No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM EUGENE THOMPSON, PETITIONER

v.

PHILIP PARKER, RESPONDENT

APPENDIX

THIS IS A CAPITAL CASE

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January 16, 2018

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867 F.3d 641
United States Court of Appeals,
Sixth Circuit.

William Eugene THOMPSON,
Petitioner–Appellant,
v.
Philip W. PARKER, Warden,
Respondent–Appellee.

No. 13-6085
|
Argued: October 19, 2016
|
Decided and Filed: August 14, 2017
|
Rehearing En Banc Denied October 18, 2017

Synopsis
Background: After affirmance of state prisoner's murder conviction and death sentence, 147 S.W.3d 22, and affirmance of denial of state postconviction relief, 2010 WL 4156756, prisoner petitioned for federal habeas corpus relief. The United States District Court for the Western District of Kentucky, No. 5:11–cv–00031, Thomas B. Russell, Senior District Judge, 2012 WL 6201203 and 2013 WL 3816705, denied the petition. Prisoner appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

[1] deliberating jurors' discussion, during penalty phase, of a news story about a case in which a violent criminal who had been paroled at age 70 committed a murder, did not violate prisoner's right to fair trial by impartial jury, and

[2] state court reasonably determined that penalty-phase jury instructions did not require juror to find mitigating circumstances unanimously.

Affirmed.

*644 Appeal from the United States District Court for the Western District of Kentucky at Paducah. No. 5:11–cv–00031—Thomas B. Russell, District Judge.

Attorneys and Law Firms

ARGUED: Dennis J. Burke, DEPARTMENT OF PUBLIC ADVOCACY, La Grange, Kentucky, for Appellant. Jason Bradley Moore, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. ON BRIEF: Dennis J. Burke, Krista A. Dolan, DEPARTMENT OF PUBLIC ADVOCACY, La Grange, Kentucky, for Appellant. James Hays Lawson, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

Before: BOGGS, GRIFFIN, and WHITE, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

In 1986, Petitioner William Thompson, having served twelve years of a life sentence for an unrelated murder for hire, killed his prison-farm supervisor, stole his wallet, keys, and pocketknife, and fled. Thompson was captured at a bus station in Madisonville, Kentucky, and charged with murder, robbery, and escape, for which he was tried by jury and sentenced to death, twenty years, and ten years, respectively. Because the trial court abused its discretion in refusing to excuse certain jurors from the case and because Thompson's prior conviction for murder was improperly used as an aggravating circumstance, Thompson was granted a retrial on direct appeal. *Thompson v. Commonwealth*, 862 S.W.2d 871, 877 (Ky. 1993). In 1995, on retrial, Thompson pleaded guilty to all three counts as part of a plea agreement to avoid jury sentencing. The Commonwealth sought jury sentencing anyway, the trial court denied the request, the Commonwealth appealed, and the court of appeals ruled that the Commonwealth was entitled to jury sentencing despite the plea agreement. *Commonwealth v. Thompson*, No. 95–CA–0136–MR (Ky. Ct. App. June 10, 1996) (unpublished). The jury returned a death-penalty verdict, finding two aggravating factors: (1) Thompson had previously committed a murder, and (2) Thompson committed the present murder against a prison guard while in prison. The trial court accordingly sentenced Thompson to death.

In state post-conviction habeas corpus proceedings, Thompson succeeded on his claim that the trial court had failed to hold a mandatory competency hearing. *Thompson v. Commonwealth*, 56 S.W.3d 406, 407, 410 (Ky. 2001). Thompson was unsuccessful on all his other

state claims for relief, however, and after the trial court held the required competency hearing and found that Thompson had been competent to plead guilty, the Kentucky Supreme Court affirmed Thompson's convictions and sentences. *Thompson v. Commonwealth*, 147 S.W.3d 22, 34, 55 (Ky. 2004), *reh'g denied* (Nov. 18, 2004), *cert. denied*, 545 U.S. 1142, 125 S.Ct. 2966, 162 L.Ed.2d 893 (2005). The Kentucky Supreme Court also affirmed the denial of Thompson's motion to vacate, set aside, or correct his sentence ***645** under Ky. R. Crim. P. 11.42. *Thompson v. Commonwealth*, No. 2009-SC-000557-MR, 2010 WL 4156756, at *1, *5 (Ky. Oct. 21, 2010, as modified on denial of reh'g, Jan. 20, 2011) ("Rule 11.42 proceedings"). Thompson then filed a federal habeas corpus petition raising seven claims:

> (1) the jury considered extraneous evidence;
>
> (2) trial counsel rendered ineffective assistance;
>
> (3) the prosecutor made improper closing arguments to the jury;
>
> (4) the trial court improperly restricted Thompson's voir dire questioning;
>
> (5) in violation of *Mills v. Maryland*, 486 U.S. 367, 384 [108 S.Ct. 1860, 100 L.Ed.2d 384] (1988), the penalty-phase jury instructions implied that certain mitigators had to be found unanimously to be considered;
>
> (6) the Kentucky Supreme Court's proportionality-review process is unconstitutional; and
>
> (7) the cumulative effect of the errors at trial denied Thompson his constitutional rights.

R. 13 at 12–59.

The district court heard and denied Thompson's federal habeas petition, from which Thompson now appeals on the first, fifth, and sixth grounds. Thompson claims that (1) the jury improperly considered extraneous evidence when it discussed a news account about another violent criminal who had committed a murder after earning parole at age seventy; (2) the jury instructions violated *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) because they stated that the "verdict" had to be returned unanimously but did not expressly state that unanimity was *not* required in order for a juror to find a mitigating factor, potentially leading jurors wrongly to infer that finding at least some mitigating factors also required unanimity; and (3) the Kentucky Supreme Court did not adequately conduct a comparative-proportionality review in assessing whether Thompson's death sentence was excessive or disproportionate to the penalty imposed in similar cases. For the reasons that follow, we affirm.

I

[1] [2] [3]As a threshold matter, the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, which amended 28 U.S.C. § 2254, governs our review of the Kentucky Supreme Court's denial of post-conviction relief because Thompson filed his federal petition after AEDPA's effective date, even though Thompson's conviction arises out of a 1986 homicide. *See Lindh v. Murphy*, 521 U.S. 320, 326–27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). AEDPA sets forth "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). Under AEDPA, for any "claim that was adjudicated on the merits" by Kentucky state courts, we defer to the state courts' factual determinations, we may not expand the record beyond that which the state courts reviewed, *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and we may grant habeas relief only if the adjudication of that claim "(1) resulted in a decision that was *contrary to*, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (emphases added). "A state court's determination that a claim lacks merit precludes ***646** habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)).

