Woodall. Woodall was found to have an average score for nondepressed persons. Id., 1534. His profile was described as being similar to individuals having emotional immaturity and lability. Id., 1536. Dr. Johnson described Woodall's personality as being suspicious, mistrustful, impulsive, hostile, bitter, and unempathetic. Id., 1540. He testified there were some suggestions of a personality disorder involving borderline, paranoid and antisocial characteristics. Id., 1538-39. Dr. Johnson said that Woodall stated that Woodall knew that anyone who would take someone hostage, force that person to have sex against her will, or kill that person, would be engaging in illegal and criminal activities. Id., 1549.

As stated above, after hearing all of the evidence, the jury sentenced Woodall to death. Further facts will be developed as necessary.

Significant Factual Findings by the Kentucky Supreme Court

On direct appeal, the Kentucky Supreme Court determined the facts to be as follows:

> Robert Keith Woodall appeals from a sentence of death for murder and life imprisonment for the rape and kidnapping of Sarah Hansen. Woodall entered a plea of guilty to capital murder, capital kidnapping, and first-degree rape. A jury sentencing trial was conducted July 14 through July 20, 1998. The prosecution called eleven witnesses, and the defense presented fourteen witnesses in mitigation of the crimes. Woodall did not testify at the penalty proceedings. The jury fixed a sentence of death for the capital murder and a sentence of two concurrent life terms for the kidnapping and rape.
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> The victim was a 16-year-old high school cheerleader, an honor student, a musician, a member of the National honor Society and the Beta Club and a medalist in swimming and diving. On January 25, 1997, she had planned to watch a video with her boyfriend. She went to the local mini-mart to rent a movie, leaving her home between 7:30 p.m. and 8:00 p.m., never to be seen alive again by her family. At 10:42 p.m., two police officers were dispatched to search for the victim. Thereafter, they found the minivan that she had been driving in a ditch at Luzerne Lake, approximately 1.5 miles from the mini-mart. The officers followed a four to five hundred foot trail of blood on a gravel roadway from the van. The unclothed body of the victim was found floating in the water. Her throat had been slashed twice with each cut approximately 3.5 to 4 inches long. Her windpipe was totally severed. She actually died of drowning.
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> The police questioned Woodall when they learned that he had been in the mini-mart on Saturday night. He gave two conflicting statements about his activities on the night of the murder after he left work. The police observed that Woodall was wearing a brand of tennis shoe similar to the imprint on the pier next to where the body of the victim had been found. His fingerprints were on the van the victim

> was driving. Blood was found on his front door and muddy and wet clothing under his bed. Blood on his clothing and sweatshirt were consistent with the blood of the victim. The DNA on the vaginal swabs was consistent with his. His fingerprints were identified on the glass and door of the van as well as the interior doorjamb and handle. On March 18, 1997, the Muhlenberg County Grand Jury indicted him for murder, kidnapping and rape.

Woodall v. Commonwealth, 63 S.W.3d 104, 114-15 (Ky. 2002).

HABEAS STANDARD OF REVIEW

Before addressing Woodall's claims, the Commonwealth will discuss the standard of review for habeas corpus petitions which is set forth in 28 U.S.C. §§ 2254(d) and (e). These sections were amended by the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), §104 of Public Law 104-132. The new §2254(d) changed the standard of review in habeas corpus cases by providing for a greater level of deference for state court legal determinations. §2254(d) states:

> An application for 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 the state court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application, of , clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The amended provisions of §2254(d) apply to all habeas corpus petitions filed after the effective date of the AEDPA. Woodford v. Garcaeu, 538 U.S. 202 (2003); Michael Wayne Williams v. Taylor, 529 U.S. 420, 428 (2000); Terry Williams v. Taylor, 529 U.S. 362, 402 (2000)(Part II of

Justice O'Connor's opinion, joined by majority of the Court); Penry v. Johnson, 532 U.S. 782, 792 (2001); Seymour v. Walker, 224 F.3d 542, 549 (6th Cir. 2000).

I. Review of Legal Issues

(1) The standard of review for habeas cases under the AEDPA has been interpreted by the U.S. Supreme Court in Terry Williams v. Taylor, 529 U.S. 362, 402-413 (2000) (Part II of Justice O'Connor's opinion, joined by majority of the Court). The Terry Williams opinion requires that in assessing a legal ruling of a state court, a federal habeas court must first determine whether there was a controlling rule prescribed by the U. S. Supreme Court. If so, the federal court must determine whether the state court legal determination is contrary to that rule. If there is no controlling rule, the federal court must determine whether the state court's decision resulted from an objectively unreasonable application of U.S. Supreme Court precedent. **The federal habeas court must determine the governing legal standard by reference to holdings (not dicta) of the U.S. Supreme Court that clearly established federal law governing state court trials at the time of the state court's ruling.** Terry Williams v. Taylor, 529 U.S. at 403-413; Yarborough v. Alvarado, 541 U.S. 652, 660-666 (2004); Slagle v. Bagley, 457 F.3d 501, 513-514 (6th Cir. 2006), discussing U.S. Supreme Court rulings. Bell v. Cone, 535 U.S. 685, 693-694 (2002), "The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Also see*, Ramdass v. Angelone, 530 U.S. 156 (2000); Early v. Packer, 537 U.S. 3 (2002), reversing because the Ninth Circuit erroneously relied upon precedents not applicable to state courts in concluding that state court's ruling was contrary to

clearly established U.S. Supreme Court precedent; Woodford v. Visciotti, 537 U.S. 19 (2002), reversing the Ninth Circuit and holding that state supreme court's application of *Strickland* was not clearly unreasonable; Lockyer v. Andrade, 538 U.S. 63, 70-72 (2003), disapproving, Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000); Price v. Vincent, 538 U.S. 634 (2003), reversing because the Sixth Circuit erroneously reviewed the claim *de novo* and holding that Michigan Supreme Court's rejection of the claim was not unreasonable; Yarborough v. Gentry, 540 U.S. 1 (2003), reversing the Ninth Circuit and holding state court's rejection of ineffective assistance claim pertaining to closing argument was reasonable; Mitchell v. Esparza, 540 U.S. 12 (2003), reversing the Sixth Circuit and holding that state court's ruling of harmless error in capital sentencing instruction was reasonable; Middleton v. McNeil, 541 U.S. 433 (2004); Holland v. Jackson, 542 U.S. 649 (2004), reversing the Sixth Circuit; Bell v. Cone, 543 U.S. 447 (2005), *revg*., 359 F.3d 785 (6th Cir.); Brown v. Payton, 544 U.S. 133 (2005); Kane v. Espitia, 546 U.S. 9 (2005), reversing the Ninth Circuit for relying upon Ninth Circuit precedent; Carey v. Musladin, 127 S.Ct. 649 (2006).

For the Sixth Circuit's discussion of the Williams standard, *see* Williams v. Coyle, 260 F.3d 684, 689-700 (6th Cir.2001), standard applies to both direct appeal and collateral attack issues; Rockwell v. Yukins, 341 F.3d 507 (6th Cir. 2003)(en banc); Bailey v. Mitchell, 271 F.3d 652 (6th Cir. 2001); Campbell v. Coyle, 260 F.3d 531, 538-539 (6th Cir.2001); Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000); Schoenberger v. Russell, 290 F.3d 831 (6th Cir. 2002); McGhee v. Yunkins, 229 F.3d 506 (6th Cir. 2000); Seymour v. Walker, 224 F.3d 542, 549 (6th Cir. 2000); Simpson v. Jones, 238 F.3d 399, 405 (6th Cir. 2000). *Also see*, Van Woundenberg by and though Foor v. Gibson, 211 F.3d 560 at 566 and 570 (10th Cir. 2000); Hameen v.

Delaware, 212 F.3d 226 (3rd Cir. 2000); Bell v. Jarvis, 236 F.3d 149, 157-166 (4th Cir. 2000)(en banc); Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002)(en banc).

(2) This standard of review applies even when the state court summarily rejected the federal claim without explaining its reasoning. Uttecht v. Brown, 127 S.Ct. 2218, 2228 (2007). Early v. Packer, 537 U.S. 3, 8 (2002), explained, "A state-court decision is 'contrary to' our clearly established precedents if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' Avoiding these pitfalls does not require citation of our cases--indeed, **it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them**." (Citation omitted. Emphasis added.) *Also see*, Bell v. Cone, 543 U.S. 447, 455 (2005); Mitchell v. Esparza, 540 U.S. 12 (2003); Slagle v. Bagley, 457 F.3d 501, 513-514 (6th Cir. 2006); Bell v. Jarvis, 236 F.3d 149, 157-166 (4th Cir. 2000)(en banc), collecting cases; Wright v. Moore, 278 F.3d 1245, 1254-1256 (11th Cir. 2002), collecting cases; Neal v. Puckett, 286 F.3d 230, 245-246 (5th Cir. 2002)(en banc); Sellan v. Kuhlman,261 F.3d 303, 311-314 (2nd Cir. 2001); Cook v. McCune, 323 F.3d 825, 831 (10th Cir. 2003), citing, Early v. Packer, *supra*, and holding rejection of federal claim without discussion of federal law required review for reasonableness under Section 2254(d), not *de novo* review; Jeremiah v. Kemna, 370 F.3d 806 (8th Cir. 2004), and Brown v. Luebbers, 371 F.3d 458, 462 (8th Cir. 2004) (en banc), same ruling.

(3) The Kentucky Supreme Court has ruled that a claim raised on direct appeal is rejected even when its opinion did not specifically address it. Ellison v. Commonwealth, Ky.,

994 S.W.2d 939 (1999). Harris v. Stovall, 212 F.3d at 943, explained, "[W]here the state court has not articulated its reasoning, federal courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented.... That independent review [by the federal habeas court, when the state court failed to explain its reasoning], however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Also see*, Schoenberger v. Russell, *supra*. These cases were overruled by the Sixth Circuit in Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003), without discussion of Early v. Packer, *supra*, based upon a misinterpretation of one sentence in Wiggins v. Smith, 539 U.S. 510, 539 (2003), which indicated that the U.S. Supreme Court had to determine *de novo* whether the trial attorneys' failure to present mitigating evidence after an inadequate investigation was prejudicial because the Maryland Court of Appeals did not review whether the attorneys' error was prejudicial. However, the Maryland Court of Appeals' opinion was not merely silent on that issue, but instead when read together with other parts of the opinion, the opinion indicated that prejudice was not considered on that claim. Wiggins v. State, 352 Md. 580, 608-613, 724 A.2d 1, 15-18 (1999). In addition, the State's brief in the U.S. Supreme Court conceded that the Maryland Court of Appeals did not rule upon prejudice regarding that claim, so that it had to be reviewed *de novo* if the Court decided that the resolution of attorney performance was unreasonable. Respondent's brief in U.S. Supreme Court, *Wiggins v. Smith*, 2003 WL 543903 (no. 02-311)(Feb. 18, 2003), pp. *46-*49. "**Section 2254(d) dictates a highly deferential standard for evaluating state-court**

rulings, which demands that a state-court decision be given the benefit of the doubt. * Federal Courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.**" Bell v. Cone, 543 U.S. 447, 455 (2005), *revg*., 359 F.3d 785 (6th Cir.), citing Mitchell v. Esparza, 540 U.S. 12 (2003). The Sixth Circuit's ruling also directly conflicts with the interpretation by the Tenth Circuit and Eighth Circuit of Early v. Packer, *supra*, in Cook v. McCune, *supra*, and Jeremiah v. Kemna, *supra*, in which the standard of review was directly at issue. Where "there is no indication suggesting that the state court did not reach the merits of a claim, we have held that a state court reaches a decision 'on the merits' even when it fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion." Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir.2004). Also see, Cox v. Burger, 398 F.3d 1025, 1029-1030 (8th Cir. 2005), holding that state court implicitly rejected federal claim even though only state law was discussed. In Rompilla v. Horn, 355 F.3d 233, 247-248 (3rd Cir. 2004), *reversed on other grounds*, 125 S.Ct. 2456, (2005), the Third Circuit reviewed most of the Court of Appeals cases cited above in paragraph (2) and concluded, "[U]nder *Weeks v. Angelone,* 528 U.S. 225, 237 (2000), a state court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever." *Also see*, Wilson v. Ozmint, 357 F.3d 461, 467-468 (4th Cir. 2004); Connor v. McBride, 375 F.3d 643, 650-651 (7th Cir. 2004); Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005), collecting cases and also citing Weeks v. Angelone, 528 U.S. 225, 237 (2000). "We must read this and related general language in [our prior opinion] as we often read general language in judicial opinions--as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the

Court was not then considering." Illinois v. Lidster, 540 U.S. 419, 424 (2004).

(4) If the state court failed to rule upon the federal constitutional claim or unreasonably applied then-existing U.S. Supreme Court precedent to the claim, the federal court decides the federal constitutional claim *de novo*, subject to the presumption of correctness for any findings of fact made by the state courts. Terry Williams v. Taylor, 529 U.S. at 391-399; Rose v. Lee, 252 F.3d 676, 689-691 (4th Cir. 2001). The non-retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989), would also apply, see Part VI, hereafter.

II. Presumption of Correctness on Factual Issues

(1) In addition to the mandates of §2254(d), §2254(e)(1) retains the presumption of correctness for "a determination of a factual issue made by a State court". It requires that the petitioner "have the burden of rebutting the presumption of correctness by clear and convincing evidence." The exceptions to the presumption of correctness that existed in the pre-AEDPA statute were deleted.

(2)The petitioner must initially plead facts in the habeas petition to overcome presumption of correctness in order to permit the State to respond and to file appropriate parts of the state court record. Loveday v. Davis, 697 F.2d 135 (6th Cir. 1983), decided under pre-AEPDA statute. The Sixth Circuit has recognized that the continued validity of Loveday opinion after the enactment of AEDPA. Clark v. Waller, 2007 WL 1803946 (6th Cir. June 25, 2007).

(3) "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, §2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding,

§2254(d)(2)[.]" Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Also see, Rice v. Collins, 126 S.Ct. 969, 974 (2006); Schriro v. Landrigan, 127 S.Ct. 1933, 1939-1940 (2007). "Findings of fact made by a state court are presumed correct and can be contravened only where the habeas petitioner shows by clear and convincing evidence that the state court's factual findings were erroneous. This presumption of correctness also applies to the factual findings of a state appellate court based on the state trial record." (Citations and quotation marks omitted.) Bugh v. Mitchell, 329 F.3d 496, 500-501 (6th Cir. 2003). *See also* Holland v. Jackson, 542 U.S. 649 (2004); Long v. Krenke, 138 F.3d 1160, 1163 (7th Cir. 1998); Pitsonbarger v. Gramley, 141 F.3d 728, 734 (7th Cir. 1998), discussing presumption of correctness under former habeas corpus statute and under amended habeas corpus statute; Campbell v. Vaughn, 209 F.3d 280 (3rd Cir. 2000), same; Van Woudenberg by and though Foor v. Gibson, 211 F.3d 560, 572 (10th Cir. 2000); Weeks v. Snyder, 219 F.3d 245, 258 (3rd Cir. 2000); Seymour v. Walker, 224 F.3d 542, 551-552 (6th Cir. 2000).

(4) The presumption also applies to **implicit** findings in accordance with pre-AEDPA law. Uttecht v. Brown, 127 S.Ct. 2218 (2007); Campbell v. Vaughn, 209 F.3d at 285-286, citing, *inter alia*, Marshall v. Lonberger, 459 U.S. 422, 432-433 (1983)[state court implicitly discredited petitioner's evidence by denying petitioner's motion]; Weeks v. Snyder, 219 F.3d 245, 258 (3rd Cir. 2000), collecting cases; Pondexter v. Dretke, 346 F.3d 142, 148 (5th Cir. 2003), "[A] presumption of correctness would apply to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." Also see discussion in part X hereafter.

(5) The presumption of correctness under Section 2254(e)(1) applies to state court findings of fact regardless of whether the state courts granted the petitioner a "full and fair" evidentiary hearing in state court because the AEDPA amendments deleted the exceptions to the presumption. Valdez v. Cockrell, 274 F.3d 941 at 947-954 and 959 (5th Cir. 2001), *cert. denied*, 123 S.Ct. 106 (2002). "Procedural imperfections ordinarily will not affect the presumption... [T]o 'presume' facts 'correct' means a court cannot allow a habeas applicant to evade Section 2254(e)(1) by attacking the process employed by the state *factfinder* rather the actual *factfindings*." Miller-El v. Cockrell, 537 U.S. 322, 358 (2003)(Thomas, J., dissenting), also noting that statutory exceptions to presumption were deleted.

(6) Mendiola v. Schomig, 224 F.3d 589, 591-593 (7th Cir. 2000), explained that Section 2254(e)(1) does not require that findings be based upon evidentiary hearings. *Also see*, Bugh v. Mitchell, 329 F.3d 496, 501 (6th Cir. 2003); Lambert v. Blackwell, 387 F.3d 210, 237 (3rd Cir. 2004). *Cf.* Anderson v. City of Bessemer, 470 U.S. 564, 574-575 (1985). Lomholt v. Iowa, 327 F.3d 748, 751 (8th Cir. 2003), explained that Section 2254(e) requires that the petitioner demonstrate that state court finding is not supported by sufficient evidence.

III. Evidentiary Hearing Standard

(1) Under the AEDPA amendments, habeas corpus petitioners are not automatically granted evidentiary hearings on the claims raised in their petitions. Subsection (e)(2) of §2254 precludes an evidentiary hearing in federal district court "if the applicant failed to develop the factual basis of a claim in state court proceedings", unless he demonstrates: (1) that his claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the U. S. Supreme Court; or (2) a factual predicate that had not previously been discovered in

spite of the exercise of due diligence and which would establish his innocence.

> By the terms of its opening clause the statute applies only to prisoners who have "failed to develop the factual basis of a claim in State court proceedings." If the prisoner has failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2). *** **Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.*** For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has filed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2). [Emphasis added.]

Michael Wayne Williams v. Taylor, 529 U.S. 420 at 430 and 437 (2000), citing *inter alia*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). *See also*, Breard v. Greene, 523 U.S. 371, 376 (1998); Lott v. Coyle, 261 F.3d 594, 605-606 (6th Cir. 2001); Hutchison v. Bell, 303 F.3d 720 (6th Cir. 2002); Alley v. Bell, 307 F.3d 380, 389-391 (6th Cir. 2002); Smallwood v. Gibson, 191 F.3d 1257, 1265-1266 (10th Cir. 1999); Campbell v. Vaughn, 209 F.3d 280, 286-287 (3rd Cir. 2000); Beazley v. Johnson, 242 F.3d 248, 272-274 (5th Cir. 2001). *Cf.* Byrd v. Collins, 209 F.3d 486, 515-516 (6th Cir. 2000); Spreitzer v. Schomig, 219 F.3d 639, 648 (7th Cir. 2000). The failure to present a claim to the state courts until a petition for rehearing was filed in the appellate

court precluded a hearing under Section 2254(e)(2) since state law prohibited raising new claims in petition for rehearing. Schriro v. Landrigan, 127 S.Ct. 1933, 1942-1943 and fn. 3 (2007).

(2) The Supreme Court has held that Section 2254(e)(2) applies to preclude the consideration of evidence or facts not presented to the state courts even if the state courts rejected the claims without holding an evidentiary hearing. Bradshaw v. Richey, 126 S.Ct. 602, 605-606 (2005), *revg.*, 395 F.3d 660 (6th Cir.). The U.S. Supreme Court and Seventh Circuit have interpreted this section as applying to any attempt by a habeas petitioner under any provision of habeas law to supplemental the state court record with factual information not provided to the state court. Holland v. Jackson, 542 U.S. 649, 652-653 (2004); Boyko v. Parke, 259 F.3d 781, 789-790 (7th Cir. 2001).

(3) Merely requesting a hearing in state court without specifying the facts or evidence that would be developed is not sufficient to comply with Section 2254(e)(2). Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000). A habeas petitioner also forfeits his right to an evidentiary hearing under Section 2254(e)(2) by failing to request an evidentiary hearing from the state courts while his claims were reviewed in the state courts, or by failing to indicate the evidence or facts in support of his claims as required by state law when his claims were reviewed by the state courts, unless a statutory exception listed in subsection (e)(2) applies. Valdez v. Ward, 219 F.3d 1222, 1230 (10th Cir. 2000); Baja v. Ducharme, 187 F.3d 1075, 1079 (9th Cir. 1999), cited in Michael Wayne Williams v. Taylor, 529 U.S. at 432; Smith v. Bowersox, 311 F.3d 915, 921-922 (8th Cir. 2002).

(4) Even if an evidentiary hearing is not precluded by §2254(e)(2), the federal court retains the discretion to determine whether a hearing is necessary or whether the claim may

be denied without a hearing, taking into account whether the factual allegations are insufficient to establish the federal claim presented, are conclusionary, or are contradicted by the state court's record. Schriro v. Landrigan, 127 S.Ct. 1933, 1940 (2007); Cardwell v. Greene, 152 F.3d 331, 338 (4th Cir. 1998); Campbell v. Vaughn, 209 F.3d 280, 287 (3rd Cir. 2000); McCarver v. Lee, 221 F.3d 583, 597-598 (4th Cir. 2000); Walker v. Gibson, 228 F.3d 1217, 1231 (10th Cir. 2000); Dowthitt v. Johnson, 230 F.3d 733, 758 and fn. 38 (5th Cir. 2000); Washington v. Renico, 455 F.3d 722, 731, fn. 4, and 733-734 (6th Cir. 2006). *Cf.* Michael Wayne Williams v. Taylor, 529 U.S. 420, 442-444 (2000); Stanford v. Parker, 266 F.3d 442, 459-460 (6th Cir. 2001); Moss v. Hofbauer, 286 F.3d 851, 868-869 (6th Cir. 2002). "An evidentiary hearing is not a fishing expedition for facts as yet unsuspected, but is instead an instrument to test the truth of facts already alleged in the habeas petition." Lenz v. Washington, 444 F.3d 295, 304 (4th Cir. 2006). In Fisher v. Lee, 215 F.3d 438, 453-455 (4th Cir. 2000), the Fourth Circuit held that even if Section 2254(e)(2) does not preclude a hearing, the petitioner must satisfy one of the factors under Townsend v. Sain, 372 U.S. 293, 312 (1963), that would overcome the presumption of correctness of the state court finding of fact before the District Court is authorized to hold an evidentiary hearing. *Cf.* Mitchell v. Rees, 114 F.3d at 577.

