IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

ROBERT KEITH WOODALL,	)	**Electronically Filed**
	)	
Petitioner,	)	Case No.: 5:06MC-10-R
	)	
vs.	)	Judge Thomas B. Russell
	)	
THOMAS L. SIMPSON, WARDEN,	)	
	)	
	)	**Petitioner Is Under A**
Respondent.	)	**Sentence Of Death**
	)	**No Execution Is Currently Scheduled**

PETITION FOR A WRIT OF HABEAS CORPUS

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Petitioner Robert Keith Woodall, by counsel, hereby files a Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus challenging his conviction and sentence. Petitioner is a Kentucky Inmate under a sentence of death and is being held in the Kentucky State Penitentiary in violation of the Constitution of the United States. His inmate number is 127513. Thomas L. Simpson, Respondent, is the Warden of the Kentucky State Penitentiary, the address of which is 266 Water Street, P.O. Box 5128, Eddyville, Kentucky 42038-5128.

I.
JURISDICTION

1. Petitioner was charged with the January 25, 1997 kidnapping, rape and murder of Sarah Hansen in Muhlenberg County, Kentucky. Venue was changed to Caldwell County, Kentucky. The trial proceedings were held in the Caldwell Circuit Court located in Princeton, Kentucky. On April 10, 1998, Petitioner pled guilty to all charges and asked for judicial sentencing. This request was allowed to be withdrawn, and a sentencing trial before a jury commenced on July 14, 1998. Petitioner did not

testify. On July 20, 1998, the jury recommended life sentences on the kidnapping and rape charges and a sentence of death on the murder charge. The trial court followed the jury's recommendation and final sentence was entered on September 4, 1998.

2. Petitioner timely appealed his conviction and sentences to the Kentucky Supreme Court. The court denied the appeal. Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2001).

3. On October 7, 2002, the United States Supreme Court denied Petitioner's timely Petition for Certiorari. Woodall v. Kentucky, 537 U.S. 835 (2002).

4. On December 3, 2002, Petitioner initiated a state post-conviction action in the Caldwell Circuit Court, challenging both his conviction and sentence.

5. On April 22, 2003, the court denied the post-conviction action without an evidentiary hearing. On May 23, 2003, the court denied a properly filed reconsideration motion.

6. Petitioner timely appealed the denial of post-conviction relief to the Kentucky Supreme Court. The Court denied the appeal. Woodall v. Commonwealth, 2005 WL 3131603 (Ky.). On February 23, 2006, the Court denied a properly filed rehearing petition.

7. Petitioner timely filed a Petition for Certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. Woodall v. Kentucky, ---S.Ct.---, 2006 WL 2158371 (2006).

8. While the appeal of his first post-conviction action was underway, Petitioner filed a second post-conviction action on June 1, 2004 in the Caldwell Circuit Court. On October 4, 2004, the court denied the post-conviction action without an evidentiary hearing.

9. Petitioner timely appealed the denial of post-conviction relief to the Kentucky Supreme Court. On October 20, 2005, the court denied the appeal. Woodall v. Commonwealth, 2005 WL 2674989 (Ky.). The Court denied a rehearing petition on February 23, 2006.

10. Petitioner timely filed a Petition for Certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. Woodall v. Kentucky, ---S.Ct.---, 2006 WL 2094649 (2006).

11. Petitioner does not currently have any petition, application, motion or appeal pending in any court, either state or federal, as to the conviction and sentence at issue in this matter. **Petitioner advises the Court and makes a statement that his claims are fully exhausted with the exception of his Twenty-Ninth Claim, which has not been exhausted in state court because it is premature and is raised by Petitioner in compliance with *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).**

12. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 2254.

II.
Prior Attorneys

13. At trial, three attorneys represented Petitioner: the Hon. Mark S. Baker, Jefferson County Commonwealth Attorney's Office, 514 West Liberty Street, Louisville, Kentucky 40202; the Hon. Michael L. Williams, 28-2 Woodland Hills, Newport, Kentucky 41071; and the Hon. Jill Giordano, 122 E. Main Street, P.O. Box 128, Princeton, Kentucky 42445.

14. On direct appeal and on certiorari from the direct appeal, the Hon. Thomas M. Ransdell and the Hon. Randall L. Wheeler, both at Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, represented Petitioner.

15. In the first post-conviction action through appeal, Petitioner was represented by the Hon. David H. Harshaw III, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031 and the Hon. Susan J. Balliet, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601. Mr. Harshaw represented Petitioner on certiorari.

16. In the second post-conviction action through appeal, Petitioner was represented by the Hon. David H. Harshaw III, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031, the Hon. Susan J. Balliet, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, and the Hon. Shelly R. Fears, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601. Ms. Balliet represented Petitioner on certiorari.

III.
STATEMENT OF THE CASE

A. Trial Record

17. Petitioner's parents did not want him. He was conceived by his mother, Barbara, out of wedlock, when she was 15 years old. (TE 1433).[1] She was forced to marry Petitioner's father, Robbie Woodall, because she was pregnant with Petitioner. (TE 1403, 1447). During the first year or two of Petitioner's life, his mother and father moved a lot but Barbara's parents finally helped them get a trailer in Drakesboro. (TE 1404). Despite having their own trailer home, Barbara and Petitioner stayed with her parents quite a bit. (TE 1405). Barbara did not work. (Id.)

[1] Petitioner's reference "TE" relates to the Transcript of Evidence from the trial. Petitioner's reference "TR" relates to the Transcript of Record from the trial proceedings. Petitioner's reference "TR2" relates to the Transcript of Record from Petitioner's first post-conviction action. Petitioner's reference "TR3" relates to the Transcript of Record from Petitioner's second post-conviction action. Petitioner's reference "TE Supp." relates to the Transcript of Evidence from the trial proceedings prior to the change of venue from Muhlenberg County.

18. When Petitioner was two, Barbara and Robbie had another child, Michael. (TE 1406). During his early childhood, Michael developed Tourette's Syndrome, which caused him to throw things, have outbursts and even swear as a child. (TE 1416). This made Michael a very difficult child to deal with. (TE 1416, 1436, 1453).

19. Petitioner's mother fought depression from the time that Petitioner was a baby. (TE 1452). She began to see a psychologist when Petitioner was in elementary school, and while Michael was being treated from Tourette's Syndrome. (TE 1453). Michael's illness contributed to her depression. Barbara has been taking medication for her depression off and on since 1981, when she and Petitioner's father divorced. (TE 1454).

20. Petitioner also had a physical problem from the time he was a child. He had a "spastic colon" which led to both constipation and erratic and unexpected bowel movements. (TE 1349, 1448, 1451). In elementary school, Petitioner would have accidental bowel movements in his pants two to three times per week and would have to be sent home. (TE 1349). Different members of the family would sometimes put soap into Petitioner's rectum in order to loosen his stools. (TE 1412, 1439). Prior to the trial, one expert testified that looking into this further was worthwhile. (TE 347). This type of bodily invasion was of a type to cause major psychological disorders of the dissociative variety. (TE 344). No further mental health evaluations were done, however. Testimony at Petitioner's trial called the soap insertion a form of sexual abuse and that persons so abused are more likely to be sexual offenders. (TE 1581). Petitioner's erratic bowel movements lasted into his teens, and when he would have

accidents as an older child, he would hide the clothes that he had soiled. (TE 1411, 1417, 1418).

21. Throughout Petitioner's childhood his father was rarely around and was usually drinking or smoking pot. (TE 1433). Even he considered himself to be a very poor provider. (TE 1435, 1450, 1476). And Robbie did not spend time with his children or do anything to take care of them. (TE 1452). Petitioner's grandparents supported them. (TE 1450).

22. Petitioner also did not receive any nurturing from his mother. (TE 1408). She would usually just sit around watching t.v. or playing video games. (TE 1408). Barbara changed quite a bit after she got married and had children. (TE 1477). Others in the family took care of Petitioner and his brother. (TE 1409). Barbara did not maintain herself or of the Woodall's home. It was "nasty". There were dirty dishes, dirty clothes, roaches and mice. (TE 1409, 1410). She seldom cooked and many times the children smelled of sour milk. (TE 1409, 1411). Others in the family had to see that Petitioner and his brother were clean enough to go to school. (TE 1410). At one time, Petitioner's family had no water for several months. (TE 1410, 1435). At another time, the family went without heat for a couple of months. (TE 1410). During that time, Petitioner's grandmother, who was watching the children, decided that she would not let them go home. (TE 1438). Robbie nevertheless took them home to their cold house, and Petitioner's grandmother had to get a judge to call the police. (TE 1438). Robbie was given thirty minutes to find some place warm for the children. (TE 1438). Throughout Petitioner's childhood, the situation at home did not improve. (TE 1410).

23. Robbie and Barbara Woodall separated when Petitioner was six. (TE 1449). Barbara later gave birth to another child, by Robbie, but the two were then divorced. (TE 1414). Robbie had been seeing other women (TE 1436) and after the divorce never paid child support. (TE 1438, 1454, 1478). At one time, he owed $27,000.00 in back child support. (TE 1478). Barbara and her three children were forced to live on $235.00 per month welfare. (TE 1455). Petitioner's father basically disappeared. (TE 1419). He would sometime make promises to visit but would not show up leaving the children to wait hoping that he would appear. (TE 1415, 1439).

24. Sometime after the divorce, Barbara moved to Illinois with Petitioner and his siblings. (TE 1414). But when Petitioner was about middle school age, he and his sister, Amy, were sent back to Kentucky to live with his aunt and grandmother. (TE 1416, 1456). Barbara and Michael stayed behind in Illinois. (TE 1416). Although Barbara and Michael later returned to Kentucky themselves she still did not work, depended on her mother, and did not improve in taking care of the children or her home. (TE 1420).

25. Petitioner had difficulty in school from the beginning. He repeated the second grade. (TE 1345). And he always received low grades in math. (TE 1351). His numerous accidental bowel movements typically occurred during the portion of the day set aside for math. (TE 1351).

26. No one noticed Petitioner's borderline intellectual functioning until high school. By then, he was not doing well on exams, was not entering into any discussions, would fall asleep with his head on the desk, take no notes, was withdrawn, had difficulty reading and would receive test scores in the low 40s. (TE 1358). Because of these

problems, Petitioner was tested and received an IQ score of 74. (TE 1374, 1501). Although he was in high school, he was functioning at the age equivalent of 11 to 12. (TE 1503). It was recommended that Petitioner be placed in a special learning program for the educable mentally handicapped. (TE 1505).

27. Petitioner left high school at the age of 17. (TE 1457).

28. After Petitioner quit high school, he held various jobs but in 1993 was convicted of sexual abuse. (TE 1421). This led his mother to see a psychiatrist. (TE 1421). And although Petitioner also abused two of his cousins, he could not understand that he was harming them. (TE 1422). The girls have now forgiven him for doing this. (TE 1426).

29. At the time of the crimes, Petitioner worked at a car wash where he got along well with others and was a good worker. (TE 1379). His landlord also described him as a good tenant. (TE 1386). Petitioner had also fathered a son, Cody. (TE 1461).

30. Sarah Hansen was killed January 25, 1997. (TE 1206). Petitioner was arrested three days later and charged with her murder, kidnapping and rape. (TR 50-52; TE 1241). On March 18, 1997 the Muhlenberg County Grand Jury indicted him for those offenses. (TR 43). One week later, the Commonwealth announced its intention to seek the death penalty. (TR 44). Because of "massive publicity ... to the point of saturation," (TE 8), venue for the prosecution was changed from Muhlenberg County to Caldwell County. (TE 8-9).

31. The trial date, which was set at the arraignment in Muhlenberg County, was continued to February 23, 1998 because a witness for the Commonwealth was unavailable. (TR 88). Shortly before the February 23, 1998 trial date, the case was

continued a second time due to Petitioner's lead counsel's physical and mental problems. A physician diagnosed Petitioner's counsel as "physically and emotionally exhausted," having just completed a different capital trial on February 11, 1998. (TR 677). The physician's letter, dated February 16, 1998, also stated that Petitioner's lead counsel in this death penalty case was "not sleeping well. His concentration and recent memory are impaired. As well as his cognitive impairments, he is suffering from nausea/vomiting with a secondary dizziness presumably related to hypoglycemia from his diabetic condition." (Id.). The trial was reset for April 13, 1998. (TE 254).

32. Petitioner Woodall made a motion for a PET (Positron Emission Tomography) scan, to investigate a suspected neurological disorder. (TR 735). On April 7, 1998, that motion was denied. (TR 779). At trial, Woodall's step-mother Susan Woodall testified that Woodall suffered from hand tremors. (TE 1487-8).

33. On April 10, 1998, Petitioner plead guilty to the charged offenses based, as his attorney said, on "the Court's denial of a continuance in order that we might proceed to obtain that evaluation so that we could prove what could have been an affirmative defense or at least, the very least, statutory mitigation evidence or statutory mitigator." (TE 407). Three days after advising his client to plead guilty, Petitioner's lead counsel had a "mini-stroke." (TE 422). The capital sentencing hearing, which had been scheduled to begin on April 14, 1998, was continued. (TE 422-424). While lead counsel was in the hospital recuperating from his stroke, the trial judge ordered that Petitioner undergo a Sex Offender Presentence Evaluation. (TR 907).

34. The trial judge located and appointed a different attorney to function as "an assistant to Mr. Williams." (TE 459). Although lead counsel Williams had advised the court that he would be unavailable for trial until after August 20, 1998, (TR 924), the court rescheduled the sentencing hearing for July 14, 1998. (TE 927). New counsel's renewal of the motion for a PET scan and for a continuance of the sentencing hearing were denied. (TR 989).

35. On July 14, 1998, Petitioner's jury sentencing began. (TE 574). Petitioner's lead attorney was not present. (Id.). The trial court, expressing its belief that the jury could consider the fact that Petitioner offered "no testimony, no explanation, no remorse," (TE 1592), denied Petitioner's request for an instruction on his right not to testify. (TE 1589). The jury recommended a death sentence. (TR 1145). At a second phase of the sentencing trial, the jury recommended life imprisonment for the offenses of kidnapping and rape. (TE 1148).

36. Final Judgment was entered on September 4, 1998. (TR 1179). In following the jury's death recommendation, the trial judge specifically considered the Sex Offender Presentence Evaluation, (TE 1651), and the KCPC evaluation. (TE 1652). The judge also considered the aggravating circumstances of the "[h]einous nature of the crime," (TE 1192), "[n]o remorse expressed by defendant," (Id., 1197), "the brutality and viciousness of the offense," (TE 1197), and "the apparent stalking." (Id.).

B. First Post-Conviction Action Record

37. The trial court denied Petitioner's post-conviction petition without conducting an evidentiary hearing.

38. In 1998, compelling mitigating evidence was known and could have been presented, but was not. For instance, Barbara Woodall's medical records, Petitioner's biological mother, establish a genetic link and biological component to Petitioner's mental problems. Barbara had been treated for depression and other mood disorders. The defense knew she had multiple hospitalizations relating to her mental instability. Barbara testified to her depression, but a much stronger case regarding her mental problems could have and should have been presented.

39. The defense also knew that Barbara Woodall, like Petitioner, suffered from uncontrollable shaking, a fact that was not presented. Tremors plagued her since her late teens. This shaking had never been definitively diagnosed. For years, various neurologists had been attempting to help Barbara. Diagnoses of Multiple Sclerosis and Lupus had been explored to no avail. The medical records also indicated that Barbara had told one of her physicians that her biological mother Barbara Leigh Finney, her biological sister (Lessie) and her biological nephew all suffered from Multiple Sclerosis, which was the disease that Barbara believed herself to have at that time. This information should have alerted the defense team to seek and present a genetic, biological predisposition for Woodall's behavior.

40. The defense knew some of Barbara Woodall's family history. They knew that Barbara Woodall had been adopted by Liz and Prentice Mayes when they lived in Chicago. And the defense knew that Barbara's biological mother, Barbara Leigh Finney, was an exotic dancer who died under suspicious circumstances, possibly a drug overdose, and possibly murder. They knew Barbara Woodall had a biological

sister named Lessie Sanders, and they knew where to find her. But they did not follow through.

41. There was one other vital piece of information in Barbara's medical records. One of Barbara's medical records indicates that Barbara suffered from psychotic thoughts:

> I subsequently talked with the patient's sister, Diana Utley, who indicated the patient has been living with her for the past ten days. She states her sister is hearing voices, thinks she has a baby in her stomach, thinks that doctors are conspiring against her and thinks that people are stealing from her house. She is extremely paranoid and is not eating or sleeping.

42. Similarly, Petitioner informed a defense investigator, and others, that he has heard voices calling his name his whole life.