[4] [5] [6]The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are independent of each other: a state-court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's ruling is an "unreasonable application" of clearly established federal law, on the other hand, "if the state court identifies the correct governing legal rule" or

principle from Supreme Court precedent but "applies it to the facts of the particular state prisoner's case" in an unreasonable manner, including by "unreasonably extend[ing]" or "unreasonably refus[ing] to extend" the principle. *Id.* at 407, 120 S.Ct. 1495. In both cases, in identifying governing legal rules, we may look only to the holdings of the Supreme Court's decisions, not the dicta. *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014).

With these parameters in mind, we proceed to the merits of Thompson's claims.

II

Extraneous Evidence

Thompson argues that, in violation of his Sixth and Fourteenth Amendment rights, his jurors improperly considered extraneous evidence: a news account (read, seen, or heard by one of them or, perhaps, heard *about* by one of them) concerning another violent criminal who had been imprisoned and yet committed a murder after being paroled at age 70. Thompson argues that discussion of this news account played on jurors' fears that, if Thompson was ever released from prison, he would still be a danger to society no matter his age.[1] Thompson's proof that jurors discussed the news account during deliberations included an affidavit from the jury foreman and the foreman's testimony at an evidentiary hearing.

[1] At the time of Thompson's trial, the severest non-capital sentence for which he was eligible was life without the possibility of parole for twenty-five years. *See Thompson*, 2010 WL 4156756, at *3.

In the Rule 11.42 proceedings, the state supreme court held that Thompson's extraneous-evidence claim was barred because it could or should have been raised on direct appeal, *Thompson*, 2010 WL 4156756, at *5, but the Warden in federal habeas proceedings conceded that it was not barred—and indeed, that none of Thompson's claims were barred whether for failure to exhaust, procedural default, or otherwise. R. 19 at 2. The district court agreed that this claim was not barred:

> Thompson contends, and Respondent acknowledges, that this claim was not procedurally defaulted because the Kentucky Supreme Court does not regularly follow the procedural rule it applied to deny Thompson's claim without reaching the merits. Thompson's claim is not a claim that he could have and should have raised on direct appeal, and Kentucky courts do allow such claims to be brought in a RCr 11.42 motion. *See Bowling v. Commonwealth*, 168 S.W.3d 2, 9–10 (Ky. 2004). Therefore, Thompson's claim is not procedurally defaulted. ***647** *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

R. 30 at 5.

The district court then held, correctly, that because the Kentucky courts had not adjudicated this claim on the merits, AEDPA deference did not apply. *Ibid.*; *see Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003). Further, because Thompson did not lack diligence in developing the factual record in state court, the district court was permitted to hold an evidentiary hearing as to this claim, and to cite the facts developed at that hearing. *See Pinholster*, 563 U.S. at 184, 131 S.Ct. 1388.

At the evidentiary hearing (which, of course, was held fourteen years after the jury trial), the jury foreman testified that he did not remember details of the deliberations but that the news account "was brought up probably after two or three votes or whatever ... I just remember it was brought up and that was it." R. 42 at 13. The foreman testified that "it was probably a 9–to–3 or 8–to–4 ... vote at that time, and there was three holdouts or whatever to the end until the last vote. And it was probably brought up sometime during that period." *Id.* at 14. The foreman testified that no one physically brought newspaper articles or anything similar into the jury room, but rather that someone had mentioned the story in the course of the jury's deliberations. The district court denied relief, holding that "[a] discussion of a news story about an unrelated crime does not constitute extrajudicial evidence which would set aside a verdict."

[7]We review the district court's denial of habeas relief de novo, *Bigelow v. Williams*, 367 F.3d 562, 569 (6th Cir. 2004), and we affirm.

[8] [9]Under the Sixth and Fourteenth Amendments, a criminal defendant is entitled to "a fair trial by a panel of

impartial, 'indifferent' jurors." *Morgan v. Illinois*, 504 U.S. 719, 726–27, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). "In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial," *id.* at 727, 81 S.Ct. 1639, without regard to any extraneous influences. *See Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it...."); *Sheppard v. Maxwell*, 384 U.S. 333, 351, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences"; the jury's verdict must be based on "evidence received in open court, not from outside sources").

[10]But impartiality and indifference do not require ignorance. Because "jurors will have opinions from their life experiences, it would be impractical for the Sixth Amendment to require that each juror's mind be a tabula rasa." *United States v. Jones*, 716 F.3d 851, 857 (4th Cir. 2013). Indeed, it would not only be impractical but also undesirable: for jurors to evaluate the evidence before them and do their job intelligently, they must take into account rather than ignore what general knowledge they may have gained from their life experiences.

> So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon *particular facts material to its disposition resting* ***648** *in their private knowledge*, but should be governed by the evidence adduced, they may, and *to act intelligently they must*, judge of the weight and force of that evidence *by their own general knowledge* of the subject of inquiry.

Head v. Hargrave, 105 U.S. 45, 49, 15 Otto 45, 26 L.Ed. 1028 (1881) (emphases added).

[11]There is thus a bright line, and rightly so, between, on the one hand, jurors' taking into account "their own wisdom, experience, and common sense," *Doan v. Brigano*, 237 F.3d 722, 734 (6th Cir. 2001), *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), when evaluating the evidence admitted at trial, and, on the other hand, jurors' employing extraneous evidence such as news reports *of the case being decided by the jurors*, *e.g.*, *Nevers v. Killinger*, 169 F.3d 352, 366 (6th Cir. 1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940, 942–43 (6th Cir. 2000); or physical news items being brought into the jury room, *e.g.*, *Wiley v. State*, 169 Tex.Crim. 256, 332 S.W.2d 725, 726 (1960) (reversing death sentence where one juror brought in a local newspaper clipping containing a recent news story, which the foreman read aloud to the jury and which began: "Tom Ainsworth, 40, convicted murderer from Cut'n Shoot, celebrated the end of his parole Thursday night by buying a jug of gin and then killing a man"); *Waldorf v. Shuta*, 3 F.3d 705, 710–11 (3d Cir. 1993) (jurors were "reading, commenting [on,] and circulating" a highly prejudicial New York Post article in the jury room).