(5) Even if an evidentiary hearing is held by the federal habeas court, that court must still determine whether the state court's ruling was an objectively unreasonable application of U.S. Supreme Court precedent existing at the time the conviction and sentence became final on direct appeal, and that standard also applies to claims raised on collateral attack in state court. Pecoraro v. Walls, 286 F.3d 439, 443 (7th Cir. 2002), citing, Williams v. Coyle, 260 F.3d 684, 697-698 (6th Cir. 2001); Valdez v. Cockrell, 274 F.3d 941, 946-947, 951-952 (5th Cir. 2001);

Johnson v. Luoma, 425 F.3d 318, 324 (6th Cir. 2005).

IV. Unexhausted Claims

(1) The habeas petitioner bears the burden of demonstrating that he exhausted state court remedies in accordance with state law as to each claim raised in the habeas petition. Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), citing, Darr v. Burford, 339 U.S. 200, 218-219 (1950). Under Section 2254(b), as amended by the AEDPA (§104 of Public Law 104-132), the state respondent is no longer required to plead non-exhaustion as a defense. As the Sixth Circuit explained in Coleman v. Mitchell, 244 F.3d 533 at 538 (6th Cir. 2001), a habeas corpus petitioner cannot obtain federal habeas relief unless he has completely exhausted his available state court remedies by presenting the claim to the state's highest court, and he cannot circumvent the exhaustion requirement by failing to comply with state procedural rules. *Also see*, Stanford v. Parker, 266 F.3d 442, 451 (6th Cir. 2001); Alley v. Bell, 307 F.3d 380, 385-386 (6th Cir. 2002); In Re: Cook, 215 F.3d 606 (6th Cir. 2000). Perceived futility of presenting the claim to the state courts is not cause to excuse exhaustion or to excuse procedural default. Engle v. Isaac, 456 U.S. 107 at 130 and fn. 35 and 36 (1982); Smith v. Murray, 477 U.S. 527, 534 (1986). "[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Bousley v. United States, 523 U.S. 614, 623 (1998). Also see Part XII, hereafter, discussing procedural default.

(2) A claim which is unexhausted because it was never presented to the state courts and which is undefaulted because it is not procedurally barred by state law at the time of habeas review may be rejected on the merits by the federal habeas court in spite of the lack of exhaustion, pursuant to 28 U.S.C. Section 2254(b)(2). Van Woudenberg by and through Foor v.

Gibson, 211 F.3d 560, 569 (10th Cir. 2000); Carpenter v. Vaughn, 296 F.3d 138 at 145-146 and fn. 6 (3rd Cir. 2002).

V. Harmless Error Standard

The 1996 amendment to the habeas statute did not change the standard for harmless error analysis under Brecht v. Abrahamson, 507 U.S. 619 (1993), which applies regardless of whether the state appellate court conducted harmless error analysis. Fry v. Pliler, 127 S.Ct. 2321 (June 11, 2007), citing, Penry v. Johnson, 532 U.S. 782, 794-796 (2001), Calderon v. Coleman, 525 U.S. 141, 145 (1998), and distinguishing, Mitchell v. Esparza, 540 U.S.12 (2003). Also see part XI hereafter.

VI. Non-Retroactivity Doctrine

The U.S. Supreme Court has unanimously ruled that the non-retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989), continues to apply independently of the standard of review established by the revised §2254(d). Horn v. Banks, 536 U.S. 266 (2002), *opinion after remand, sub nom.* Beard v. Banks, 542 U.S. 406 (2004); Breard v. Greene, 523 U.S. 371, 377 (1998); Whorton v. Bockting, 127 S.Ct. 1173 (Feb. 28, 2007), *revg.*, 408 F.3d 1127 (9th Cir.); Green v. French, 143 F.3d 865, 874 (4th Cir. 1998); Fisher v. Texas, 169 F.3d 295, 304 (5th Cir. 1999); Wright v. Moore, 278 F.3d 1245, 1258 (11th Cir. 2002). Also see discussion in part VIII hereafter.

VII. Pre-AEDPA Principles

Because many of the same principles (*e.g.*, procedural default, harmless error, non-retroactivity) governing habeas review continue to apply under the new statue, §2254(d) and (e), as applied under the former statute, the Commonwealth will also discuss the standard of

review as it existed prior to the enactment of Public Law 104-132.

HABEAS PRINCIPLES APPLICABLE REGARDLESS OF APPLICATION OF PUBLIC LAW 104-132

VIII. Legal Issues and Non-Retroactivity

(1) Before the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (§104 of Public Law 104-132, amending 28 U.S.C. §2254), the standard of review regarding legal conclusions pertaining to federal constitutional law was de novo in federal habeas corpus proceedings. Thompson v. Keohane, 516 U.S. 99, 108-113 (1995); Lundy v. Campbell, 888 F.2d 467, 469-470 (6th Cir. 1989); Clemmons v. Sowders, 34 F.3d 352, 354 (6th Cir. 1994).

(2) But any claim in a habeas petition that would require the application of a new rule of constitutional law as of the date when the habeas petitioner's conviction became final on appeal (i.e. when the U. S. Supreme Court denied his certiorari petition) is generally barred. Teague v. Lane, 489 U.S. 288 (1989); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Sawyer v. Smith, 497 U.S. 227 (1990); Graham v. Collins, 506 U.S. 461 (1993); Gilmore v. Taylor, 508 U.S. 333 (1993); Caspari v. Bohlen, 510 U.S. 383 (1994); Goeke v. Branch, 514 U.S. 115 (1995); Gray v. Netherland, 518 U.S. 152, 167-170 (1996); Lambrix v. Singletary, 520 U.S. 518 (1997); O'Dell v. Netherland, 521 U.S. 151 (1997); Breard v. Greene, 523 U.S. 371 (1998); Schriro v. Summerlin, 542 U.S. 348 (2004); Whorton v. Bockting, 127 S.Ct. 1173 (Feb. 28, 2007), *revg*., 408 F.3d 1127 (9th Cir.). Teague requires that the habeas petitioner demonstrate that the interpretation of federal constitutional law that he relies upon was the **only** reasonable interpretation of federal law existing at the time that his conviction became final on direct appeal and that no other interpretation was reasonable. Lambrix v. Singletary, 520

U.S. 518, 538 (1997).

(3) The mere fact that a trial error based upon a new rule of constitutional law can be considered to be structural error does not by itself authorize a new constitutional rule to be applied retroactively to cases on habeas review. Tyler v. Cain, 533 U.S. 656, 666-667 (2001).

(4) The Teague rule does **not** apply to changes in law **unfavorable** to criminal defendants or habeas petitioners. Gilmore v. Taylor, 508 U.S. 333, 341-342 (1993); Lockhart v. Fretwell, 506 U.S. 364, 372-373 (1993); Wilkerson v. Whitley, 28 F.3d 498, 507 (5th Cir. 1994)(en banc); Smith v. Jones, 256 F.3d 1135, 1139-1146 (11th Cir. 2001). Hence the State is entitled to rely upon constitutional precedents decided **after** the petitioner's direct appeal concluded.

IX. State Law Issues

(1) The state courts' interpretations of state law are binding on federal habeas corpus courts. "We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." Bradshaw v. Richey, 126 S.Ct. 602, 604 (2005). Wainwright v. Goode, 464 U.S. 78, 84 (1983); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995); Duffel v. Dutton, 785 F.2d 131, 133 (6th Cir. 1986); Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001); Davis v. Straub, 430 F.3d 281, 290-291 (6th Cir. 2005).

(2) As noted in Barefoot v. Estelle, 463 U.S. 880, 887 (1983), and in Herrera v. Collins, 506 U.S. 390, 401 (1993), "Federal Courts are not forums in which to relitigate state trials." Hence errors of state law are generally not cognizable on federal habeas review. Engle v. Isaac, 456 U.S. 107, 121, fn. 21 (1982); Lewis v. Jeffers, 497 U.S. 764, 781-784 (1990); Estelle

v. McGuire, *supra*; Romano v. Oklahoma, 512 U.S. 1, 10-14 (1994); Seymour v. Walker, 224 F.3d 542, 552 (6th Cir. 2000); Middleton v. McNeil, 541 U.S. 433, 437 (2004), "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process." The mere fact that the habeas petitioner disagrees with the state supreme court's interpretation of state law is not sufficient to establish a violation of the Federal Due Process Clause. Chambers v. Bowersox, 157 F.3d 560, 564-565 (8th Cir. 1998); Diguglielmo v. Smith, 366 F.3d 130 (2nd Cir. 2004). An error of state law raised under the theory of ineffective assistance of counsel is not subject to review by a federal habeas court. Ford v. Norris, 364 F.3d 916, 919 (8th Cir. 2004).

X. Presumption of Correctness on Factual Issues

(1) Findings of historical fact (explicit or implicit) and determinations of the credibility of witnesses made by the state courts are presumed correct under Title 28 U.S.C. §2254(d) [prior to 1996 revision], even when those findings pertain to a federal constitutional claim. Thompson v. Keohane, *supra*; Marshall v. Lonberger, 459 U.S. 422, 432-433 (1983)[state court implicitly discredited petitioner's evidence by denying petitioner's motion]; Perkett v. Elem, 514 U.S. 765 (1995)[jury selection]; Wainwright v. Goode, 464 U.S. 78, 85 (1983); Sumner v. Mata, 449 U.S. 539, 551-552 (1981) [presumption applies to findings of fact by state appellate court] ; McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996); Lundy v. Campbell, 888 F.2d 467, 469-470 (6th Cir. 1989); Loveday v. Davis, 697 F.2d 135 (6th Cir. 1983) [presumption applies to state appellate court findings of fact, but not legal conclusion, regarding sufficiency of evidence to sustain conviction].

(2) Prior to the 1996 revision of the habeas statute, State Court findings of fact, but not conclusions of law, regarding effective assistance of counsel were reviewed under the presumption of correctness, 28 U.S.C. §2254(d) [prior to 1996 revision]. Strickland v. Washington, 466 U.S. 668, 698 (1984); West v. Seabold, 73 F.3d 81 (6th Cir. 1996); Smith v. Jago, 888 F.2d 399, 407-408 (6th Cir. 1989); Reese v. Fulcomer, 946 F.2d 247, 254-257 (3rd Cir. 1991); Waldrop v. Jones, 77 F.3d 1308, 1313 (11th Cir. 1996).

(3) The presumption also applies to findings made on denial of a motion for new trial based on post-trial affidavits. Warner v. Zent, 997 F.2d 116, 132-133 (6th Cir. 1993).

XI. Harmless Error Standard

Even when a federal habeas corpus court concludes that a federal constitutional error occurred during the trial, such error does not warrant relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict" so that the error deprived the habeas petitioner of his right to a fair trial in violation of due process. Brecht v. Abrahamson, 507 U.S. 619, 638 (1993); California v. Roy, 519 U.S. 2 (1996); Calderon v. Coleman, 525 U.S. 141 (1998); Coe v. Bell, 161 F.3d 320, 335-336 (6th Cir. 1998); Gilliam v. Mitchell, 179 F.3d 990 (6th Cir. 1999). *Also see*, Bonin v. Calderon, 59 F.3d 815, 823-824 (9th Cir. 1995); Moore v. Carlton, 74 F.3d 689, 691 n.2 (6th Cir. 1996).

XII. Procedural Default - Legal Claims

(1) A federal constitutional claim not presented to state courts at the time and in the manner prescribed by state law is treated as a procedurally defaulted claim. A procedurally defaulted claim is reviewable by a federal habeas corpus court only after the habeas petitioner demonstrates cause and actual prejudice to overcome the default or a "miscarriage of justice",

i.e., a colorable claim of factual innocence in light of federal constitutional error. Wainwright v. Sykes, 433 U.S. 72 (1977); Coleman v. Thompson, 501 U.S. 722 at 750 (1991); Sawyer v. Whitley, 505 U.S. 333 (1992); Schlup v. Delo, 513 U.S. 298 (1995); Gray v. Netherland, 518 U.S. 152 (1996), opinion on remand, 99 F.3d 158 at 161-164 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1102; O'Sullivan v. Boerckel, 526 U.S. 838 (1999); West v. Seabold, 73 F.3d 81 (6th Cir. 1996); Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000); Seymour v. Walker, 224 F.3d 542, 549-551, 554-556, 557, and 560 (6th Cir. 2000); Simpson v. Jones, 238 F.3d 399 (6th Cir. 2000); Lynn v. United States, 365 F.3d 1225, 1234-1235 (11th Cir. 2004), summarizing Supreme Court's rulings. "[A]s general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised." Bell v. Cone, 543 U.S. 447, 451, fn. 3 (2005). In McCleskey v. Zant, 499 U.S. 467, 498 (1991), the U.S. Supreme Court explained, "If 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. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim."

(2) Failure to present a claim on appeal or motion for discretionary review to the state appellate court operates as a procedural default. O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Stanford v. Parker, 266 F.3d 442, 451 (6th Cir. 2001); Alley v. Bell, 307 F.3d 380, 385-386 (6th Cir. 2002).

(3) The same federal constitutional provision must be cited (or argued) as the basis for the claim in both state and federal courts. Abdullah v. Groose, 75 F.3d 408, 412 (8th

Cir. 1996) (en banc), citing *inter alia*, Duncan v. Henry, 513 U.S. 364 (1995); Jacobs v. Mohr, 265 F.3d 407 (6th Cir. 2001). The claim must be identified as a federal constitutional violation in the motion or brief filed in the highest state court. Baldwin v. Reese, 541 U.S. 27 (2004).

(4) The U.S. Supreme Court has explained that the "miscarriage of justice" or "actual innocence" exception to procedural default requires that the petitioner present "reliable evidence not presented at trial" and that the petitioner demonstrate that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence". Schlup v. Delo, 513 U.S. 298, 324-327 (1995); Calderon v. Thompson, 523 U.S. 538, 559-560 (1998); Bousley v. United States, 523 U.S. 614, 623-624 (1998). "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, *supra*. *Also see*, Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999); Simpson v. Jones, 238 F.3d 399, 407 (6th Cir. 2000); Lynn v. United States, 365 F.3d 1225, 1234-1235 (11th Cir. 2004). The fact that evidence was improperly admitted during the petitioner's trial does not establish cause or actual innocence to excuse a procedural default and improperly admitted evidence must be considered in determining whether the petitioner's evidence is sufficient to satisfy the petitioner's burden. "The petitioner must make his evidentiary showing even though -- as argued in this case -- evidence of guilt may have been unlawfully admitted." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

(5) The fact that a state appellate court relies upon procedural default (or lack of preservation in the trial court) as an alternative ground for rejection of the merits of a claim is sufficient to establish procedural default for purposes of federal habeas review. Sochor v. Florida, 504 U.S. 527, 534 (1992), holding that state court's ruling that claims were not

preserved for appeal and lacked merit was default ruling. *Also see,* Lambrix v. Singletary, 520 U.S. 518, 522-523 (1997); Carey v. Saffold, 536 U.S. 214, 225-226 (2002); Coleman v. Thompson, 501 U.S. 722, 729 (1991); Scott v. Mitchell, 209 F.3d 854, 865-868 (6th Cir. 2000); Simpson v. Jones, 238 F.3d 399, 408-409 (6th Cir. 2000). Review by the state appellate court for "plain error" or similar type of unpreserved error review does not waive a procedural default that occurred in the state trial court. Sochor v. Florida, *supra*; West v. Seabold, 73 F.3d 81 (6th Cir. 1996); Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 423-424 (6th Cir. 2003); Rodriguez v. McAdory, 318 F.3d 733, 735-736 (7th Cir. 2003), citing, Carey v. Saffold, 536 U.S. 214, 225-226 (2002), and Stewart v. Smith, 536 U.S. 856, 859-861 (2002). *See also*, Bell v. Cone, 543 U.S. 447, 451, fn. 3 (2005).

(6) A procedurally defaulted claim (e.g., ineffective assistance of counsel) will not supply cause to excuse a different procedurally defaulted claim (e.g., trial error), unless there is an independent showing of cause and prejudice to overcome the procedural default of the ineffective assistance of counsel claim. Edwards v. Carpenter, 529 U.S. 446 (2000), *revg.*, Carpenter v. Mohr, 163 F.3d 938 (6th Cir. 1998).

(7) Procedural default also applies to total failure to present a claim to state courts if that claim is presently barred by state law. Teague v. Lane, 489 U.S. 288, 297-299 (1989); Coleman v. Thompson, 501 U.S. 722, 731-735, fn.1 (1991); Gray v. Netherland, *supra*; O'Sullivan v. Boerckel, *supra*; Hannah v. Conley, 49 F.3d 1193 (6th Cir. 1995); In Re: Cook, 215 F.3d 606 (6th Cir. 2000); Seymour v. Walker, 224 F.3d 542, 554-556 (6th Cir. 2000).

(8) Perceived futility of presenting the claim to the state courts is not cause to excuse default. "[F]utility cannot constitute cause if it means simply that a claim was

'unacceptable to that particular court at that particular time.' " Bousley v. United States, 523 U.S. 614, 623 (1998); Smith v. Murray, 477 U.S. 527, 534 (1986); Engle v. Isaac, 456 U.S. 107 at 130 and fn. 35 and 36 (1982); Lynn v. United States, 365 F.3d 1225, 1234-1235 (11th Cir. 2004).

(9) Errors by counsel in collateral attack proceedings do not provide cause to excuse procedural default, even though counsel was appointed under state law. Holland v. Jackson, 542 U.S. 649, 653 (2004); Coleman v. Thompson, 501 U.S. 722, 752-753 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987); McCleskey v. Zant, 499 U.S. 467, 495 (1991); Byrd v. Collins, 209 F.3d 514, 516 (6th Cir. 2000); Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 425-426 (6th Cir. 2003); Abdus-Samad v. Bell, 420 F.3d 614, 632 (6th Cir. 2005); Post v. Bradshaw, 422 F.3d 419, 425 (6th Cir. 2005); Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997)(en banc); Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992); Zeitvogel v. Delo, 84 F.3d 276, 281-282 (8th Cir. 1996); Moore v. Reynolds, 153 F.3d 1086, 1097 (10th Cir. 1998); Beazley v. Johnson, 242 F.3d 248, 270-271 (5th Cir. 2001); Martinez v. Johnson, 255 F.3d 229 at 238-241 and at 245-246 (5th Cir. 2001); 28 U.S.C. Section 2254 (i), "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

(10) Complaints about lack of funding or resources provided to collateral attack counsel do not establish cause for the same reasons. Bannister v. Delo, 100 F.3d 610, 624 (8th Cir. 1996); Kennedy v. Herring, 54 F.3d 678, 684 (11th Cir. 1995); Bell v. Bell, 460 F.3d 739, 761 (6th Cir. 2006). *Cf.* Lopez v. Wilson, 426 F.3d 339, 350-356 (6th Cir. 2005)(en banc), holding no right to counsel in collateral attack proceeding. Moreover, any such argument would

require creation of a new rule of federal constitutional law which did not exist at the time the petitioner's convictions and sentences became final on direct appeal, and would be barred by the Teague v. Lane, 489 U.S. 288 (1989), non-retroactivity doctrine. *Cf.* Thomas v. Gilmore, 144 F.3d 513, 516 (7th Cir. 1998), ineffective assistance of counsel claim exceeding Strickland standard was barred by Teague.

(11) Complaints about state court collateral attack proceedings are not subject to habeas review since they are collateral to conviction and sentence and generally do not provide cause to excuse a procedural default. Gall v. Parker, 231 F.3d 265, 319 (6th Cir. 2000); Jacobs v. Mohr, 265 F.3d 407, 415 (6th Cir. 2001); Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986); Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995); Kenley v. Bowersox, 228 F.3d 934 (8th Cir. 2000)(collecting cases), appeal after remand, 275 F.3d 709 (8th Cir. 2002); Greer v. Mitchell, 264 F.3d 663, 681 (6th Cir. 2001); Alley v. Bell, 307 F.3d 380, 387 (6th Cir. 2002); Roe v. Baker, 316 F.3d 557, 570-571 (6th Cir. 2002); Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007).

XIII. Procedural Default - Factual Claims

Prior to the enactment of the AEDPA amendment of section 2254, adding subsection (e), the procedural default rule was also applied to evidence or facts not properly presented to the state courts. Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), overruling in part Townsend v. Sain, 372 U.S. 293, 312 (1963); Alley v. Bell, 307 F.3d 380, 386 (6th Cir. 2002), reliance upon legal theory or factual basis not presented to state court for any claim prohibited by procedural default and exhaustion doctrines; Byrd v. Collins, 209 F.3d 486, 515-516 (6th Cir. 2000); Weeks v. Jones, 26 F.3d 1030, 1043 (11th Cir. 1994); Turner v. Delo, 69 F.3d 895 (8th

Cir. 1995); Zeitvogel v. Delo, 84 F.3d 276, 279 (8th Cir. 1996); Demarest v. Price, 130 F.3d 922 (10th Cir. 1997), collecting cases; Spreitzer v. Schomig, 219 F.3d 639, 648 (7th Cir. 2000).

XIV. Kentucky State Law on Successive Collateral Attacks

Kentucky law generally bars successive collateral attack motions and in addition imposes a three year time limit from the date the conviction became final on appeal to file a claim in a collateral attack motion. Kentucky Criminal Rule 11.42 (3) and (10). *See also,* McQueen v. Commonwealth, 948 S.W.2d 415 and 949 S.W.2d 70 (Ky.1997); Palmer v. Commonwealth, 3 S.W.3d 763 (Ky. App.1999); Commonwealth v. Stacey, 177 S.W.3d 813 (Ky. 2005); Gall v. Parker, 231 F.3d 265, 316 (6th Cir. 2000); Bowling v. Parker, 138 F.Supp.2d 821, 849 (E.D. Ky. 2001), *affd*., 344 F.3d 487 (6th Cir. 2003). Hence any claim not previously presented to the Kentucky courts would be procedurally defaulted under these provisions. See cases above under XII procedural default - legal claims.