43. Woodall's tremors and mental infirmities, like his brother's Tourettes, and his mother's tremors and severe depression, are almost certainly linked in a broad strain of genetic problems riddling Woodall's maternal line. (TR2 151-156). The team discovered, first, that Woodall's maternal Aunt Lessie Sanders has always suffered from serious mental problems. Between the ages of 16 and 36, she was hospitalized three times for attempting suicide. She has suffered from flashbacks, depression, a nervous breakdown, and frequent loss of touch with reality. (TR2 152).

44. All of Lessie's children (Woodall's cousins) and Lessie's grandchildren (second cousins) also suffer from serious mental problems. (TR2 152, 154). Cousin **Julie Sanders** suffers from mild mental retardation, a severe learning disability, a seizure disorder (grand mal and petit mal), and bipolar disorder. Julie has been hospitalized for psychiatric reasons, and tried to commit suicide in 1991. (TR2 153). Cousin **Brian Ledbetter** (Lessie's son) has bipolar disorder, multiple sclerosis, and major depression. (TR2 153). Cousin **Victoria Sanders** (Lessie's daughter) suffers from a

learning disability and major clinical depression. (Id.). Cousin **Donny Sanders**, (Lessie's son) --in and out of juvenile institutions and jail since he was twelve-- has shown violent tendencies, and almost beat a man to death in 1998. (Id.). Cousin **Timmy Sanders** (Lessie's son) is such an extreme recluse that he has trouble with grocery shopping, and avoids his family. (Id.). Julie Sanders' son **Joey** has cerebral palsy, and a 1996 MRI shows that part of his brain is atrophied. He suffers from severe mental impairment, petit mal seizures, anger control problems, and violent episodes. (TR2 154). Julie's other son **Zachary** at age five has the developmental level of a two-year-old. Id. Julie's **third child** was born dead in 2002, with half of his brain atrophied. (Id.).

45. The jury also never heard just how pitiful the living conditions were in the Woodall home. They did not hear that Woodall's Aunt Lori scraped maggots out of the Woodall refrigerator. Or that the Woodall home made Woodall's grandfather vomit. Or that Woodall's uncle had to burn his clothes after staying there. (TR2 196-198).

46. At trial it was determined that Woodall defecated in his pants at least two to three times a week in school. (TR2 146, TE 1349). Ms. Melton testified that in grade school Petitioner had a spastic colon. (TR2 149, TE 1349). On cross-exam Melton volunteered that she herself had a spastic colon, and it was not so abnormal or unusual. (TE 1354-1355). According to an investigator's memo, Ms. Melton could have testified that every day in school Woodall would have a bowel movement in his pants, evince no reaction, and be sent home. (TR2 149). The same memo states that Melton did not at all equate her common ailment, which she acknowledged, with Woodall's unusual one. (Id.).

47. Melton also testified that the other kids at school did not mind Woodall's condition. (TE 1350). However, the defense had witnesses they could have put on who would have testified that Woodall stank, other children avoided him, teased him, and called him names. (TR2 146, 195).

48. Lead defense counsel, Michael Williams, bullied Petitioner into pleading guilty. (TR2 556-558). With four or five death penalty trials approaching at once, Williams had a "nervous breakdown" one week before Woodall's trial. (TR2 599-600). Before he collapsed, instead of building Woodall's defense, Williams desperately sought continuances. (TR 140, 158, 286-298, 337-338, 372-385). Williams met with successor counsel, Jill Giordano, once only, never sharing what he knew. (TR2 147).

49. During the investigative time of the post-conviction action, Petitioner had a mental breakdown.

50. In the early months of 2002, Woodall had a severe and sustained break with reality that can be directly attributed to attempts by his then current counsel to represent his best interests. The genesis of this break with reality originated in the latter months of 2001 when Woodall was made aware that the Kentucky Supreme Court could soon decide his request for re-hearing of his direct appeal. At this time, Woodall also became aware that a post-conviction investigation of his case had been initiated in the event that his petition for re-hearing was unsuccessful, and such an investigation would attempt to revisit every aspect of his case.

51. On January 13, 2002, days after meeting with post-conviction counsel and agreeing to assist his counsel regarding the important facts of his case, the medical staff at KSP made their first observation that something was not right with Woodall.

52. On January 17, 2002, the Kentucky Supreme Court denied his petition for re-hearing.

53. On January 21, Woodall was admitted to the infirmary for aberrant behavior.

54. Medical records from the infirmary report:

1-13-01 Has many psychosomatic complaints, "My back hurts, my jaw hurts, nothing tastes right, can't sleep. Can't have a BM, my ear hurts." Acts very strange for him, paranoid et nervous. States feels really funny, Denies feelings of self harm. I gave him a pill for constipation, he was very apprehensive about taking it. Thought it would hurt him. Just not acting like himself @ all. B. Whiseman, RN. Medical Records, page 2.

1-15-02 8:30 p.m. Contacted via person per Sgt. Hines. IM "acting high." Reported behavior confused et speech slurred et eyes glassey [sic]. Upon exam IM voiced multiple C/O. Stated he "hasn't eaten or had a BM in one week." Abdomen soft round et bowel sounds active. B/P 130/90. Skin W/D, color pink, eyes appeared dialated [sic] et glassy however, light was dim. Checked pupil response …flashlight et papillary response was brisk. Hand grips equal et strong. Gait normal. Oriented to person et place but did not know what day it was and confused when looking at calander [sic]. Will continue to monitor et refer to MD this AM. P. Herrell RN. Id., page 3.

1-15-02 Late entry. IM had urine test per security et Sgt. Hines reported urine concentrated but negative for drugs. P. Herrell RN. Id., page 4.

1-19-02 During pill rounds this noc. I/M continues to show unusual behavior. Looking around his cell etc. Oriented to person et place but not time. I asked him if every thing was o.k. when urinating, burning etc. Really thought about. Then stated he has been burning. U/A done. Dark – amber – rust color. Strong odor. Specific Gravity 1.025. PH 6.0, Protein 30+, negative blood. T 97.7, BP 110/78, P 96, R 14. States only urinates 1-2 x day. Pupils equal and reactive to light. Skin warm, dry. States mucus in urine quite often but none observed @ this time. Will instruct dayshift supervisor this AM. MD will be notified. B. Whiseman RN. Id.

1-21-02 12:15 admitted to Infirmary … confused – nuero's intact … pupils intact – answers questions only to name… (name illegible). Id., page 5.

1-21-02 2 pm Pacing in cell. (name illegible). Id.

1-21-02 9:20 pm Lying in bed w/o sheet or pillow case. When asked why he hadn't put them on the bed yet he stated "I forgot." PM meds given per order. V/S T 98˚, P 74, R 18, B/P 128/79. Remains very confused. Observed over 25 minutes holding water pitcher in front of face w/o

moving. Continued to hold pitcher in same position when officer asked him how he was doing. Urinating on floor in front of commode. Will continue to monitor. P. Herrell RN. Id., page 5.

1-22-02 12:30 Pt confused; does not know what day it is. When asked why he was in the hospital he stated he didn't know although he did remember being brought down. Pt hesitant when answering any questions c/o not being able to take a shower or eat & drink Initially c/o nausea & vomiting but later denies either. Pupils dilated and sluggish bilaterally On exam pt. c/o groin pain on urination. Before being taken back to his room he stated he had what he pointed to as mid dermal chest pain. He could not describe the pain but said he had had it for months and had not been able to breathe. Pt given 2 glasses of water to drink before returning to his room. Has pitcher in room… C. Hiland ARNP. Id., pages 5-6.

1-22-02 9:25 pm. Remains confused, needs constant encouragement to complete simple task, ex. Making bed, taking medications. Unable to obtain a urine sample @ this time due to confusion and paranoid ideations. Will continue to monitor behavior – K.Knight RN. Id., page 6.

1-23-02 9:30 am Seen by Dr. Haas. No orders received Remains confused, apprehensive, paranoid AM meds given No signs self harm to self (name illegible). Id.

1-23-02 9 pm HS medication administered @ this time. Continues to exhibit confused and paranoid behavior – K. Knight RN. Id., page 7.

55. The observations of the nursing staff reflect a troubled man and are consistent with Woodall suffering from a serious mental illness.

56. After leaving the infirmary, Woodall had problems defecating on himself. He refused to clean up himself or his feces smeared cell. As a result, Woodall landed in segregation. Woodall also refused all visits, including those from his attorneys.

57. While segregated, Woodall would not eat, losing approximately fifty pounds, and slept most of the day, barely communicating. He refused a follow-up mental health evaluation.

58. Over time, Woodall recovered and has regained a semblance of mental stability.

59. Additionally, Woodall offers no insight into his own breakdown and dissociation. However, the breakdown and dissociation provides a window into an understanding of what transpired on January 25, 1997, and the extent of the mental illness from which he suffers.

60. Post-conviction counsel provided notice to the trial court that Woodall was not competent to rationally assist them in discovering essential facts relevant to his mental health and ultimately his case.

61. Post-conviction counsel also moved the trial court for permission to pursue expert funding. This request relied on the prior expert testimony, who had consulted with a leading expert in the field of dissociation (TR2 175, 183; TE 335-341), that Woodall showed signs of a dissociative disorder far more serious than any prior evaluations have revealed (TR2 157-158; TE 334), and the aforementioned incident post-dating trial. The trial court denied the request.

C. Second Post-Conviction Action Record

62. After filing his first post-conviction action, Petitioner located and interviewed Juror Nancy Hawkins. (TR3 30). On June 9, 2003, after making and initialing many changes and assuring herself it was correct, Hawkins signed a preliminary affidavit. (Id.). She signed a cleaned-up version, incorporating her changes, on September 10, 2003. (Id.).

63. The affidavit provides as follows:

> I was a member of the jury that sentenced Robert Woodall to death. I initially voted to sentence Woodall to life in prison without the possibility of parole. My husband's aunt had been murdered and the person responsible, to the best of my knowledge, was released after ten years. In the end, in part because of this personal experience, I found that I could not trust the justice

> system to carry through a life without parole sentence. I changed my vote from life without the possibility of parole to a death sentence. This was a hard decision for me. The night before the last day of the [sentencing hearing] or a night or two before that, I searched the Internet for information on what the Bible had to say about the death penalty. I did this because I wanted to make the right decision in the case. One Internet site I visited had a list of all the various references to capital punishment in the Bible. I printed this list out and brought it with me to Court the next day. I made a few copies for all the jurors. I brought these copies into the deliberation room and put them on the table and told the other jurors about them. I cannot recall if any of the other jurors looked at the list of Bible verses. I looked up many of the verses and considered them. I recall the verses included the one that speaks of "an eye for an eye." Also present on the list was a verse that spoke about how one was responsible for one's own actions. There were also verses that spoke of God's mercy. (TR3 19-20).

IV.
CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
NO ADVERSE INFERENCE INSTRUCTION

64. During voir dire, Petitioner requested to ask prospective jurors if they understood that he did not have to testify during the penalty trial and whether any decision to do so would be held against him. (TE 697). The trial court refused. (Id.).

65. At the conclusion of the presentation of evidence by both the prosecution and defense, Petitioner did not testify. (TE 1586). The court asked Petitioner if this was his decision and informed him, incorrectly, that his right against self-incrimination had already been waived by his plea of guilty. (Id.). The defense tendered a "no adverse inference" instruction, (TE 1588; TR 1099); **even though the Commonwealth had no objection**, the court declined to give one.

66. The court stated that it would not be "intellectually honest" to give such an instruction because Petitioner had waived the right against self incrimination when he pled

guilty. The court stated that the jury could, therefore, consider his lack of any expression of remorse, lack of explanation of the crime or "anything else" because of the plea. (TE 1589). Specifically, the court stated that he would not tell the jury that "you can go out and rape and murder and kidnap and admit it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury cannot consider that." (TE 1591). The court also gave the prosecutor permission to comment on the lack of an expression of remorse in his closing argument which allowed the prosecutor to direct the jury's attention during his argument to the fact that, despite pleading guilty, Petitioner had sat through the trial "looking down like this." (TE 1612).

67. The trial court held Petitioner's decision not to testify against him in determining the sentences that would be imposed in relying on Petitioner's lack of an expression of remorse as a non-statutory aggravator and as a reason why the sentences were appropriate. (TR 1189, 1192, 1197).

68. The Supreme Court, pursuant to the 5th and 14th Amendments, requires that a trial judge instruct the jury that the defendant has no obligation to testify and that no adverse inference can be drawn from his failure to do so if the defendant so requests. Carter v. Kentucky, 450 U.S. 288 (1981).

69. The Supreme Court unequivocally recognized, in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 1873, 68 L.Ed.2d 359 (1981), that: "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." Id., 1873; see Finney v. Rothgerber, 751 F.2d 858, 865 (6th Cir. 1985)..

70. In Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Court held: "Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." Id., 324. The Court noted: "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." Id. at 327.

71. The trial court's failure to instruct the jury not to speculate about Petitioner's decision not to testify during the penalty trial denied him due process, a reliable determination of penalty and his right against self incrimination pursuant to the 5th, 8th and 14th Amendments to the United States Constitution. The Court's decision not to allow voir dire and to allow the Commonwealth to comment on Petitioner's lack of testifying exacerbates the trial court's constitutional error. Petitioner is entitled to a new penalty trial because the Commonwealth cannot establish beyond a reasonable doubt that this error was harmless.

SECOND CLAIM FOR RELIEF
BATSON ERROR

72. Over Petitioner's objection, the Commonwealth exercised a peremptory strike of the only remaining African-American in the jury pool, Carla Diggs. (TE 1165). The Commonwealth had already successfully excluded for cause (improperly) the only other minority.

73. During individual voir dire Ms. Diggs answered quite clearly that she could consider the entire range of penalties and that she would not automatically vote for or against any of them. (TE 672). She stated that she would consider any aggravation or mitigation evidence as instructed by the Court. (TE 673). She said she had not heard, read or seen anything about the case in the media. (TE 673). Indeed, she had not

even heard of the case before she was called as a juror. (Id.) Ultimately, Ms. Diggs stated, "I can be fair." No motions were made to strike her for cause. (TE 677-78).

74. At the conclusion of voir dire, Ms. Diggs was the only remaining African-American in the jury pool. Petitioner objected and pointed out that she was the sole remaining African-American juror in the pool. (TE 1165). The prosecutor responded that Ms. Diggs had been struck because she had answered a question on the jury questionnaire - a question which the prosecutor did not identify - that she "did not trust anyone". The prosecutor stated that she had also given other "negative" responses to questions on the questionnaire but did not elaborate. (TE 1166).

75. Other than observing for the record that Petitioner is white, the Court simply "noted" the defense objection and moved on. (TE 1166). The entire discussion of this matter covers two pages of transcript. (TE 1165-66). The trial court's cursory treatment of this serious constitutional issue denied Petitioner due process and equal protection and a reliable determination of his sentences. Accordingly, Petitioner was denied his rights pursuant to the 6th, 8th and 14th Amendments to the Constitution.

76. The trial court's treatment violated the long-standing Supreme Court precedent of Powers v. Ohio, 499 U.S. 400, 401, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

77. In Batson v. Kentucky, 479 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) the Supreme Court established a three-step process for determining whether peremptory challenges had been so exercised. First, the defendant must establish a prima facie case of racial discrimination. However, this requirement is moot once the prosecutor offers his explanation for the peremptory challenge, as occurred in this case. Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395

(1991); United States v. Hill, 146 F3d 337, 341 (6th Cir. 1998). Second, the prosecutor must provide a race-neutral reason for the exercise of the peremptory challenge. Batson, 476 U.S. at 97, 106 S.Ct. 1712. This requirement was also satisfied in this case.

78. However, the third part of the process is for the Court to conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). This third step in the process gives the trial court "the responsibility to assess the prosecutor's credibility under all the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances." U.S. v. Hill, at 342. The reason for this inquiry is that a given race-neutral reason may appear to be rational and yet be a pretext for discrimination. See Hernandez, 500 U.S. at 363. The Supreme Court has described the duty of assessing the credibility of the prosecutor's race-neutral reason as embodying the "decisive question" in the Batson analysis. Hernandez, 500 U.S. at 365.

79. In Petitioner's case, this third step of the Batson inquiry never occurred. Rather, the trial court required no elaboration or details from the prosecutor, cut off any further presentation of information concerning this constitutional issue and simply told the defense, as it moved on to other matters, that it would note the objection.