[12]Thompson relies principally on *Nevers* and on various decisions of our sister circuits such as *Waldorf*. But none of Thompson's cited authorities support the proposition that merely *discussing* a news story about *another case* that one or some of the jurors *might have read or seen or heard about* is analogous either to seeing extraneous reports *about the case the jurors are deciding* or to having physical news items such as newspaper clippings either provided to jurors or brought into the jury room by jurors.

The jury's sole task in this case was to set Thompson's punishment. Its options were to impose a term of imprisonment for a number of years no less than twenty, a life sentence with the possibility of parole, or a death sentence. Surely, the jury's deliberations would naturally include discussing such considerations as the likelihood that Thompson, if released even at an old age, would kill again. And in the context of such deliberations, the jurors' general knowledge about recidivism, even if it includes recollections of unrelated news coverage of other crimes, is fair game for discussion.

To hold otherwise would have curious (and undesirable) implications about the sort of "evidence" that might be considered extraneous. What if, for example, a juror were an actuary who had general knowledge of the life expectancy of someone similarly situated to the defendant: would that juror's discussion of the defendant's odds of reoffending be "extraneous evidence" and thus violate the defendant's constitutional rights? Or, what if the jurors in this case, instead of discussing a news story, had discussed a story that had been related in a

novel? Would all general knowledge gleaned from reading books be considered "extraneous evidence"? Or only from reading nonfiction books?

It therefore makes sense that, at a minimum, to be considered extraneous evidence, the evidence must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury. *Cf. Warger v. Shauers*, —— U.S. ——, 135 S.Ct. 521, 529, 190 L.Ed.2d 422 (2014) (holding, in a civil ***649** case, that " '[e]xternal' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room").

III

Jury Instructions

Thompson's next claim is that his jury instructions, in violation of the Eighth Amendment as interpreted in *Mills v. Maryland*, 486 U.S. 367, 384, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), improperly implied that the jury had to find mitigating factors *unanimously* in order to consider them. This claim is subject to AEDPA deference because the state supreme court reached the merits in rejecting it. *Thompson*, 147 S.W.3d at 47–48 (holding, in the alternative, that this claim was both unpreserved and meritless). The district court denied Thompson's claim and we review that denial de novo. *Bigelow*, 367 F.3d at 569.

[13] [14]The Eighth Amendment requires the jury to have the ability "to consider and give effect to all relevant mitigating evidence" offered by the defendant. *Boyde v. California*, 494 U.S. 370, 377–78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). To that end, it is unconstitutional for a state to require jurors to agree unanimously on the existence of a mitigating factor. *Mills*, 486 U.S. at 384, 108 S.Ct. 1860. In *Mills*, the verdict form stated: "Based upon the evidence we *unanimously* find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist ... and each mitigating circumstance marked 'no' has not been proven...." *Id.* at 387, 108 S.Ct. 1860 (emphasis added). The verdict form contained a list of seven potentially mitigating circumstances and an eighth marked "other." *Ibid.* Next to each was written "yes" or "no," and the jury was to indicate its finding. *Ibid.* The Supreme Court rejected these instructions because the jury could not find any mitigator to exist unless the jurors agreed unanimously that *that* mitigator existed. *Id.* at 377–84, 108 S.Ct. 1860; *see also United States ex rel. Kubat v. Thieret*, 679 F.Supp. 788, 813 (N.D. Ill. 1988) ("If ... you *unanimously* conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence, you should sign the form which so indicates." (emphasis omitted)) (following *Mills*), *aff'd*, 867 F.2d 351 (7th Cir. 1989).

[15]Our court has held that "the proper inquiry" under *Mills* "is whether a reasonable jury *might have interpreted* the instructions in a way that is constitutionally impermissible." *Coe v. Bell*, 161 F.3d 320, 337 (6th Cir. 1998). But the Supreme Court has made clear that what violates the Eighth Amendment is requiring jurors to *find mitigators* unanimously—not, for example, requiring jurors to weigh aggravators against mitigators and find unanimously that the aggravators outweigh the mitigators. *See Smith v. Spisak*, 558 U.S. 139, 147–48, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010). In *Spisak*,

> The judge gave the jury two verdict forms for each aggravating factor. The first of the two forms said:
>
> " 'We the jury in this case ... do find beyond a reasonable doubt that the aggravating circumstance ... was sufficient to outweigh the mitigating factors present in this case.
>
> " 'We the jury recommend that the sentence of death be imposed....' "
>
> The other verdict form read:
>
> " 'We the jury ... do find that the aggravating circumstances ... are not sufficient to outweigh the mitigation factors present in this case.
>
> ***650** " 'We the jury recommend that the defendant ... be sentenced to life imprisonment....' "

The instructions and forms made clear that, to recommend a death sentence, the jury had to find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigating circumstances. But the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously. Neither the instructions nor the forms said anything about how—or even whether—the jury should make individual determinations that each particular mitigating circumstance existed. They focused only on the overall balancing question. And the instructions repeatedly told

the jury to "conside[r] all of the relevant evidence." In our view the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the circumstance that *Mills* found critical, namely,

> "a substantial possibility that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."

We consequently conclude that the state court's decision upholding these forms and instructions was not "contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Mills*.

Id. at 147–49, 130 S.Ct. 676.

[16]Thompson's jury instructions were worded far more closely to those in *Spisak* than to those in *Mills*. Indeed, Thompson himself characterizes his jury instructions as requiring the "verdict" to be unanimous but being "*silent* as to the [sic] whether the finding of aggravating and mitigating circumstances had to be unanimous, improperly impl[ying] that the finding of mitigating factors by the jury had to be unanimous." Pet'r's Br. 4–5 (emphasis added). Thompson's argument is that the instructions, in using the word "you," were ambiguous and on the whole implied that "you the *jury*" rather than "you the *juror*" had to find mitigators to exist. Unlike the instructions in *Mills*, however, nothing expressly required the jury to find mitigating factors unanimously. And we have previously upheld an instruction "that an *aggravating* factor had to be found unanimously, but [that] was silent with regard to how many had to agree in finding a mitigating factor." *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (en banc) (Kennedy, J., writing for the majority on this issue). Thompson's jury instructions required that "the jury find beyond a reasonable doubt" that an aggravating circumstance or circumstances existed.