ARGUMENT

Preliminary Argument

Petitioner presents thirty (30) separate grounds for a new sentencing trial or for relief from state court judgment. Petitioner has asserted generically that he has exhausted all of his claims (except for claim #29) in the Kentucky state courts. *Cf.* Kentucky Civil Rule 76.12(4)(c)(v). As an initial matter, the Commonwealth notes that Rule 5 of the Rules Governing Title 28 U.S.C. § 2254 Cases in the United States District Courts does not require that the Commonwealth's answer respond to the petition on a point-by-point basis, unlike the Federal rules of Civil Procedure. Williams v. Calderon, 52 F.3d 1465, 1483 (9th Cir. 1995).

The habeas petitioner bears the burden of proving any facts not determined by the state courts, further bears the burden that he is entitled to relief under § 2254, and bears the burden of overcoming the presumption of correctness as to facts found (explicitly or implicitly) by the state court. See Miller-El v. Cockrell, 537 U.S. 322, 348 (2003); Holland v. Jackson, 124 S.Ct. 2736 (2004); Woodford v. Visciotti, 537 U.S. 19, 25 (2003); Garlotte v. Fordice, 515 U.S. 39, 46 (1995). Also see, Standard of Review section of this memorandum, Parts I, II, and X.

As was previously noted in the Standard of Review section of this memorandum, Part IV, the habeas petitioner bears the burden of demonstrating that he exhausted his claims in the state courts up to and including the highest state court from which review can be had, and also bears the burden of presenting the particular facts that he relies on in support of the claim or claims to the state courts. See Standard of Review section of this memorandum, Parts III, XII and XIII.

The Commonwealth hereby incorporates by reference the Commonwealth's briefs filed in the Kentucky Supreme Court regarding Petitioner's case (Nos. 1998-SC-0755-MR, 2003-SC-000475-MR and 2004-SC-0931-MR). The Commonwealth also incorporates by reference the Commonwealth's response to Woodall's motions under RCr 11.42 and CR 60.02. In addition, the Commonwealth incorporates by reference the published opinions of the Kentucky Supreme Court, Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001), cert. denied, 537 U.S. 838, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002) and the unpublished opinions of the Kentucky Supreme Court, Woodall v. Commonwealth, 2005 WL 3131603 (Ky. November 23, 2005) and Woodall v. Commonwealth, 2005 WL 2674989 (Ky. October 20, 2005); all of these documents to accompany this memorandum are being filed with the Court.

With respect to each of the grounds presented by Petitioner that were not presented in their entirety to the Kentucky Supreme Court in one of Petitioner's Kentucky Supreme Court briefs, the Commonwealth contends that those grounds or sub-parts of those grounds are procedurally defaulted. See Standard of Review section of this memorandum, parts III, IV, XII and XIII.

To the extent that the grounds or sub-parts thereof were presented to the Kentucky Supreme Court, and were found to be properly presented in accordance with Kentucky law, the Commonwealth submits that the Kentucky Supreme Court's rejection of those grounds was not a clearly unreasonable application of then-existing U.S. Supreme Court precedent and was not contrary to then-existing U.S. Supreme Court precedent. See Standard of Review section of this memorandum, Part I. To the extent that the Kentucky Supreme Court reviewed unpreserved allegations of trial error and expressly declared such allegations to be unpreserved, the Commonwealth submits that such allegations of error are procedurally defaulted. See Standard of Review section of this memorandum, Part XII.

To the extent that the Kentucky Supreme Court rejected claims presented in Petitioner's Rule 11.42 appeal for failure to present an adequate factual basis for the claim as required by Rule 11.42(2), the Commonwealth submits that each of those claims or sub-parts thereof are procedurally defaulted. See Standard of Review section of this memorandum, Parts II, XII, and XIII.

To the extent that any argument or part thereof is not based upon a rule of federal constitutional law compelled by U.S. Supreme Court precedent existing at the time that his convictions and sentences became final on direct appeal, the argument is precluded by the

Teague non-retroactivity doctrine. See Standard of Review section of this memorandum, Parts VI and VIII.

Finally, the Commonwealth submits that if any federal constitutional error occurred during the course of Petitioner's state court proceedings, and that error has not been procedurally defaulted, the error is harmless. See Standard of Review section of this memorandum, Parts V and XI.

I.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIM REGARDING THE TRIAL COURT'S REFUSAL TO GIVE A NO ADVERSE INFERENCE INSTRUCTION WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

Woodall claims that his rights were violated pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution when the trial court refused to instruct the jury to draw no adverse inference from Woodall's decision not to testify. Woodall raised this in Argument I on page 7 of his direct appeal brief. The Commonwealth responded in its Brief for Appellee, in Argument I, at page 12. The Kentucky Supreme Court reviewed the issue and found no violation of the United States or Kentucky Constitution. Woodall v. Commonwealth, 63 S.W.3d 104, 115 (Ky. 2002). The Kentucky Supreme Court found no error and, further ruled even if there were an error, any possible error would non-prejudicial because Woodall admitted to the crimes and the aggravators and, the evidence of guilt was overwhelming.

Specifically the Kentucky Supreme Court stated:

> Woodall argues that he was denied due process, his right not to testify and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from the decision of Woodall not to testify during the penalty trial. Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.
>
> There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), extended Fifth Amendment protection and thus the Carter, supra, rule to the penalty phase of a trial. Estelle, supra, is not a jury instruction case, unlike Carter. Estelle does not cite to Carter or indicate that Carter has been extended. The factual situation in Estelle is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither Carter nor Estelle involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were no words that could be used against him so as to implicate the Fifth Amendment privilege as in Estelle.
>
> Woodall contends that Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), permits a guilty plea which does not waive the privilege

> against self-incrimination at the sentencing phase. Mitchell, supra, does not apply here. In Mitchell, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.
>
> The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

Woodall at 115.

The Kentucky Supreme Court's rejection of Woodalls's claim was not contrary to nor a clearly unreasonable application of then existing United States Supreme Court precedent. See Standard of Review section of this memorandum, Part I. Also, the Kentucky Supreme Court's findings of fact must be deferred to under the presumption of correctness. See Standard of Review section of this memorandum, Parts II and X. The Kentucky Supreme Court's interpretation of state law is binding on this Court. See Standard of Review section of this memorandum, Part IX. Furthermore, even if this Court rules that Woodall's Fifth Amendment privilege was violated because the Carter instruction was not given to the jury, any error is harmless due to Woodall's guilty plea and the overwhelming evidence of guilt. See Standard of Review section of this memorandum, Parts V and XI.

The Kentucky Supreme Court was also correct in applying harmless error analysis to the failure of the trial court to give a Carter instruction. Lewis v. Pichak, 384 F.3d 355, 357-358 (3rd Cir. 2003) citing to United States v. Brand, 80 F.3d 560, 568 (1st Cir. 1996); Richardson v. Lucas, 741 F.2d 753, 745-55 (5th Cir. 1984); Finney v. Rothgerber, 751 F.2d 858, 864 (6th Cir. 1985); United States v. Burgess, 175 F.3d 1261, 1265-66 (11th Cir. 1999). *Also see*, Hunter v. Clark, 934 F.2d 856, 859-860 (7th Cir. 1991) (*en banc*), citing to Arizona v. Fulminante, 499 U.S. 279 (1991).

In Brecht v. Abrahamson, 507 U.S. 619 (1993), the U.S. Supreme Court adopted the following standard for harmless error review in habeas cases: whether the contitutional error had "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750 (1946). In Fry v. Pliler, 127 S.Ct. 2321 (2007), the U.S. Supreme Court held the harmless error standard adopted in Brecht continues to apply to all habeas cases even after enactment of the AEDPA and even if the state court did or did not undertake harmless error analysis.

Apart from Woodall's own admission of guilt, the Commonwealth presented the following uncontested evidence:

1. Sarah Hansen and Woodall were seen in the Minit Mart (the last place Sarah was seen alive) at approximately the same time. (TE 9, 1200).

2. Woodall's clothes had Sarah's blood on them. (TE 9, 1241, 1264, 1327).

3. Woodall's shoe prints were on the pier where Sarah's body was thrown in the water. (TE 9, 1233, 1237-38).

4. Woodall's front door had Sarah's blood on it. (TE 9, 1239).

5. Woodall's fingerprints were on and in the van Sarah was last seen driving. (TE 9,

1240, 1306).

6. Woodall's DNA was on Sarah's vaginal swab. (TE 9, 1327).

7. Woodall's prior record showed a prior conviction of 2 counts of first degree sexual abuse . (TE 9, 1330).

According to Robert Keith Woodall himself, there was absolutely no doubt about his guilt regarding the kidnapping, murder and rape of young Sarah Hansen. The was no doubt about the aggravating circumstances of rape and kidnapping. There was no doubt about how cold-blooded, cruel and vicious these crimes were. Even if the judge had instructed the jury not to adversely infer anything from Woodall's silence during the sentencing phase, the sentence of death was well warranted and would have been the same. Any error complained of did not contribute to the verdict obtained. Ordering a new sentencing trial for an individual who is by his own admission, guilty of grabbing a young girl, slashing her throat twice, raping her and dumping her into a freezing lake to drown would be a waste of judicial time and resources.

Lastly, the Respondent asserts that Woodall impliedly argues for a new rule of federal constitutional law - one that would entitle those who plead guilty to receive a no adverse inference instruction at the sentencing trial - beyond that recognized by the United States Supreme Court at the time that his direct appeal became final. Therefore, Woodall's implied argument for a new rule of federal constitutional law is barred by the Teague non-retroactivity doctrine. See Standard of Review section of this memorandum, Parts VI and VIII. Woodall's claim for relief should be rejected.

II.

THE KENTUCKY SUPREME COURT'S RULING ON WOODALL'S BASTON CLAIM WAS NOT OBJECTIVELY UNREASONABLE GIVEN THAT THE COURT FOUND THAT THE PROSECUTOR'S STRIKE OF THE AFRICAN-AMERICAN JUROR WAS NOT MOTIVATED BY DISCRIMINATORY INTENT.

Woodall claims that his Fifth, Eighth, and Fourteenth Amendment rights were violated when the trial court allowed the Commonwealth to use a peremptory challenge to strike an African-American member of the jury pool. This issue was raised on direct appeal as issue VI (Woodall's brief, p. 56) (Commonwealth's brief, p. 63). The Kentucky Supreme Court found that the prosecutor's justification for striking peremptorily the one remaining African-American juror, was not a pretext for racial discrimination. The Kentucky Supreme Court's ruling was not objectively unreasonable.

The Kentucky Supreme Court addressed the Batson issue and found the following:

> Woodall argues that he was denied due process and equal protection of the law because the trial judge failed to conduct an inquiry into and make findings of fact concerning the alleged discriminatory intent and credibility of the reasons given by the prosecutor for a peremptory challenge of the only African American in the final jury pool. At the conclusion of the voir dire examination, only one African American remained in the jury pool. The other African American called for jury duty had been challenged and removed for cause. No motion was made to strike the remaining juror for cause but the prosecution exercised a peremptory strike against her. In a response to an objection by the defense, the prosecutor stated that the juror had been struck because she answered a question on a jury questionnaire to the effect that she "did not trust anyone."

> Woodall contends that the prosecution struck the juror solely because of her race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)
>
> In Batson, supra, the United States Supreme Court promulgated a three step process for determining whether peremptory challenges had been properly exercised. First, a defendant must establish a prima facie case of racial discrimination. Second, the prosecutor must provide a race neutral reason for the exercise of the peremptory challenge, and third, the trial court is to conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. Our examination of the record in this case indicates that the justification for striking peremptorily the one remaining African American juror was not a pretext for racial discrimination. The Commonwealth can rely on a jury questionnaire to derive its race neutral reasons for striking a juror. Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176 (1992). An attitude of mistrust expressed on a juror questionnaire should be given the same weight as an attitude of mistrust or bias expressed by a juror on voir dire examination. Batson was not intended to remove all prosecutorial discretion as to the use of peremptory challenges but only to eliminate the obviously bad practice of eliminating potential jurors because of their race only. The evaluation of whether the offered reasons for a prosecutorial challenge remains in the sound discretion of the trial judge. See U.S. v. McMillon, 14 F.3d 948 (4th Cir.1994), which stated in part that the trial court, present on the scene, found the reasons articulated were both nondiscriminatory and actual. Under all the circumstances, the trial judge did not abuse his discretion by rejecting the Batson challenge.

Woodall, 63 S.W.3d 104, at 120-121.

In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, only if they are "not fairly supported by the record. Purkett v. Elem, 514 U.S. 765, 769 (1995). The Kentucky Supreme Court specifically found,

after examining the record, "that the justification for striking peremptorily the one remaining African American juror was not a pretext for racial discrimination." This factual finding of the Kentucky Supreme Court is presumed to be correct.

The Kentucky Supreme Court's opinion in Woodall's case reflects that the Kentucky Supreme Court reviewed the record, the evidence presented, and arguments of counsel and determined that the prosecutor presented a valid and credible race-neutral reason for removing the African American potential juror. The Kentucky Supreme Court made the necessary factual findings to determine that the prosecutor did not violate Batson in exercising the peremptory challenge. As explained in the Standard of Review section of this memorandum parts II and X, on habeas review findings of fact made by state appellate court are also subject to the presumption of correctness contained in Title 28 U.S.C. § 2254 (e)(1), just as findings of fact made by trial court are subject to that presumption. Therefore for purposes of habeas review it makes no difference whether the fact finding occurred on review by the Kentucky Supreme Court or on review by the trial court. *Cf.*, Rice v. Collins, 547 U.S. 333, 338-339 (2006). As explained in Rice, the standard of review under § 2254 (d) is whether the state appellate court's ruling was objectively unreasonable in light of the facts presented in the trial court and existing U.S. Supreme Court cases governing Batson claims.

The state court record also refutes any suggestion that the trial court prevented Woodall's attorneys from presenting pertinent evidence to the court regarding their claims of jury selection error. (TE 8, 1166-1167; and TE 9, 1187-1188). Woodall's argument that the fact finding can only occur in the trial court would require a new rule of federal constitutional law that has not been explicitly recognized by the U.S. Supreme Court and would be contrary to the

non-retroactivity doctrine recognized in Teague v. Lane, 498 U.S. 288 (1989). See Standard of Review, parts VI and VIII. Therefore, the Kentucky Supreme Court's rejection of Woodall's claim of Batson error was not objectively unreasonable under then existing United States Supreme Court precedents and in light of the findings of fact made by the Kentucky Supreme Court.

III.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIM REGARDING THE EXCLUSION OF TWO POTENTIAL JURORS WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE UNITED STATES SUPREME COURT PRECEDENT AS IT EXISTED AT THE TIME.

Woodall claims that two potential jurors were removed due to their opposition to the death penalty. Woodall originally raised this issue on direct appeal as Issue V. (Woodall's Direct Appeal Brief, p. 52). The Commonwealth addressed this issue on direct appeal as Issue V. (Brief for Appellee, p. 58).

In regard to the issue the Kentucky Supreme Court specifically stated the following:

> Woodall claims that the trial judge abused his discretion by striking two potential jurors for cause and that the alleged wrongful exclusion of the jurors is not subject to a harmless error analysis. We will refer to the two jurors in question as the first juror and the second juror in order to respect their privacy as we have done with the jurors in the previous section of this Opinion.
>
> Initially, we must observe that jurors who are substantially impaired in their ability to impose a death sentence may be excused for cause. Wainwright v. Witt,

469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

> After an exhaustive examination of the record in regard to the first potential juror, we conclude that the trial judge did not abuse his discretion in excusing her for cause. The potential juror was relatively articulate and knowledgeable about the different range of penalties available in the case. She expressed a considerable interest in a penalty of life in prison for 25 years without hope of parole. Near the end of the voir dire by the prosecution, she clearly stated that she did not like capital punishment and that she would not consider it period. Although the potential juror was 78 years old, she seemed to be in full command of her faculties and knowledgeable about the legal system.
>
> The second juror indicated a hesitancy and an ambivalence about the death penalty. When asked if he could consider the range of possible punishments, including death, he answered "No sir, I don't think I could do that." Later, when asked if he could consider death if the judge instructed the jurors to give each one fair consideration, the juror answered, "I don't think I consider the death penalty as far as something like that, no sir." The second juror was struck for cause and the defense made no objection. Both jurors were properly struck for cause.

Woodall, 63 S.W.3d 104, at 119-120.

The Kentucky Supreme Court's rejection of Woodall's claim was not contrary to nor a clearly unreasonable application of then-existing United States Supreme Court precedent. See Standard of Review section of this memorandum, Part I. Also, the Kentucky Supreme Court's findings of fact must be deferred to under the presumption of correctness. See Standard of Review section of this memorandum, Parts II and X. The Kentucky Supreme Court's interpretation of state law is binding on this Court. See Standard of Review section of this memorandum, Part IX.

Both jurors were properly excused because both of them indicated an inability to consider the death penalty. Bessie Hopson was one of the jurors struck for cause. During individual voir dire, the trial court had the following conversation with Ms. Hopson:

> THE COURT: Will you be able to consider each of these penalties involved in this case?
>
> MS. HOPSON: I think so.
>
> THE COURT: Would you automatically vote for any of these particular penalties?
>
> MS. HOPSON: Yes.
>
> THE COURT: You would automatically vote for one of them?
>
> MS. HOPSON: Yes, I would.
>
> THE COURT: And what penalty would that be?
>
> MS. HOPSON: I'd say maybe 25 years.
>
> THE COURT: Alright. You're saying that you would vote for 25 years --
>
> MS. HOPSON: Without parole.
>
> THE COURT: Pardon?
>
> MS. HOPSON: I think didn't that say without parole?
>
> THE COURT: Okay. The one that says life without parole for 25 years?
>
> MS. HOPSON: Uh-huh.
>
> THE COURT: You think you would automatically vote for that penalty?
>
> MS. HOPSON: I think I would.

> THE COURT: Alright. Are you telling us that that's what you would vote for if you had to determine a sentence right now based what the charges are and what he's pled guilty to? Is that what you're saying?
>
> MS. HOPSON: Yeah.

(TE 6, 859-860).

Later on, during the Commonwealth's voir dire, Ms. Hopson reiterated her opposition to considering anything other than life without parole for 25 years:

> MR. VICK: And again, sitting there right now then you feel that the fair - the punishment you would impose, I think you said automatically, would be 25 years - life without parole eligibility for 25 years. Is that right?
>
> MS. HOPSON: That's what I said.

(TE 6, 866-867).

Finally, near the end of the Commonwealth's voir dire, Ms. Hopson made her opposition to the death penalty clear:

> MR. VICK: Do you have any religious beliefs or feelings against any of those range of punishments?
>
> (Defense objected and was overruled)
>
> MS. HOPSON: I don't like capital punishment.
>
> MR. VICK: Pardon me?
>
> MS. HOPSON: Not capital, you know, not the chair.
>
> MR. VICK: I'm sorry?
>
> MS. HOPSON: I couldn't go with the chair.
> (Juror was prompted to speak up)
>
> MR. VICK: I believe you just stated, Ms. Hopson, that you had some beliefs against capital punishment.

> MS. HOPSON: Uh-huh.
>
> MR. VICK: And you said the chair. By that are you saying you could not or do not believe in the death penalty?
>
> MS. HOPSON: No.
>
> MR. VICK: Are you opposed to - does your belief, your feelings inside you prevent you from really considering the death penalty?
>
> MS. HOPSON: No, I wouldn't consider that.
>
> MR. VICK: You could not consider imposing the death penalty?
>
> MS. HOPSON: Uh-uh.

(TE 6, 869-870).

The trial court granted the Commonwealth's motion to excuse Ms. Hopson for cause, stating:

> I think she's going to have problems following the evidence first. She's 78 years old. Something wasn't right about her. I think she's not - arguably she has a pretty good recall of what she read, but she wasn't connecting here some way or another, and I think she would have said most anything. She basically answered the questions I asked the way she thought I wanted to ask and also for the lawyers, and she said - and when she said she could not consider the death penalty, she said it with conviction, and I think that she is not qualified to serve. So I'm going to grant the motion over the objection of defense counsel.

(TE 6, 875).

The second juror Woodall discusses is Richard Thompson. During Woodall's voir dire of Mr. Thompson, Woodall asked the juror whether he could fairly consider the entire range of possible punishments, including the death penalty:

> MR. BAKER: If you - now, we're talking about an intentional murder, a rape, and a kidnapping. Could you impose the could you consider the death penalty in a case like that?
>
> MR. THOMPSON: No sir, I don't think I could do that.

(TE 7, 940).

Mr. Thompson reiterated his unwillingness to consider the death penalty later on in Woodall's voir dire:

> MR. BAKER: And if the Judge told you as part of the law you would have to consider as one of those twenty to fifty years, life, life without parole, life with no parole, and the death penalty, and you had to give each and every one of those fair consideration, could you do that?
>
> MR. THOMPSON: I don't think I consider the death penalty as far as something like that, no sir.

(TE 7, 941).

The Commonwealth moved to strike Mr. Thompson for cause due to his inability to consider the death penalty as a possible punishment. (TE 7, 942). Woodall made no objection, and the Commonwealth's motion was granted. (Id.).

The Kentucky Supreme Court's opinion explicitly applied the standard adopted by the U.S. Supreme Court in Wainwright v. Witt, supra. The U.S. Supreme Court has since had occasion to review a claim that Wainwright v. Witt was misapplied by a state court in excluding three jurors for cause regarding their views on the death penalty. In that case the U.S. Supreme Court rejected the habeas petitioner's claim that federal constitutional error occurred and further rejected the habeas petitioner's argument that the state court's application of Wainwright v. Witt was objectively unreasonable. Uttecht v. Brown, 127 S.Ct. 2218 (2007). Under the standard

adopted by the Supreme Court in that case, this Court must reject Woodall's claim.

IV.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIM THAT SIX POTENTIAL JURORS SHOULD HAVE BEEN STRUCK FOR CAUSE, THREE OF WHICH WERE REMOVED BY PEREMPTORY CHALLENGE, WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THEN EXISTING UNITED STATES SUPREME COURT PRECEDENT.