80. The record raised a substantial basis to complete the required Batson review of the prosecution's stated reason for striking Carla Diggs. First, the prosecutor did not cite any answers given during voir dire to support his use of the peremptory strike and,

indeed, there were none. Second, the prosecutor told the trial court there was more than one "negative" response to questions on a juror questionnaire, but the prosecutor's strike sheet notes only one. (TR 1105). Moreover, the prosecutor was not required by the Court to identify the question, which elicited the response, nor was he required to elaborate on the other questions and responses on which he professed to rely. Finally, the prosecutor had successfully moved for cause the only other minority of the panel.

81. There is only one question on the questionnaire, Number 38, which appears could have elicited a negative response. That question asked, "In your opinion, what, if anything, is wrong with the criminal justice system?" (TR 1014). Obviously, this question *is specifically designed to elicit a negative response*. If indeed this was the question to which the negative response was given, then it is likely that other jurors also provided their own rendition of complaints about the criminal justice system. The trial court did not review all questionnaires to determine how the answer of Carla Diggs differed from those given by other jurors who were not struck.[2]

82. Petitioner was denied due process, equal protection and a reliable determination of his sentences by the prosecutor's striking of the only African-American in the jury pool and by the trial court's cursory treatment of the issue, thereby violating the 5th, 8th and 14th Amendments. The wrongful exclusion requires automatic reversal.

[2]It is also significant to note that the jury questionnaires were not given to all jurors and that many questions from that document, including question Number 38, were not allowed during the voir dire of jurors who had not completed the questionnaire. (See TE 1006-1011).

THIRD CLAIM FOR RELIEF
IMPROPER EXCUSAL OF TWO JURORS FOR CAUSE

83. **Juror Bessie Hopson –** Juror Hopson expressed a preference for a sentence of life imprisonment without the possibility of parole for 25 years (LWOP/25). (TE 860). She believed, however, that the entire range of penalties should be considered. (TE 861). She agreed to consider both mitigating and aggravating evidence in reaching her decision. (TE 862). She agreed to put what she had read about the case in the newspaper aside, and decide the case based upon the evidence presented in court. (TE 865). The prosecutor asked if she could consider a more harsh penalty than LWOP/25, and she again agreed that she could consider a harsher penalty. (TE 869). Although she expressed some ambivalence about the death penalty, she said she could consider the death penalty as a possible punishment, "[i]f I had to." (TE 872). Hopson was an African-American juror. (TE 874).

84. The trial court justified excusing for cause what was apparently one of only two African-American jurors on the jury venire[3] as follows,

> 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 asked the questions I asked the way she though 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 she is not qualified to serve. (TE 875).

85. Contrary to the court's denigration of her mental faculties, i.e., her potential "problems following the evidence," this juror gave a most detailed and accurate

[3]The other African-American juror, Carla Diggs, was removed from the jury by the prosecutor's use of a peremptory challenge. (TR 1105; TE 1165-1166).

recounting of the facts of the crime based upon what she had read in the Caldwell County newspaper many months prior to Petitioner's trial. (TE 863). She obviously possessed an excellent memory. To contrast, the trial court refused a defense motion to strike Juror Lana Conger for cause even though she had a problem with her nerves, (TE 931), and was taking antidepressant medication. (TE 933). As for her conviction with respect to her religious view that she did not "like" capital punishment, it should be noted that the prosecutor was allowed to go after her religious views on capital punishment over a defense objection. (TE 869). The trial court had ruled pretrial that defense counsel could not question potential jurors about their religious affiliation, (TR 1014, TE 510), and when defense counsel wanted to ask jurors their views on the death penalty the prosecutor's objections were sustained, (TE 685), and defense counsel was not allowed to ask jurors their views of the death penalty. (TE 689). Nor did the trial court interject with the qualification, "Could you consider the death penalty if you were instructed to do so and it was warranted by the evidence," as he did repeatedly when defense counsel asked jurors about their ability to consider the minimum sentence. (TE 1058; 1061; 1070; 1119-1120). Nevertheless, Hopson stated, both before and after the prosecutor asked her religious views on the death penalty, that she could consider the death penalty as a punishment and that the entire range of punishments should be considered. (TE 861, 872).

86. Pursuant to Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), Juror Hopson did not possess views that would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." Juror Hopson was not substantially impaired in her ability to

consider the death penalty, would have been able to carry out her duties in accordance with the instructions and her oath.

87. **Juror Richard Thompson --** When the trial court asked Juror Richard Thompson if he had any personal beliefs that would prevent or substantially impair him from considering any of the five possible punishments in this case, he answered in the negative. (TE 936). When he was asked if he would be willing to consider evidence offered in aggravation of punishment, he agreed that he would. (TE 937). When asked by the prosecutor he stated that he would consider the death penalty, and that he had no personal beliefs against any form of punishment. (TE 938-939). For some reason, when defense counsel asked him the same question, he indicated a hesitancy with regard to the death penalty. (TE 940-941).

88. Juror Thompson was not unqualified to serve as a juror in this case. Despite his ultimate ambivalence about the death penalty, he indicated before that he would be able to consider all of the possible sentences in the sentencing range, and that he had no personal beliefs for or against any punishment that would substantially impair his ability to serve as a juror. *See*, Gray v. Mississippi, supra; Lockhart v. McCree, supra.

89. It was error to excuse Jurors Hopson and Thompson for cause because their views on the death penalty were not such that they could not set their personal opinions aside, follow the instructions and their oaths, and give the death penalty meaningful consideration as required by Wainwright. The wrongful exclusion violates the Sixth and Fourteenth Amendments and requires automatic reversal. Gray v. Mississippi, supra, 481 U.S. at 668, 107 S.Ct. at 2057.

FOURTH CLAIM FOR RELIEF
FAILURE TO STRIKE JURORS FOR CAUSE

90. Woodall exhausted all of his peremptory challenges. (TE 1103-1104). Three of his peremptory challenges were used on jurors he had moved to have stricken for cause -- Conger, Clift and Simms. He also unsuccessfully challenged for cause 3 of the 12 jurors who decided his fate -- Miller, Reynolds and Morris. (TE 1100). The failure of the trial court to excuse these jurors violated Petitioner's Sixth and Fourteenth Amendment rights. Ross v. Oklahoma, 487 U.S. 81, 85 (1988).

91. **Juror Lana Conger #278 --** This juror had a daughter who was in the high school band at the time the murder happened and she had "several competitions together" with Sarah Hansen. (TE 919). She thought that "it could have been [her] daughter." (TE 920). Because she worked at the Kentucky State Penitentiary, calculating the sentences of the inmates, she would have special knowledge about parole eligibility. (TE 923). Her sister had been violently attacked and raped. (TE 925-926). She was close to this sister. The person who committed those crimes was never apprehended, and she was "bothered" by that. Both she and her sister had been affected by the rape after it happened. (Id.). Juror Conger was taking antidepressant medication. (TE 931, 933).

92. Petitioner moved to strike Juror Conger for cause. (TE 932). The trial court denied the motion. (TE 934). Petitioner used a peremptory challenge to remove Juror Conger. (TR 1103).

93. Conger was unqualified to serve, and should have been removed by the court. First, she had two situational impairments that would predispose her to identify with the victim in this case. She identified Sarah Hansen with her daughter, and her sister had

been violently raped. Second, Conger's work in the records office of the Kentucky State Penitentiary calculating prisoner's sentences rendered her ineligible. Her job required an expert working knowledge of parole eligibility guidelines, prohibited from consideration in capital cases. Perdue v. Commonwealth, Ky., 916 S.W.2d 148 (1995). Lastly, her nervous condition for which she was taking antidepressant medication would also make it impossible for her to sit through a lengthy trial of this nature.

94. **Juror Genia Morris #176 --** Juror Morris worked at the Minit Mart in Greenville, where Sarah Hansen was abducted. (TE 641, 1078). She worked there about 6 months after the crimes occurred, and she heard the case discussed while she worked there. (TE 1079).

95. The defense moved to strike her for cause because of her exposure to one of the crime scenes, because of her exposure to the people who worked at the crime scene, one of whom was a witness at the trial, and because she had been exposed to people at the crime scene talking about the case. (TE 1084). The motion was denied. (TE 1085). Juror Morris sat on the jury that sentenced Petitioner to death.

96. Morris had a situational relationship to the offense, and should have been excused for cause because of that relationship. One of the prosecution's witnesses was a fellow employee at that same Minit Mart. She almost certainly knew him, although she may not have recognized his name. (TE 1083). It is also quite possible that she had contact with members of the victim's family or her boyfriend, since they apparently patronized the store. Also, it is the same as if Morris had made an unauthorized visit to the crime site. It can be presumed that part of her decision was based on her own

personal knowledge, and not on the evidence that was adduced at trial. Finally, her exposure to discussions at the actual crime scene -- where the declarants were presumably acquainted with the victim, the Petitioner and their families -- were likely to have been of much different nature than the idle gossip that is associated with garden-variety pretrial publicity.

97. **Juror Kathryn Reynolds #94 --** When Petitioner attempted to ask Juror Reynolds if she could consider a sentence of life for an intentional murder, the trial court interrupted and qualified the question, "If you were instructed to consider that by the Court and you felt it was warranted by the evidence." (TE 1119-1120). Defense counsel then asked if she could consider a sentence of 20 years, and she answered, "I couldn't go with that." (TE 1120). The trial court then rehabilitated her by asking if she could consider a 20 years sentence if it was "warranted under the evidence." She replied, "if I knew what the evidence was, yeah." (Id.). When Reynolds considered the possibility of "parole in twenty years" for someone convicted of intentional murder, she said, "I don't know. I really don't. I can't -- I think if someone has committed murder they need to pay for it." (TE 1121).

98. Petitioner moved to strike Juror Reynolds for cause because she was impaired in her ability to consider the minimum penalty. (TE 1124). The motion was denied. (TE 1125). Juror Reynolds sat on the jury that sentenced Petitioner to death. Jurors who are unable to consider the full range of penalties must be excused for cause. Defense counsel asked whether the juror could conceive of a situation where a 20-year sentence were appropriate, and Reynolds' response was "I couldn't go with that." (TE 1120). Reynolds should have been excused for cause.

99. **Juror Noah Miller #185 --** This juror was unable to understand the voir dire questions posed to him by the trial court. (TE 947). He did not know what was meant by mitigation. (TE 948). When asked if he would consider "low I.Q., mental illness, [or] intoxication" in assessing punishment, he responded, "Well, part of it might be." When asked which part, he said, "Stability about it -- the person." (TE 949). Miller never indicated that he would consider Petitioner's low I.Q. as mitigating evidence, although he was given the opportunity to do so. Petitioner moved to strike Juror Miller for cause because he did not understand the questions he was being asked, and he did not know the difference between mitigation and aggravation. (TE 951). The trial court denied the motion, even though he admitted that Miller had indicated that he would not consider some of the mitigating evidence. The trial court stated, "That's the danger we get involved in when we start throwing out these specifics." (Id.). Juror Miller sat on the jury that sentenced Petitioner to death. (TR 1100).

100. Miller should have been excused for cause. KRS 29A.080(2)(d) provides that a prospective juror is disqualified to serve on a jury if he has insufficient knowledge of the English language. Miller was unable to understand what was being said in voir dire. Furthermore, even the trial court understood this juror to say that he would not consider some types of mitigating evidence. He never indicated that he would consider Petitioner's low I.Q. as mitigating. It is constitutionally required that the sentencer in a death penalty case be able to consider and give effect to mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982).

101. **Juror Joseph Sims #16 --** Sims stated he was for the death penalty. (TE 1013). When asked if he would consider evidence of mental illness to be mitigating, Simms said, "I'm sure somebody more qualified than I am has already made that decision." (TE 1021). The trial court then asked Simms if he would consider mental condition after being instructed to consider mental condition, and Simms responded, "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." (TE 1022). Finally, he said he would consider mitigating evidence, "if the Court instructs me that way." (Id.).

102. Petitioner moved to strike Simms for cause based upon the fact that he was for the death penalty and his unwillingness to consider mitigation. (TE 1024). Defense counsel argued that the manner of the trial court's rehabilitation regarding his inability to consider mitigating evidence made it certain that the juror would give the correct response, regardless of his true beliefs. Defense counsel argued that Simms would only consider self-defense or insanity as mitigation. The trial judge warned defense counsel against "antagonizing these people by confusing them." (TE 1024). He denied Petitioner's motion to strike Simms for cause. (Id.). Petitioner used a peremptory challenge to remove Juror Simms. (TR 1103).

103. Simms should have been excused for cause. He had a predetermined opinion that if Petitioner had a mental condition, under our judicial system he would not be standing trial. The court's instruction on mitigating circumstances required the jury to consider mitigating evidence only if they found it to be true. Simms indicated he would leave it up to the experts, who obviously found that Petitioner did not have a mental condition because he was standing trial. Therefore, Simms would never have

considered Petitioner's mitigating evidence. A juror who is substantially impaired in their ability to consider mitigating evidence is unqualified to serve in a death penalty case. Eddings, supra,; Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

104. **Juror Joe Clift #8 --** When asked if he could consider as sentence of 20 years, Juror Clift said "I don't know." (TE 989). Juror Clift proclaimed, "I am for the death penalty." (TE 991). He explained that in his view the justice system was "turning people loose out of prison and they're feeding on the public, and I don't think they should turn them loose like that." (Id.). After being told Petitioner had a prior offense, Clift said he would lean toward the death penalty, "since he was -- like I said, turned loose on the public again." (TE 992).

105. Petitioner moved to strike Juror Clift for cause because he was impaired in his ability to consider punishments other than death. (TE 994). The trial court remarked, "I think 99 percent of the people who believe in the death penalty probably would" lean toward giving Petitioner the death penalty. (Id.). He denied the motion for cause because Clift had properly answered his leading questions about considering the entire range of punishment. (TE 995). Petitioner used a peremptory challenge to strike Juror Clift. (TR 1103).

106. Juror Clift should have been excused for cause. Jurors who prefer one sentence and are unable to consider the full range of penalties and give effect to mitigation must be excused for cause. The trial court's attempt to rehabilitate Clift with leading questions did not prove he was unimpaired in his ability to consider the lower penalty range.

107. The failure to excuse for cause some or all of these jurors was error. 5th, 6th, 8th, 14th Amends. Because each of these jurors was substantially impaired, reversal is automatic. Gray v. Mississippi, 481 U.S. 648 (1987).

FIFTH CLAIM FOR RELIEF
THE INSTRUCTIONS REQUIRING UNANIMOUS MITIGATION

108. When defense counsel raised the issue that the jury did not need to be unanimous in finding mitigating circumstances and that mitigating circumstances did not have to be proven beyond a reasonable doubt, the trial court said of the non-unanimous mitigation-verdict instruction, "that's not an instruction that I will give to [the jury]. I will not give them an instruction saying, 'You do not have to find mitigating circumstances unanimous.'" (TE 845). The trial court also said the instructions would contain a requirement that findings be proven beyond a reasonable doubt. (TE 847).

109. The trial court gave the jury seven written instructions. (TE 1137-1143). In those seven instructions, the word "you" is used 20 times. The first paragraph of the "Mitigating Circumstances" instruction is as follows:

> 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[.] (TE 1140).

110. A reasonable juror would understand the "yous" contained throughout the instructions to relate to the plural "you," which would mean the jury as a whole.

111. In the instruction on "reasonable doubt" the word "you" is used four times. The instruction reads in part, "If you have a reasonable doubt as to ... one or both of the aggravating circumstances ... you shall not make any finding with respect to it. ... If ...

you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment." (TE 1142). The word "you" refers to the plural "you" because it is "you" who fixes the defendant's punishment. The jury fixes the punishment as a whole, not as individual jurors.

112. Another example is the instruction on "Authorized Sentences." (TE 1141). In that instruction, the word "you" is used five times. Each time it is referring to the plural "you," as opposed to the singular "you." To make this clear, at one point in the instruction it says, "... you must state in writing, signed by the Foreperson, that you find the aggravating circumstance ... beyond a reasonable doubt." By juxtaposing the word "you" with the phrase "signed by the Foreperson," the instruction tells the jury that the word "you" is the plural "you," referring to the jury as a whole. Indeed, if the jury interpreted the word "you" in this instruction as a singular "you," it would seem their verdict did not have to be unanimous. Therefore, the instruction, when reasonably read in context with the instructions as a whole, required the jury to be unanimous in their findings of mitigating circumstances.

113. The trial court utilized different language when referring to the singular jurors, "one of you." The "Unanimous Verdict" instruction reads: "The verdicts of the jury must be in writing, must be unanimous, and must be signed by one of you as Foreperson." (TE 1143).