We noted at oral argument, however, that—although not raised by Thompson or addressed by the district court—one of Thompson's jury instructions actually used the phrase "you the jury" (rather than only "you") in discussing mitigating factors:

> INSTRUCTION NUMBER TWO ENTITLED MITIGATING CIRCUMSTANCES:
>
> In fixing a sentence for the defendant for the offense of murder, you shall consider such mitigating or extenuating facts and circumstances as has [sic] been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true: A. That the offense was committed while the defendant was under the influence of ***651** extreme mental or emotional disturbance, even though the influence of extreme mental or emotional disturbance was not sufficient to constitute a defense to the crime. B. At the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental illness, 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 the law was insufficient to constitute a defense to the crime and C. Any other circumstance arising from the evidence which ***you the jury*** deem to have mitigating value. In addition to the foregoing, you shall consider those aspects of the defendant's character, background and those facts and circumstances of the particular offense of which he is guilty, to-wit: the murder of Charles Fred Cash, about which he has offered evidence in mitigating [sic] of the penalty to be imposed upon him and which you believe from the evidence to be true. [changed because this is how the format appears in the cited trial transcripts.]

Trial Tr. at 1237–38 (emphasis added).[2]

2 In setting forth the "relevant portions of the jury instructions," R. 42 at 46, the district court omitted most of the text of this seemingly relevant jury instruction.

A reasonable jury might well have interpreted this instruction to mean that, in addition to the mitigators contemplated in items A and B of the instruction, the jury should consider certain mitigators described in item C found by "you the jury"—i.e., the jury as a whole.[3] Even so, in light of *Spisak*, the state court did not unreasonably apply *Mills* in finding the jury instructions constitutional.

3 On the other hand, immediately following the "you the jury" language, the instruction states that "[i]n addition to the foregoing, you shall consider those aspects of the

> defendant's character, background and those facts and circumstances of the particular offense of which he is guilty, ... about which he has offered evidence in mitigating of the penalty to be imposed upon him and which you believe from the evidence to be true." This catchall language mitigates concern that the jury may have concluded that item C required that their consideration of "other circumstances" as mitigating be confined to those that the jury found as a whole.

That is because, as was the case in *Spisak*, nothing in Thompson's jury instructions actually required the jury (or any individual jurors) to *make a determination* as to the presence or absence of mitigators in the first place. Indeed, Thompson's jury instructions made clear that the jurors had to find aggravating factors "beyond a reasonable doubt," Trial Tr. at 1237, and that the jurors could not impose the death penalty (or a sentence of life without parole for a minimum of 25 years) without finding and specifying an "aggravated circumstance or circumstances," *id.* at 1489, on a verdict form that had to be "unanimous," *id.* at 1241. Moreover, the jurors here were instructed:

> If you have a reasonable doubt as to the truth or existence of any aggravating circumstance listed in Instruction No. 3, you shall not make any finding with respect to it.
>
> If, upon the whole case, you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

Id. at 1486.

The Supreme Court held that the instructions in *Spisak* did not violate *Mills*, and we therefore must conclude that the Kentucky courts' upholding the jury instructions ***652** in this case was not "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Mills*. The jury here was instructed to consider all the evidence before it, to consider the potentially aggravating and mitigating factors introduced at trial, and to issue a unanimous verdict. According to the instructions, returning a death-penalty verdict required the jury to find, beyond a reasonable doubt, the existence of aggravating factors, and the jury was required to list the specific aggravating factors that the jury had collectively found. In contrast, the jury instructions and verdict form did not instruct the jury that a juror individually could not decline to return a sentence of death on account of a mitigating circumstance unless the jury unanimously found that circumstance to exist. Simply put, Thompson's instructions are easily distinguishable from those in *Mills*. Thus, Thompson has failed to show that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington*, 562 U.S. at 102, 131 S.Ct. 770.

IV

Proportionality Review

Finally, Thompson argues that the Kentucky Supreme Court's proportionality review was unconstitutional because the universe of "similar" cases to which his was compared was too small. That court looked only to those cases where a death sentence was imposed. Thompson contends that the court should also have looked to similar cases where a death sentence, though sought, was not imposed. This claim was adjudicated on the merits in the Kentucky courts, so AEDPA deference should apply; the district court, however, reviewed this claim de novo, and the Warden has not asked us to apply AEDPA deference on appeal. Thompson, however, has used the language of AEDPA deference in his brief and his reply brief. Pet'r's Br. 46 ("contrary to clearly established law"), 47 ("contrary to, or an unreasonable application of, clearly established federal law"), Reply Br. 10 ("contrary to, or based upon an unreasonable application of, clearly established federal law").

We need not enter the thicket of whether AEDPA deference applies, however, because whether it does or does not, Thompson's claim still fails.

[17]We first note that Thompson has raised three arguments on appeal, only one which was presented to the district court. "The clear rule is that appellate courts do not consider issues not presented to the district court." *Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983). We therefore decline to address the following two arguments that Thompson did not raise below: (1) the proportionality review in his case was constitutionally flawed not only because the comparison group was too small, but also because the court "made no effort to compare the facts and circumstances of Thompson's life and background to the lives of the people within the comparison group"; and (2) the comparison group of non-excessive-death-penalty cases used in the proportionality review improperly included some decided before the Supreme Court, in *Furman v. Georgia*, 408

U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held the death penalty unconstitutional—i.e., cases in which the death sentences were presumptively excessive. *See McCleskey v. Kemp*, 481 U.S. 279, 301, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (explaining that prior to *Furman*, "the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive").

[18] [19]The argument that Thompson has preserved is that the Kentucky Supreme ***653** Court violated his constitutional right to due process by failing to require a better comparative-proportionality review (i.e., comparing Thompson's sentence to those others have received), which we note is different from inherent-proportionality review (i.e., comparing the severity of the sentence to the gravity of the crime). *See Pulley v. Harris*, 465 U.S. 37, 42–44, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). But there is no constitutional entitlement to any comparative-proportionality review, a fact that Thompson readily admits. *See id.* at 43–46, 50–51, 104 S.Ct. 871; Pet'r's Br. 40, 45. Thompson argues that Kentucky's proportionality-review statute confers upon him a liberty interest that is in turn protected by the Fourteenth Amendment Due Process Clause. But Thompson's federally protected liberty interest created by that statute, at most, is an interest in having the Kentucky Supreme Court *follow that statute*, which it did. That court compared Thompson's case to those of other defendants sentenced to death for a single murder and specifically cited two of those other cases. *Thompson*, 147 S.W.3d at 54–55. That analysis was sufficient to satisfy Kentucky law. *See* Ky. Rev. Stat. Ann. § 532.075(3)(c), (5); *Bowling v. Parker*, 344 F.3d 487, 522 (6th Cir. 2003). And when it comes to a petitioner's liberty interest in state-created statutory rights, absent some other federally recognized liberty interest, "there is no violation of due process as long as Kentucky follows its procedures." *Id.* at 522.