Woodall argues that his federal constitution rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated because three potential jurors and three actual jurors were not removed for cause. Woodall concedes that he exercised peremptory challenges to remove three of the potential jurors at issue. The other three jurors that Woodall complains about were among the twelve jurors that decided his case. Woodall originally raised this issue on direct appeal as argument IV. (Woodall's direct appeal brief, p. 45). The Commonwealth's brief responded to this issue as argument IV. (Commonwealth's direct appeal brief, p. 42). The Kentucky Supreme Court addressed Woodall's argument in part III of its opinion, 63 S.W.3d at 118-119. The Kentucky Supreme Court stated as follows:

> Woodall argues that the trial judge abused his discretion by failing to strike six allegedly unqualified jurors for cause and thereby violated his right to an impartial jury and impaired his use of peremptory challenges. Woodall used all ten of his peremptory challenges; three of the peremptory challenges were exercised on jurors he had sought to remove for cause. He also unsuccessfully challenged for cause three of the twelve jurors who sat on the case. Motions to strike jurors for cause are within the sound discretion of the trial judge. Bowling, supra.

In regard to Juror 278, the allegation that she was impaired because her sister had been raped is without merit. The refusal to strike jurors for cause because they had previously been victims of violent crimes has been repeatedly upheld. See Hodge; Stoker v. Commonwealth, Ky., 828 S.W.2d 619 (1992). Here, the crime victim was the juror's sister rather than herself. There was no cause for strike.

It was never established that the employment of the juror at the Kentucky State Penitentiary gave her any special knowledge about parole, and there is no authority for the proposition that mere knowledge about parole eligibility is a basis for a challenge for cause. The trial judge recognized the fact that the potential juror was taking antidepressant medication and properly believed that she could serve if necessary. Bowling, supra. There was no abuse of discretion in regard to the potential juror. The contention that the juror was biased because her daughter's band competed against the victim's band was unsupported by the record.

Juror No. 176 possessed no special knowledge that could have influenced other jurors. The argument that the juror was situationally impaired because she had worked at the mini-market for one month more than six months after the crime occurred is without merit. The juror specifically denied on voir dire that she knew one of the prosecution witnesses and there was no evidence to substantiate the claim by Woodall. The juror indicated on voir dire that any conversations she may have had with fellow workers at the mini-mart were of a general nature. There was no abuse of discretion in refusing to strike the juror for cause.

Juror No. 94. Woodall argues that the juror should have been struck for cause because she could not consider a minimum sentence. The record shows that the juror indicated on two different occasions that she could consider the entire range of penalties. In response to the trial judge's question of whether she could consider a twenty-year sentence if so instructed, she answered she could if it were supported by the evidence. Although a juror is disqualified if he or she cannot consider the minimum penalty pursuant

to Grooms, supra, excusal for cause is not required merely because the juror favors severe penalties, so long as he or she will consider the full range of penalties. Hodge, *citing* Bowling. Per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. Hodge.

Woodall claims that Juror No. 185 should have been excused for cause pursuant to KRS 29A.080(2)(d) because he had an insufficient knowledge of the English language and was unable to understand what was being said in voir dire. Woodall also argues that the juror never indicated whether he could consider I.Q. of 74 of Woodall as a mitigating factor. No. 185 sat as a juror. He stated on two separate occasions that he could consider mitigating evidence and follow the instructions of the trial judge on mitigating evidence. During voir dire, the juror stated he could consider someone's stability as a mitigating circumstance. There was no abuse of discretion in denying the motion to strike for cause.

Juror No. 16 was removed from the case by peremptory challenge after a motion to strike for cause had been denied. Woodall claims that the juror was impaired because he could not consider mitigating evidence. Although the juror may have been temporarily confused on voir dire, he finally indicated that he would consider mitigating evidence, "If the court instructs me that way." The juror satisfied the requirements of *Grooms, supra,* and the trial judge did not abuse his discretion in refusing to strike the juror for cause.

Potential Juror No. 8 was peremptorily challenged after the trial judge had refused to strike him for cause. Woodall complains that the motion for cause was denied because the juror had properly answered what he labels as the "leading questions" by the judge about considering the entire range of punishment. When initially asked if he could consider a 20-year minimum sentence, the juror answered "I don't know," and later proclaimed that he was for the death penalty. After appropriate rehabilitation by the trial judge, the juror indicated that he would base any decision in the case as to punishment on the evidence presented. The

> trial judge did not use leading questions in order to elicit such an answer. The proscription provided in Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991), is not applicable.
>
> The refusal of the trial judge to strike jurors for cause did not violate the right to a fair and impartial jury and did not unnecessarily compromise his use of the allotted peremptory challenges.

Woodall, 63 S.W.3d 104 at 118-119

A. Juror #278, Lana Conger

Ms. Conger had a daughter in the Campbell County High School band. Her daughter had "several competitions together" with Sarah Hansen's Muhlenberg County band. (TE 7, 919). Ms. Conger's sister was a rape victim. (TE 7, 925 -926). Ms. Conger was taking antidepressants. (TE 7, 931, 933). She made it clear that she could consider the entire range of penalties in this case, as well as all mitigating evidence introduced by Woodall. (TE 7, 916-920, 927). She also stated clearly that she could be impartial. (TE 7, 923, 928). At the end of voir dire, Woodall moved to strike Ms. Conger on the basis that she was situationally impaired due to the fact her daughter was in a high school band that competed against Sarah Hansen's band and due to the fact her sister was a crime victim. (TE 7, 932-933). Woodall's motion was denied. (TE 7, 934). Woodall eventually used a peremptory challenge to remove Ms. Conger. (TR VII, 1103).

Woodall makes no showing in Ms. Conger's daughter even knew Sarah Hansen personally or had a friendship with her. The two went to different schools in different counties and there is no evidence in the record that they ever even met or talked. Woodall's contention that Ms. Conger was biased because her daughter's band competed against Sarah Hansen's band

is simply speculative and unsupported by the record. Woodall's claim that Ms. Conger was impliedly biased because her sister was raped is also meritless because the Kentucky Supreme Court has repeatedly upheld refusals to strike jurors for cause because the jurors had previously been victims of violent crimes. Hodge v. Commonwealth, 17 S.W.3d 824, 838 (Ky. 2000), habeas denied, sub nom., Hodge v. Haeberlin, 2006 WL 1895526 (E.D. Ky. July 10, 2006). Woodall also argues that because Ms. Conger worked at Kentucky State Penitentiary, she possessed special knowledge about parole eligibility and therefore should have been struck for cause. Ms. Conger was not even asked about parole eligibility, and Woodall never established even possessing special knowledge about parole. The burden was upon Woodall to establish that the juror was disqualified as a matter of law, and he failed to do so. In any event, the Kentucky Supreme Court's determination that this juror was not impliably bias or legally disqualified from serving as a juror as a finding of fact binding upon this Court under the presumption of correctness. See Standard of Review section of this memorandum, parts II and X.

B. Juror #176, Genia Morris

Ms. Morris worked at the Minit Mart in Greenville, where Sarah Hansen was abducted. (TE 8, 1078). She worked there during August of 1997, over six months after the crime had occurred. (TE 8, 1079). She stated that crime was "not really discussed" while she was there. (Id.). She only worked there for one month. (Id.). She did not know any of the prosecution's witnesses. (TE 8, 1083). Ms. Morris indicated that she was able to consider the entire range of penalties. (TE 8, 1076, 1081). Woodall moved to strike her on the grounds that she worked at the "crime scene" and possessed information about the case that other jurors did not. (TE 8, 1084). The Commonwealth pointed out the crime scene was actually Luzerne Lake,

where Sarah Hansen drowned. (TE 8, 1084). The Commonwealth also stated it would not be putting on any evidence regarding Sarah Hansen's abduction from the Minit Mart. (TE 8, 1084-1085). The trial court denied Woodall's motion. (TE 8, 1085).

Although Ms. Morris worked at the same Minit Mart that Sarah Hansen was abducted from, the Commonwealth put on no proof as to the actual abduction. The Commonwealth's case did not deal with the Minit Mart in any way. In fact, as the Commonwealth pointed out, the actual crime scene was the lake where Sarah Hansen drowned, rather than the Minit Mart. Ms. Morris therefore had no special familiarity with the crime scene. Although Woodall alleges that Ms. Morris knew one of the prosecution witnesses, Ms. Morris specifically denied this on voir dire, and Woodall offers no evidence to substantiate his claim. Finally, Ms. Morris made it clear on voir dire that any discussions that she may have had with fellow workers at the Minit Mart were of a general nature. She possessed no special knowledge of any sort that may have influenced the other jurors. Therefore, the Kentucky Supreme Court's determination that this juror was not impliably biased and disqualified from serving as a juror as a matter of law was not objectively unreasonable and is subject to the presumption of correctness as a finding of fact.

C. Juror #94, Kathryn Reynolds

During Woodall's voir dire, he asked Ms. Reynolds if she could consider the minimum penalty:

> MR. BAKER: Could you consider, and assuming all that's tacked on whatever the Judge just said, but could you consider in a case where you found intentional murder, do you have any personal beliefs or anything that would prevent or substantially impair you from considering

> imposing a sentence of twenty years with possibility of parole?
>
> MS. REYNOLDS: I couldn't go with that.
>
> MR. BAKER: You couldn't go with that?
>
> THE COURT: Okay. Let me ask you this. If you were instructed to consider that and you felt it was warranted under the evidence, could you consider it?
>
> MS. REYNOLDS: Yes, if I knew what the evidence was, yeah.
>
> THE COURT: That's why we - why you ask the question like that. (TE 8,1120)

Ms. Reynolds also indicated to the trial court that she could consider the full range of penalties at the beginning of her voir dire. (TE 8, 1116-1117). Woodall moved to strike Ms. Reynolds for cause based on her alleged inability to consider the minimum penalty. (TE 8, 1124). The trial court replied:

> That was when she testified - you didn't ask her if she was instructed to consider that and if the evidence warranted it. I think she was basing that on what she knows about the case at this time. So that motion will be denied.

(TE 8, 1124 -1125).

Woodall argues that Ms. Reynolds should have been struck for cause because she was impaired in her ability to consider a minimum sentence for Woodall. Ms. Reynolds specifically indicated on voir dire that she could give fair consideration to the full range of possible penalties.

When asked by Woodall, Ms. Reynolds made it clear that she could consider the full range of penalties if she "were instructed to consider that and [she] felt it was warranted

under the evidence." She also answered yes to the trial court's inquiry at the beginning of her voir dire regarding whether she could fairly consider the full range of penalties.

Therefore, the Kentucky Supreme Court's finding that this juror was not disqualified from serving as a juror because of her views regarding the minimum penalty was objectively reasonable in light of the evidence. The Kentucky Supreme Court's ruling was not objectively unreasonable nor was it contrary to the standard adopted by the U.S. Supreme Court in Morgan v. Illinois, 504 U.S. 719 (1992). The Kentucky Supreme Court's determination is a finding of fact subject to the presumption of correctness.

D. Juror #185, Noah Miller

During Woodall's voir dire, Mr. Miller was asked about his opinion of mitigating evidence:

> MR. BAKER: Okay. The Judge talked with you a little bit about aggravation and mitigation. Do you know what he means by mitigation?
>
> MR. MILLER: No really.
>
> MR. BAKER: Okay. Well, I'm not sure I really know, but here is what I use. I know it's unclear when they just confine it to terms like that, but when we talk about mitigation - when I do, it's a fact or an event or evidence that may make you want to punish someone less severely. Okay. Now, self-defense, insanity, those type of things aren't mitigation. Those are defenses. That's not what I'm talking about. Okay. Am I being clear here?
>
> MR. MILLER: Yes, I believe so.
>
> MR. BAKER: Mitigation would be things like a low I.Q., mental illness, whether intoxication are a few things that are in the statute. Would those types of things, would they be important to you in considering to reach your decision

> on how to punish someone or would they just not matter to a hill of beans?
>
> MR. MILLER: Well, part of it might be.
>
> MR. BAKER: Which part?
>
> MR. MILLER: On deciding on - on the the stability about it.
>
> MR. BAKER: On the what?
>
> MR. MILLER: Stability about it - the person.
>
> MR. BAKER: The stability of someone. Okay. That would matter to you?
>
> MR. MILLER: I believe so.
>
> MR BAKER: You think so. Are you sure?
>
> MR. MILLER: Yes. (TE 7, 948-949)

During the Commonwealth's voir dire, the prosecutor clarified the witness' view on mitigation:

> MR. VICK: Mr. Miller, I want to ask you some questions, too. Now, concerning - you heard Mr. Baker's definition of mitigation and all that. I simply want to ask you if you do agree or are you able to whatever - how this Court defines what mitigation is in the written instructions, do you think you have any problem in considering and following that?
>
> MR. MILLER: No sir. (TE 7, 949-950)

Woodall moved to strike Mr. Miller for cause based on his alleged inability to understand the proceedings. (TE 7, 951). The trial court responded:

> Well, I feel like that he answered very directly. He was pretty alert. To me he certainly didn't fall in the Ms. Hopson category as far as the Court's observation is

> concerned. He answered the questions. He answered the questions you were asking. I thought he was pretty lucid. He listed a couple of matters that he'd consider in mitigation. He said stability of the defendant. That's pretty perceptive in my - he probably would not have considered intoxication that was thrown out. That's the danger we get involved in when we start throwing out these specifics. I thought he was pretty alert and pretty perceptive, so I'll overrule the motion.

(TE 7, 951).

Mr. Miller stated on two separate occasions that he could consider mitigating evidence. During Woodall's voir dire, Mr. Miller indicated that he would consider someone's "stability" as a mitigating circumstance. When the Commonwealth attempted to clarify his views, Mr. Miller made it clear that he could follow the judge's instructions on mitigation.

Therefore, the Kentucky Supreme Court's determination that Miller was not disqualified from serving as a juror was not contrary to nor an unreasonable application of the U.S. Supreme Court's ruling in Morgan v. Illinois, 504 U.S. 719 (1992), and is subject to the presumption of correctness.

E. Juror #16, Joseph Simms

During Woodall's voir dire, he asked Mr. Simms about mitigating evidence:

> MR. BAKER: And when we talk about mitigation what we mean is any facts or evidence that may make you want to punish less severely than you otherwise would. I mean still within the 20 to life and -
>
> MR. SIMMS: I understand that, according to the evidence that I see.
>
> MR. BAKER: And then you would to hear about or - would you want to hear about mitigation evidence before reaching a decision?

MR. SIMMS: I'd want to hear the evidence, yeah, all the evidence.

MR. BAKER: Right. So it would be - could you consider evidence of mental illness as mitigating evidence?

MR. SIMMS: I'd leave that to the psychologist or whoever else - I'm sure somebody more qualified than I am has already made that decision.

MR. BAKER: When you - that was a bad way to ask that question. Let me ask it again to you. You're going to be given the opportunity to consider certain things at trial, as you know, before you impose your punishment, and some of the evidence that can consider is what we talked about earlier as mitigation evidence. If you heard evidence of mental illness, would that be something that you would want to consider in reaching your decision on how to punish Keith or is that something that just wouldn't matter to you?

(Commonwealth objects)

THE COURT: I'll sustain the objection. Mr. Simms, let me ask you this. If you were to receive instructions from the Court that you were to consider mitigating circumstances and that one of those mitigating circumstances that you were to consider was a mental condition, mental illness, low I.Q., whatever, would you be able to consider that?

MR. SIMMS: I'd consider it, but I think with our judicial system the way I understand it, he wouldn't be here in this thing if he was not fit to be tried. I think - am I wrong?

THE COURT: Alright. That's a good point. It may be as to - we might not be here for guilt or innocence, but he might suffer - he may have a mental condition that goes to punishment, not necessarily guilt or innocence. Do you see what I'm saying? It's considered to be a mitigating circumstance. The question would be if the Court instructed you that you consider mitigating evidence -

> MR. SIMMS: I have no problem. I have no problem - if the Court instructs me that way, I would have no problem with that.
>
> THE COURT: You would be able to consider his mental condition at the time he committed the crime to include low I.Q. or whatever that might be submitted into evidence, you'd be able to consider that?
>
> MR. SIMMS: (Nodding affirmatively.)

(TE 7, 1020-1023).

Woodall moved to strike Simms for cause on the grounds that he could not consider mitigating evidence. (TE 7, 1024). The trial court responded:

> I think that's why you need to ask him the question when you ask him that "if instructed by the Court and if warranted by the evidence," and I've advised you of that once.

(TE 7, 1024). The trial court then denied Woodall's motion. (Id.).

Although Mr. Simms may have temporarily been confused, he indicated an ability to consider Woodall's mitigating evidence. He specifically agreed to consider Woodall's low IQ as mitigation if instructed to by the trial court. Therefore, the Kentucky Supreme Court's ruling that this juror was not disqualified is not contrary to nor an unreasonable application of the U.S. Supreme Court ruling in Morgan v. Illinois, 504 U.S. 719 (1992), and the Kentucky Supreme Court's finding must be deferred to by this Court under the presumption of correctness.

F. Juror #8, Joe Clift

Mr. Clift stated that he could consider the entire range of penalties, as well as any mitigation evidence Woodall might offer. (TE 7, 984-985). During Woodall's voir dire, Mr. Clift was asked if he could consider the minimum sentence:

> MR. BAKER: Okay. The Judge talked to you a little bit about the penalties that you would be asked to consider after you've heard all the evidence, and those range from 20 years to death. What I want to know is if you could fairly and honestly consider, on the facts the Judge had laid out of you, imposing a life sentence?
>
> MR. CLIFT: Why not? I mean considering you've got to hear the evidence before.
>
> MR. BAKER: Okay. Well, then by your answer you're also be given an opportunity to impose a sentence as low as 20 years. Given what you know now, do you think you could fairly and honestly tell me that you could consider imposing a sentence of 20 years in a case like this?
>
> MR. CLIFT: I don't know.
>
> MR. BAKER: You don't know?
>
> MR. CLIFT: I don't know.
>
> MR. BAKER: I haven't heard the - both of you.

(TE 7, 988 -989).

Later in Woodall's voir dire, Mr. Clift indicated that he was opposed to "turning people loose out of prison" to "feed" on the public again. (TE 7, 991). Woodall asked Mr. Clift whether that would influence him towards a death sentence:

> MR. BAKER: Well, would you be leaning toward the death penalty in this case?
>
> MR. CLIFT: Probably since he was - like I said, turned loose on the public again.
>
> MR. BAKER: Well, given your answer to that, do you think if we're - in all honesty or in fairness, that it would be pretty difficult for you to consider, knowing what you know, imposing a sentence of 20 years in this case?

> (Commonwealth objects)
>
> THE COURT: Mr. Clift, let me ask you this question, and this is what Mr. Baker is getting it, and I'm going to get directly to it. Would the fact that the defendant has been convicted of a prior offense and been in the penitentiary for three years and released, would that keep you from considering the entire range I've given to you?
>
> MR. CLIFT: No, it wouldn't.
>
> THE COURT: Would that fact alone keep you from considering a 20 year sentence?
>
> MR. CLIFT: No, like I said, I'd have to hear the --
>
> THE COURT: You'll have to hear all the evidence.
>
> MR. CLIFT: (Nodding affirmatively).

(TE 7, 992-993).

Woodall moved to strike Mr. Clift based on his alleged predisposition to death and his inability to consider the entire range of penalties. (TE 7, 994). The trial court responded:

> I think he answered that he could consider them all in answer to the entire range, and also to include mitigating circumstances. So I'm going to overrule the motion.

(TE 7, 995).

Mr. Clift told the court that his opinions about the death penalty and recidivism would not affect his ability to consider the entire range of penalties. It should be noted that the court did not ask a leading question to elicit this answer, as Woodall alleges. Mr. Clift made it clear that he would base his opinion of Woodall's proper punishment on the evidence presented. That is all that is required. Therefore, the Kentucky Supreme Court's determination that this juror was not disqualified is not contrary to nor an unreasonable application of the U.S. Supreme

Court's ruling in Morgan v. Illinois, 504 U.S. 719 (1992), and must be deferred to by this Court under the presumption of correctness.

A state court's determination as to whether a juror is impartial is reviewed under the presumption of correctness as finding of fact. Patton v. Yount, 467 U.S. 1025 (1985); Wainwright v. Witt, 469 U.S. 412, 425-428 (1985); Darden v. Wainwright, 477 U.S. 168, 175-178 (1986); Mu'Min v. Virginia, 500 U.S. 415, 428-429 (1991). "The trial judge may properly choose to believe those statements [by a prospective juror] that were most fully articulated or that appear to have been least influenced by leading." Patton, at 1039. In order to overturn a state court's finding on an impartiality of a juror, a federal habeas corpus court must conclude that the finding was "manifestly erroneous." DeLisle v. Rivers, 161 F.3d 370, 382 (6th Cir. 1998) (en banc), citing Patton, at 1031. Also see, McQueen v. Scroggy, 99F.3d 1302, 1320-1321 (6th Cir. 1996); Hill v. Bragano, 199 F.3d 833, 844-845 (6th Cir. 1999).

With respect to Woodall's complaints about the jurors being biased in terms of the minimum penalty, Woodall's argument is contrary to the standard adopted by the U.S. Supreme Court in Morgan v. Illinois, supra. The standard articulated under Morgan is whether a juror would automatically vote for the death penalty or would fail in good faith to consider all of the evidence of aggravating and mitigating circumstances as required by the jury instructions. To the extend that Woodall argues that a juror can be disqualified because the juror has reservations regarding imposing a minimum prison sentence, Woodall argues for a new rule of federal constitutional law that is contrary to the non-retroactivity doctrine recognized by the United States Supreme Court in Teague v. Lane, 489 U.S. 288 (1989). See the Standard of Review section of this memorandum, part VI and part VIII.

With respect to Woodall's complaints about the three jurors that he removed from the jury panel by exercising a peremptory challenge, Woodall could not establish a federal constitutional violation under existing precedents of the United States Supreme Court. United States v. Martinez-Salazar, 528 U.S. 304 (2000); McQueen, 99 F.3d at 1320-1321; Hill, 99 F.3d at 844-845. Woodall's argument to the effect that a different rule of constitutional law should be applied to his case is contrary to Title 28 U.S.C. § 2254(d)(1) and the Teague non-retroactivity doctrine. See Satcher v. Pruett, 126 F.3d 561, 574-575 (4th Cir. 1997), and the Standard of Review section of this brief, parts I and VI. Careful review of the entire state court record regarding voir dire under the presumption of correctness that applies will demonstrate that Woodall received a fair and impartial jury to determine his sentence in accordance with U.S. Supreme Court rulings. See Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007).