114. Voir dire reinforced that a reasonable juror would understand the jury had to be unanimous in finding the existence of a mitigating circumstance. First, the trial court refused Petitioner's request to inform potential jurors that they did not have to find the mitigating circumstances unanimously or beyond a reasonable doubt. (TE 843-

847). Second, the trial court personally gave an instruction to virtually every potential juror that, "A mitigating circumstance is the opposite of an aggravating circumstance." (TE 655, 672, 683, 700, 714, 725, 734, 750, 764, 774, 787, 798, 808, 822, 837, 878, 891, 905, 910, 918, 937, 944, 965, 985, 999, 1013, 1028, 1037, 1066, 1077, 1107, 1117, 1128, 1146). The written jury instructions told the jury that aggravating circumstances had to be found unanimously and beyond a reasonable doubt. (TE 1137, 1141, 1142, 1143, 1145). In combination, a reasonable juror would understand that mitigating circumstances, like aggravating circumstances, must be found unanimously and beyond a reasonable doubt.

115. In Mills v. Maryland, 486 U.S. 367, 384, 108 S.Ct. 1860, 1870, 100 L.Ed.2d 384 (1988), the death sentence was vacated since under the court's instructions there was a "substantial probability" that the jurors "may have thought they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstance." See also Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003).

116. A reasonable juror would understand that the jury as a whole had to unanimously find the existence of mitigating circumstances in order to consider them. This violates the Sixth, Eighth and Fourteenth Amendments, and requires reversal for a new penalty hearing.

SIXTH CLAIM FOR RELIEF
IMPROPER VERDICT FORM

117. The trial court instructed the jury on mitigating circumstances, aggravating circumstances, and alternative sentences. (TR 1136-1148). The jury was instructed that it could not fix a sentence of death, LWOP, or LWOP/25 unless it found an

aggravating circumstance to be true beyond a reasonable doubt, in which event it had to designate that aggravating circumstance in writing. (TE 1141). However, the only place to designate an aggravating circumstance were in locations on the verdict form which, when completed, fixed a sentence of death, LWOP, or LWOP/25. (TR 1144-1145).

118. Pursuant to KRS 532.030(1), the jury possessed the discretion to recommend a sentence of "life, or to a term of not less than twenty (20) years nor more than fifty (50) years."

119. The verdict forms, however, directed a verdict against the lower range of penalties. When the jury found an aggravating circumstance, the verdict form excluded a required sentencing option. A juror who cannot consider the entire range of penalties cannot sit in judgment in a capital case. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Further, a jury must be able to give effect to mitigation. Mills, supra.; Davis v. Mitchell, supra.

120. The verdict form in this case mandates that Petitioner's death sentence be vacated and that his case be remanded for resentencing because it violates the Sixth, Eighth and Fourteenth Amendments.

SEVENTH CLAIM FOR RELIEF
THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT

121. Woodall filed a motion in limine to prohibit the prosecutor from arguing lack of remorse during his closing argument, and he objected to comments made by the prosecutor during the argument about his guilty plea being a defense strategy. (TE 285, 1598, 1612).

122. During his closing argument, the prosecutor stated:

> You are the representatives of the citizens of Caldwell County. You are the representatives of the citizens of Muhlenberg County. You are the representatives of each citizen in this state. Criminal law is a lot like, I feel, a contract or an agreement between our various citizens, because we have a large number of people when a criminal trial occurs chosen representatives, jurors are picked, are selected, to hear evidence and return a verdict, and all of us whom you represent rely upon you to do your job, to return in every case and in this case a true verdict. (TE 1602).

123. He also stated that his personal opinion of the case was that a death penalty was warranted: "You may remember when I stood before you last time I told you I felt that the only true punishment in this case was that of the death penalty." (TE 1602). Additionally:

> I tell you the true verdict. The true verdict is that of death, and I say it without hesitation. It's not an easy thing that we do sometimes, but it is a necessary thing that we do, and if you have any doubt as to verdict form number 5 being the death verdict then I ask you to do me a favor. I want you if you would after you have looked at all this evidence, I want you to look at Commonwealth's Exhibit Number 1 [a photo of Sarah Hansen]. Before or after you vote on what the punishment is in this case, pass it around. Look into those eyes. Say, "Have I done justice. Have I returned the true verdict?" You'll know when you look at this, and that's when you will know you've done the right thing, not the easy thing but the right thing. On behalf of the Commonwealth of Kentucky, I ask you, I demand, I request that you return a true verdict in this case, the only verdict, and I thank you. (TE 1622-23).

124. The prosecutor also talked of Sarah Hansen as a "little girl" who was "full of pure goodness" and "full of life". (TE 1603, 1610). On the other hand, the prosecutor repeatedly referred to Petitioner as "evil". (TE 1603, 1610, 1615, 1616, 1617). He told the jury that Petitioner was a "sexual predator" who "was on the hunt, was on the prowl that night. Evil walked the streets of Greenville." (TE 1603). Indeed, the prosecutor was so intent on labeling Petitioner as evil that he asked a clearly objectionable question of a defense witness, Dr. Gail Spears, a licensed clinical

psychologist, how "evil" fit into her field. (TE 1593). This question drew an immediate objection which the prosecutor did not contest. (Id.)

125. The prosecutor also went outside the record during his closing argument to quote a book about evil that he had at home in his closet:

> I just said, "What was the name of that book and what was it it said?" There's something that fit, and there was - - John Walsh is the host of America's Most Wanted. I don't know if any of you - - he had a son named Adam that was abducted and murdered, and back at that time what he - - what he said, he was talking to a pathologist much like Dr. Lavaughn, "'How can you as a doctor go look at a body of someone that's been raped and murdered and mutilated? How do you do that?'" And what he said just seemed to strike me as being so appropriate and applicable here. If I can find the quote, he said, "'I believe that there's such a thing as true goodness in this world and also that there's true evil. People who don't believe the devil walks this earth have not seen the things I've seen. I've known through experience that there are people out there who believe that they have the right to do whatever they like to whomever they choose. If they want to have sex with a woman or a dog, or to rip, beat, and torture anyone at all, they do. These people are not insane. They're as sane as you and me, but they don't live by the rules of any moral code, at least not one within human society. They are so incredibly selfish that they live only by their own rules, and these people are horribly, horribly evil.'" Ladies and Gentlemen, that's got the ring of truth to me in what I've seen and what we've heard. (TE 621-22).

126. After sensationalizing the night of the crimes as one of "horror" and "terror" (TE 1604-1605), the prosecutor urged the jurors to place themselves in the shoes of Sarah's family and to consider her lost future:

> In our country we allow family and friends to come before jurors and to plea or ask for mercy. That's just the way it is. But you know, wouldn't it be something if Alan and Julie Hansen had some rights to plea for mercy or just to say, 'Can I see her one more time before you kill her? Before you slash her throat, can I hug her? Before you drag her off for thirty minutes of pure horror and evil, let me say bye to her?' And we get to hear about Dakota [Petitioner's son]. How many children will Sarah will ever have? I want you to remember that, because every time someone says,

> "Keith this", its just got to come to somebody's mind, "Well, what about Sarah? What about Sarah?"

127. The prosecutor also stated:

> [Y]ou've heard on and on how the defendant has pled guilty. Well, ladies and gentlemen, don't think that I asked him to plead guilty. Don't think that I care if he pled guilty or not. So why did he plead guilty? We've got somebody here through attorneys, through counsel, who has received a copy of each and every report that we had ... The defendant stood in this court on April 10 of 1998 and pled guilty so that defense counsel can say ... Keith has pled guilty. He's admitted he's done wrong, so we're not here for that." And while we're talking about other defense strategies ... how many of those [witnesses who testified about their observations of Petitioner] have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that. That's not the defendant, Robert Keith Woodall. (TE 1611-1612).

128. The trial court instructed the jury with regard to mitigating circumstances as follows:

> In fixing the sentence of a 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. (emphasis added) (TR 1140).

129. The prosecutor did not follow these instructions and told the jury that it did not have to either. He told them specifically that the "mitigating circumstances are two," telling them they could only consider as mitigation the two enumerated factors on which the court had instructed, leaving out any mention that the jury could consider

any other mitigating or extenuating circumstances as it believed to be true. (TE 1615).

130. After discussing Petitioner's youth, the prosecutor told the jury that "the only other mitigator for you to consider here is if at the time of the offense committed by the defendant he did not have the capacity, the ability to appreciate the criminality of the requirements of law and was impaired as a result of mental illness or retardation." (TE 1615). The prosecutor then proceeded to tell the jury why, in his opinion, Petitioner did not satisfy this instruction. However, he totally omitted the second half of the instruction which was in accordance with KRS 532.025(2)(b)(7), requiring the jury to consider Petitioner's mental illness and retardation *even if* the resulting impairment of his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was insufficient to constitute a defense of the crime. The prosecutor's omission, or misstatement of law, nullifies the jury's instructions to consider and give effect to mitigation as required by Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

131. The comments by the prosecutor were clearly not only a reference to a lack of an expression of remorse, but also to Petitioner's silence during the penalty trial which resulted from a defense strategy for him to plead guilty and avoid having to testify. These comments constituted an unconstitutional attack on Petitioner's 5th Amendment right to remain silent, and such an attack is reversible error. Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965); Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979); Rachel v. Bordenkircher, 590 F.2d 600 (6th Cir. 1978). Indeed, the prosecutor, in effect, urged the jury to consider

Petitioner's guilty plea as aggravation, not as the mitigating factor it was. (TR 1193). Such misuse of conduct that should militate in favor of a lesser penalty offends due process. Zant v. Stephens, 462 U.S. 862, 886, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

132. The totality of the above arguments resulted in a fundamentally unfair trial, and thereby deprived Petitioner of his constitutional rights as provided for in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), and Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

EIGHTH CLAIM FOR RELIEF
RESTRICTIONS ON VOIR DIRE

133. Petitioner's case received a huge amount of pretrial publicity, not only in the county where the crime occurred, but in every sector of the state, especially Western Kentucky. Because pretrial publicity was "massive to the point of saturation", (TE Supp. 14), the original trial judge in Muhlenberg Circuit Court, found that "it would be extremely difficult, if not impossible, to find a jury of twelve in this county or any adjoining county to serve on this case with an open mind." (Id., 15). Venue was changed to Caldwell County because Princeton was outside the circulation of the Owensboro newspaper. The Muhlenberg Circuit Judge lamented the fact that there was no way to move the case outside the circulation area of the Courier-Journal, "because that's the entire state." (Id., 16).

134. Despite the change of venue to Caldwell County, nearly every juror was familiar with the facts of the case before the trial began. Many potential jurors had connections to Muhlenberg County. However, the trial court repeatedly and severely curtailed

defense counsel's ability to ask questions regarding issues that were clearly proper subjects for voir dire.

135. The right to an impartial jury is basic to our system of justice. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The right to challenge and preempt jurors is "one of the most important of the rights secured to the accused." Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894).

136. The trial court unduly restricted voir dire in the following areas:

Restrictions on mental condition/borderline retardation as mitigation

137. Petitioner is at least borderline mentally retarded. In 1991, I.Q. testing measured his full scale I.Q. at 74, (TE 1501), four points above mentally retarded. In 1998, a prosecution psychologist measured his full scale I.Q. at 78, also within the borderline mentally retarded range. Petitioner's I.Q. scores place him within four points and within eight points, respectively, of being ineligible for the death penalty.[4] Borderline mental retardation is a statutory mitigating circumstance under Kentucky's death penalty law. KRS 532.025(2)(b)(7). Constitutionally, a defendant facing the death penalty must not only be allowed to present evidence of his low I.Q., but the jury must be able to consider and give effect to it as mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982) .

[4]KRS 532.140 provides that, "no person who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution." KRS 532.130(2) provides the relevant definition of a "seriously mentally retarded offender", which is "[a] defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period ... 'Significant subaverage general intellectual functioning' is defined as an intelligence quotient (I.Q.) of seventy (70) or below."

138. The trial court prevented Petitioner from questioning potential jurors in a way that could determine whether they would consider evidence of his borderline mental retardation as mitigating evidence. When the first juror was called for individual voir dire, defense counsel wanted to ask, "Would you give consideration as mitigation evidence that Keith Woodall has borderline intellectual functioning? Would that be something you would consider?" (TE 658). The question defense counsel wanted to ask was designed to directly get at the jurors' ability to consider and give effect to mitigating evidence in the way that is constitutionally required by Eddings, supra. The Commonwealth immediately objected, and the trial court sustained its objection. (Id.). The trial court tried to justify it's ruling by saying that it would allow the defense to ask only about statutory mitigating factors "in that framework." (TE 659). According to the trial court, "[M]ental retardation is a little bit too specific." The trial court, after realizing that mental retardation was within the "framework" of the statutory mitigating circumstance, stated, "I mean they're all going to say yes, and I mean we're -- they're either going to say yes or no. If they do not say yes, they're going to go for some other reason. They're not going to be able to consider the entire range." (TE 661). The question the trial court eventually allowed the defendant to ask the juror was, "if he would consider mitigating circumstances including the mental condition or mental retardation of the defendant." (TE 664). Later, the trial court restricted the questioning of the other jurors even further to, "Would you consider the mental condition of the defendant at the time of the offense," (TE 670), which defense counsel pointed out did not address the question of whether the jurors would consider that mental condition as mitigating evidence. (TE 668).

139. The questions allowed by the court were inadequate to make a meaningful determination of whether the jurors would be able to consider and give effect to Petitioner's mitigating evidence of borderline mental retardation.

140. The court restricted Petitioner to questions constitutionally inadequate in that they made no mention of the type of "mental condition" the jury was being asked to consider. Nor did it require the jurors to state whether they would consider this "mental condition" to be mitigating evidence, as opposed to aggravating evidence. Further, by limiting the jury's consideration to "the time of the offense", the trial court again opened up the possibility that this evidence could be used to aggravate his punishment for the offense as opposed to help establish that the mental deficiencies actually lend themselves to good behavior in a structured environment.

141. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), held that "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Id., 504 U.S. at 739, 112 S.Ct. at 2235. Petitioner was denied a voir dire sufficient to assure that the empanelled jurors would be able to follow the instructions that the trial court would ultimately give them concerning the use to be made of his mitigating evidence.

Denial of voir dire on the right to remain silent.

142. Petitioner was not allowed to voir dire potential jurors on his right not to testify at the penalty phase of his trial. (TE 698). The trial court expressed uncertainty that the failure to testify was not something that jurors could consider, and, ultimately,

refused Petitioner's tendered instruction on the right not to testify. (TE 1589-1593; TR 1099).

143. In Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Supreme Court held that a defendant is entitled to a "no adverse inference" instruction if he exercises his 5th Amendment right to not testify at his trial. However, the trial court felt and noted that juror's should and would consider Petitioner's failure to testify in assessing punishment for these offenses. (TE 1589-1590).

144. Where a juror feels that the defendant should testify, regardless of the court's instruction that no adverse inference may be drawn from that, then the juror is subject to be stricken for cause. Thus, Petitioner should have been permitted to inquire during the voir dire process, to see if potential jurors were aware that he had a right to not testify, and whether they would hold his failure to testify against him.

Denial of voir dire on the fact that the jury did not have to be unanimous in its findings of mitigation.

145. When Petitioner asked a potential juror concerning his reaction to the fact that the jury does not have to be unanimous in finding mitigating circumstances, but the jury does have to be unanimous in finding aggravating circumstances and in fixing a sentence, the prosecutor objected and the trial judge stated, "I think that's an improper question." (TE 843). The trial court doubted the correctness of the legal proposition that the jury does not have to be unanimous in its finding of mitigating circumstances, "[T]he unanimous part about the mitigating circumstances is what I think is confusing. I'm not really sure that's correct." (TE 844). The trial court forbade defense counsel from asking about jury unanimity on mitigating

circumstances because, "I will not give 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 845). Defense counsel were given a continuing objection to the court's restriction of voir dire on this subject. (TE 847).

146. Jurors do not have to be unanimous in their finding of mitigating circumstances. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); see Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). Therefore, the trial court was plainly wrong when he stated that he believed this line of voir dire questioning was a misstatement of the law. This is a reasonable line of inquiry that should have been permitted.

147. If a juror refused to consider mitigating evidence unless all of the other jurors also agreed the evidence was mitigating, that would be grounds for a challenge for cause. If a juror even hesitated to agree with the non-unanimous requirement for mitigating evidence, then that could be a basis for exercising a peremptory challenge. Petitioner should have been allowed to voir dire the jury on this issue. Voir dire on this issue was made all the more critical, since the trial court refused to instruct the jury in the written jury instructions that there was no requirement that mitigating circumstances be found unanimously.

Denial of voir dire on the fact that mitigating circumstances did not have to be proven beyond a reasonable doubt.