Thus, even on de novo review, Thompson's proportionality-review claim fails.

V

The order of the district court is **AFFIRMED**.

All Citations

867 F.3d 641

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United States District Court, W.D. Kentucky, at Paducah.

William Eugene THOMPSON, Petitioner
v.
Phillip W. PARKER, Respondent.

Civil Action No. 5:11CV–31–R.

Dec. 10, 2012.

Attorneys and Law Firms

David H. Harshaw, III, Dennis J. Burke, Meggan Smith, Kentucky Department of Public Advocacy, LaGrange, KY, for Petitioner.

James H. Lawson, Kentucky Attorney General, Frankfort, KY, for Respondent.

[CAPITAL CASE]

I. INTRODUCTION

THOMAS B. RUSSELL, Senior District Judge.

*1 This matter is before the Court on the amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 filed by William Eugene Thompson, by counsel. While serving a life sentence for murder in the minimum-security Western Kentucky Farm Center, Thompson killed Charles Fred Cash, a Kentucky Department of Corrections officer. Thompson pleaded guilty to the murder. At a sentencing trial, the jury sentenced Thompson to death.

The Court has exhaustively reviewed the parties' briefing, the record below, and the relevant case law. After doing so, the Court concludes that Thompson is not entitled to habeas relief on any of the claims of error raised. The Court also finds that a certificate of appealability should issue with respect to claim five but should be denied as to Thompson's other claims.

II. FACTUAL FINDINGS

The Kentucky Supreme Court set out the following facts underlying Thompson's sentence. *Thompson v. Commonwealth,* 147 S.W.3d 22 (Ky.2004).

> At the time of this crime, Appellant was serving a life sentence for murder. He was transferred to the Western Kentucky Farm Center, a minimum security prison facility that includes an inmate-operated dairy farm. During the early morning hours of May 9, 1986, Appellant and his supervisor, Fred Cash, reported to work at the dairy barn. According to Appellant, he became enraged outside a calf barn while he and Mr. Cash were attempting to start some equipment. Appellant admits striking Mr. Cash once to the head with a hammer. Little is known about exactly what transpired thereafter, as Appellant claims to have "blacked out." However, the evidence reveals that Mr. Cash's skull was crushed by numerous blows to the head with a hammer and his body was dragged into a calf's stall. According to Appellant, upon realizing what he had done, he removed Mr. Cash's pocketknife, keys and wallet, and left the Farm Center in the prison dairy truck. Appellant fled to the nearby town of Princeton, where he purchased a ticket and boarded a bus bound for Madisonville. The authorities apprehended Appellant in Madisonville.

Id. at 31.[1] This Court presumes the state court's findings of fact to be correct. *See* 28 U.S.C. § 2254(e)(1).

1 Additional facts will be developed where relevant to Thompson's claims of error.

III. PROCEDURAL HISTORY

Thompson originally was tried before a jury in Lyon Circuit Court in October of 1986 and was found guilty of murder, first-degree robbery, and first-degree escape. He was sentenced to death, twenty years, and ten years, respectively. The Kentucky Supreme Court reversed the conviction and remanded the case for a new trial. *Thompson v. Commonwealth,* 862 S.W.2d 871 (Ky.1993). Upon remand, Thompson pleaded guilty to all three charges. Thompson waived jury sentencing on the robbery and escape charges and was sentenced to two consecutive prison terms totaling twenty years. A second penalty-phase trial was held in Graves Circuit Court on February 2–11, 1998, to determine sentencing on the murder charge. The prosecution called ten witnesses, and the defense called four witnesses, including Thompson himself. At the conclusion, Thompson was again sentenced to death for the murder of Fred Cash. The jury found the existence of the following two aggravating factors: Thompson's prior conviction of murder and the victim was a corrections officer engaged in the performance of his duties at the time of his murder. *Thompson v. Commonwealth,* 147 S.W.3d at 45. The trial court formally sentenced Thompson to death on March 12, 1998.

***2** Thompson again appealed his sentence, raising a number of issues including his competency to enter a guilty plea. The Kentucky Supreme Court remanded the case for a retrospective competency hearing and abated determination of the remaining issues on appeal. *Thompson v. Commonwealth,* 56 S.W.3d 406, 407 (Ky.2001). After a hearing, the trial court determined that Thompson had been competent to plead guilty. Thompson filed a subsequent appeal raising twenty-nine claims of error. The Kentucky Supreme Court affirmed Thompson's conviction and sentence in a unanimous opinion rendered on August 26, 2004. *Thompson v. Commonwealth,* 147 S.W.2d at 84. The United States Supreme Court denied *certiorari* on June 27, 2005. *Thompson v. Kentucky,* 545 U.S. 1142, 125 S.Ct. 2966, 162 L.Ed.2d 893 (2005).

Thompson filed a motion to vacate and set aside his sentence under Kentucky Rule of Criminal Procedure (RCr) 11.42 on May 18, 2006. The Lyon Circuit Court denied the motion on May 15, 2009, finding an evidentiary hearing was not warranted. Thompson appealed the denial to the Kentucky Supreme Court, which affirmed on October 21, 2010. *Thompson v. Commonwealth,* No.2009–SC–557–MR, 2010 Ky. Unpub. LEXIS 99, at *11 (Ky. Oct. 21, 2010).

Thompson filed a petition for writ of habeas corpus in the United States District Court for the Western of District of Kentucky on March 1, 2011. He filed an amended petition on July 12, 2011. In his amended petition, he raises the following seven claims for relief: 1) the jury considered extrajudicial evidence; 2) defense counsel was ineffective in not making sure that the jury knew Thompson was already serving out a life sentence; 3) the prosecutor engaged in improper argument; 4) the trial court unfairly limited questioning in *voir dire;* 5) the jury instructions were improper on mitigation; 6) Kentucky's proportionality review process is flawed; and 7) cumulative error.