V.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIM REGARDING THE JURY INSTRUCTION ON MITIGATING CIRCUMSTANCES WAS NOT CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THEN EXISTING UNITED STATES SUPREME COURT PRECEDENT SINCE THE JURY INSTRUCTIONS IN WOODALL'S CASE DID NOT PRECLUDE THE JURY FROM CONSIDERING ANY EVIDENCE AS MITIGATING CIRCUMSTANCES.

Woodall originally raised this issue on direct appeal as issue VII (Woodall's direct appeal brief, page 61.) The Commonwealth addressed this issue on direct appeal as issue VII (Commonwealth's direct appeal brief, page 67.) Woodall argues that the trial court erred in submitting an instruction to the jury that required it to find mitigating circumstances unanimously

and beyond a reasonable doubt. More specifically Woodall argues that submission of the instruction in his case prevented the jury from giving adequate weight to his mitigation evidence in violation of Mills v. Maryland, 486 U.S. 367, 384 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990). The mitigating circumstance instruction in Woodall's case, however, did not create a reasonable likelihood that the jury was prevented from considering mitigating evidence. Juror instruction no. 4 (TR VIII, 1140) states as follows:

> Mitigating Circumstances
>
> In fixing the sentence of the Defendant for the offense of Murder, you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true including but not limited to such of the following you believe from the evidence to be true:
>
> 1. At the time of the offenses committed by the Defendant, the capacity of the Defendant to appreciate the criminality of the requirements of the law was impaired as a result of mental illness or retardation, even though the impairment of the capacity of the Defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime.
>
> 2. The youth of the Defendant at the time of the crime.

In addition instruction no. 6 (TR VIII, 1142) stated as follows:

> If you have a reasonable doubt as to the truth or existence of one or both aggravating circumstance or circumstances listed in instruction no. 2, you shall not make any finding with respect to it.
>
> If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

Juror instruction no. 7 (TR VIII, 1143) stated as follows:

> The verdicts of the jury must be in writing, must be in unanimous, and must be signed by one of you as

Foreperson.

In summary, the jury instructions did not tell the jury that they had to be convinced beyond a reasonable doubt as to mitigating circumstances and did not tell the jury that they had to be unanimous in finding mitigating circumstances.

In response to this argument the Kentucky Supreme Court stated as follows, 63 S.W.3d at 125-126:

> IX. Instruction on Mitigators
>
> The trial judge did not err in giving an instruction on mitigating circumstances to the jury where that instruction did not require that mitigating circumstances be found unanimously or beyond a reasonable doubt.
>
> Woodall claims that the trial court submitted an instruction that required the jury to find mitigating circumstances unanimously and beyond a reasonable doubt. He contends that the jury instructions, when read as a whole and given their common sense meaning, lead to a conclusion that the entire jury had to be unanimous. We find such argument unconvincing. This Court has repeatedly indicated that an instruction on unanimous findings on mitigation is not required. Bowling [v. Commonwealth, 873 S.W.2d 175, 180 (1993)]. This situation does not violate the doctrine set out in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988), because there was no requirement the jurors unanimously reach a conclusion regarding any mitigating factor. Each individual juror was free to examine and react to any mitigating factor when determining the appropriate sentence. Any juror who found a mitigating factor could use that to prevent the unanimous sentence of death.

The en banc sixth circuit rejected a similar argument in Kordenbrock v. Scroggy, 919 F.2d 1091, 1120-1121 (1990) (en banc) (part VI of Judge Kennedy's opinion approved by a majority of the court). The standard of review for claims that a penalty phase instruction

precluded a jury from considering relative mitigating evidence was adopted by the U.S. Supreme Court in Boyde v, California, 494 U.S. 370 (1990). Also see, Buchanan v. Angelone, 522 U.S. 269 (1998); Brown v. Payton, 544 U.S. 133 (2005); Ayers v. Belmontes, 127 S.Ct. 469 (2006). In Bowling v. Parker, 138 F. Supp.2d 821, 907-911 (E.D. Ky. 2001), affirmed, 344 F.3d 487, 518 (6th Cir. 2003), the court rejected a similar argument about a Kentucky mitigating circumstance instruction under the AEDPA standard of review. The Sixth Circuit also rejected a similar argument in another Kentucky death penalty case applying Supreme Court precedents prior to Mills v. Maryland, supra. Slaughter v. Parker, 450 F.3d 224, 239-240 (6th Cir. 2006). The Sixth Circuit has also rejected similar arguments in two Tennessee death penalty cases. Coe v. Bell, 161 F.3d 320, 338 (6th Cir. 1998); Henley v. Bell, 487 F.3d 379, 390-391 (6th Cir. 2007).

Finally, even if the court determines that the Kentucky Supreme Court's ruling regarding this jury instruction was contrary to or unreasonable application of Boyde v. California, as further clarified and explained in Buchanan v. Angelone, supra, the Attorney General submits that any possible error would be harmless. The U.S. Supreme Court and the Sixth Circuit have held that even if an instruction violates Boyde, harmless error review must be conducted. Calderon v. Coleman, 525 U.S. 141 (1998); Coe v. Bell, supra, 161 F.3d at 335-336.

The standard of review for habeas cases governed by the AEDPA was set forth by the U.S. Supreme Court in Fry v. Pliler, 127 S.Ct. 2321 (2007), in which the Supreme Court held that the standard previously adopted by the Court in Brecht v. Abrahamson, 507 U.S. 619 (1993), applied to habeas cases regardless of whether the state court did or did not conduct harmless error review with respect to the claim at issue. The extent of the evidence against Woodall, which established his guilt of the aggravating circumstances, was overwhelming and, as has

previously been discussed in the Counterstatement of the Case portion of this memorandum, and was also summarized under Argument I previously.

VI.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S COMPLAINT THAT THE JURY USED A VERDICT FORM THAT COMBINED THE FINDING OF AN AGGRAVATING CIRCUMSTANCE WITH THE SENTENCE IS NOT CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THEN EXISTING U.S. SUPREME COURT PRECEDENT.

Woodall originally raised this issue on direct appeal as issue XXVI (Woodall's direct appeal brief, page 133.) The Commonwealth addressed this issue on direct appeal as issue XXVI (Commonwealth direct appeal brief, page 134). The Kentucky Supreme Court addressed and rejected this issue in part XXVI of its opinion, 63 S.W.3d at 133-134, and stated as follows:

> The verdict form used in this case and a number of other cases does not constitute reversible error. Similar arguments have been rejected in *Hodge* [*v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000), habeas denied, sub nom., *Hodge v. Haeberlin*, 2006 WL 1895526 (E. D. Ky. July 10, 2006)], *Foley* [*v .Commonwealth*, 942 S.W.2d 876 (Ky. 1996), habeas denied, sub nom., *Foley v. Parker*, 488 F.3d 371 (6th Cir. 2007)], *supra*; *Haight*, *supra*; and *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). Federal courts have also refused to grant relief. See *James v. Whitley*, 926 F.2d 1433 (5th Cir. 1991); *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995).

Jury instruction no. 5 (TR VIII, 141) explained that the jury could impose a sentence from among five different categories of punishment, confinement for not less than twenty years nor more than fifty years, life imprisonment, life imprisonment without the benefit of probation or parole for twenty-five years, life imprisonment with the benefit of probation or

parole, or death. The instruction further directed that the jury could not impose a death sentence or life imprisonment without parole for twenty-five years unless the jury was satisfied beyond a reasonable doubt that one or both of the aggravating circumstances listed in the jury instructions were true. The jury was given its choice of five verdict forms. (TR VIII, 1144-1145.) Verdict form no. 1 authorized the jury to impose a prison sentence, verdict form no. 2 authorized the jury to impose a life sentence, verdict form no. 3 authorized the jury to impose a sentence of imprisonment for life without benefit of probation or parole for twenty-five years and required the jury to find and set forth an aggravating circumstance beyond reasonable doubt. Verdict form no. 4 authorized the jury to impose a sentence of life without the benefit of probation or parole and required the jury to find beyond a reasonable doubt the existence of an aggravating circumstance and set forth that finding in the verdict form. Verdict form no. 5 authorized the jury to impose a death sentence and required the jury to find beyond a reasonable doubt an aggravating circumstance and describe that circumstance in the verdict form. The verdict form in Woodall's case found the aggravating circumstance "that the defendant[']s act of kidnaping and murder [occurred when the defendant] was engaged in the commission of rape in the first degree".

Because Woodall's complaint is in the nature of an argument regarding the jury instructions, the standard adopted by the U.S. Supreme Court in Boyde v. California, 494 U.S. 370 (1990) applies. The Kentucky Supreme Court's opinion pointed out that two other federal courts rejected similar arguments regarding similar types of verdict forms. The Sixth Circuit rejected a similar argument in Slaughter v. Parker, 450 F.3d 224, 241-242 (6th Cir. 2006).

Therefore, the Kentucky Supreme Court's rejection of this claim was not contrary too nor unreasonable application of then existing United States Supreme Court precedent. See Standard of Review section of this memorandum, part I. In addition, the Attorney General submits any possible error is harmless. See Standard of Review section of this memorandum, parts V and XI. And also see harmless error discussion in the preceding argument.

VII.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIMS REGARDING THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THEN EXISTING UNITED STATES SUPREME COURT PRECEDENT.

Appellant raised issues regarding the prosecutor's closing argument; this issue was raised on direct appeal as issue II (Woodall's direct appeal brief, page 13). Commonwealth addressed this issue on direct appeal as issue II (Commonwealth's direct appeal brief, page 20). The Kentucky Supreme Court rejected Woodall's arguments in part VIII of its opinion, 63 S.W.3d at 124-125 and stated as follows:

> VIII. Prosecutor's Closing Argument
>
> Woodall maintains that there were numerous improper and prejudicial comments by the prosecutor during closing arguments, all of which resulted in denying due process and a reliable determination of his sentences.
>
> Woodall claims that
>
> A) The prosecutor appealed to the jurors' sense of responsibility to the community.

B) That the prosecutor expressed his personal opinion that death was the only true punishment and that for the sake of

justice, the returning of such a penalty was the right thing to do.

C) The prosecutor improperly contrasted the pure goodness of the victim and sympathy for her family against the evil of the defendant.

D) The prosecutor improperly commented on the silence of the defendant at trial and denigrated the defense for allowing him not to testify.

E) The prosecutor misstated evidence and asked the jury to speculate about matters not in evidence.

F) The prosecutor misstated the law and nullified the instructions of the court concerning mitigating circumstances.

The prosecutor did not improperly appeal to the jury's sense of responsibility to the community. A prosecutor may call on a jury to do its duty. Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1988).[10]

It should be noted that there were objections to portions of the closing statement by the prosecutor, but no objection was made to the errors alleged under this issue. It was not improper for the prosecutor to give his interpretation of the evidence and his recommendation as to punishment. See Hamilton v. Commonwealth, Ky., 401 S.W.2d 80 (1966). The prosecutor's argument was merely to give his recommendation based on the facts presented as well as they guilty plea, including the aggravating circumstances. The comments of the prosecutor were not inappropriate. The statements made by the prosecutor about both victim and defendant are not the basis for error. All of the

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[10] On habeas review, the United States District Court rejected Slaughter's argument that the prosecutor's closing argument violated his federal constitutional rights. Slaughter v. Parker, 187 F. Supp. 2d 755, 801-803 (W.D. Ky. 2001), reversed in part on other grounds, 450 F.3d 224 (6th Cir. 2006).

comments made by the prosecutor were supported by the evidence. Of course, the defense had the opportunity for final closing arguments and response as thought to be necessary.

The Commonwealth may portray the reality of the violence, giving some background and information regarding the victim in order to give a full understanding of the nature of the crime. Bowling [v. Commonwealth, 942 S.W.2d 293 (Ky. 1997)]. In a concurring opinion, it has been stated that a prosecutor can provide the fact finder with a quick glimpse of the life the criminal chose to end so as to remind the jury the the victim was a unique human being. Payne v. Tennessee, 501 U.S. 808, 11 S. Ct. 2597, 115 L.Ed.2d 720 (1991). We agree. We have found no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community. McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984). The references to the victim and her family did not in any way deprive Woodall of a fair and impartial trial. Victim impact evidence is another method of informing the sentencing authority about the specific harm cause by the crime. Payne, supra.

There was no improper reference to the lack of remorse or silence by the accused. We find nothing in the remarks of the prosecutor that refers to the lack of remorse or silence, but only in emphasis on the fact that Woodall pled guilty after he realized the amount of evidence the state had against him. The remarks used in this case are only a comment on defense strategy by the prosecutor. Slauahter, [sic] supra. The prosecutor was entitled to make a comment on the demeanor of Woodall in the courtroom. There was no objection to this comment and no prejudice resulted. It did not refer to a lack of remorse or silence or failure to testify. The prosecutor did not urge the jury to consider the plea as an aggravator.

The comments by the prosecutor were reasonable inferences drawn from the evidence. The prosecutor did not misstate evidence or ask the jury to speculate about matters not in evidence. Clearly, the prosecutor can give his opinion of the evidence. Cf. Tamme v.

> Commonwealth, Ky., 973 S.W.2d 13 (1998). In addition, the evidence supports the inference that the clothing of the victim had been forcefully removed. The prosecutor did not improperly comment on the fact that a defense witness testified on direct examination that during a course of three years, Woodall sexually abused both of her daughters, and that he had gone to prison for abusing another girl and not her two daughters. The prosecutor merely made a reasonable inference that it was unknown how many counts of sexual abuse were outstanding based on the evidence.
>
> The mere phrase used by the prosecutor, "When does it end?" does not imply that Woodall would continue to be dangerous so as to invoke condemnation expressed in Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984). This Court has recently approved the consideration by the jury of future dangerousness in Hodae [sic] v. Commonwealth, supra, [17 S.W.3d 824 (Ky. 2000), habeas denied, sub nom., Hodge v. Haeberlin, 2006 WL 1895526 (E.. Ky. July 10, 2006)] quoting Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct 2107, 129 L.Ed.2d 133 (1994).
>
> Finally, the prosecutor did not misstate the law or nullify the jury instructions regarding mitigating circumstances. The prosecutor is entitled to argue that mitigating evidence is entitled to very little weight. See Tamme. Defense counsel argued extensively to the jury about all mitigating factors. Woodall has shown no actual prejudice. Many of the allegations presented under this assignment of error suggest that the decision at trial not to be object was only trial strategy.

The standard of review regarding alleged improper closing arguments by the prosecutor for a penalty phase has been addressed by the U.S. Supreme Court in Darden v. Wainwright, 477 U.S. 168, 179 (1986); Boyde v. California, 494 U.S. 370, 384-386 (1995); Ramono v. Oklahoma, 512 U.S. 1, 8-14 (1994); Payne v. Tennessee, 501 U.S. 808 (1991). The Sixth Circuit has addressed similar arguments and rejected them in Bowling v. Parker, 344 F.3d 487, 512-518 (6th Cir. 2003); Byrd v. Collins, 209 F.3d 486, 528-539 (6th Cir. 2000); Buell v.

Mitchell, 274 F.3d 337, 364-365 (6th Cir. 2001). The prosecutor's closing argument appears in the state court record at TE 12, 1601-1623. Defense counsel's closing argument appears in the state court record at TE 12, 1623-1636. The Court will observe that defense counsel had the final closing argument after the prosecutor argued so that he could respond to anything that the prosecutor said in closing argument. This Court must defer to the Kentucky Supreme Court's findings of fact regarding the prosecutor's closing argument under the presumption of correctness. See Standard of Review section of this memorandum, part II.

The Kentucky Supreme Court's rejection of Woodall's claim or claims regarding the prosecutor's closing argument was not objectively unreasonable in light of then existing U.S. Supreme Court precedent, nor was it contrary to those precedents, nor was it an unreasonable application of those precedents. See Standard of Review section of this memorandum, part I.

VIII.

THE KENTUCKY SUPREME COURT'S RULING THAT THE TRIAL COURT DID NOT IMPROPERLY RESTRICT VOIR DIRE WAS NOT CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THEN EXISTING U.S. SUPREME COURT PRECEDENTS.

Woodall contends that the trial court unduly restricted voir dire in the following areas: (1) restrictions on mental conditions/borderline retardation as mitigation; (2) denial of voir dire on the right to remain silent; (3) denial of voir dire on the fact that the jury did not have to be unanimous in its findings of mitigation; (4) denial of voir dire on the fact that mitigating circumstances did not have to be proven beyond a reasonable doubt; and (5) the trial court's restrictions on questions concerning potential jurors' ability to consider the minimum sentence

made that inquiry meaningless. Woodall claims his Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights were violated. Woodall raised this issue on direct appeal as issue III. (Woodall's Direct Appeal Brief, p. 28). The Commonwealth addressed this issue on direct appeal as issue III. (Commonwealth's Direct Appeal Brief, p. 33). The Kentucky Supreme Court addressed each of the issues on page 115-118 of its direct appeal opinion.

Specifically the Kentucky Supreme Court stated the following:

> Woodall contends that the trial judge placed excessive and unfair restrictions on his ability to develop information about jurors on voir dire and as a result, his right to exercise peremptory challenges intelligently and his guarantee of a fair and impartial jury were violated. He claims that the trial judge repeatedly and severely curtailed his ability to question jurors during voir dire. There can be no question that an adequate voir dire examination is essential to the seating of a fair and impartial jury. This is particularly true in a death penalty case where an adequate voir dire process has been held to be mandatory. Morris v. Commonwealth, Ky., 766 S.W.2d 58 (1989).
>
> A) It was not an abuse of discretion by the trial judge to restrict the voir dire of Woodall concerning specific mitigation evidence which he planned to present. The trial judge permitted Woodall to ask general mitigation questions, but prohibited questions about specific mitigating factors such as the low I.Q. attributed to Woodall. Federal courts have recognized that denying a defendant the right to voir dire jurors on specific mitigating factors is not an abuse of discretion. See U.S. v. Tipton, 90 F.3d 861 (4th Cir.1996); U.S. v. McVeigh, 153 F.3d 1166 (10th Cir.1998).
>
> As in Tipton, supra, Woodall sought to question the jury about specific mitigating circumstances rather than a generalized inquiry as allowed by the trial judge. Here, the trial judge had asked jurors on individual voir dire whether they were willing to consider the entire range of penalties

and had also asked them if they were willing to consider mitigating evidence. The judge permitted Woodall to question jurors extensively regarding mitigating circumstances so long as the questions were general and did not inquire into specific mitigation. The trial judge has broad discretion in the area of questioning on voir dire. Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985). Questions are not competent when their evident purpose is to have jurors indicate in advance or to commit themselves to certain ideas and views upon final submission of the case to them. Ward, supra. The mere fact that more detailed questioning might have somehow helped the accused in exercising peremptory challenges does not suffice to show abuse of the discretion in conducting the examination. See Tipton, supra; see also, *Annotation,* "Propriety and Effect of Asking Prospective Jurors Hypothetical Questions, on Voir Dire, as to How They Would Decide Issues of the Case." 99 A.L.R.2d 7; see also Commonwealth v. Moon, 389 Pa. 304, 132 A.2d 224 (1957), cert. dismissed, 355 U.S. 908, 78 S.Ct. 335, 2 L.Ed.2d 270; Commonwealth v. Everett, 262 Pa.Super. 61, 396 A.2d 645 (1978).

Woodall was trying to get jurors to indicate in advance what their views were regarding his I.Q. of 74. He was seeking to oblige jurors to commit themselves by either accepting a specific mitigator or rejecting it before any evidence was heard. The trial judge was attempting to protect against such danger and did not abuse his broad discretion. It should be recalled that in 1991, I.Q. testing measured Woodall's I.Q. at 74, and in 1998, a prosecution psychologist measured his full-scale I.Q. at 78. Both scores are 4 to 8 points respectively higher than the definition of a seriously mentally retarded offender as found in KRS 532.130(2). KRS 532.140 does not permit execution of a person below an I.Q. of 70.

B) Woodall complains that the trial judge abused his discretion by denying voir dire examination into the attitudes of the jurors regarding the right of Woodall to remain silent. We disagree. The trial judge correctly refused to allow proposed questions on the Fifth Amendment rights of the accused. There was no error on the part of the trial judge in this respect and in any event, it is nonprejudicial

and harmless beyond a reasonable doubt as noted earlier.

* * *

D) It was not error for the trial judge to deny Woodall an opportunity to voir dire on the subject of whether the jury must be unanimous in its findings of mitigation. Again, the trial judge has broad discretion to supervise the voir dire examination. If there was any confusion in the mind of the jury about mitigating circumstances at the voir dire stage, it was clearly resolved by the jury instructions which were proper. It was clear to the jurors that if one of them believed that Woodall did not deserve the death penalty, they could not return a verdict of death. The trial judge did not abuse his discretion by not permitting further inquiry by Woodall in this regard.

E) The refusal of the trial judge to permit defense counsel to voir dire potential jurors on their opinions about the differences in the burden of proof for mitigating circumstances and aggravating circumstances does not amount to reversible error. Mitigating circumstances do not have to be proven beyond a reasonable doubt. See Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). On the other hand, KRS 532.025(3) requires aggravating circumstances to be proved beyond a reasonable doubt. Such a difference is not a disparity which would give rise to either a challenge for cause or a peremptory.

* * *

G) Woodall argues that whether jurors can base their verdict on evidence is a separate inquiry from whether they can consider minimum sentences. He contends that the qualification placed on the questioning about the ability to consider minimum sentences was improper. The trial judge directed that the jurors only had to be able to consider a minimum sentence "if warranted by the evidence," and that such qualifications on the question were designed to conceal bias and not to disclose it.

Again, there is no question that Woodall is entitled to a jury that can fairly consider the entire range of

> punishments for his crimes. Grooms v. Commonwealth, Ky., 756 S.W.2d 131 (1988). It was proper for the trial judge to make it abundantly clear to the jurors that they must consider their verdict in light of the instructions given to them by the court and the evidence presented. The qualifying language required by the trial judge was proper and made it clear that if the instructions and the evidence so warranted, they could consider a minimum penalty. That is all that is required by the law. See Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000); Bowling v. Commonwealth, Ky., 873 S.W.2d 175 (1993).