148. The trial court refused to allow voir dire on attitudes concerning the difference in the burden of proof for mitigating circumstances and aggravating circumstances. (TE 847). Mitigating circumstances do not have to be proven beyond a reasonable doubt.

KRS 532.025. Nevertheless, aggravating circumstances must be proven beyond a reasonable doubt. KRS 532.025(3).

149. Any juror who would require proof beyond a reasonable doubt by Petitioner as to the existence of a particular piece of mitigating evidence, or who would lower the prosecution's burden of proof because of this seeming disparity, could be challenged for cause. A juror's response to this inquiry could also form the basis for a peremptory challenge.

The trial court's restrictions on questions concerning potential jurors' ability to consider the minimum sentence made that inquiry meaningless.

150. The trial court ostensibly allowed Petitioner to question potential jurors about their willingness to consider imposing the minimum sentence, but he imposed a restriction on the questioning that was so obstructive that it rendered the questions meaningless. The trial court held that any questioning on the minimum sentence, "needs to be qualified [with the statement], 'if instructed to consider it by the Court and if warranted by the evidence." (TE 1007). Following the imposition of that limitation, any time defense counsel asked a juror if they could consider the minimum sentence, the trial court immediately interjected, "If you were instructed to do so consider that and if warranted by the evidence." (TE 1058; 1061; 1070; 1119-1120).

151. The trial court's restriction on defense questions regarding the minimum sentence rendered the questioning meaningless. Only a completely unfair juror would refuse to consider a 20-year sentence that was "warranted by the evidence." In fact, the restriction answers the question. This restriction made it impossible to determine whether jurors were biased such that they were substantially impaired in their ability to consider a 20-year sentence. Petitioner had a right to ask potential jurors a

meaningful question to determine if jurors were impaired in their ability to consider the minimum sentence, not only to establish a challenge for cause but for the informed exercise of his peremptory challenges. Ironically, when a juror indicated that she did not favor the death penalty, the trial court did not ask her this "magic question" until defense counsel insisted upon it. (TE 1139). Then, the trial court pretended like he had no idea which question defense counsel was referring to. (TE 1139-1142). When the trial court finally asked this juror the "magic question," she agreed that she could consider the death penalty if she was instructed to consider it and if it was warranted by the evidence. (TE 1142).

152. The limitations placed upon defense counsel during the voir dire were so great that they denied Petitioner his constitutional right to a fair and impartial jury and his right to an adequate voir dire so that he could exercise his peremptory challenges in a meaningful and intelligent way. U.S. Const. 5ht, 6th, 8th, and 14th Amends. Petitioner is entitled to relief unless the Commonwealth can establish beyond a reasonable doubt the error was harmless. Alternatively, the above error had a substantial and injurious effect on Petitioner's trial.

NINTH CLAIM FOR RELIEF
STATEMENT IN SEX OFFENDER TREATMENT EVALUATION

153. After Petitioner plead guilty, to the offenses of murder, rape and kidnapping on April 10, 1998, the trial judge, sua sponte, ordered that an evaluation be conducted pursuant to KRS 532.050(4) by the "sexual offender treatment program." (TR 909). The trial court required in that order that a report of the evaluation to be tendered to him no later than April 29, 1998. (Id.).

154. Petitioner objected on the basis that he had not yet been tried for the penalty and, accordingly, still had the right not to be compelled to give any statements which could be used against him. (TR 920). The trial court declined to delay the evaluation because it did not want to "use up any more time". The court did state, however, that it would not release the report to the Commonwealth or defense until after the penalty trial had ended. (TE 436).

155. The sex offender treatment evaluation was completed and mailed to the trial judge on April 27, 1998. (TR 933). The report stated that Petitioner "was extremely guarded in answering all questions and most responses were extraordinarily brief in nature." Therefore, the evaluator, Jack Allen, noted that the "interview was abbreviated and further limited by the defendant's professed inability to recall any specific events surrounding the offense." More specifically, the report stated:

> In order for a client to benefit from sex offender treatment, it is essential that he/she acknowledge responsibility for perpetrating the said acts of sexual abuse. Mr. Woodall advised that he was unable to recall any specific events surrounding the kidnapping, murder and rape of the victim. The defendant was unable to explain his lack of recall but acknowledged he had no prior history of blackouts or neurological injury that might explain such a memory lapse. Therefore, it appeared the defendant was engaging in a form of denial, a defense mechanism routinely employed by sex offenders to diminish or eradicate their responsibility in the perpetration of an offense. It should be noted that, on the said day of the offense, Mr. Woodall recalled working at the car wash and later going home. He thought he remembered eating supper that evening. He professed an ability to recall any events thereafter.

156. Allen also stated that "in order for a sexual offender to benefit from treatment, it is imperative that they acknowledge responsibility for their offense. Mr. Woodall's professed lack of recall about the offense would, in effect, seriously negate any possibility of benefiting from sex offender treatment." Allen continued that "the

defendant essentially denied the offense in so much as he professed an inability to remember any specific events surrounding the murder, rape and drowning of the victim." The report concluded that based upon this and other considerations "Mr. Woodall would not represent a viable candidate for such treatment." (Id.)

157. Under Section 1 of KRS 532.050, the court should not have ordered a pre-sentence investigation in this case because of Petitioner's plea and conviction of a capital offense. Gall v. Commonwealth, Ky., 607 S.W.2d 97, 113 (1980). Regardless, the statute has an express provision that gave the court the authority to delay the pre-sentence investigation report until after sentencing if the defendant is in custody or is ineligible for probation or conditional discharge. It is clear that Petitioner was in custody and that because of his plea to murder, kidnapping and rape, he would not have been so eligible.

158. Further, the use of it by the trial court in determining the sentences to be imposed upon Petitioner violated both the express provisions of KRS 532.050[5] and federal constitutional provisions forbidding the compulsion of statements that are later used against the defendant in a criminal proceeding. During the sentencing proceedings the trial court referred to the sex offender treatment evaluation as a basis for the

[5] KRS 532.050(4) states that "all communications relative to the evaluation and treatment of the sex offender shall fall under the provisions of KRS 197.440 ..." KRS 197.440 states:

> Communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program between a sexual offender or member of the offender's family and any employee of the department who is assigned to work in the program, shall be privileged from disclosure in any civil or criminal proceeding, unless the offender consents in writing to the disclosure or the communication as related to an ongoing criminal investigation.... The offender shall be informed in writing of the limits of the privilege created in this section.

imposition of the death penalty and terms of imprisonment. (TE 1651, 1656). Also, in the trial judge's report filed after sentencing the trial court listed as a non-statutory aggravating circumstance that Petitioner had expressed no remorse. (TR 1192). The court also gave this as one reason why the sentences were appropriate. (TE 1197). Accordingly, the statements made by Petitioner during the sex offender treatment evaluation denying any memory of the crimes were clearly used by the trial judge as a basis for the sentences imposed in violation of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) and Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).

159. The trial court in this case was concerned that despite a guilty plea. Petitioner offered no explanation or expression of remorse to it or the jury. But it was not up to the court to compel any such statements by Petitioner during the sex offender treatment evaluation or use the statements he did make against him. Certainly, once those communications had been improperly disclosed, the court should not have used them either as the basis for his rulings during the penalty phase of the trial or as a basis for concluding that Petitioner's statements established the non-statutory aggravating factor of lack of a remorse, or even the appropriateness over all of the imposition of the death sentence and the terms of imprisonment. The trial court's use of these compelled communications violated 5th, 8th and 14th Amendments to the United States Constitution.

TENTH CLAIM FOR RELIEF
GUILTY PLEA UNKNOWING, UNINTELLIGENT
AND INVOLUNTARY

160. Lead counsel, Michael Williams, bullied him into pleading guilty. TR2 556-558. Second-chair counsel, Mark Baker, observed this bullying. Id.

161. The constitutional validity of a guilty plea is governed by the watershed case, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In that case the United States Supreme Court, concerned about the very real possibility that guilty pleas might be the product of "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats," Id., 395 U.S. at 242-243, 89 S.Ct. at 1712. Petitioner's guilty plea is constitutionally invalid because the mandates of Boykin were not met.

162. Petitioner is at least borderline mentally retarded. While alone not determinative, it explains how he involuntarily entered his plea. Low intelligence is a factor that has traditionally been considered in voluntariness determinations. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2058, 36 L.Ed.2d 854 (1973). It naturally makes Petitioner more dependant upon the advice of others in reaching his decisions and less independent in his affairs. It also lowers his understanding of the legal concepts he was being asked to waive. His borderline mental retardation is a factor that must be considered in each of the subsections of this issue.

163. When asked whether Petitioner wished to enter a guilty plea, his attorney said that he did, "[b]ased on ... the Court's denial of a continuance in order that we might proceed to obtain that evaluation so that we could prove what could have been an affirmative defense or at least, the very least, statutory mitigation evidence or statutory mitigator,

Judge, for those reasons we are moving to enter a conditional plea." (TE 407-408). As defense counsel made clear, Petitioner was coerced into pleading guilty because his trial counsel was not ready to go to trial. Counsel presented the guilty plea as Petitioner's only option. Petitioner, his cognitive abilities limited by borderline retardation, did what his counsel told him he had to do, he plead guilty. It was not a voluntary choice.

164. Trial counsel functioned in an impaired state when this improper advise was given. A physician's letter (two months prior to the entry of this plea) states, "Mr. Williams ... is physically and emotionally exhausted. He is not sleeping well. His concentration and recent memory are impaired. As well as his cognitive impairments, he is suffering from nausea/vomiting with a secondary dizziness presumably related to hypoglycemia from his diabetic condition." (TR 677). Moreover, within days of this guilty plea, Williams had a "mini-stroke." (TE 422). This was his last appearance in this case even though he never moved to withdraw, and he was never relieved from being counsel. (TE 478, 486).

165. Petitioner would do whatever this attorney told him to do. If counsel wanted him to waive his constitutional rights, Petitioner would do it, and counsel knew this. When this counsel wanted to hold the deposition of a psychologist while Petitioner was not present, the trial court balked at the idea, and said that the Petitioner would have to waive his presence at the deposition. When the waiver issue came up, this counsel said, "Yeah, I'll do that. I can get that. I'll get that on the record if you want." (TE 278). He did not say he would ask the defendant if he was willing to waive his presence, he promised, "I can get that."

166. Petitioner pled guilty because his attorney bullied him and told him he had to plead guilty. This was not a voluntary guilty plea - a coerced guilty plea violates due process. United States v. Jackson, 390 U.S. 570, 582 (1968).

167. Boykin, supra, holds that the trial court taking a guilty plea must be certain that the accused has a "full understanding of what the plea connotes and of its consequence." Id., 395 U.S. at 244, 89 S.Ct. at 1712. Petitioner was never advised that as a direct consequence of his guilty plea he would be waiving his 5th Amendment privilege and be forced to undergo a Sex Offender Evaluation. After his guilty plea and before his sentencing hearing, the trial court issued an order stating that Petitioner would have to be evaluated as a Sex Offender pursuant to KRS 532.050(4). (TE 909). No mention of this was made when the trial court took Petitioner's guilty plea. The Sex Offender Evaluation required the Petitioner to state his "version of the offense." (TR 934). When Woodall stated that he could not recall the events surrounding the offense, the evaluator declared that he did not have "any possibility of benefiting from sex offender treatment." (Id.). The trial court then used the Sex Offender Evaluation in deciding that Petitioner should receive the death penalty. (TE 1651). Petitioner should have been told that a consequence of his plea was that Sex Offender Evaluation was going to be done and that it was going to be used as aggravating evidence against him. This is especially true since Woodall's attorney stated on the record at the beginning of the plea colloquy that Petitioner had a "lack of memory about facts surrounding the commission of this crime." (TE 407). There is nothing in the record to indicate that Petitioner was aware of this critical consequence of his

guilty plea, and voluntarily chose to plead guilty anyway. Therefore, his guilty plea was not voluntary under Boykin, supra.

168. Also, the trial court in this case never attempted to ascertain, from Petitioner, a factual basis for the charges on which he was pleading guilty, or an intelligent statement by the accused in open court that he is aware of all the essential elements of the offense. See Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); ABA Standards Relating to Pleas of Guilty, §1.6. At no time during the guilty plea colloquy did the trial court inform Woodall of the essential elements of the charged offenses or ask Woodall to describe his conduct on the night in question. Petitioner's monosyllabic responses, "Yes sir" and "No sir," to leading questions by the trial court were inadequate to demonstrate that he was admitting that he engaged in the criminal conduct. In sum, there was an insufficient factual basis to show that Woodall was admitting that he actually engaged in the conduct necessary to prove these offenses.

169. The totality of the circumstances of the plea demonstrate Petitioner did not knowingly, intelligently and voluntarily enter the plea, and therefore, his rights under the Sixth and Fourteenth Amendment were violated.

ELEVENTH CLAIM FOR RELIEF
DENIAL OF CONTINUANCE

170. Trial counsel requested a continuance of the trial. (TR 964, 989; TE 470-471, 485).

171. Petitioner originally was represented by Michael Williams and Mark Baker. (TE Supp., District Court, p. 9). Williams was lead counsel. Baker was trying either his second or third felony trial. (TR 552; TE 1218). At one time, the case was scheduled for trial on February 23, 1998, but Williams was involved in another death penalty

trial until slightly more than a week before the trial date. (TR 594; TE 219). On February 19th, Williams' supervisor at the Department of Public Advocacy sent a letter to the court stating that it was his opinion Petitioner would receive ineffective assistance of counsel unless Mike Williams was given a continuance. (TR 677). Accompanying that letter was a letter from Williams' physician dated February 16th, stating that, since he completed the previous death penalty trial, Williams was "physically and emotionally exhausted," "[h]is concentration and recent memory are impaired," he has "cognitive impairments," and "he is suffering from nausea/vomiting with a secondary dizziness." Id. The trial court felt he had no choice but to continue the February 23rd trial date. (TE 251). The court set a new trial date for April 13, 1998. (TE 254).

172. As the April 13th trial date approached, Mr. Williams asked for another continuance. (TR 772; TE 277). That motion was denied. (TR 773). On April 10th, Petitioner entered his guilty plea. At the guilty plea proceeding Williams told the court that the decision to enter a conditional guilty plea was "[b]ased on ... the Court's denial of a continuance in order that we might proceed to obtain that evaluation so that we could prove what could have been an affirmative defense or at least, the very least, statutory mitigating evidence." (TE 407). Williams then moved to continue the penalty phase hearing before the trial court, but that motion was denied. (TE 417). The penalty phase trial was set for April 14th. (TE 420).

173. Around 9:00 or 9:30 p.m. on April 13th, the trial court received a phone call that Mr. Williams was in the Greenville Hospital with a possible "mini-stroke." (TE 422). He was not present the morning the penalty phase was scheduled to begin, and there were

rumors he would be in the hospital for 8 days. (Id.). The case needed to be rescheduled again, but this time the trial court decided that he would require the Department of Public Advocacy to assign another attorney to assist Williams and Baker, in case Williams was unable to continue on the new trial date. (TE 429). The trial court recognized that Baker did not have sufficient experience to be lead counsel in the case. (TE 428).

174. When the new attorney chosen by the Department of Public Advocacy was not able to try the case on the July 14th date selected by the trial court, he suggested Jill Giordano, an attorney from Caldwell County. Giordano was present at a hearing on April 24, 1998, where she stated she did not have any jury trials scheduled for July. She assured the court that she "would certainly do [her] best" to be ready by the court's July sentencing date. (TE 459). She said, "I think I could be prepared in July." (Id.). The trial court assured her that, "right now what I'm doing today is approving or assigning as the law will allow an assistant to Mr. Williams." (TE 459-460). The court appointed Giordano "to assist Mr. Mike Williams and Mr. Mark Baker as co-counsel on this case." (TE 462).

175. On June 12, 1998 Ms. Giordano filed a motion for a continuance of the July 14th sentencing date. (TR 964). She pointed out that she would not be assisting Williams, because Williams could not be present until August because of a scheduling conflict. She stated that when she accepted the appointment she had not seen the court record or the case file. The case file consisted of "dozens of file folders and thousands of pages." (TR 965). She stated, "If counsel were to prepare for this case every night and day between May 13, 1998 and July 14, 1998, she could not be adequately

prepared for such a serious case." (Id.). At the hearing on her motion for a continuance, Giordano noted how huge the file was in this case. She said that she had "spent every free minute" for the past four weeks reviewing the file, (TE 470), and had not completed reviewing the court file in the case. She noted that there were "some 40 to 50 people" she needed to interview. (TE 471). Although she was available for court on July 14th, she said, "I would be remiss if I did not come to this Court and let the Court know that I don't believe I can effectively represent Mr. Woodall with these seven to eight weeks of preparation for this capital case." (Id.).