IV. STANDARD OF REVIEW

A. AEDPA Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, which amended 28 U.S.C. 2254, governs this Court's review of the instant habeas petition. The AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.' " *Woodford v. Garceau,* 538 U.S. 202, 206, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003) (quoting *Williams v. Taylor,* 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). The AEDPA sets forth "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown,* 551 U.S. 1, 10, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) (citing §§ 2254(d)(1)-(2); *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Under the AEDPA,

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> ***3** (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254.

The standard under the AEDPA, on which the petitioner bears the burden of proof, is " 'difficult to meet' [and a] 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt .' " *Cullen v. Pinholster,* —— U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (quoting *Harrington v. Richter,* ——U.S. ——, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011); *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam)). The Supreme Court recently explained that the AEDPA's requirements reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* 131 S.Ct. at 786 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *see also Montgomery v. Bobby,* 654 F.3d 668, 676 (6th Cir.2011) ("Section 2254(d), as amended by AEDPA, is a purposefully demanding standard.") (citing *Harrington v. Richter,* 131 S.Ct. at 786). The Supreme Court cautioned that the AEDPA requires federal habeas courts to review state court decisions with "deference and latitude," and that "[a] state court's determination that a claim lacks merit precludes habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter,* 131 S.Ct. at 786 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are independent tests and must be analyzed separately. *Williams v. Taylor,* 529 U.S. at 412–13; *Hill v. Hofbauer,* 337 F.3d 706, 711 (6th Cir.2003). A state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *William v. Taylor,* 529 U.S. at 405. A state court's ruling violates the "unreasonable application" clause "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. An unreasonable application can also occur where "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Unreasonableness is an objective standard, and the fact that another court has applied the law in the same manner is not dispositive. *Id.* at 409–10. "Unreasonable" is distinct from "incorrect"; even if a state court incorrectly applies a rule of law, that error will not warrant habeas relief unless the application was objectively unreasonable. *Mitchell v. Esparza,* 540 U.S. 12, 18, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).

***4** The "clearly established federal law" clause of § 2254(d)(1) "refers to the holdings, as opposed to the dicta of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. at 412; *Barnes v. Elo,* 231 F.3d 1025, 1028 (6th Cir.2000). "[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court[.] ... It therefore cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews,* —— U.S. ——, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) (per curiam). Reviewing courts may consider lower federal court decisions, however, to the extent that such decisions reflect review and interpretation of " 'relevant Supreme Court case law to determine whether a legal principle or right had been clearly established by the Supreme Court case law.' " *Smith v. Stegall,* 385 F.3d 993, 998 (6th Cir.2004) (quoting *Hill v. Hofbauer,* 337 F.3d at 716).

Even where a state court decision does not specifically cite to relevant federal case law, the deferential AEDPA review standard applies. *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (holding that the state court is not required to cite United States Supreme Court cases, or even be aware of them, to be entitled to AEDPA deference, "so long as neither the reasoning nor the result of the state-court decision contradicts them"). However, the deferential standard of the AEDPA does not apply where the state court has not adjudicated the merits of the particular claim. *Clinkscale v. Carter,* 375 F.3d 430, 436 (6th Cir.2004) (citing *Maples v. Stegall,* 340 F.3d 433, 436 (6th Cir.2003) ("Where as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply.") (citing *Williams v. Coyle,* 260 F.3d 684, 706 (6th Cir.2001)). In that instance, the claim is reviewed *de novo. Id.*

The Supreme Court recently emphasized the limitation on review under § 2254(d)(1) in *Cullen v. Pinholster,* 131 S.Ct. at 1398. In that case, the Supreme Court held that a federal court's review under § 2254(d)(1) is limited to the

record that was before the state court that adjudicated the claim on the merits. *Id.* This is because "review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.' " *Id.* at 1399 (citing *Lockyer v. Andrade,* 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). "To determine whether a particular decision is 'contrary to' then-established law, a federal court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court." *Id.* (citing *Williams v. Taylor,* 529 U.S. at 405, 406).

With regard to the "unreasonable determination of the facts" clause in § 2254(d)(2), a "clear factual error" constitutes an "unreasonable determination of the facts in light of the evidence presented." *Wiggins v. Smith,* 539 U.S. 510, 528–29, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In other words, a state court's determination of facts is unreasonable if its findings conflict with clear and convincing evidence to the contrary. This analysis mirrors the "presumption of correctness" afforded factual determinations made by a state court, which can only be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Mitchell v. Mason,* 325 F.3d 732, 737–38 (6th Cir.2003); *Clark v. O'Dea,* 257 F.3d 498, 506 (6th Cir.2001). This presumption only applies to basic, primary facts, and not to mixed questions of law and fact. *See Mitchell v. Mason,* 325 F.3d at 737–38.

***5** A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b)-(c). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on his or her claims. *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir.1994); *Manning v. Alexander,* 912 F.2d 878, 881 (6th Cir.1990). If the petitioner still has a remedy in the state courts in which the state court would have the opportunity to rule on the federal constitutional claims in petitioner's case, exhaustion has not occurred. *Rust v. Zent,* 17 F.3d at 160. At the current juncture, the Court sees no apparent exhaustion problems with the petition in this case and does not engage in a *sua sponte* analysis of exhaustion where Respondent has not raised it.

Habeas petitioners face an additional hurdle before federal courts may review a question of federal law decided by a state court. As applied in the habeas context, the doctrine of procedural default prevents federal courts from reviewing claims that a state court has declined to address because of a petitioner's noncompliance with a state procedural requirement. In *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court held that, for purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." Additionally, the Supreme Court held in *Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that:

> [If a] state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 749.

B. Constitutionality of AEDPA

Thompson argues that the AEDPA is unconstitutional. In so doing, he relies solely on a dissent from a denial of a rehearing *en banc* by Ninth Circuit Court of Appeals Judge Reinhardt in *Crater v. Galaza,* 508 F.3d 1261 (9th Cir.2007). While making no substantive arguments himself, Thompson quotes from Judge Reinhardt's dissent, which contends that the AEDPA's deference provisions "constitute[ ] a severe congressional incursion on the federal 'judicial power' which Article III of the Constitution vests wholly and exclusively in the federal courts." *Id.* at 1261. Judge Reinhardt asserts that the AEDPA violates the separation-of-powers doctrine in two principal ways: by prohibiting the federal courts from applying the ordinary principles of *stare decisis,* thereby interfering with the federal courts' normal adjudicatory process, and by requiring federal courts to give effect to incorrect state rulings which violate the Constitution. Thompson also maintains that the issue has not yet been decided by the Supreme Court.