The Kentucky Supreme Court's rejection of Woodall's claim was not contrary to nor a clearly unreasonable application of then-existing United States Supreme Court precedents. The leading U.S. Supreme Court precedent on penalty voir dire is Morgan v. Illinois, 504 U.S. 719 (1992), and Morgan was not violated in Woodall's case. Also see, McQueen v, Scroggy, 99 F.3d 1302, 1329-1330 (6th Cir. 1996); Oken v. Corcoran, 220 F.3d. 259, 266 (4th Cir. 2000), The U.S. Supreme Court has ruled that the presumption of innocence does not apply to the penalty phase of a capital trial as to offenses the defendant was already convicted of. Delo v. Lashley, 507 U.S. 272, 278-279 (1993). The leading U.S. Supreme Court precedent on general voir dire is found in a capital case is Mu'Min v. Virginia, 500 U.S. 415 (1991), and Mu'Min was not violated in this case. See Standard of Review section of this memorandum, Part I. Also, the Kentucky Supreme Court's findings of fact must be deferred to under the presumption of correctness. See Standard of Review section of this memorandum, Parts II and X. The Kentucky Supreme Court's interpretation of state law is binding on this Court. See Standard of Review section of this memorandum, Part IX. Furthermore, any error is harmless, See Standard of Review section of this memorandum, Parts V and XI.

A. The Kentucky Supreme Court's decision regarding specific mitigating factors was not unreasonable.

Woodall argues that the trial court should have permitted him to ask questions during voir dire regarding specific mitigating factors such as borderline mental retardation. Prior to trial, the trial court issued an order clarifying his approach to questions regarding mitigation:

> The purpose of voir dire is to qualify jurors and determine if they are willing to consider mitigating evidence and in keeping with their oath. The Constitution requires no more than such consideration. See Boyde v. California, 494 U.S. 370 (1990). In the Fourth Circuit case of United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), the Trial Court's refusal to allow defendant to inquire as to specific mitigating factors such as "deprived, poor background", "emotional, physical abuse", "young age", "limited intelligence", and "brain dsyfunction", was appropriate. See also Mu'Min v. Virginia 500 U.S. 415 (1991). Therefore, the Defendant may inquire in individual voir dire as to whether the jurors would be willing to consider mitigating circumstances that may be included in the Court's instructions, but not propose a litany of possible mitigating factors which may or may not be introduced into evidence. The defense may inquire as questions in general terms as those which Defendant might think appropriate . . .

(TE 8, 1087 -1088).

The trial court therefore allowed Woodall to ask generalized mitigation questions, such as "Would you consider the mental condition of the defendant at the time he committed the offense?" (TE 5, 670). It barred Woodall from asking questions about specific mitigating factors, for example Woodall's low I.Q.

Federal courts have stated that denying defendants the right to voir dire jurors on specific mitigating factors is not a constitutional violation. U.S. v. Tipton, 90 F.3d 861, 878-79 (4th Cir 1996); U.S. v. Greer, 968 F.2d 433, 437 (5th Cir. 1992); U.S. v. McVeigh, 153 F.3d

1166, 1208 (10th Cir. 1998). The Tipton Court explained:

> From what has been said, it follows that the district court's refusal to question or allow detailed questioning about specific mitigating factors did not constitute an abuse of discretion. The undoubted fact that such detailed questioning might have been somehow helpful to appellant in exercising peremptory challenges does not suffice to show abuse of the district court's broad discretion in conducting the requisite inquiry. See Mu'Min v. Virginia, 500 U.S. 415, 424-25, 111 S.Ct. 1899, 1904-05, 114 L.Ed.2d 493 (1991). Because we conclude that the district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would always vote for the death penalty whatever the circumstances, we cannot find error in the court's refusal to conduct or allow further detailed inquiry about specific mitigating factors.

Tipton, 90 F.3d 861, 878-879.

This case is analogous to Tipton. Here, as in Tipton, Woodall sought to question the jury about specific mitigating circumstances rather than conducting the generalized inquiry allowed by the trial court. The trial court in this case had asked the jurors on individual voir dire whether or not they were willing to consider the entire range of penalties, and had also asked them if they were willing to consider Woodall's mitigating evidence. It also allowed Woodall to question the jurors extensively regarding mitigating cirumstances, as long as he kept the questions general and did not inquire into specific mitigating circumstances.

In addition, it should be noted that Kentucky law vests great discretion in the trial court regarding limitations on voir dire. As stated in Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985):

> The trial court has broad discretion in the area of questioning on voir dire. Generally, questions of jurors in criminal cases should be as varied and elaborated as the

> circumstances required, the purpose being to obtain a fair and impartial jury whose minds are free and clear from all interest, bias or prejudice which might prevent their finding a true and just verdict. Notwithstanding, questions are not competent when their evident purpose is to have jurors to indicate in advance or to commit themselves to certain ideas and views upon final submission of the case to them.

Ward, 695 S.W.2d 404, at 407.

Kentucky is not alone in restricting inquiry of jurors regarding how they would decide legal issues in a criminal case. See Annotation, "Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues for the case," 99 A.L.R.2d 7. Also see Commonwealth v. Moon, Pa., 132 A.2d 224, *cert. dismissed*, 355 U.S. 908 (1957); Commonwealth v. Everett, Pa., 396 A.2d 645 (1974).

Here it is obvious that Woodall was trying to get the jurors to indicate in advance what their views were regarding Woodall's low I.Q. By asking specific questions about a specific mitigating factor, Woodall was attempting to force the jurors to commit themselves to either accepting Woodall's specific mitigator, or rejecting it before any evidence was heard. That was the danger the trial judge was attempting to protect against, and he did not abuse his discretion by doing so.

B. The Kentucky Supreme Court's decision as it relates to voir diring the jury on Woodall's right to remain silent, was not objectively unreasonable.

The Kentucky Supreme Court's finding that the trial court did not abuse its discretion in denying voir dire into the attitudes of the jurors regarding Woodall's right to remain silent was not objectively unreasonable since Woodall had plead guilty and confessed to the crimes and aggravating circumstances. The Kentucky Supreme Court found no error in regard to

this issue and in any event found that if there were error it would be harmless beyond a reasonable doubt. This is so given the fact that Woodall had already pled guilty to and admitted all the crimes and the aggravating circumstances. The U.S. Supreme Court has yet to rule on whether an in court guilty plea may be considered the constitutional equivalent of in court testimony. Therefore, Woodall argues for a new rule of constitutional law contrary to the Teague v. Lane, 489 U.S. 288 (1989), non-retroactivity doctrine. See Standard of Review section of this memorandum, parts VI and VIII.

C. The Kentucky Supreme Court's finding that the trial court did not err when it denied Woodall an opportunity to voir dire on the subject of whether the jury must be unanimous in its findings of mitigation was not unreasonable. AND

D. The Kentucky Supreme Court's ruling that the refusal of the trial court to permit defense counsel to voir dire potential jurors on their opinions about the differences in the burden of proof for mitigating circumstances and aggravating circumstances did not amount to reversible error and is not contrary to nor an unreasonable application of the existing U.S. Supreme Court precedent.

These arguments are meritless, because there is no possibility the jury was confused on these points. The jury instructions regarding mitigation were proper, and it was clear to the jury that if even one of them thought that Woodall did not deserve the death penalty, it would be impossible for them to return a unanimous verdict on death. Any confusion the jury may have felt about mitigating circumstances at the voir dire stage was resolved by the jury instructions, and the trial court did not abuse its discretion by forbidding Woodall's voir dire on this matter. McQueen v. Scroggy, supra. The trial court's instruction on mitigating circumstances was undoubtedly proper (See Argument VII, *infra*).

As the trial court stated in his ruling on this matter:

> Well, I think that's confusing. You're talking about people that don't know anything about the Court system and asking them if they understand this. I don't understand it. The aggravating circumstances have to be proven beyond a reasonable doubt, but I'm not sure this mitigating circumstance, uh, gets into a question of whether or not if they are using the mitigating circumstances not to impose the death penalty then obviously the verdict has got to be unanimous... Just don't ask them if they understand that they do not have to prove mitigating circumstances beyond a reasonable doubt - excuse me - just don't ask them if they know they do not have to be unanimous if finding mitigating circumstances. The instructions will speak for themselves. I think to go into it at this time is confusing to the jury. They don't understand that, because they haven't been told, and I'm not sure - that's not an instruction I will give to them. I will not give to them an instruction saying, "You do not have to find mitigating circumstances unanimous." So it's really not a correct statement of the law.

(TE 6, 844-845).

As explained in the previous Argument V, the court's jury instructions conformed to the requirements established by U.S. Supreme Court precedents and did not mislead the jury about its ability to consider mitigating circumstances and reject a death sentence in its discretion. Kentucky law disapproves of attempts to define the standard for a burden of proof, but allows counsel to argue the matter in closing argument. Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996), citing, Hardin v. Savageau, 906 S.W.2d 356, 358 (Ky. 1995). The U.S. Supreme Court has held that the defendant has the burden to prove mitigating circumstances by preponderance of evidence. Delo v. Lashley, 507 U.S. 272 (1993). The U.S. Supreme Court also held that courts are not required to define "reasonable doubt" in order to explain the prosecution's burden of proof. Victor v. Nebraska, 511 U.S. 1, 5 (1994). In short, no

existing U.S. Supreme Court precedent constitutionally compels state courts to permit this type of voir dire. The trial court's ruling was in accordance with Kentucky Supreme Court precedents.

Therefore, Woodall has failed to establish that these rulings were contrary or an unreasonable application of then existing U.S. Supreme Court precedents.

E. The Kentucky Supreme Court's finding that the trial court did not abuse its discretion by qualifying Woodall's questions concerning the juror's ability to return a minimum sentence was not contrary to nor an unreasonable application of existing U.S. Supreme Court precedent.

The Kentucky Supreme Court found that the trial court did not abuse its discretion by adding the phrase "if you were instructed to consider that and if warranted by the evidence" to Woodall's questions regarding whether the jury could consider the minimum sentence.

There is no doubt that Woodall was entitled to a jury that can fairly consider the entire range of possible punishments for his offenses under state law. Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988). However, the Commonwealth is entitled to a jury that will follow its oath to return a verdict based on the evidence. Therefore it was proper for the trial court to make it clear to the jurors that they had to consider their verdict in light of their instructions and the evidence presented. The trial court therefore qualified Woodall's question, and every juror that decided Woodall's fate made it clear that if their instructions and the evidence so warranted, they could consider the minimum penalty. That is all Kentucky or federal law requires. Morgan v. Illinois, 504 U.S. 719 (1992), does not require more than this. Also see, Bowling v. Parker, 344 F.3d 487, 519-521 (6th Cir. 2003).

The Kentucky Supreme Court's decision in finding no unreasonable restrictions on voir dire was not contrary to or an unreasonable application of then existing United States Supreme Court precedent. Even if there was an error on any of the above issues, which there was not, error would be harmless given that this was a penalty phase trial and that Woodall had already admitted by guilty plea to each of the crimes and the aggravating circumstances.

To the extent any of Woodall's arguments would require a new rule of constitutional law beyond what was required at the time, these arguments would be barred by the Teague non-retroactivity doctrine.

IX.

THE KENTUCKY SUPREME COURT'S REJECTION OF WOODALL'S CLAIM REGARDING THE TRIAL COURT'S DECISION TO ORDER A SEX OFFENDER TREATMENT EVALUATION IN CONNECTION WITH POST-TRIAL SENTENCING REVIEW WAS NOT CONTRARY TO NOR AN UNREASONABLE APPLICATION OF THEN EXISTING PRECEDENT OF THE UNITED STATES SUPREME COURT.

Woodall raised this claim on direct appeal as issue IX (Woodall's Direct Appeal brief, p. 72). The Commonwealth addressed this issue on direct appeal as issue IX (Commonwealth's Direct Appeal, p. 78). The Kentucky Supreme Court addressed this issue in part VI of its opinion, 63 S.W.3d at 121-122 and stated as follows:

> Woodall argues that the use by the trial judge of statements made by him during a sex offender treatment evaluation, which the trial judge ordered after he pled guilty but before his penalty trial and sentencing, to sentence him to death and to the terms of imprisonment violated Kentucky law and the federal and state constitutions. He claims that the trial judge used the statements to sentence

him to death and a term of years imprisonment which was a violation of his right against self-incrimination. We disagree.

Woodall made no incriminating statements about the crimes for which he had already pled guilty. He denied remembering the circumstances surrounding the crimes. None of his rights were violated.

Approximately one week after Woodall pled guilty, the trial judge ordered an evaluation be conducted pursuant to KRS 532.050(4) by the sex offender treatment program. Defense counsel objected to the evaluation and the trial judge stated that he would not release the report to the defense nor the prosecution until after the penalty trial had been completed. The report stated that Woodall was extremely guarded in answering all questions and most responses were extraordinarily brief in nature. The evaluator observed that the interview was abbreviated and further limited by the defendant's professed inability to recall any specific events surrounding the offense.

The trial judge properly ordered the report pursuant to KRS 532.050(4) which provides in part that if a defendant has been convicted of rape, the court shall, prior to determining the sentence, order an evaluation to be conducted by the sex offender treatment program. Subsection 1 of the statute does not preclude the trial judge from ordering a presentence investigation report simply because this is a capital case. The statute does not require a presentence investigation report, but neither does it preclude such a report. The presentence investigation report is different from the sexual offender evaluation in subsection 4 of the statute.

The report was not used during the penalty phase and was not given to either counsel until the time of sentencing when the trial judge approved the sentence as fixed by the jury. Pursuant to KRS 532.025 and 532.050, it is the duty of the trial judge to impose an appropriate sentence for the individual once guilt has been determined. Here, Woodall pled guilty and so there is no authority to prevent the trial judge from ordering the sex offender evaluation and the presentence report. Before pronouncing

> sentence, the trial judge gave the defendant the opportunity to make any amendments, alterations or changes to any of the reports. Woodall did submit some letters on his behalf but did not make a request for amendments, corrections or make objections. There is no evidence that the trial judge considered any statement made by Woodall during the evaluation in reaching the sentence ultimately imposed. The rights of the accused were not violated because he made no incriminating statements during the evaluation.
>
> Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), is not applicable because it is factually different. In Mitchell, supra, the defendant did not deny committing crimes but only admitted some of the offenses she was charged with. Here the silence of Woodall did not cause the judge to assume that he had committed other crimes. He had already admitted committing the offenses when he pled guilty.
>
> Woodall never expressed any remorse during the trial and the trial judge considered the lack of expression of remorse when he followed the penalty fixed by the jury, however, there is no evidence the trial judge assumed lack of remorse from the evaluation report. We find relying on the principles in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), unpersuasive. In Estelle, supra, the Supreme Court held that the prosecution's use of psychiatric testimony at the sentencing phase of the defendant's capital murder trial to establish his future dangerousness violated his constitutional rights. Here, there is simply no evidence that the trial judge used the statements of Woodall during the evaluation to establish lack of remorse or the appropriateness of the penalties fixed by the jury.

The Kentucky Supreme Court's ruling that state law, i.e., KRS 532.050 and 532.025, was not violated is binding upon this Court since the Kentucky Supreme Court is the final arbitrator on matters of state law. See Standard of Review section of this memorandum, part IX. The Kentucky Supreme Court's factual findings regarding what happened and what the

judge did and did not do in connection with the sentencing trial and post-trial sentencing hearing are findings of fact binding on this Court under the presumption of correctness contained in Title 28 U.S.C. § 2254 (e)(1). See Standard of Review section of this memorandum, parts II and X.

In light of the factual findings made by the Kentucky Supreme Court and the Kentucky Supreme Court's interpretation of state law, the Kentucky Supreme Court's ruling is not contrary to nor an unreasonable application of then existing precedent of the United States Supreme Court. See Standard of Review section of this memorandum, part I. The mere fact that the state sentencing judge considered Woodall's lack of remorse based upon what Woodall did in killing the victim and disposing of her body, and what Woodall said during his guilty plea colloquy and the other evidence presented during the penalty phase of trial, did not violate Woodall's constitutional rights since considering lack of remorse based on evidence other than a defendant's failure to testify is not unconstitutional. Six v. Delo, 94 F.3d 469, 476-477 (8th Cir. 1996); Bates v. Lee, 308 F.3d 411, 420-421 (4th Cir. 2002); State v. Rizzo, 266 Conn. 171, 280-281, 833 A.2d 363, 432 (2003), collecting state court cases. *Cf.* United States v. Dunnigan, 507 U.S. 87, 96 (1993).

X.

WOODALL'S GUILTY PLEA IS VALID.

Woodall contends that his guilty plea is invalid. He recites the customary allegation that his guilty plea was not knowing, intelligent, and voluntary. In particular, Woodall claims that:

(1) he was too mentally retarded to plead guilty,

(2) his stimulus for pleading guilty was the denial of a continuance during which

the defense might have explored the possibility of an unspecified "affirmative defense" or unspecified "mitigation",

(3) he was not advised that in pleading guilty he was waiving his Fifth Amendment privilege against self-incrimination,

(4) there was no factual basis for the guilty plea,

(5) he was "bullied" by one of his trial lawyers, and

(6) the member of the defense team who "bullied" him was physically (and therefore mentally) "impaired."

Woodall's claim is refuted by law and by the record of his case. He does not demonstrate or even allege that the Kentucky Supreme Court misapplied U.S. Supreme Court authority as envisioned in the AEDPA. The failure of Woodall to so demonstrate is fatal to his claim. Woodall's failure to so allege requires summary dismissal of his claim.

1. Woodall was not too mentally retarded to enter a valid guilty plea. He was not mentally retarded at all. The mental retardation sub-claim Woodall presents here is addressed at length in Argument XIV of this memorandum. It is enough to say here that the Kentucky Supreme Court found "there was no evidence of mental retardation." *Woodall v. Commonwealth*, 2005 WL 3131603 (Ky.), p. 1. Woodall does not actually challenge here the correctness of that state court finding of fact.

2. Even in the abstract it would seem exaggerated to say that a plea of guilty **as charged** was occasioned by the denial of a continuance. In this case the denial of a continuance was mentioned only as an afterthought. Defense counsel told the trial judge that the guilty plea was being entered because of all "the evidence" including "statements of witnesses, forensic

testing, results of that forensic testing", and Woodall's alleged "lack of memory about facts surrounding the commission of the crime." (TGPP, pp. 3-4). **"Based on all of those and** the Court's denial of a continuance in order that we could prove what **could** have been an affirmative defense or at least, the very least, statutory mitigation evidence or statutory mitigator . . . ." (*Id.*) (emphasis added). In any event, the denial of a continuance is not a cognizable factor for invalidating a guilty plea, especially where it is admitted that the motive for seeking delay is the mere hope that some unspecified good fortune might surprise the defendant. The apparent, real reason for Woodall pleading guilty in this instance was his desire to minimize the amount of evidence the sentencer would hear about the details of his crimes.

3. Woodall was specifically advised of his privilege against self-incrimination and that by pleading guilty he was waiving that right:

> THE COURT: More importantly, do you understand you have a right against self-incrimination, which means that you don't have to say anything and that the Commonwealth would have to prove your guilt beyond a reasonable doubt.
>
> WOODALL: Yes sir.
>
> THE COURT: Do you understand you have that right?
>
> WOODALL: Yes sir.
>
> THE COURT: Do you understand you waive or give up all those rights by pleading guilty?
>
> WOODALL: Yes sir. (TGPP, pp. 7-8).

4. There is no constitutional requirement that the factual basis for a guilty plea be recited for the record. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162

(1970). The trial court nevertheless established for the record the factual basis for Woodall's guilty plea.

> THE COURT: Do you understand, Mr. Woodall, what facts the Commonwealth would have to prove beyond a reasonable doubt for you to be convicted on these offenses?
>
> WOODALL: Yes sir.
>
> THE COURT: And did you on or about January 25th, 1997 in Muhlenberg County commit the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, and this murder was committed while engaged in the offense of rape in the first degree?
>
> WOODALL: Yes sir.
>
> THE COURT: And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the capital offense of kidnapping Sarah Hansen in which she was not released alive?
>
> WOODALL: Yes sir.
>
> THE COURT: And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the offense of first degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death?
>
> WOODALL: Yes sir. (TGPP, pp. 6-7).

The foregoing also confirms that Woodall was well aware of the charges to which he was pleading guilty. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

5. Wodall's claim of "bullying" by one of his defense lawyers is refuted by the record. Woodall told the trial judge that he had consulted with his attorneys, that he understood

the consequences of pleading guilty, and that he was voluntarily pleading guilty of his own free will and accord. (TGPP, p. 6). Twice more during the colloquy, Woodall informed the trial judge that he was pleading guilty freely, voluntarily, and intelligently. (*Id*., p. 11). Woodall's triple assurances of voluntariness belie his later claim that his guilty plea was the product of bullying on the part of one of his lawyers.

6. There is nothing to indicate that defense counsel was "impaired" at the time of Woodall's guilty plea. Woodall points to a physician's letter stating that counsel was "physically and emotionally exhausted" but that letter was nearly two months prior to the guilty plea. Counsel's possible "mini stroke", if that is what it was, occurred some three days after the guilty plea. (TE 3, p. 422). Woodall does not even allege specific, improper advice on counsel's part. Defense counsel made no complaint about his own health at the guilty plea hearing. Nothing in the record of the guilty plea hearing suggests that counsel was physically or mentally impaired.

Finally, Woodall does not even allege that the Kentucky Supreme Court misapplied Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) or misapprehended the facts in the record. Woodall's attack on the validity of his guilty plea must fail. He cannot show that the Kentucky Supreme Court's decision in this matter was contrary to or an unreasonable application of established U.S. Supreme Court precedent. No error of constitutional dimension occurred in this matter. There is no factual or legal basis for invalidating his guilty plea on federal habeas corpus review.

XI.

ANOTHER CONTINUANCE WAS NOT WARRANTED.

What Woodall complains about here is the denial of a continuance other than the one discussed in the preceding argument. The basis for the continuance motion discussed in the preceding argument was Woodall's desire to contemplate defenses and mitigation the existence of which was neither known nor specified.

The basis for the continuance motion under discussion here was the amount of penalty-phase preparation time available to an attorney who had been added as co-counsel together with the two other lawyers who had already representing Woodall for a long time.

Woodall's present claim lacks merit. There were multiple continuances. The grounds offered for this continuance were not valid. The third lawyer assigned to the defense team assured the trial judge that the 81 days lead time available to her was sufficient. Contrary to the ground offered in her continuance motion 49 days after making that assurance, there was no need for her to re-interview all of the witnesses.

The following chronology illustrates the unreasonableness of yet another continuance in this case.