176. The court denied the request for a continuance. (TR 989; TE 485). Ultimately, Petitioner was forced into a trial for his life without his lead counsel, with an attorney who was trying his second or third felony case, and with an attorney who had warned the court that she could not render effective assistance because she had less than three months to prepare for a capital trial.

177. Pursuant to Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), Petitioner's constitutional rights were violated as guaranteed by the Sixth, Eighth and Fourteenth Amendments.

178. Petitioner's case was complex. There was expert testimony presented concerning blood spatters, DNA evidence, pathology, fingerprints, psychological testing. Petitioner was tried without his original lead attorney who could not be available until August. His other experienced counsel had less than three months to prepare for this death penalty case. At the time of the motion for a continuance, she had met with Petitioner's unavailable lead counsel once, (TE 477), and his availability to help her prepare was "basically none." Petitioner's experts were unavailable to assist in

preparation because they were traveling out of state. (TE 475). Giordano needed to interview "some 40 to 50 people," and she did not have enough time to prepare. (TE 471). Giordano confessed to an insufficient amount of time to master the facts of the case and develop a thoroughly considered trial strategy.

179. As argued *infra* in the discussion of the ineffectiveness claims, there were multiple deficiencies in the presentation of the evidence. Most of these it can be assumed could have been remedied by a continuance. With time, counsel could have presented known or available evidence on Woodall's history of hearing voices and his history of dissociation. Also, counsel could have presented evidence on the genetic defects in Woodall's family as well as additional information on his borderline mental retardation. If counsel had had more than a passing familiarity with the witnesses, the fecal incontinence evidence would not have been so minimized. Lastly, more time would have made more dynamic and persuasive the presentations of Woodall's horrendous upbringing and his sexual abuse.

180. The denial of the motion of continuance resulted in deficient representation that undermines confidence in the integrity of the death sentence.

TWELFTH CLAIM FOR RELIEF
DENIAL OF AN EXPERT/TESTING

181. Prior to Petitioner's guilty plea he filed a motion requesting that he provided for funding for "the brain imaging procedure known as a PET scan (positron emission tomography)." (TR 735). It was asserted that this technique would exceed the standard for admissibility from Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and that this testing was reasonably necessary. (Id.).

182. Relying in part on an evaluation conducted at the Kentucky Correctional Psychiatric Center, counsel expressed his "belief that Mr. Woodall suffers from and experiences disorders of the brain, including some which are believed to have an organic or biological basis." (Id.). Counsel pointed out that a PET scan would provide a picture of the metabolism of certain chemicals within the brain allowing an evaluation to be made about whether certain portions of the brain may not be functioning appropriately. (TR 736). More specifically, the PET scan could "reveal correlations between the functioning (or lack thereof) of certain portions of the brain with aggressive, violent behavior, thus suggesting a chemical imbalance or other biological or neurological deficiency impacting upon a person's capacity to control violent or aggressive impulses." (TR 736). Counsel noted that an MRI or CAT scan would show only "structural features" of the brain which counsel thought would be inadequate. (TR 737).

183. At a hearing on this motion, counsel noted that there were also indications that Petitioner might be suffering from dissociative identity disorder (DID) and that the PET scan would be a test that might "rule out or exclude other possibilities." (TE 272). The Commonwealth opposed the testing because it did not want to delay the case and because it saw nothing in the KCPC report that would support it. Counsel responded that a borderline personality disorder, which the KCPC report revealed, can be the result of "brain chemical dysfunction". Counsel also noted that the KCPC evaluation did not take into account a history that predisposed Petitioner to that mental problem, coupled with impulse and rage control disorders that were strongly suggestive of a chemical neurological origin. (TE 275-276).

184. At that hearing Dr. Eric Drogin, a psychologist and attorney, testified. (TE 305). Dr. Drogin said that he had met Petitioner and had reviewed the evaluation from KCPC. (TE 315). In particular, he said he had reviewed Dr. Richard Johnson's "diagnostic impressions" which showed that Petitioner might be suffering from a personality disorder not otherwise specified with traits of borderline personality disorder and paranoid personality disorder. (TE 316). Dr. Drogin testified that the diagnostic impressions were not the same as a final diagnosis. (TE 316). He said that a final diagnosis would depend on the review of other available evidence, materials and further assessment. (TE 317).

185. Dr. Drogin also testified that there could be a biological problem that would lead to personality disorders. (TE 322). He testified that to determine this there should be "a more focused neuropsychological evaluation" and "medical assessments that will allow us to observe what is happening physically, electrically, neurochemically in the brain of a patient." (TE 323-324). This would include a PET scan. (TE 324). Dr. Drogin said that the "essential purpose" of this type of assessment was to determine through a visual image if the brain was not functioning properly. (TE 324-325). Dr. Drogin recommended that this "neuropsychological assessment was warranted in this case". (TE 325-326).

186. Dr. Drogin also testified that there were indications that Petitioner was suffering from disassociative identity disorder (previously referred to as multiple personality disorder). (TE 329). Dr. Drogin stated that there were tests for this disorder, but that they were not normally given unless there were indications that this could be a problem. (TE 331-332). Dr. Drogin thought that Petitioner could be suffering from

this disorder. (TE 334). Dr. Drogin believed that further testing should be done on Petitioner since he met "all or most of the features and characteristics" related to this disorder. (TE 338-339). He also testified that it was "important to rule out other likely explanations". (TE 340).

187. At the conclusion of the hearing, counsel asserted that it had been shown that there was a possible affirmative defense and that if he did not "get the time and the expertise to investigate it, we will not have a defense." In addition to the motion for funding for a PET scan, counsel also filed a motion for continuance in order to obtain the PET scan and a further evaluation related to dissociative identity disorder. (TR 772). The trial court, however, denied a continuance for the purpose of obtaining these evaluations. (TR 776). The Court further denied the motion for a PET scan. (TR 779).

188. Approximately two months later, after Petitioner had pled guilty and new counsel had been added to represent him at his upcoming penalty trial, new counsel filed a motion to reconsider the motion for a PET scan "as it may reveal substantial evidence of mitigation." (TR 962). At a hearing on the motion, counsel argued that this was now being considered as mitigation evidence and since evidence of mitigation "is very broad" that this "particular examination could be very critical to this case." (TE 467). This motion, however, was also denied. (TE 485).

189. PET scans are sufficiently well established to allow for their admissibility.

190. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) compels that Woodall needed the time and the testing to develop his defense. As stated by the

Court in Ake, "the private interest in the accuracy of a criminal proceeding that places an individual's liberty or life at risk is almost uniquely compelling.

191. The need for the PET scan and for a continuance were necessary to allow him to build a defense. Counsel noted at the time Petitioner pled guilty that his decision to do so was partly based on the trial court's decision not to allow him the ability to develop what could have been an affirmative defense or mitigation. (Transcript of Guilty Plea, 3).

192. The denial of testing deprived Petitioner of his Sixth, Eighth and Fourteenth Amendment rights as protected by Ake, supra. Prohibiting the development of mitigating evidence requires automatic reversal.

THIRTEENTH CLAIM FOR RELIEF
INCOMPETENCY

193. At the trial level, Woodall's counsel stipulated his competency. And except for the period in 2002 when Petitioner broke down, there are no indications that competency in the sense of not understanding the legal process is an issue in this case. However, competency in the sense of being able to assist counsel in fashioning an appropriate mental health defense is an issue.

194. Competency was raised for the first time in post-conviction. (TR2 156-165, 285-294, 529-551, 584-5, 593-5, 649).

195. The trial court held there was "nothing" to indicate the court should have held a competency proceeding. (TR2 593). The Kentucky Supreme Court ruled that Petitioner only had speculative evidence of incompetency. The courts ignored the compelling facts surrounding Petitioner's breakdown. (TR2 529-537). As detailed above, both the trial record and the post-conviction record contain evidence

supporting a more serious mental illness for Petitioner than has heretofore been diagnosed.

196. A competency hearing should have been held both at the trial level and the post-conviction level. Failure to provide a formal competency hearing, both at trial and in post conviction, violates federal due process. Drope v. Missouri, 420 U.S. 162 (1975).

197. The United States Supreme Court has indicated that competency is a legitimate concern in collateral attacks on convictions. Rees v. Peyton (Rees I), 384 U.S. 312 (1966) (per curiam) (Court ordered competency determination after habeas petitioner sought to withdraw cert petition); see also Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003) (petitioner entitled to stay until found competent).

198. Petitioner has been deprived of substantive due process and procedural due process as guaranteed by the Fourteenth Amendment as a result of being tried while incompetent and the state courts' failures in holding a hearing.

FOURTEENTH CLAIM FOR RELIEF
MENTAL RETARDATION

199. Petitioner is not eligible for the death penalty because he is mentally retarded. (TR2 165-172, 294-302, 595-597). In addition to the evidence from the trial record, in post-conviction Petitioner discovered that his trial attorneys had obtained a juvenile IQ test that squarely put him within Kentucky's definition for mental retardation. Counsel Giordano provided an affidavit that states that she was aware of an I.Q. test score of 68 in Woodall's file. (TR2 235).

200. Executing the mentally retarded is unconstitutional. Atkins v. Virginia, 536 U.S. 304 (2002).

201. Under KRS 532.135(4) the question of Petitioner's mental retardation should have been presented to a jury prior to sentencing. Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000). Lack of mental retardation operates as an element of a capital crime. Under Ring, Apprendi, and In Re Winship, 397 U.S. 358 (1970), all elements must be presented and found by a jury beyond a reasonable doubt. To execute Woodall without a jury finding on mental retardation, and mental illness, would violate Woodall's 6th, 8th, and 14th Amendment rights.

202. The DSM III-R states: "…an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ [score] of 70 is considered to represent a band or zone of 65 to 75 [actual I.Q.]."[6] This range is the "zone of uncertainty [and a] critical consideration that must be part of any decision concerning a diagnosis of mental retardation." [7]

203. Dr. Robe stated that Woodall's WAIS-R test score of 74 identified Woodall's I.Q. as falling *somewhere in the range from 69 to 79* actual I.Q. TE Vol. 13, Exhibit 3. The trial court overlooked the variance, and overlooked that two I.Q. levels in this range, 69 and 70, render Woodall ineligible for the death penalty. His WAIS-R test score of 74 did not rule Woodall out for death-ineligibility under KRS 532.140. His 74 score ruled him *in*.

204. Under Atkins, the range of I.Q. test scores that disqualify a defendant from death include scores up to 75. The Court relied on the American Association on Mental Retardation (AAMR) test score range of 70 to 75 as the upper limit.[8] Atkins, 122

[6] American Psychiatric Association, 1992.
[7] *Mental Retardation*, *Definition, Classification, and Systems of Support*, 9th Ed. 1992, American Association of Mental Retardation, p. 37.
[8] Id., p. 14.

S.Ct. 2242, at 2245. The AAMR expressly states that "the upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests…."[9] That is, the AAMR recognizes that --given the five-point variance-- one could score as high as 75 on an I.Q. test and still have an actual I.Q. no higher than 70.

205. Woodall also manifested "substantial deficits in adaptive behavior…during the developmental period."[10]

206. The Eighth and Fourteenth Amendments, as examined in Atkins, supra., prohibit Petitioner's execution.

FIFTEENTH CLAIM FOR RELIEF
FAILURE TO REQUEST COMPETENCY HEARING

207. On April 3, 1998, one week before Woodall entered a guilty plea, Dr. Eric Drogin, a licensed forensic psychologist hired by the defense, testified in a telephone conference that after reading Johnson's report, he now suspected Woodall was suffering from a serious Axis I mental illness. Drogin recommended further neurological and neuropsychological testing and evaluation. During the telephonic hearing, Drogin informed the court that the defense had raised the issue of competency and had asked him to evaluate competency, but without a full neuropsychological evaluation, any competency evaluation was "inconclusive." (TR2 157-158, TE 356).

[9] Id.

[10] The Atkins decision approved the American Association of Mental Retardation (AAMR) and American Psychiatric Association (APA) definitions of mental retardation, which, like KRS 532.135, require inquiry into the defendant's adaptive skills and age of onset.

208. Defense counsel Williams –not psychologically trained—had no expertise and no business telling the court he felt competency was not an issue. Waiving competency proceedings for Woodall was symptomatic of Williams' impending health crisis, and was ineffective assistance of counsel.

209. Regardless of Woodall's understanding of the court system, Woodall was and far from understands the complexities of his own genetic and mental health problems, let alone understanding how these problems interplay with and affect his defense. Specifically, Woodall was not and is not capable of meaningfully assisting his lawyers in discovering and presenting evidence that supports his mental health issues, which have always been the primary issues in his case. Like most typical human beings who suffer from mental illness or mental retardation, Woodall has spent his life attempting to mask his problems, to fit in, to avoid ridicule, rather than seeking to reveal and highlight his deficiencies. (TR2 164).

210. Petitioner received the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments, in that his attorney deficiently failed to request a competency hearing, and Petitioner was tried while incompetent.

SIXTEENTH CLAIM FOR RELIEF
FAILURE TO UTILIZE MENTAL RETARDATION

211. Woodall's attorneys were ineffective in failing to research, develop, present, and argue the evidence that Woodall is ineligible for the death penalty due to mental retardation.

212. Under KRS 532.135(1), Woodall's attorneys should have filed a motion no later than 30 days before trial alleging that Woodall was seriously mentally retarded, and thus ineligible for the death penalty. Had they done so, and had they presented all the

evidence they had - plus all the evidence that they could have and should have obtained, including expert evidence - there is a reasonable probability that the trial court would have made a determination under KRS 532.135(2) prior to Woodall's plea proceedings that Woodall was seriously mentally retarded. If the court determined Woodall was mentally retarded, the death penalty would have been excluded from any further consideration.

213. If the court did not find Woodall to be seriously mentally retarded in pre-trial proceedings, under KRS 532.135(4) Woodall would still have been free to raise mental retardation as a legal defense to be considered by the jury during his sentencing trial. Woodall's counsel were ineffective for failing to insist on presenting the question of mental retardation to Woodall's trial court in a pre-trial motion, and ineffective again in failing to present the issue again, to be considered and decided by Woodall's jury.

214. Under In Re Winship, 397 U.S. 358 (1970), all elements of a crime must be presented to the jury and found by the jury to exist beyond a reasonable doubt. By failing to bring the issue of serious mental retardation to the jury, and allowing their client to be sentenced to death without a jury determination of this element, Woodall's counsel acted ineffectively. Woodall's 6th, 8th, and 14th Amendment rights were violated. *See also* Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) (affirming the rule already established in In re Winship).

215. Woodall's counsel were also ineffective for failing to present all the available mental retardation evidence as mitigation evidence during his sentencing trial. In addition to counsel's loss of the 68 I.Q. test score, and their failure to understand the import of

Woodall's WAIS-R score of 74, Woodall's lawyers 1) never sought out or discovered the significant genetic mental health evidence recently gathered by post conviction counsel regarding Woodall's maternal family line, and 2) failed to fully investigate and present evidence of Woodall's severe adaptive deficiencies, present since he was a young child.

216. The defense expert, Dr. Gail Spears never evaluated Woodall. (TE 1583). Spears testified about the importance of adaptive behavior testing, yet she never administered any adaptive behavior instruments to him. (TE 1575). If she had evaluated Woodall, she might well have found that his severe adaptive deficits, when considered in combination with his I.Q. scores of 68 and 74, indicated that his true I.Q. is actually 70 or below. Due to counsel's ineffectiveness in failing to have Spears evaluate Woodall, Spears was forced to acknowledge that a person who had evaluated Woodall, such as Johnson, would know far more about Woodall than she who did not evaluate him. (TE 1583).

217. Constitutional assistance of counsel at a capital penalty phase means counsel competently presenting the available mitigation. See Wiggins v. Smith, 123 S.Ct. 2527n (2003); Campbell v. Coyle, 260 F.3d 531, 554 (6th Cir. 2001).

218. Petitioner received the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments, in that his attorney deficiently failed to present evidence of Petitioner's mental retardation, and therefore, failed to establish that Petitioner was/is not eligible for the death penalty.

SEVENTEENTH CLAIM FOR RELIEF
INEFFECTIVE ASSISTANCE REGARDING GUILTY PLEA

219. Woodall's lead counsel Williams yelled and bullied Petitioner into accepting an open guilty plea. (TR2 175). This overbore Petitioner's free will. Second chair counsel Baker witnessed this occur. (Id.). Woodall has also alleged that getting forceful with his clients was a practice of the lead counsel. (Id.).