***6** As stated in a recent case from the Eastern District of Michigan, *Harrison v. Forest,* No. 10–10723, 2012 U.S. Dist. LEXIS 95820, at *38–39 (E.D.Mich. July 11, 2012), the Fourth and Ninth Circuits both have rejected the argument that the AEDPA violates the separation-ofpowers doctrine:

> In amending section 2254(d)(1), Congress has simply adopted a choice of law rule that prospectively governs classes of habeas cases; it has not subjected final judgments to revision, nor has it dictated the judiciary's interpretation of governing law and mandated a particular result in any pending case. And amended section 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy. Under the AEDPA, we are free, if we choose to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights. Section 2254(d) only places an additional restriction upon the scope of the habeas remedy in certain circumstances. *Green v. French,* 143 F.3d 865, 874–75 (4th Cir.1998) (internal citations [omitted]), *abrogated on other grounds by Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).
>
> Section 2254(d) merely limits the source of clearly established law that the Article III court may consider, and that limitation served to govern prospectively classes of habeas cases rather than offend the court's authority to interpret the governing law and to determine the outcome in any pending case. *Duhaime v. Ducharme,* 200 F.3d 597, 601 (9th Cir.2000); *see also Evans v. Thompson,* 518 F.3d 1, 4–10 (1st Cir.2008).

Harrison v. Forest, 2012 U.S. Dist. LEXIS 95820, at *38–40. While individual judges have found the deference provisions of AEDPA to violate the separation-of-powers doctrine, "no circuit court has taken that position on behalf of the entire circuit." *Bonomelli v. Dinwiddie,* 399 F. App'x 384, 387 (10th Cir.2010).

As to Thompson's argument that the constitutionality of the AEDPA has not yet been decided by the Supreme Court, while it has not been squarely addressed by the Supreme Court, "the constitutional foundations of § 2254(d)(1) are solidified by the Supreme Court's repeated application of the statute." *Bowling v. Parker,* No. 03–28–ART, 2012 U.S. Dist. 113022, at *30 (E.D.Ky. Apr. 2, 2012). "It would be quite curious for the Supreme Court to apply a statute more than five dozen times without any of the Justices so much as casting doubt on its validity." *Id.* at *31.

Accordingly, this Court concludes that § 2254(d) does not violate the doctrine of separation of powers. With the foregoing principles in mind, the Court turns to Thompson's claims for habeas relief.

V. ANALYSIS

A. Claim One—Extrajudicial Evidence in Jury Room

Thompson first asserts that extrajudicial influence upon the jury's sentencing deliberations violated his constitutional rights to an impartial jury and to confront the witnesses against him under the Sixth and Fourteenth Amendments.

1. Background

*7 Thompson contends that a juror was exposed to information concerning another murder trial (the "Singleton case"), which was in the news around the same time as his trial, and that the other case was brought up in jury deliberations. The defendant in that trial was a 70–year–old man who committed a murder in Florida after being released from prison on parole after serving fourteen years. In support of this claim, Thompson relies on an affidavit from the jury foreperson in his sentencing trial, Roger Dowdy, which Thompson put in the trial court record in 2005, seven years after trial. The affidavit states:

> I was the jury foreman in the case of Commonwealth vs. William Eugene Thompson.
>
> In determining Mr. Thompson's sentence, the jury was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence.
>
> During the time of the trial, there was another case in the news that the jury discussed during deliberations. A seventy year old man who committed a murder[2] in California had been released from prison on parole. This man, despite his age, then committed another murder in Florida. The jury was afraid that Mr. Thompson, even as an old man, would be a danger to society if released.

[2] The affidavit is incorrect on this point. The man in the Florida case was Larry Singleton. His previous crime was not murder. Singleton abducted and raped a hitchhiker in California and left her for dead after cutting off both her arms. Singleton was convicted and served fourteen years. After his release, he committed a murder in Florida at the age of seventy. Am. Pet. at 12–13.

An article about that other case is attached to this affidavit. Similar news pieces ran in the media

available in Graves County.
Am. Pet. at 12 (citing post-conviction trial record at 26). Thompson also premised his postconviction RCr 11.42 motion in Lyon Circuit Court on Dowdy's affidavit on this issue. The Lyon Circuit Court denied the motion without an evidentiary hearing. The Kentucky Supreme Court affirmed the denial on this issue on grounds that the argument was not properly brought in the RCr 11.42 motion because "[i]ssues that could have or should have been raised on direct appeal cannot be raised in a motion pursuant to RCr 11.42." *Thompson v. Commonwealth,* 2010 Ky. Unpub. LEXIS 99, at *11 (citing *Leonard v. Commonwealth,* 279 S.W.3d 151, 156 (Ky.2009)).

In this habeas action, Thompson moved for an evidentiary hearing on this claim, as well as his ineffective-assistance-of-counsel claim. The Court granted the motion as to this claim only by Memorandum Opinion and Order (DN 30) entered May 2, 2012. Therein this Court concluded, as Respondent acknowledged on brief, that the instant claim was not procedurally defaulted because it was not a claim that could have or should have been raised on direct appeal, and Kentucky courts do allow such claims to be brought in RCr 11.42 motions. *See Bowling v. Commonwealth,* 168 S.W.3d 2, 9–10 (Ky.2004). Because this claim was not adjudicated on the merits in state court, the deference due under § 2254(d) therefore does not apply. This Court reviews the instant claim *de novo. See Clinkscale v. Carter,* 375 F.3d at 436; *Maples v. Stegall,* 340 F.3d at 436.

In addition, in the Court's May 2, 2012, Memorandum Opinion and Order, the Court concluded that it can consider juror testimony regarding "overt acts" of misconduct but cannot consider evidence of the subjective effect of any extrajudicial matter on a juror. *See United States v. Jones,* 468 F.3d 704, 709 (10th Cir.2006) ("[Q]uestioning of a juror who has been exposed to extraneous information is limited to the circumstances and nature of the improper contact, and questions bearing on the subjective effect of the contact on the juror's decision making are prohibited.") (internal citation and quotation marks omitted).