1) The crimes were committed on January 25, 1997. Woodall was indicted on March 18, 1997. (TR I, p. 43). Trial was scheduled for October 28, 1997. (*Id*., p. 8).

2) Woodall requested and received a change of venue on July 31, 1997 and thereafter a continuance to February 23, 1998. (*Id*., pp. 12-20, 88-89).

3) Woodall requested and received another continuance from February 23, 1998

to April 13, 1998. (TE 2, p. 254). The basis for granting this continuance was the health of one of Woodall's two defense lawyers, Michael Williams. (*Id*., pp. 251, 254).

4) On March 30, 1998, Woodall requested yet another continuance. The ground for this motion was Woodall's desire to search further for a possible mental defense or a possible mental-oriented mitigating factor. (TR V, p. 772). That motion for a continuance was denied. (*Id*., pp. 773-777). The trial judge considered the totality of the circumstances in denying this request for a third continuance:

> Almost thirteen months have elapsed since the indictment on these very serious charges; and through previous Orders and directives of this Court, Defendant and his counsel have been given ample opportunity to fully investigate, evaluate and assess the mental condition of the Defendant. In fact, it was not until approximately twenty-five days from the February 23, 1998, trial date that counsel for the Defendant served upon the Commonwealth its intention to rely upon mental condition as either a defense or mitigation.
>
> The evidence presented in support of the motion for continuance, to include the testimony of Dr. Eric Drogin and the request for Positron Emission Tomography testing constitutes simply a late hour if well meaning fishing expedition based to a large extent upon conjecture and highly arcane speculation . . . . Two previous continuances have been granted over the Commonwealth's objections. With each continuance, the Commonwealth has had to reschedule the appearance of a substantial number of witnesses, some of them expert witnesses with undoubtedly heavy schedules. In addition, it has been over fourteen months now since the death of Sarah Hansen. Her family deserves much consideration whenever the Court considers prejudice to the Commonwealth upon another delay. (*Id*.).

5) As detailed in the preceding argument, Woodall entered his guilty plea on April 10, 1998. The request that defense counsel made at the time of Woodall's guilty plea for a

continuance of the April 14, 1998 sentence hearing was initially denied.

6) On the night before the April 14, 1998 sentence hearing, defense attorney Michael Williams suffered a possible "mini-stroke." (TE 3, p. 422). This resulted in the trial judge granting yet another continuance, the third. (*Id*., pp. 428-429).

7) With the express agreement of newly added defense co-counsel, Woodall's sentence hearing was rescheduled for July 14, 1998. Attorney Jill Giordano joined the defense team as co-counsel with attorneys Michael Williams and Mark Baker at a hearing on April 24, 1998. Having handled several capital cases previously, she informed the trial judge that the 81 days until the July 14, 1998 sentence hearing would provide ample time for her to prepare. (*Id*., pp. 457-458).

> THE COURT: I've also indicated to you that I felt duty bound to get this case concluded this summer and was looking at a July date. Would you be able to prepare and be able to assist or even try this case yourself if we set this case for July 14th?
>
> MS. GIORANDO: I don't have my calendar with me, but I know that July I don't have any – I'm not aware of any jury trials I have set, and if they are, they're set in your district, Judge, so with what I know about the case, which I don't want to represent to anyone I know a whole lot more than what I've read and just picked up in the community, I see no problems. I don't have any major cases set for trial between now and then. I have two or three in the May trial docket here that are some felony cases, but I see no problem with being prepared. I may be speaking out of line by saying that, because I know that the file is quite voluminous in this case, and – but I would certainly do my best assuming that, you know, everything can be worked out and the Office of Public Advocacy approves me doing the case. I think I could be prepared in July. (*Id*., p. 459).

8) On June 12, 1998, Ms. Giordano filed a motion asking for a continuance of the July 14, 1998 sentence hearing. (TR VII, p. 964). The motion was denied. (*Id.*, p. 989).

Woodall's direct appeal counsel mentioned Due Process in passing but it is questionable whether a genuine question of federal constitutional dimension was fully and fairly presented to the state appellate court. Woodall's focus on direct appeal – and therefore the focus of the Kentucky Supreme Court on direct appeal – was whether denial of a fourth continuance was an abuse of discretion under Snodgrass v. Commonwealth, 814 S.W.2d 579 (Ky. 1991). Because Woodall did not attempt to develop an authentic Due Process claim in the Kentucky courts, but instead presented his claim as one sounding in state law, the Respondent asserts the bar of procedural default in this proceeding.

A fourth continuance was not warranted. By the time of the July 14, 1998 sentence hearing, three experienced defense lawyers were representing Woodall. Even the late-comer, Ms. Giordano, had nearly three months to prepare for the presentation of what Messrs. Williams and Baker had long since prepared themselves. As Ms. Giordano assured the trial judge in advance, she did not have much else to do in the meantime.

Woodall's sentence hearing occurred some 18 months after his indictment, and he had been continuously represented by defense counsel since the inception of this case.

Woodall cannot credibly contend that the denial of a fourth continuance deprived him of a fundamentally fair sentence hearing. Woodall's petition to this Court does not demonstrate or even allege that the Kentucky Supreme Court's disposition of this claim was contrary to or involved an unreasonable application of extant U.S. Supreme Court authority. Woodall was not deprived of his federal constitutional rights by the denial of a fourth

continuance. A writ of habeas corpus is not warranted under the circumstances presented by this case.

XII.

FUNDING FOR A LAST-MINUTE "PET" SCAN WAS NOT WARRANTED.

A.

The Facts

Woodall vigorously opposed any evaluation of his mental condition from the beginning of this case. He even filed an original action in the Kentucky Supreme Court, seeking a writ to prohibit the Commonwealth from conducting any kind of psychological evaluation. (TR II, pp. 183-201).

Woodall did not serve notice on the Commonwealth of his intent to rely on a mental health defense until January 26, 1998, less than a month before the then-scheduled trial date. (TR IV, pp. 516-521). After a thorough evaluation, including a detailed discussion of Woodall's psychological history, KCPC issued its report on February 17, 1998. (TR V, p. 775).

The KCPC report was not completely to Woodall's liking. He moved for further neuropsychological testing, including a PET (Positron Emission Tomography) scan. (TR V, p. 735). Defense counsel suspected the existence of "disorders of the brain, including some which are believed to have an organic or biological basis." (*Id.*) Defense counsel also speculated that there were indications of Woodall suffering from dissociative identity disorder. (TE 2, p. 272).

In support of his motion, Woodall offered the testimony of Dr. Eric Drogin, a lawyer and psychologist. Drogin testified that he had met Woodall twice, once for five-and-a-

half hours, and another time for forty-five minutes. (TE 3, pp. 352, 357). Drogin had not issued a written report on either occasion. (*Id.*). He did not prepare a separate psychological history of Woodall himself, instead relying on KCPC's work. (TE 3, p. 358).

The results of psychological testing that Drogin obtained were remarkably similar to KCPC's results. (TE 3, p. 367). Drogin admitted that the KCPC report contained considerably more information than he had developed during his six-plu-hours with Woodall. (TE 3, p. 364). Drogin also admitted that the basis for his opinion was simply that some of Woodall's test results did not make sense to him. (TE 3, pp. 372-374). Drogin stated that in light of Woodall's test results, he had submitted a July 9, 1997 affidavit to defense counsel advising that neuropsychological testing be done. (TE 3, p. 356). Finally, Drogin admitted that the KCPC report contained no mention of Woodall suffering a dissociative identity disorder. (TE 3, p. 368).

B.

The KCPC Report Made It Clear That There Was No "Reasonable Necessity" For Further Neuropsychological Testing.

At KCPC, Woodall was evaluated by Dr. Richard Johnson. (TR V, p. 750). Johnson described the evaluation process in his final report:

> The evaluation at KCPC was multidisciplinary and consisted of physical examination and medical testing, psychiatric consultation, psychosocial evaluation, review of school and correctional records, and psychological testing. While an inpatient at KCPC, Mr. Woodall was subject to around-the-clock behavioral monitoring. Chart entries by psychiatric nurses and correctional officers, which summarized the defendant's behavior and adjustment while hospitalized, were reviewed as part of this evaluation. A

> series of clinical and forensic interviews were conducted with him by this evaluator. A total of 6 hours was spent by this evaluator interviewing and testing Mr. Woodall. (TR V, p. 750).

By contrast, relied only on the contents of two interviews with Woodall, one of which was conducted with defense counsel present. (TE 3, pp. 352, 357). Drogin did not prepare a written report, which the prosecution would have been entitled to see in the event that defense counsel intended to call him as a witness. (TE 3, p. 352). He did not perform an independent psychological history of Woodall, instead relying on KCPC's report. (TE 3, p. 358). He did not have the benefit of 24-seven monitoring of Woodall's condition and behavior. It is therefore clear that Drogin's unreported assessment was less than multifaceted and comprehensive in comparison to what was done by Johnson at KCPC.

Johnson's report concluded:

> Mr. Woodall is a 23 year old white male who has been charged with Murder, Rape, and Kidnapping. Questions have been raised about his mental functioning, particularly whether or not there is the presence of any mental retardation. The results of the evaluation at KCPC which included review of historical school and correctional records did not reveal any evidence of mental retardation . . . . He was seen as an individual who presented indications of cannabis abuse and current adjustment disorder with mixed anxiety and depressed mood as a result of the stress of his current life situation. He also presented evidence of a personality disorder involving paranoid and borderline traits. His psychological testing placed him in the upper part of the borderline range . . . . He did not present any evidence of a major mental illness, thought disorder, or indications of organic or cerebral impairment. His behavior was appropriate throughout his hospitalization at KCPC. Mr. Woodall was seen as being capable of bearing criminal responsibility for his actions if found guilty on his current charges. (TR V, p. 750).

At the penalty phase of the trial, Woodall called Johnson as his own witness, and the report was introduced as mitigating evidence. (TE 11, pp. 1523-1542).

Kentucky's legal standard regarding the PET scan request was whether there existed a "reasonable necessity" for the funding to conduct further neuropsychological testing. Sommers v. Commonwealth, 843 S.W.2d 879 (Ky. 1992). It is clear in Woodall's case that there was no such necessity for a PET scan, since the KCPC report had specifically ruled out the possibility of organic brain damage.

The testimony by attorney / psychologist Eric Drogin was non-committal. The trial judge considered Drogin's testimony unpersuasive. Drogin had spent little time with Woodall. Drogin had not kept records. He had not prepared a psychological history. He had avoided preparing a written report. He had not enjoyed the benefit of 24-seven observation by mental health staff.

It is obvious that Drogin simply disagreed with the conclusions reached by KCPC. Drogin offered no real evidence or explanation to support his own conclusions. Indeed, Drogin admitted that the basis of his opinion was simply that he was surprised by some of the test results. (TE 3, pp. 372-374). That is not sufficient to establish "reasonable necessity" for conducting a PET scan or other new testing.

It is also worth noting that Woodall was in no way prejudiced by the denial of a PET scan. After all, he called Dr. Johnson as a mitigation witness. Johnson explained the contents of his report to the jury, including that he considered Woodall to be suffering from a variety of mental problems. (TE 11, pp. 1523-1542; TE 11, pp. 1545-1548).

Woodall's case is factually similar to Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988). In Simmons, the defendant was evaluated by a psychiatrist and a social worker at the Kentucky Correctional Psychiatric Center. The psychiatrist in Simmons reported to the trial court his opinion that the defendant was competent to stand trial. As in Woodall's case , the psychiatrist testified on behalf of the defendant during the sentencing phase. In affirming the trial court's denial of funds for the appointment of two independent psychiatrists, two independent psychologists and one licensed clinical social worker, the Kentucky Supreme Court in Simmons said that the defendant:

> failed to show a necessity for the expert assistance he requested. He stated in general terms only that expert assistance was needed to prepare adequately for trial and possible sentence hearing. He did not state the names of any doctor or social worker that he desired to examine him, nor did he furnish any estimate of the cost. He further did not state what he expected to show or in what manner the requested assistance would of any specific benefit to him. He made no challenge to the competency of [the psychiatrist] or that [the psychiatrist] was uncooperative with him or was not available for consultation.

Simmons, 746 S.W.2d, at 395.

Woodall's case is analogous. He did not challenge the competency of Dr. Johnson and in fact called him as a witness during his sentence hearing. If anything, Woodall's case presents an even stronger reason than Simmons for the denial of further testing, because here the KCPC report ruled out the possibility of a organic brain defect.

In the Kentucky Supreme Court, Woodall relied on Binion v. Commonwealth, 891 S.W.2d 383 (Ky. 1995). However, Binion is factually distinguishable. In Binion, the KCPC report affirmatively expressed the possibility of organic brain damage. Binion previously had

experienced delusions. Binion had been taking antipsychotic medications. The defendant in Binion had a very strong factual basis for his claim that further testing was "reasonably necessary."

Woodall also relied on Hunter v. Commonwealth, 869 S.W.2d 719 (Ky. 1994) in the Kentucky Supreme Court. Hunter, too, is easily distinguished. In Hunter, the KCPC doctor who performed the original evaluation on the defendant changed his mind just prior to trial and indicated that the defendant might have additional mental problems that had gone unrecognized in his report.

C.

Woodall's Motion Was A Delay Tactic.

In denying Woodall's motion for a continuance for the purpose of PET scan testing, the trial court stated:

> The evidence presented in support of the motion for continuance, to include the testimony of Dr. Eric Drogin and the request for Positron Emission Tomography testing, constitutes simply a late hour if well meaning fishing expedition based to a large extent upon conjecture and highly arcane speculation. (TR V, p. 777).

The trial court went on to point out that Eric Drogin had recommended this exploratory neurological testing to Woodall's counsel back in July of 1997. (*Id.*). Instead, defense counsel chose to fight the efforts of the Commonwealth to have Woodall's mental condition evaluated.

Having fought for four months the Commonwealth's attempts to have him evaluated, Woodall was ill suited suddenly assert a mental health defense less than a month

before the scheduled trial while claiming a lack of time and resources to conduct a mental investigation. The trial court saw Woodall's brinksmanship for what it was.

D.

Conclusion

The Kentucky Supreme Court correctly decided this claim in Woodall's direct appeal. Woodall's habeas petition does not demonstrate or even allege that the decision of the state appellate court was contrary to or involved an unreasonable application of controlling U.S. Supreme Court precedent.

XIII.

WOODALL'S COMPETENCY TO STAND TRIAL, PLEAD GUILTY AND BE SENTENCED WAS, AND IS, UNCONTESTED.

Woodall's habeas petition literally fails to state a claim. His argument simply admits that any opportunity to raise competency was defaulted at trial and on direct appeal, and that it was first presented in a state post-conviction action where it was rejected procedurally and on the merits.

Respondent urges this Court to summarily reject Woodall's claim. It is procedurally defaulted. It also is conclusory and fails to state a claim on which a writ of federal habeas corpus could be granted. The absence of merit in Woodall's claim is self evident. Dusky v. United States, 362 U.S. 403, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

> Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded

> should have been raised on direct appeal. We note, however, the trial court *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative. Woodall v. Commonwealth, 2005 WL 3131603 (Ky.), p. 1. (RCr 11.42 appeal).

On RCr 11.42 review, the trial judge specifically had found as a matter of fact that the record was devoid of anything that might suggest incompetency on the part of Woodall. (April 22, 2003 Order and Judgment, p. 6). Like the federal courts, Kentucky courts presume that a criminal defendant is competent. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); Jacobs v. Commonwealth, 58S.W.3d 435, 440 (Ky. 2001). Woodall himself was found to have absolutely no physiological deficiency of or damage to his brain, TR V, p. 750, which in any event would not itself have qualified as proof of incompetency.

As the trial judge explained at length in his April 22, 2003 Order And Judgment, the KCPC evaluation of Woodall was gratuitous in the first place: "The evaluation was ordered by the Court simply as a precautionary matter, and not based upon any reason to suspect that Woodall was not competent to stand trial." (Id., p. 6).

"None of those reasons [for questioning competency in Thompson v. Commonwealth, 56 S.W.3d 406 (Ky. 2001)] existed in this case." (April 22, 2003 Order and Judgment, p. 7).

The trial judge contrasted a different case, in Floyd County, Kentucky, where "the prosecution had filed for a competency evaluation citing concern about competency because of a

defense psychologist who had not made a specific determination as to competency. No such concern from either the prosecution or defense existed in this case." (*Id.*).

"The order for full mental evaluation, to include competency, was done sua sponte by the Court as a precautionary matter. This was not done because this Court had 'reasonable grounds to believe' the Defendant 'was incompetent to stand trial.' See KRS 504.100 (1)." (*Id.*).

"Three attorneys represented the Movant / Defendant during the course of the prosecution against him." (*Id.*, p. 6)

"Neither the Court nor the prosecution nor the defense team ever in this case had reasonable grounds to doubt the competency of Robert Keith Woodall to stand trial. ***Even a suspicion of such is conspicuously absent from the record.***" (*Id.*, p. 8) (emphasis added).

"In short, no reasonable grounds ever existed in this case to question the Movant's competency." (*Id.*, p. 7).

XIV.

WOODALL IS NOT MENTALLY RETARDED.

Woodall first raised his mental retardation claim in a state post-conviction action. By then, of course, the claim was procedurally defaulted. Page 16 of Woodall's Kentucky Supreme Court brief in his state post-conviction appeal appeared to concede this.

Page 27 of the Commonwealth's Kentucky Supreme Court brief in the state post-conviction appeal "gladly embrace[d]" Woodall's concession of procedural default, repeating Woodall's own argument heading that "PETITIONER'S CLAIMS WERE NOT RAISED OR DECIDED ON DIRECT APPEAL."

Also, Woodall conceded in a later argument on page 22 of his Kentucky Supreme Court brief on state post-conviction appeal that: "While the Court below ruled on the merits of [his] ineffectiveness claims, the Court also made a threshold ruling that [he] should have raised his ineffectiveness of counsel arguments on direct appeal." To put it another way, the state post-conviction judge enforced the bar of procedural default but discussed the merits in such a manner as to not undo that procedural bar.

The Commonwealth's Kentucky Supreme Court brief on state post-conviction appeal recognized that Woodall was trying to reposition himself in anticipation of federal habeas corpus review. Woodall's Kentucky Supreme Court brief on post-conviction appeal volunteered the "merits" statement quoted above in hopes of nibbling away at his procedural default standing in the way of federal habeas corpus review. The Commonwealth exposed what Woodall was attempting to do. The Commonwealth observed that the state post-conviction judge had addressed the merits as an aside, in such a manner as to not undo the procedural bar already enforced. The federal habeas corpus ramifications of this matter seemed the only plausible reason for Woodall to bring it up and to approach it in the manner that he did.

Accordingly, in Woodall's state post-conviction appeal, the Kentucky Supreme Court enforced the state procedural bar of default and relegated the merits of his claim to an alternative holding:

> Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded should have been raised on direct appeal. We note, however, the trial court *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant

> was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative.

Woodall v. Commonwealth, 2005 WL 3131603 (Ky.) , p. 1.

There is no factual or legal basis for Woodall's procedurally defaulted claim of mental retardation.

XV.

WODALL WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE ABSENCE OF A PRE-TRIAL COMPETENCY HEARING.

Woodall's competency claim appears as Argument XIII of his habeas petition. Here, he repackages the same competency claim as counsel ineffectiveness.

Woodall's present argument is undeveloped to say the least. In Argument XIII of this response, the Respondent has demonstrated the complete absence of any factual or legal basis for Woodall's competency claim, which was procedurally defaulted anyway.

Woodall does not even attempt to show that the Kentucky Supreme Court's rejection of this claim was contrary tonor a clearly unreasonable application of then-existing United States Supreme Court precedent. Woodall's claim should be rejected by this Court accordingly.

XVI.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE FOR FAILURE TO UTILIZE WOODALL'S "MENTAL RETARDATION."

The premise of Woodall's claim is false. He is not mentally retarded.

The legal basis for establishing mental retardation involves more than scores on intelligence quotient tests. There must be proof of functional, *i.e.*, behavioral mental retardation. Such functional or behavioral mental retardation must have manifested itself prior to the claimant's eighteenth birthday. KRS 532.135. The DSM itself requires such proof before there can be a diagnosis of serious mental retardation.

In Woodall's case, the mental health professionals examined and observed him on a 24-seven basis. As noted in previous arguments in this response, Dr. Johnson affirmatively found that there was no evidence indicative of mental retardation on Woodall's part. Acordingly, the Kentucky Supreme Court specifically found that there was no evidence of mental retardation either.

The report by KCPC's Dr. Johnson concluded:

> Mr. Woodall is a 23 year old white male who has been charged with Murder, Rape, and Kidnapping. Questions have been raised about his mental functioning, particularly whether or not there is the presence of any mental retardation. The results of the evaluation at KCPC which included review of historical school and correctional records did not reveal any evidence of mental retardation . . . . He was seen as an individual who presented indications of cannabis abuse and current adjustment disorder with mixed anxiety and depressed mood as a result of the stress of his current life situation. He also presented evidence of a personality disorder involving paranoid and borderline traits. His psychological testing placed him in the upper

> part of the borderline range . . . . He did not present any evidence of a major mental illness, thought disorder, or indications of organic or cerebral impairment. His behavior was appropriate throughout his hospitalization at KCPC. Mr. Woodall was seen as being capable of bearing criminal responsibility for his actions if found guilty on his current charges. (TR V, p. 750).

At the penalty phase of the trial, Woodall called Johnson as his own witness, and the report was introduced as mitigating evidence. (TE 11, pp. 1523-1542). Having accepted Dr. Johnson's conclusions enough to call him as his own witness, it is entirely untenable for Woodall to argue oppositely at this juncture in the proceedings.

> Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded should have been raised on direct appeal. We note, however, the trial court *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative. Woodall v. Commonwealth, 2005 WL 3131603 (Ky.), p. 1. (RCr 11.42 appeal).

Woodall's habeas petition does not challenge the correctness of the Kentucky Supreme Court's findings in this respect. Neither does Woodall's habeas petition allege that the legal determination made by the Kentucky Supreme Court in this matter was contrary to or involved an unreasonable application of then-existing U.S. Supreme Court case law. A factual predicate for Woodall's ineffectiveness of counsel claim in this regard is completely absent and was procedurally defaulted by his failure to even allege mental retardation until state post-

conviction review. Woodall's contention that the absence of mental retardation is an "element" of capital murder has no basis in law and should be rejected out of hand. A writ of habeas corpus should not issue on this claim.