220. Additionally, lead counsel Williams promised Petitioner that the plea could be withdrawn, if he received a death sentence. (TR2 556-557). Lead counsel Williams informed Petitioner that the trial court indicated to him that it would give a sentence less than death. (Id.).

221. It is ineffective for a lawyer to coerce his client into making a decision regarding one of the three principal rights at trial: whether to plead guilty, whether to waive a jury trial, and whether to testify. Also it is unethical for a lawyer to do so. SCR 3.130(1.2)(a). Petitioner's attorneys were ineffective in failing to discover, develop, and counsel their client regarding all defenses available to him, including the defenses of insanity and mental retardation. As demonstrated herein, these were viable defenses.

222. In a guilty plea case, ineffective assistance can be demonstrated by showing that but for counsel's errors, the defendant would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 57 (1985). The plea must be fully informed, an evaluation of potential defenses must occur.

223. Petitioner never saw the police reports or any of the prosecution's discovery. (TR2 174). He was aware of at least some of the mitigation evidence that was presented at his sentencing hearing, because he had lived it. (Id.). However, he was not aware of

Lessie Sanders or of the genetic problems in his family. (Id.). He was specifically not aware when he pled guilty that there was a high probability he had valid mental health defenses to the crime itself. (Id.).

224. Additionally, when Williams collapsed, and Giordano took over as lead counsel, responsibility for Woodall's guilty plea passed to her shoulders. She should have moved to withdraw Woodall's guilty plea for two reasons. First, if she had completed the investigation of the case, she would have discovered that Woodall had not been advised of all his possible defenses. More importantly, Giordano should have moved to withdraw the plea because Woodall's prior counsel coerced him.

225. Petitioner received the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments, in that his attorney deficiently failed to fully and properly inform him of his options before the guilty plea, and for counsel's errors, the defendant would have gone to trial.

EIGHTEENTH CLAIM FOR RELIEF
INEFFECTIVE ASSISTANCE REGARDING A CONTINUANCE

226. To begin, Giordano did not have the time to get familiar enough with the case to make a compelling case for a continuance. While she surely could have done more, the principal person responsible for why the case went to trial without proper preparation was former counsel Williams.

227. Eleven days before the April 1997 trial date, Williams asked the trial Court for a continuance based on evidence that Woodall suffered from a major Axis I mental illness. (TE 346). Dr. Drogin testified regarding Woodall's dissociative symptoms and how they required further investigation. (TE 361-2). However, Williams did not support his continuance motion with the testimony or affidavit of defense consultant

Dr. William Kluft, who was a true expert on the Axis I illness in question. (TR2 183). Kluft could have testified that it is normal for persons with this illness to be initially misdiagnosed with other conditions, including personality disorders. (Id.). If Williams had effectively used Kluft, it would have been an abuse of the trial court's discretion to deny a continuance. Ake v. Oklahoma, 470 U.S. 68 (1985).

228. Williams did not even get time from the trial court to further develop a defense based on Johnson's diagnosis of personality disorder with borderline and paranoid traits. This failure is at least partly due to the fact that Williams did not present the trial court with the available evidence that borderline personality disorder has a biological basis along with the available evidence of Woodall's family history of psychopathology. (Id.).

229. Ultimately, the trial court characterized Williams' desire for more time to pursue brain imaging and more time to investigate the Axis I illness as a "fishing expedition based to a large extent on conjecture." (TR 777). It was not conjecture. Williams based his request on the opinions of not one, but two experts, Drogin and Kluft. However, Williams never gave the trial court sufficient factual support for his need of additional time to rule out the suspected mental illness, and his need for scanning Woodall's brain.

230. Due to this deficient performance rendered in violation of the Sixth, Eighth and Fourteenth Amendments, Woodall never received the benefit of the time to develop the available evidence of insanity and genetic impairment as well as the yet to be discovered more definitive diagnosis of what is operating within his mind. More time

to prepare for trial would also have allowed for proper presentation of the upbringing, fecal incontinence, and sexual abuse evidence.

NINETEENTH CLAIM FOR RELIEF
INEFFECTIVE ASSISTANCE REGARDING PSYCHOSIS
AND DISSOCIATION

231. Despite the fact that trial counsel possessed evidence of psychosis and disassociation, no such evidence was presented to the jury.

232. To begin, trial counsel should have presented an insanity defense. According to the DSM-IV, one of the diagnostic criteria for borderline personality disorder is "transient, stress-related paranoid ideation or *severe dissociative symptoms*." DSM-IV, page 654 (emphasis added). The DSM-IV also states: "Some individuals develop psychotic-like symptoms (e.g. hallucinations, body-image distortions, ideas of reference, and hypnagogic[11] phenomena) during times of stress." Id., at 652. Johnson would have testified that elements of Woodall's mental disorder potentially included temporary breaks with reality. (TR2 187). He would have testified that Woodall's two-week stay at KCPC without evidence of psychosis did not definitively rule out that Woodall suffered from disconnections with reality. (TR2 187).

233. The DSM-IV endorses that borderlines sometimes suffer psychosis. Psychosis would interfere with Woodall's ability to appreciate that criminality of his actions or interfere with his ability to conform his conduct to the law.

234. Woodall demonstrated dissociative symptoms. (TE 361-2 (testimony of Dr. Drogin)). Woodall had "lapses in memory and …[an] inability to remember incidents that he earlier claimed to be able to remember." (Id.). Importantly, Woodall has heard a

[11] Hypnagogic – *adj*. – 1. Inducing sleep; soporific. 2. Of, relating to, or occurring in the state of intermediate consciousness preceding sleep: *hypnagogic hallucinations*. American Heritage Dictionary, Fourth Edition, 2000.

voice calling his name his entire life. (TR2 150-1). Woodall's mother also heard voices. Id. It is incredible that none of these facts were presented to a jury at least in mitigation. All these facts were known to trial counsel. (Id.).

235. And Woodall is still exhibiting psychotic and dissociative symptoms. (TR2 529-551). During his 2002 breakdown, Woodall was catatonic. (TR2 530-532). He also had a reoccurrence of his fecal incontinence. (Id.). He was unable to clean himself of his own feces. (Id.). He was confused and paranoid. (Id.).

236. Trial counsel were deficient in that they failed to investigate, discover and present both an available defense to the crime and compelling mitigation. This failure undermines confidence in the integrity of the guilty plea, the existence of the aggravating circumstance found by the jury, and/or the verdict of death. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTIETH CLAIM FOR RELIEF
INEFFECTIVENESS REGARDING WOODALL'S GENETIC PREDISPOSITION TO BE AFFLICTED WITH MENTAL ILLNESSS

237. Williams acknowledged that he needed to investigate Woodall's "extended family." (TR 612). He was searching for a "genetic" basis for Woodall's mental state. (Id.). Yet, Williams never directed the investigation towards Lessie Sanders. This is patently unreasonable. Other than Woodall's mother, brother, and sister, Sanders was Woodall's only other known maternal biological relation. Also, given the indication in Barbara Woodall's medical records that some of Barbara's problems existed in Sanders' line of the family, it is even more unreasonable not to have pursued an interview with Sanders.

238. Williams knew that Woodall's mother had severe depression. He knew that "there is an inherited factor in depression." (TE 343). He was aware that his client's brother had Tourette's Syndrome, a genetically inherited neurological disease. He was aware that his client heard voices and that his client sometimes had tremors. He knew his client's mother also heard voices and had tremors, severe ones. Williams also knew that Woodall had been diagnosed by Dr. Johnson at KCPC with a personality disorder with paranoid and borderline traits. Further, he was aware, and stated to the court, that science had posited a biological basis for borderline personality disorder. (TE 275-6).

239. Williams knew all this, yet he never sought to present the genetics component of Petitioner's mitigation. His only apparent action on the obvious defense that his client had a biological/genetic impairment was to ask for brain imaging eleven days before the trial was supposed to begin. The trial court denied that request. Hence, Williams performance was deficient because he "ignored known leads" that would have led to highly effective mitigation evidence. See Johnson v. Bell, 344 F.3d 567, 573-4 (6th Cir. 2003).

240. Due to genetic predispositions, insanity and mental health problems run in families, including aberrant behavior. Such behavior so caused is not fully intentional. Thus there is a reasonable probability that if Woodall's lawyers had gathered and presented all the mental health evidence that was readily available, including the genetic evidence, the jury in this case would have seen Woodall in an entirely different, more forgiving light.

241. The defense should have demonstrated that Woodall's maternal family history was rife with psychopathologies such as Tourette's Syndrome[12], severe depression, learning disorder, bipolar disorder, tremor disorder, and atrophied brain. The information obtained from Lessie Sanders is vital to this demonstration. Something is clearly amiss in Woodall's family tree. (TR2 332, Exhibit 1 to RCr 11.42 Motion). One does not have to be a geneticist to see this. While this standing alone is compelling evidence, the defense would then have taken the next step – proving that something genetically pathological is operating within Woodall.

242. Expert testimony could have shown that whatever is wrong with Woodall has a genetic component. Simply finding an expert who could explain Johnson's diagnosis[13] would have been effective: "[B]iological vulnerability coupled with environmental failures, prototypically but not exclusively abuse and parental psychopathology, probably contribute in some manner to the development of …[borderline personality] disorder." (TR2 218, Exhibit 4 to RCr 11.42 Motion, Goldman et al., *Psychopathology in the Families of Children and Adolescents With Borderline Personality Disorder*, Am J Psychiatry, 150:12, 1835, December 1993). The defense could have demonstrated that science has posited a genetic basis for borderline personality disorder.

243. The defense then could have presented testimony that a diagnosis of borderline personality disorder is "consistent with the presence of frontal and perhaps parietal

[12] Tourette's is an inherited disease. DSM-IV, p. 102-3. Tourette's Syndrome is also linked genetically to a myriad of other psychopathologies. Id.; see also Comings, *Tourette Syndrome and Human Behavior*, p. 677, Hope Press, Duarte, CA, 1990. Additionally, Tourette's Syndrome is linked to paranoia and hearing voices. Id., at 200.

[13] While defense counsel called Johnson to the stand, this decision was made to prevent him being used by the Commonwealth in rebuttal. TE 1494. Johnson was subpoenaed by the Commonwealth. TR 1063. Johnson's diagnosis holding Woodall criminally responsible for the crime was what the defense needed an answer for but did not find.

lobe brain dysfunction." (TR2 246, Exhibit 8 to RCr 11.42 Motion, Swirsky-Sacchetti et al., *Neuropsychological Function in Borderline Personality Disorder*, J of Clinical Psychology, May 1993, 394, Vol. 49, No. 3). Further, the defense could have tied frontal lobe impairment to the propensity to commit violent acts. CT, PET and MRI studies conclude that there is a definite correlation between frontal lobe dysfunction and a propensity to violence:

> Four of the studies provide evidence for selective frontal dysfunction. One of these studies involved murderers, one involved violent subjects, one involved sex offenders in which the largest subgroup consisted of rapists, and one involved child molesters charged with sexual assault. As such, frontal dysfunction tends to be found in violent offenders, child assaulters, or sex offenders containing a large proportion of rapists, who may be more likely to be violent than incest offenders or pedophiles…the hypothesis suggested, therefore, is that there is a tendency for frontal dysfunction to be associated with violent offending and rape… One recent study, although not assessing violence per se, does lend some conceptual support to the notion of prefrontal dysfunction in violence and aggression. Goyer (1992) tested a total of 17 personality disordered subjects (largely borderline or antisocial personality disorder) on PET using an auditory CPT as the uptake task…A significant negative correlation was observed between aggression scores and glucose metabolism…This study provides some further support for the notion of frontal deficits in relation to aggression and behavior. Raine, *The Psychopathology of Crime*, p. 150-1. Academic Press, San Diego, 1993.

244. At the trial, defense counsel only put on evidence of limited intelligence and poor upbringing. While these also were operating to shape Woodall, the jury never heard the most compelling evidence available. The jury never heard that Woodall was born with the genes for the personality that made him commit the crime. One is certainly less culpable for those things over which one has less control:

245. Trial counsel were deficient in that they failed to investigate, discover and present both an available defense to the crime and compelling mitigation. This failure undermines confidence in the existence of the aggravating circumstance found by the jury, and/or the verdict of death. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTY-FIRST CLAIM FOR RELIEF
INEFFECTIVENESS REGARDING NEURO-TESTING

246. This claim involves both PET testing as well as more advanced clinical neurological testing.

247. In July of 1997, Williams' mental health consultant, Dr. Eric Drogin, had recommended additional clinical neurological testing by a specialist. (TE 325-6). However, Woodall's counsel failed to obtain the recommended additional testing, despite that fact that the trial court never precluded the defense from doing so. The Commonwealth, in fact, stated that it had objection to testing so long as it did not again delay the trial. (TR 760). As to why this testing had not been done previously, Williams stated that he relied on KCPC to do this testing for the defense. (TE 388-9). The KCPC report was produced in mid-February, 1998. (TR 751 (sealed)). However, it took Williams until March 18, 1998 to file notice that he was going to do the neuropsychological testing. (TR 746-48). Then, though never precluded by the trial court, Williams never had the testing done.[14]

248. The familial and scientific evidence supports a biological/genetic basis for Woodall's personality disorder. Additional proof of this conclusion would be positive testing of Woodall indicating a neurological deficit.

[14] Williams knew that screening tests for neurological deficits were not definitive. TE 320. Drogin had determined in July 1997 that "anomalous" results indicated a need for further tests. (TE 374).

249. The defense should have educated the trial court to the fact that borderlines test normally on the basic tests, such as was given to Woodall at KCPC. (TR2 253, Exhibit 9 to RCr 11.42 Motion, O'Leary et al., Neuropsychological Testing of Patients With Borderline Personality Disorder, Am J Psychiatry, 148:1, 109, January 1991). It is only on the more complicated tests that borderlines deviate from the norm. (Id.). Drogin's recommendation for neuropsychological testing at the specialist level was an apt one for Woodall.

250. Borderlines have bad brains. Brain scans, especially PET scans, demonstrate brain abnormalities in borderlines.[15] Williams stated that science had posited a biological basis for borderline personality disorder. (TE 275). However, Williams never put the necessary science before the trial court to get the funding.

251. Trial counsel were deficient in that they failed to investigate, discover and present both an available defense to the crime and compelling mitigation. This failure undermines confidence in the existence of the aggravating circumstance found by the jury, and/or the verdict of death. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTY-SECOND CLAIM FOR RELIEF
INEFFECTIVENESS REGARDING FECAL
INCONTINENCE MITIGATION

252. The defense presented evidence of Woodall's fecal incontinence. However, they failed to emphasize the extreme abnormality of Woodall pooping in his pants on a daily basis. They put on the stand one of Woodall's teachers, Kimberly Melton. She

[15] Tourette's Syndrome, which Woodall's brother has, also has been tied to brain dysfunction visible through brain imaging. TR2 257-259, Exhibit 10 to the RCr 11.42 Motion, Malison et al., SPECHT Imaging of Striatal Dopamine Transporter Binding in Tourette's Disorder, Am J Psychiatry, 152:9, 1359-1361, September 1995.

testified that Woodall's condition was not anything abnormal because she herself had a spastic colon. (TE 1354-5). A spastic colon is also known as irritable bowel syndrome (IBS). (TR2 261-3, Exhibit 11 to RCr 11.42 Motion). It is a common ailment sometimes referred to as a nervous stomach. (TR2 194-5). But people with IBS do not defecate in their pants. (TR2 195).

253. The defense never corrected the false impression left by Melton. The defense did not re-direct Melton. The defense under Williams had interviewed her prior to the trial. (Id.). In this interview she had acknowledged that her IBS was different from Woodall's fecal incontinence. (Id.). She had told the defense previously that she had thought Woodall's incontinence was so bad that she had encouraged Barbara to seek a specialist to treat him.[16] (Id.). If the defense had re-directed Melton, she would have testified that her IBS did not cause her daily incontinence.[17] (Id.). As it was, Melton's testimony undercut the very adaptive deficit that she was put on the stand to emphasize.

254. Melton was the key witness presented by the defense as to fecal incontinence. She was the only non-family member to testify to it. Hence, the jury could have viewed her as less biased. Therefore, when she minimized the impact of the incontinence on the young Woodall, she made anything the family members said seem like an exaggeration.

255. Additionally, the defense did not delve into the true impact this failure of toilet training had on Woodall's psyche. Although they had interviewed two classmates of Woodall's who had witnessed his fecal incontinence, they failed to put either on the

[16] This information was not elicited by defense counsel.

[17] If redirecting had not been successful, the investigator who had interviewed her could have been put on the stand.

stand. (TR2 195). Melton had testified that the other kids at school did not really notice Woodall's incontinence. (TE 1350). This was not the case.

256. Jared English was a classmate of Woodall's in second through fourth grade. (TR2 195). He could have testified that the kids picked on Woodall because he crapped on himself. (Id.). Woodall defecated in his pants every day. (Id.). English would have testified that Woodall stank up the whole room, that Woodall had few friends, and that other kids did not want to go near him. (TR2 195-6.) Importantly, English further would have testified that the teachers seemed to ignore the situation. (TR2 196).

257. John Hunt was also a classmate of Woodall's. (Id.). He would have testified that the other kids made fun of Woodall because he was dirty and he constantly crapped in his pants. (Id.).

258. There is no possible strategic reason for not putting on the evidence from Woodall's classmates. The testimony of his classmates was not cumulative of any other testimony. This failure combined with the unchallenged assertion by Melton regarding her own spastic colon, left the jury with the impression that Woodall's fecal incontinence was a minor childhood problem. It surely was not. It is a humiliation that caused Woodall to live in a constant state of shame, a humiliation that has continued into Woodall's adolescence and reemerged in 2002.

259. James Gilligan, M.D., writes that "[t]he emotion of shame is the primary or ultimate cause of all violence." Gilligan, Violence, Reflections on a National Epidemic, p. 110, Vintage Books, N.Y., 1996. Gilligan believes that people with feelings of shame or low self-esteem commit violent acts as a way of restoring pride in their ability to

control their surroundings. Id., at 111-112. There is a reasonable probability that the jury would have returned a verdict less than death if they had this information. Strickland at 694.

260. Trial counsel were deficient in that they failed to present and undermined compelling mitigation. This failure undermines confidence in the integrity of the death verdict. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTY-THIRD CLAIM FOR RELIEF
INEFFECTIVE ASSISTANCE REGARDING UPBRINGING

261. Defense counsel failed to fully explain the conditions of Woodall's upbringing. This can be attributed to the short time that Giordano had available to process the material and marshal it for court.

262. Defense counsel relied principally on Woodall's maternal family to paint a picture of his upbringing. Predictably, while the family presented some of the problems in Woodall's home, the family members also portrayed a loving auxiliary support system for him. Defense counsel did not put before the jury evidence, which they had gathered, which indicated that the maternal family was not as rosy as they appeared.

263. The defense never put Woodall's paternal uncle, David Woodall, on the stand, although he had been interviewed. (TR2 197). The jury never heard his strong opinions about Woodall's maternal family. (Id.). He believed the whole clan to be "trash." (Id.). David would have described how Woodall's grandmother Liz Mayes's house was the neighborhood party house. (Id.). He could have described how underage drinking was encouraged there. (Id.).

264. The defense also did not present some of the specific incredible details of Woodall's physical environment. David would have painted a far worse picture of the physical conditions of the Woodall home than was portrayed at the trial. David could have testified about the time his parents went to Barbara's trailer to clean it, when Barbara was in the hospital. (Id.). The filth was so intense that David's father had to throw-up during the cleaning. (Id.). David could also have told the jury that he had once stayed at the home, and that after he left, he had to burn his clothes. (Id.). David would have been a compelling witness. (Id.). There was no reason not to put him on the stand.

265. The defense also missed an opportunity with a witness they did put on the stand. Lori Wood testified about roaches and mice. (TE 1410). However, the defense never elicited from her the most potent details regarding the vermin in the Woodall trailer. Wood had told the defense that conditions were so abject that Woodall's mother had actually given the mice names. (TR2 197). Wood had also told the defense that she had once scraped maggots from the Woodall refrigerator. (TR2 198).

266. Trial counsel were deficient in that they failed to fully present compelling mitigation. This failure undermines confidence in the integrity of the death verdict. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTY-FOURTH CLAIM FOR RELIEF
INEFFECTIVE PRESENTATION OF
SEXUAL ABUSE MITIGATION

267. Dr. Spears testified that based on her clinical experience Woodall's mother's shoving soap into his rectum was a form of sexual abuse. (TE 1581). Spears further testified that those who are sexually abused are more likely to become sexual offenders. (Id.).

This was the extent of her testimony on this subject. This area of her testimony covered less than one page of the trial transcript. This was not enough to convince anyone that Woodall had been sexually abused. More needed to be done.

268. Spears needed to testify about just how the invasive soap procedure affected Woodall's psyche. Spears needed to testify about just how childhood trauma such as this would cause Woodall to become a sexual offender. She spoke of her clinical experience yet she never talked about it in specifics.

269. Putting this before the jury in such an abbreviated form was a complete non-sequitor.

270. There was not enough lay testimony on how Woodall experienced excruciating pain when soap was put in his rectum. (TR2 198). Spears could have explained how Woodall would be more pre-disposed to become a sexual offender because of the abuse he experienced. (Id.). She could have explained how –due to the sexual abuse against Woodall-- Woodall would have come to associate sex and violence. (Id.).

271. Trial counsel were deficient in that they failed to fully present compelling mitigation. This failure undermines confidence in the integrity of the death verdict. Petitioner's rights pursuant to the Sixth, Eighth and Fourteenth Amendment were violated.

TWENTY-FIFTH CLAIM FOR RELIEF
JUROR RELIANCE ON EXTRAJUDICIAL AUTHORITY

272. Juror Hawkins' attested that the Bible played in her verdict recommending death. (TR3 19-20). Hawkins stated she "considered" the on-line Bible verses. Id.

273. The verses that Hawkins took into account specifically included the one that is most often cited as Biblical authority in favor of imposing the death penalty. The introduction and influence of the Bible and religion in Petitioner's jury's decision is the extraordinary circumstance on which Petitioner relies for vacation of his sentence.

274. Juror Hawkins' actions technically amount to "juror misconduct," as jurors are not permitted to introduce extraneous material in the jury room during deliberations.

275. Petitioner has the right under the Sixth and Fourteenth Amendments to the United States Constitution to a trial by an impartial jury and a verdict based only on the evidence introduced at trial. Estelle v. Williams, 425 U.S. 501 (1976); Turner v. Louisiana, 379 U.S. 466 (1965); Irvin v. Dowd, 366 U.S. 717 (1961). A court must review the totality of the circumstances around the introduction of extraneous material to determine its effect on the jurors. Remmer v. United States, 350 U.S. 377, 378 (1956).

276. In Petitioner's case, it is clear from her sworn Affidavit that Juror Nancy Hawkins engaged in juror misconduct in consulting and considering extraneous material by searching the Internet "for information on what the Bible had to say about the death penalty." Not only did she consult the Bible for her own personal decision making process, she actually "made a few copies for all the jurors" to consider and "brought these copies into the deliberation room and put them on the table and told the other jurors about them." Further, Juror Hawkins admitted and acknowledged that certain Bible verses played a decisive role in her decision making process, as she stated that she "looked up many of the verses and considered them," particularly the Bible verse that speaks of "an eye for an eye." The fact that extraneous material was consulted and relied upon by at least one juror, and introduced into the jury room during sentencing deliberations for other jurors to consider, creates a strong presumption of prejudice that cannot be overcome or rebutted by the Commonwealth. Certainly Juror Hawkins, and possibly other jurors, made a capital sentencing determination, at

least in part, on a basis other than the law of the Commonwealth of Kentucky. Such misconduct undermines the Sixth and Fourteenth Amendments rights to a fair and impartial jury and the channeled decision making process required in capital cases by the Eighth Amendment.

277. Under Turner, Remmer, and all of the other federal and state authority cited above, Petitioner's death sentence must be vacated because there is a reasonable probability that the jury's verdict was influenced by the Bible verses.

TWENTY-SIXTH CLAIM FOR RELIEF
FIRST AMENDMENT VIOLATION

278. Juror Hawkins' actions constitute a violation of the prohibition against the establishment of religion under the 1st and 14th Amendments to the United States Constitution.

279. "Congress shall make no law respecting an establishment of religion…." U.S. Const. Amend. I.[18] The Supreme Court of the United States has interpreted the Due Process Clause of the Fourteenth Amendment as making the Establishment Clause applicable to state and local government. Emerson v. Bd. of Educ., 330 U.S. 1, 8 (1947). Governmental actions challenged under the Establishment Clause are reviewed under the three-prong test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, the governmental action first must have a secular purpose and "second, its principal or primary effect must be one that neither advances nor inhibits religion." Id. at 612-13.

[18] The Kentucky equivalent of the federal Establishment Clause is found in Section 5 of the Kentucky Constitution. Section 5 provides in relevant part as follows: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity… ."

280. Finally, the governmental action must not result in "excessive entanglement with religion." Id. In the past several years, the Supreme Court has reframed the Lemon analysis, focusing on whether either the purpose or effect of the challenged governmental action results in the endorsement of religion. Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

281. In Petitioner's case, Juror Hawkins' actions must be subjected to First Amendment scrutiny because, in sitting on Petitioner's sentencing jury, she acted in a public capacity on behalf of the Commonwealth of Kentucky, rather than as a private citizen. See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 626 (1991) ("[T]he objective of jury selection proceedings is to determine representation on a governmental body.").

282. As a state actor, Juror Hawkins' actions are irreconcilable with both prongs of the "endorsement test." The practice of searching the Internet for what the Bible had to say about the death penalty was solely for the nonsecular purpose of seeking Christian divine inspiration and guidance in reaching a capital sentencing decision. Moreover, Juror Hawkins' acts of making copies of her findings for each juror, taking the copies into the jury room during deliberations, and calling the other jurors' attention to the verses had the inevitable effect of communicating to the other members of the jury that they, too, should seek such divine inspiration and guidance from the Christian religion. Her actions endorsed and approved the Bible as a source of "law" relevant to capital sentencing.

283. Juror Hawkins, and perhaps other jurors, made a capital sentencing decision, at least in part, based upon what the Christian law in the Bible had to say about the death

penalty, rather than based solely upon the law of the Commonwealth of Kentucky. As is evidenced by her making copies for all of the other jurors to consider during deliberations, Juror Hawkins obviously found the verses highly relevant and persuasive. Therefore, under the "endorsement test" articulated in McCreary County and Lynch, Juror Hawkins' conduct fails both prongs of the endorsement test. First, her action had no secular purpose, and second, its primary effect advanced the Christian religion.

TWENTY-SEVENTH CLAIM FOR RELIEF
PROPORTIONALITY REVIEW DOES NOT COMPORT WITH CONSTITUTION

284. The Commonwealth of Kentucky, through its death penalty statutes, has set up a proportionality review process. See KRS 532.075(3)(c). Once such a review is established by state statute, it must be applied constitutionally to comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). However, Kentucky's review process does not compare cases in which the death penalty was imposed to "the penalty imposed in similar cases." This Court's universe has been limited solely to those cases in which the death penalty was imposed; not to "similar cases" in which death was not imposed. It renders the review process meaningless in violation of Due Process and Equal Protection as guaranteed by the Fourteenth Amendment and the Eighth Amendment.

285. Due process and equal protection demands that the Kentucky Supreme Court expand its universe to all similar cases, whether death was imposed or not, so that there can be a meaningful proportionality review of Keith's death sentence. The Kentucky proportionality review process simply insures that a sentence of death will *always* be found proportionate as long as there has been one other death penalty appeal with an

identical aggravating factor. This is clearly not "in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, supra.

286. Further, Petitioner never received access to the KRS 532.075(6) data compiled by the Kentucky Supreme Court regarding the application of capital punishment throughout the state. Formally and informally, this Court has rejected arguments to obtain this data. See Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 682 (1985)("…not entitled to such data.")

287. The ban on cruel and unusual punishment "derives from the notion that the state does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." Furman v. Georgia, supra, 408 U.S. at 274 (Brennan, J., concurring). Petitioner's death sentence cannot stand because others who "deserve" capital punishment as much as, or more so than, he have escaped it. Under any rational criteria, this case compares favorably to scores of capital cases since 1976 where a death verdict was not returned.

288. The fact that Keith Woodall was sentenced to death, while others who committed similar, or worse, crimes were allowed to live, shows that the death penalty was wantonly, freakishly, and disproportionately applied in this case.

289. Thus, Petitioner's death sentence was affirmed without disclosure of the information relied upon, and without the participation of counsel or argument of any kind. This offends the 6th, 8th, 14th Amends., U.S. Const. See Gardner v. Florida, 430 U.S. 349, 360 (1977); Griffin v. Illinois, 351 U.S. 12 (1956).

TWENTY-EIGHTH CLAIM FOR RELIEF
UNCONSTITUTIONALLY VAGUE NON-STATUTORY AGGRAVATORS

290. In the trial court's report, two of the non-statutory aggravating circumstances he listed were the "heinous nature of the crime" and "no remorse expressed by defendant." (TR 1192). The trial court also said in his report that the sentences imposed were "appropriate considering the brutality and viciousness of the offense, the apparent stalking and no remorse expressed by the defendant." (TR 1197). None of these are not among the aggravating factors set forth in KRS 532.025(2)(a).

291. Moreover, using these considerations as aggravating factors is not without serious constitutional problems, particularly when such terms are not defined. Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). See also, Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1133, 117 L.Ed.2d 367 (1992).

292. The trial court's reliance on "apparent stalking" and "no remorse expressed by the defendant" are also not supported by the evidence presented in this case and are improper as either aggravation or reasons to justify the appropriateness of the sentences imposed for that reason alone. Furthermore, it is clear that once Keith had pled guilty the trial court expected him to offer some explanation or expression of regret and thought that his failure to do so should be held against him. (TE 1591). At no time did Keith say that he was *not* remorseful for the commission of the offenses. Accordingly, using the lack of an expression of remorse as an aggravating factor is simply punishing him for the exercise of his Fifth Amendment privilege and is improper and unconstitutional. (See First Claim for Relief.)

293. The trial court's use of unconstitutionally vague non-statutory aggravating circumstances, circumstances not supported by the evidence and of one circumstance which punishes him for exercising a constitutional right, resulted in the denial of due process and a reliable determination of Keith's sentences which violated the 5th, 8th, and 14th Amendments.

TWENTY-NINTH CLAIM FOR RELIEF
INCOMPETENT TO BE EXECUTED

294. Petitioner suffers from a form of mental illness – the true and full extent of which has yet to be determined. The most recent execution date precipitated a breakdown and a catatonic or dissociative state. Thus, his execution then would have violated the Eighth and Fourteenth Amendments.

295. This claim has yet to be exhausted in the state courts as his execution is not imminent and therefore his competence to be executed could and should not be determined. Petitioner raises this claim now in order to comply with Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

THIRTIETH CLAIM FOR RELIEF
CUMULATIVE ERROR

296. Petitioner made this claim both in his direct appeal brief as well as in his post-conviction action. The Kentucky Supreme Court in both instances did not consider the claim because in neither instance did it even find one error to consider.

297. The cumulative effect of the preceding errors requires that Appellant's convictions and sentences be set aside. Cargyle v. Mullin, 317 F.3d 1196 (10th Cir. 2003).

PRAYER FOR RELIEF

A. Issue a writ of habeas corpus that the petitioner be brought before the court to be discharged of his unconstitutional confinement and relieved of his unconstitutional conviction and/or sentence of death;

B. Order the Respondents to produce the records on direct appeal and post-conviction appeal, together with any responsive pleadings deemed just and appropriate; and

C. Grant Petitioner, who is indigent, sufficient funds to secure expert testimony to prove the facts as alleged in this petition;

D. Grant Petitioner, upon his request, the authority to obtain subpoenas *in forma pauperis*, for witnesses and documents necessary for an evidentiary hearing;

E. Order such hearings as may be necessary; and,

F. Schedule the filing of legal briefs and memorandum in support of the issues of law as raised in the petition in order to fully inform the court.

Respectfully submitted,

/s/ David H. Harshaw III
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition was mailed to Robert K. Woodall, Inmate Number 127513, Kentucky State Penitentiary, P.O. Box 5128, Eddyville, Kentucky 42038-5128, and to the Hons. David A. Smith and N. Susan Roncarti Lenz, Assistant Attorney Generals, Office of the Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, on this 28th day of December, 2006.

/s/ David H. Harshaw III
COUNSEL FOR PETITIONER

VERIFICATION

I declare under penalty of perjury that the foregoing Petition is true and correct to the best of my knowledge and belief.

w/permission Robert Keith Woodall
Petitioner

HABEAS CORPUS PETITION VERIFICATION

I declare under penalty of perjury that the foregoing Petition to which this Verification is attached is true and correct. I also give permission to my attorneys to electronically sign my name to the final habeas corpus petition. Executed on:

Dec. 12/11/06
Date

Robert Keith Woodall
Robert Keith Woodall