XVI.

WOODALL'S DECISION TO PLEAD GUILTY WAS NOT THE PRODUCT OF COUNSEL INEFFECTIVENESS.

Woodall's comprehensive attack on the validity of his guilty plea appears as Argument X in his habeas petition. Here, Woodall represents that attack as claim of counsel ineffectiveness.

Respondent would refer the Court to Argument X of this response but in the interest of brevity he does not repeat it here. It occurs to the Respondent that if Woodall's guilty plea is valid, which the Respondent submits that it is, then there was no occasion for counsel ineffectiveness in this regard.

Pleading guilty is hardly an unheard of strategy. A defendant who pleads guilty as in Woodall's situation does so in reasonable hopes that the sentencing jury will look favorably on his forthrightness and on his willingness to abbreviate the proceedings.

Equally important in the strategy of pleading guilty as in Woodall's situation is the calculation that dispensing with the guilt / innocence phase of the trial will tend to lessen the amount of details about the crimes that are presented to the sentencing jury. The details of Woodall's crimes against Sarah Hansen are something he certainly would have wanted to avoid or at least minimize in the eyes of his sentencing jurors. Woodall's habeas petition does not and could not dispute the correctness of the Kentucky Supreme Court's finding that the evidence of

his guilt was overwhelming.

In Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the U.S. Supreme Court made the observation that just because a defense strategy fails, that does not mean it was the ineffective assistance of counsel.

The record makes clear that there was a tremendous amount of aggressive defense lawyering brought to bear in the representation of Woodall. The strategy of pleading guilty was entirely reasonable under the circumstances of Woodall's case. The guilty plea colloquy with the trial judge leaves no doubt that Woodall understood and agreed with that strategy and that his guilty plea was entered knowingly, intelligently, voluntarily, and of his own free will. Woodall cannot now criticize his own decision in hindsight and blame his battery of lawyers for the failure of that shared strategy. A writ of habeas corpus should not issue on this claim.

XVIII.

THE DENIAL OF ANOTHER CONTINUANCE WAS NOT THE PRODUCT OF COUNSEL INEFFECTIVENESS.

Woodall's detailed complaint about the denial of another pre-guilty plea continuance appears as Argument XI in his habeas petition. Here, Woodall represents an abbreviated version of that argument under the label of counsel ineffectiveness.

Respondent would refer the Court to Argument XI of this response but in the interest of brevity he does not repeat it here. If the motion for another continuance was properly denied – and it was – then there could not have been counsel ineffectiveness in that regard.

Woodall's present claim does not involve an instance of inaction on the part of defense counsel. A motion for a continuance was made. Neither does Woodall's claim involve an instance of defense counsel failing to advance grounds for the relief he was requesting. As discussed in Argument XI, defense counsel offered multiple grounds for seeking another continuance. (Indeed, defense counsel offered essentially the same grounds which Woodall now claims to this Court were not offered.)

Rather, Woodall's claim before this Court boils down to a complaint that the trial judge denied the motion for a continuance. Contrary to Woodall's implicit suggestion, a criminal defense lawyer is not constitutionally ineffective under Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), simply because the relief he requests is denied by the trial court.

Page 30 of Woodall's habeas petition claims that defense counsel had asked the trial court for a continuance "based on evidence that Petitioner suffered from a major Axis I mental illness."

However, a review of the record shows that there was no testimony that Woodall suffered from a major Axis I mental illness. Attorney / defense psychologist Eric Drogin testified telephonically at a hearing on April 3, 1998, in an effort to persuade the trial court to grant a continuance. Drogin testified that after many, many hours of discussion, and many, many hours of pouring over existing data, that the idea of a multiple personality disorder or dissociative identity disorder (DID) occurred to him. (TE 3, p. 334). Drogin also indicated both he and Woodall's defense counsel had been "worrying for months and months over some explanation for [his] alleged behavior." (*Id.*, p. 334). Drogin also stated that DID was not the kind of

conclusion that one would reach if one were looking for a disorder to excuse criminal behavior. (*Id*). Drogin explained that DID was difficult to assess and difficult to prove. (*Id*., p. 335).

Drogin also indicated that he had spoken with a Dr. Richard Kluft regarding the matter. (*Id*). Drogin stated that they had been able to have a 45-minute speaker telephone conversation with Kluft. Drogin did not indicate what Kluft's response was. (*Id.*, p. 336).

Drogin stated that an experienced evaluator would want to conduct multiple interviews with a client over time in an effort to look for the possible existence of DID. (*Id.*, p. 345). He also admitted that he performed no screening for the disorder on Woodall. (*Id*., p. 346).

After Drogin's telephonic testimony concluded, defense counsel admitted that he had not intended "to bring Dr. Drogin on." (*Id*., p. 385).

Defense counsel told the trial court that he had not requested Drogin to draft a report because he was satisfied with the trial strategy of putting on a defense that related to mental retardation. (*Id*., p. 386).

Defense counsel also admitted to the trial court, as he had to do in candor, that he did not have sufficient necessity to get additional funding for neuropsychological testing. (*Id*., p. 383).

Defense counsel stated that Woodall had a low intelligence quotient and that a doctor from the University of Kentucky was ready to testify to that effect. (*Id*., p. 388).

Defense counsel further admitted that a "neuropsych" would not have revealed this disorder (DID). (*Id.*, p. 388).

Defense counsel Mr. Williams further explained to the trial court that he did not

want to be the first attorney with the Department of Public Advocacy to walk into court with a multiple personality defense. He stated that it was not good news. Mr. Williams mentioned Drogin's comment confirming as much. (*Id*., p. 394). Mr. Williams also admitted, as he was required to do, that the impending trial date had been set by agreement. (*Id*., p. 398). Defense counsel, Messrs. Williams and Baker, were not constitutionally ineffective as Woodall's lawyers by being honest with the trial court.

Woodall contends that defense counsel did not support the motion for another continuance with the testimony or affidavit of Kluft, who he says was an expert on DID. Woodall contends that Kluft could have alleged that it is normal for persons with this illness to be initially mis-diagnosed with other conditions. A review of the record, however, shows that Drogin himself testified that there are many other diagnoses which are often assigned to people who in fact suffer from DID. (TE 3, pp. 340-342).

Thus, Woodall cannot demonstrate how either the testimony by or an affidavit from Kluft would have added anything to the testimony given by Drogin.

Moreover, Woodall does not suggest that anything else that Kluft might have added would have changed the opinion of the trial court in refusing to grant the motion for another continuance. Woodall's claim is completely speculative and it should be summarily dismissed given the lack of specific facts in support of it.

In view of the foregoing, Woodall is not entitled to a writ of habeas corpus on this claim.

XIX.

WOODALL'S DEFENSE LAWYERS WERE NOT INEFFECTIVE IN THEIR PRESENTATION OF PSYCHOSIS AND DISASSOCIATION EVIDENCE.

The Kentucky Supreme Court Disposed of this claim in its state post-conviction appeal opinion as follows:

> We address the next four claims together, as they all relate to mental heath evaluation. Appellant claims counsel was ineffective for failing to present an insanity defense, an extreme emotional disturbance defense, a genetic defect defense, and failing to pursue further neurological testing. We find all of these claims without merit. Defense counsel chose a trial strategy which is not subject to second-guessing at this time. It was reasonable for defense counsel to rely on Dr. Johnson's evaluation, as well as the testimony of other mental health experts. *See Haight*, *supra* at 447. Appellant opines that trial counsel failed to investigate this plethora of mental health defenses. The decision not to investigate must be professionally reasonable under the circumstances, and the reviewing court gives great deference to trial counsel's decisions. *Strickland*, *supra* at 691. In this case, defense counsel's decisions were objectively reasonable, and Appellant relies on hindsight to claim counsel used the wrong strategy. Woodall, 2005 WL 3131603 (Ky.), p. 3.

Woodall alleges in his habeas petition that defense counsel possessed evidence of psychosis and dissociation, but presented no such evidence to the jury. That assertion is inaccurate. Dr. Johnson's confidential report dated February 17, 1998, clearly stated, "There was not any evidence of a thought disorder or psychosis." (Dr. Johnson's report appears in TR V, immediately following p. 750. The foregoing quotation is from p. 2 of that report.)

Woodall argues that some individuals with borderline personality disorder develop "psychotic-like symptoms." Woodall, however, fails to point out any place in Dr. Johnson's report indicating that he was one of those particular individuals.

Also, Woodall speculates that psychosis would have interfered with his ability to appreciate the criminality of his actions or that it would have interfered with his ability to conform his conduct to the law. The testimony by Dr. Johnson refutes Woodall's speculation. Dr. Johnson testified that Woodall had stated that he knew that anyone who would kidnap someone, force that person to have sex against her will, or kill that person, would be engaging in criminal activities. (TE 11, p. 1549).

Dr. Eric Drogin testified that he did not have a competent opinion regarding whether Woodall suffered from a dissociative identity disorder (DID). (TE 3, p. 338). Drogin testified that one would need to rule out other explanations for Woodall's crimes before determining that any specific diagnosis was present. (*Id*., p. 340). Drogin also stated that he had come up with the possibility of dissociative identity disorder after many hours of discussion and pouring over existing data, and after knowing that trial counsel had been "worrying for months and months over some explanation" for Woodall's behavior. (*Id*., p. 334). In fact, defense counsel were trying to persuade the trial court to grant a continuance so that further testing could be performed on Woodall in an effort to determine whether he might possibly have DID.

Woodall suggests that he has demonstrated dissociative symptoms. He claims that he has lapses in memory, and that he has heard a voice calling his name his entire life. He in no way shows how these claims, even if true, would have caused him to kidnap, beat, rape, and murder Sarah Hansen.

Finally, Woodall claims that he defecated in his pants in 2002, rendering him temporarily "catatonic", which he describes as a "breakdown." Woodall does not explain how his despair about an ill timed bowel movement four years after the sentence hearing amounts to proof that he was denied the effective assistance of counsel.

XX.

DEFENSE COUNSEL WERE NOT INEFFECTIVE IN THEIR PURSUIT OF WOODALL'S "GENETIC PREDISPOSITION" TO MENTAL ILLNESS.

Woodall's quest for a mental illness theory to blame his violent criminal behavior on now progresses to the pursuit of a cause for a cause. It would occur to any sentencing jury that if a claim of mental illness does not mitigate the crimes, then speculation about the cause of the alleged mental illness is not persuasive either.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the U.S. Supreme Court defined a mitigating circumstance as a factor bearing on the defendant's character, record, or crime. The mental conditions of a defendant's extended family do not reflect on his character, his record, or the circumstances of his crimes. *See* Stewart v. Gramley, 74 F.3d 132, 136-37 (7th Cir. 1996). Consequently, Woodall's "genetic predisposition" evidence would have been inadmissible on the grounds of irrelevancy and immateriality. *See*, Weeks v. Jones, 26 F.3d 1030,1044 (11th Cir. 1994); Harris v. Pulley, 885 F.2d 1354, 1383 (9th Cir. 1988).

Furthermore, unless Woodall's "rife with mental illness" family were also rife with convictions for violent crimes – he is conspicuously silent about the latter – this whole exercise probably would have backfired anyway. *I.e.*, if Woodall's mentally ill extended family

members were law abiding citizens, then that would suggest the absence of any connection between his mental condition and his violent crimes.

The trial judge observed in his order denying state post-conviction relief that "the genetic predisposition argument is highly speculative." (RCr 11.42 Order, p. 5).

The trial judge also recognized that even if there were a genetic predisposition for a personality disorder, there was no causative link connecting such disorder with the crimes Woodall committed. (*Id*., pp. 4-5).

The trial judge also found it difficult to see why Woodall's cousins and second cousins all supposedly suffered from some type of genetic defect common to Woodall, yet only one of them had committed an assault. The trial judge also pointed out that none of them had exhibited behavior remotely comparable with Woodall's behavior on the night that he kidnapped, raped and murdered Sarah Hansen. (*Id*., p. 5).

The Kentucky Supreme Court decided this issue on RCr 11.42 appeal as follows:

> We address the next four claims together, as they all relate to mental heath evaluation. Appellant claims counsel was ineffective for failing to present an insanity defense, an extreme emotional disturbance defense, a genetic defect defense, and failing to pursue further neurological testing. We find all of these claims without merit. Defense counsel chose a trial strategy which is not subject to second-guessing at this time. It was reasonable for defense counsel to rely on Dr. Johnson's evaluation, as well as the testimony of other mental health experts. *See Haight*, *supra* at 447. Appellant opines that trial counsel failed to investigate this plethora of mental health defenses. The decision not to investigate must be professionally reasonable under the circumstances, and the reviewing court gives great deference to trial counsel's decisions. *Strickland*, *supra* at 691. In this case, defense

> counsel's decisions were objectively reasonable, and Appellant relies on hindsight to claim counsel used the wrong strategy. Woodall, 2005 WL 3131603 (Ky.), p. 3.

Woodall's defense counsel were not ineffective for failing to succeed in this attempt to reassign blame for his violent crimes in this manner. Woodall fails to show that the Kentucky Supreme Court's disposition of this matter was contrary to or involved an unreasonable application of then-existing U.S. Supreme Court caselaw. His habeas petition on this claim should be denied accordingly.

XXI.

DEFENSE COUNSEL WERE NOT INEFFECTIVE REGARDING NEURO-TESTING.

Woodall's detailed complaint about the denial of his motion for a PET scan appears as Argument XII in his habeas petition. Here, Woodall represents an abbreviated version of that argument under the label of counsel ineffectiveness.

Respondent would refer the Court to Argument XII of this response but in the interest of brevity he does not repeat it here. If the motion for a PET scan was properly denied – and it was – then there could not have been counsel ineffectiveness in that regard.

Woodall complains that defense counsel could have and should have done more. He does not say what this would have accomplished or what this would have proven. Woodall merely speculates that additional proof of a biological or genetic basis for his personality disorder would indicate a neurological deficit as the reason. However, after the teleconference with attorney / psychologist Eric Drogin, defense counsel admitted to the trial court that additional neuropsychological testing would not turn up the alleged Axis I mental illness that they were

hoping to find. (TE 3, p. 388).

Woodall makes the broad-based claim that "borderlines have bad brains." However, there is no indication that Petitioner had a "bad brain." The record reflects Dr. Johnson testified that KCPC found no evidence of an organic or brain impairment problem. (TE 11, p. 1531).

In view of the foregoing, there is no basis for Woodall's counsel ineffectiveness claim.

XXII.

DEFENSE COUNSEL WERE NOT INEFFECTIVE REGARDING FECAL INCONTINENCE.

The sentencing jury heard quite enough about Woodall's fecal incontinence in the second grade. It was not federal constitutional error for Woodall's defense team to refrain from subjecting the sentencing jury to even more information about Woodall's childhood bowel movements.

In all matters of mitigation there exists a point of diminishing returns. It is safe to assume that Woodall's trial defense lawyers were aware of this phenomenon. Woodall was not denied the effective assistance of counsel in this regard. Woodall is not entitled to an entirely new sentence hearing on this basis. A writ of habeas corpus should not issue on this claim.

XXIII.

DEFENSE COUNSEL WERE NOT INEFFECTIVE REGARDING WOODALL'S CHILDHOOD.

Woodall asserts that the strategy of his defense lawyers during the sentence hearing was to present his family as loving and supportive, that they cared about him. Now, in

hindsight, Woodall alleges that a better strategy would have been to portray his family in a more negative light.

According to Woodall, the sentencing jury would have spared his life had defense counsel introduced testimony that an uncle considered the rest of the family to be "trash" and that they lived in filth.

In Woodall's state post-conviction appeal, the Kentucky Supreme Court noted that defense counsel had in fact introduced evidence of "squalid upbringing." Woodall v. Commonwealth, 2005 WL 3131603 (Ky.), p. 3. The additional details about squalor were not necessary. Defense lawyers are not required to introduce every item of mitigating evidence in order to be constitutionally effective. Chandler v. United States, 218 F.3d 1305, 1319. (11th Cir. 2000) (*en banc*).

XXIV.

DEFENSE COUNSEL WERE NOT INEFFECTIVE REGARDING WOODALL'S CLAIM OF CHILDHOOD SEXUAL ABUSE.

Woodall contends there should have been more testimony than there was about his mother putting soap in his rectum as a form of sexual abuse. Woodall says there should have been more details but he does not identify what those details should have been. There was no counsel ineffectiveness in this respect.

XXV.

THERE IS NO COMPETENT EVIDENCE TO IMPEACH THE JURY'S VERDICT.

RCr 10.04 states: **"**A juror cannot be examined to establish a ground for a new

trial, except to establish that the verdict was made by lot."

Several years after Woodall's sentence hearing, and in brazen disregard of the foregoing rule, public defenders persuaded one of the jurors to sign an affidavit stating that during deliberations she had looked up some Bible verses on the internet. Woodall attacks the jury's verdict on that basis.

Woodall's claim before this Court is procedurally barred by state law. Under RCr 10.04, a juror's testimony regarding deliberations cannot be used to impeach the verdict. *See* Hicks v. Commonwealth, 670 S.W.2d 837, 839 (Ky. 1984); Grace v. Commonwealth, 459 S.W.2d 143 (Ky. 1970); Bowman v. Commonwealth, 284 Ky. 103, 143 S.W.2d 1051, 1054 (1940).

Woodall argued in state court that his case is similar to Ne Camp v. Commonwealth, 311 Ky. 676, 225 S.W.2d 109 (1949). In Ne Camp, a juror consulted with a priest regarding the moral implications of imposing the death penalty, and then told another juror during deliberations that the priest advised it was not a moral sin. *Id.*, pp. 111-112. The Ne Camp court found juror misconduct "obvious" and reversed the judgment of the trial court. *Id.*, p. 112. Woodall relied on Ne Camp because the state court accepted juror testimony regarding juror misconduct during deliberations. However, Woodall's reliance on NeCamp was misplaced. In Gall v. Commonwealth, 702 S.W.2d 37, 44 (Ky. 1985), Kentucky's highest court distinguished Ne Camp, stating, "Necamp does not sanction examination of jurors to search for inconsistencies in their deliberations. Necamp only addresses the issue of jurors who consult with others and carry their advice into the jury room." *Id.*

In a successive post-conviction appeal, the Kentucky Supreme Court specifically

found Woodall's juror / affiant to be not credible. Woodall v. Commonwealth, 2004-SC-0931-MR (Ky.), pp. 4-6. (CR 60.02 appeal). The state post-conviction trial judge had indicated likewise.

Woodall's dubious claim is academic at best when it is realized that all of the other jurors who his post-conviction public defenders questioned apparently disagreed with the juror / affiant's distant recollection of the events. *See* United States v. Gonzales, 227 F.3d 520, 527 (6th Cir. 2000). Woodall's argument should be rejected out of hand.

XXVI.

WOODALL IS NOT THE VICTIM OF AN "ESTABLISHMENT CLAUSE" VIOLATION.

The present claim is a continuation of Woodall's preceding argument about the juror / affiant allegedly looking up Bible verses on the internet during deliberations.

Woodall contends that letting his death verdict stand would amount to the establishment of a state-endorsed religion in violation of the First Amendment. Stating Woodall's position is response enough.

XXVII.

PROPORTIONALITY REVIEW IS NOT A CONSTITUTIONAL REQUIREMENT.

Proportionality review is not a constitutional requirement. Pulley v. Harris, 465 U.S. 37, 104 S.Ct 871, 79 L.Ed.2d 29 (1984). For that reason, a state's exercise of proportionality review is not cognizable in a federal habeas corpus proceeding. McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996).

XXVIII.

WOODALL'S COMPLAINT ABOUT "NON-STATUTORY AGGRAVATING FACTORS" WAS PROCEDURALLY DEFAULTED.

In his direct appeal, Woodall complained about the fact that the trial judge's written report – a fill in the blank form prescribed by Kentucky's Administrative Office of the Courts – mentioned the ferocious nature of the crimes and the lack of remorse for them.

The Kentucky Supreme Court rejected Woodall's complaint, stating:

> The trial judge properly relied on nonstatutory aggravating factors to enhance the sentence. Woodall claims that such use is unconstitutional. Similar arguments have been rejected by this Court in Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1986); Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999) and Tamme v. Commonwealth, 973 S.W.2d 12 (Ky. 1998). The use of nonstatutory aggravating circumstances is permissible as long as the jury makes the required finding that at least one statutory aggravating circumstance exists. We find no error in this respect. Woodall v.Commonwealth, *supra*, 63 S.W.3d at 132.

Now, in his federal habeas petition, Woodall is attempting to morph the foregoind claim into one challenging the "unconstitutional vagueness" of non-statutory aggravating circumstances. Woodall is not allowed to change or add grounds in this manner. His claim before this Court is procedurally defaulted.

XXIX.

WOODALL CANNOT WAREHOUSE AN "INCOMPETENT - TO - BE - EXECUTED" CLAIM AS HE IS ATTEMPTING TO DO HERE.

Woodall has not properly exhausted his claim that he is incompetent to be

executed since he and his attorneys did not employ the procedure required by KRS 431.2135. The fact that Woodall's attorneys improperly raised this claim in a collateral attack motion in state court did not exhaust the claim since exhaustion requires compliance with applicable state law. See Castille v. Peoples, 489 U.S. 346 (1999).

In any event, the U.S. Supreme Court has held that incompetency to be executed claims need not be decided in a first federal habeas petition since such claims are not legally "ripe" until petitioner's mental state can be determined near the time of the execution. Panetti v. Quarterman, 127 S.Ct. 2842, 2855 (2007), citing, Stewart v. Martinez-Villareal, 523 U.S. 637, 644-645 (1998).

Therefore, Woodall's incompetency claim is not properly before the Court at this time and should be dismissed.

XXX.

THERE WAS NO CUMULATIVE ERROR.

There were no errors in Woodall's case. Consequently, there was no cumulative error.

CONCLUSION

WHEREFORE, the petition for a writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 8, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system.

I further certify that the above Answer and Memorandum, and the notice of electronic filing has been served via the CM/ECF system to Hon. David Harshaw, and Hon. Dennis Burke, Assistant Public Advocates, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031 and Honorable Laurence E. Komp, Attorney at Law, P.O. Box 1785, Manchester, Missouri 63011.

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