2. Evidentiary hearing

*8 Turning to the evidentiary hearing which took place on June 14, 2012, Thompson called one witness, foreperson Dowdy. When Thompson's counsel asked whether there was any discussion of another criminal case that was going on at the time of the trial, Dowdy testified:

> It was brought up probably after two or three votes or whatever that about the case in Florida was brought up at that time where a man has been paroled from prison and moved from California to Florida and committed murder again within a short period of time. It wasn't even—I don't know how long. I don't remember the details of it, but I just remember it was brought up and that was it.

Hr'g Tr. at 4. When asked by Thompson's counsel who brought up the Singleton case, Dowdy responded, "I don't—I don't have a clue. Fourteen years, I don't—[.]" *Id.* He stated that it was one of the other jurors. *Id.* When asked if there was a discussion about it, Dowdy testified as follows:

> I don't—I don't have a clue right now. It may have been. It may have been. I just know that—I know that it was probably a 9–to–3 or 8–to–4 ... vote at that time, and there was three holdouts or whatever to the end until the last vote. And it was probably brought up sometime during that period.

Id. at 5. Thompson's counsel asked him if it was brought up among all the jurors, and Dowdy replied, "Well, I—don't know—yeah, all the jurors heard it because we was all in the room." *Id.* About the Singleton case, he stated, "It was a man that was paroled after 20–something years in California and come to—moved to Florida and killed his neighbor after a short period, what I can remember of it." *Id.*

Respondent's counsel asked Dowdy if the Singleton case was the only topic that was discussed by the jury, and Dowdy stated, "Oh, we discussed a lot. We brought out the evidence several times. It wasn't just—it wasn't just this piece here. I mean, we brought out all—we had the box of evidence in there." *Id.* at 8. Further, he stated, "We sat in there for 10, 12 hours. I don't—or better." *Id.* at 9.

When Thompson's counsel asked Dowdy again about who brought up the story, he testified that he did not bring up the Singleton case himself. *Id.* at 9. When asked again if it was one of the other jurors who brought up the subject, he stated:

> Yes, I would think it was. I don't—like I said, I don't know whether it was one of them women

> that was having trouble making up their minds or—some of them wouldn't vote. I mean some of them said they didn't know for a long time and then—but I don't have a clue whether it was one of them or one of the other jurors.

Id. at 9–10.

The Court questioned Dowdy as follows:

> The Court: Were there any newspaper articles or anything like that brought into the room?
>
> Dowdy: I don't think there was in there, no. There wasn't—
>
> The Court: Just someone mentioned—
>
> Dowdy: Just somebody mentioned that it was—because it was prominent probably at that time. I don't know. It may have been. It was probably prominent at that time.
>
> ***9** The Court: And only one juror brought it up?
>
> Dowdy: I guess they—I don't know whether one of them brought it up ...
>
> The Court: You don't remember. You don't remember what was said.
>
> Dowdy:—remember for sure whether it was said that way or—
>
> The Court: Did more than one juror bring up the article that they'd read?
>
> Dowdy: No.

Id. at 10–11.

Thompson's counsel asked whether there was a discussion, and Dowdy testified, "There may have been a discussion about it at that time. Like I said, we ate two meals in there, and we was there for 12 hours locked in there." *Id.* at 11. Dowdy also stated, "It may—it should have—it probably was at one end of the table or another. At the other end of the table, there was several down there talking about it. Or may have been over a meal. I don't—right now, I don't know when. It may have been while we was eating." *Id.* at 13.

3. Analysis

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to a trial by an impartial jury and a verdict based solely on the evidence. *Morgan v. Illinois,* 504 U.S. 719, 726–27, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). A criminal defendant must be "afforded the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial." *Doan v. Brigano,* 237 F.3d 722, 733 n. 7 (6th Cir.2001) (citing *Parker v. Gladden,* 385 U.S. 363, 364–65, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966); *Turner v. Louisiana,* 379 U.S. 466, 472–73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)), *abrogated on other grounds by Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). A juror must be "indifferent" and "his verdict must be based upon the evidence developed at trial." *Irvin v. Dowd,* 366 U.S. at 723. "A defendant's Sixth Amendment rights are put in jeopardy when facts appear before a jury that were not developed at trial. Such extraneous influence may threaten the guarantee of an impartial jury, and may trammel a defendant's right to confrontation and cross-examination." *Gall v. Parker,* 231 F.3d 265, 334 (6th Cir.2000) (internal citations omitted), *overruled on other grounds by Bowling v. Parker,* 344 F.3d 487, 501 n. 3 (6th Cir.2003).

An "extraneous influence on a juror" is " 'one derived from specific knowledge about or a relationship with either the parties or their witnesses.' " *Garcia v. Andrews,* 488 F.3d 370, 376 (6th Cir.2007) (quoting *United States v. Herndon,* 156 F.3d 629, 635 (6th Cir.1998)). Examples of extraneous influence include " 'prior business dealings with the defendant, applying to work for the local district attorney, conducting an out of court experiment, and discussing the trial with an employee.' " *Id.* (quoting *United States v. Owens,* 426 F.3d 800, 805 (6th Cir.2005)). To prevail on this claim, the petitioner must show an extraneous influence that tainted the jury deliberations "with information not subject to a trial's procedural safeguards." *United States v. Herndon,* 156 F.3d at 636. In the Sixth Circuit, the petitioner "bears the burden of proving juror bias." *United States v. Corrado,* 277 F.3d 528 (6th Cir.2000) (citing *United States v. Zelinka,* 862 F.2d 92, 96 (6th Cir.1988)). Likewise, in Kentucky courts, juror bias "must be demonstrated by the moving party." *Bowling v. Commonwealth,* 168 S.W.3d at 10.

***10** Jurors are presumed to be impartial. *See Irvin v. Dowd,* 366 U.S. at 723. There is also a presumption that jurors follow instructions from the trial court, such as the instruction to decide the case impartially based on the

evidence. *See, e.g., United States v. Rodgers,* 85 F. App'x 483, 486 (6th Cir.2004). "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.... Due process means a jury capable and willing to decide the case solely on the evidence before it...." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Moreover, "to allow verdicts to be attacked merely for casual jury-room references on the basis of matters not in evidence would add unduly to the already fragile state of criminal convictions." *United States ex rel. Owen v. McMann,* 435 F.2d 813, 817 (2d Cir.1970) (internal citation omitted). Thus, where no extraneous influence is present, courts will not intrude into matters internal to jury deliberations. Substantial policy considerations support this rule.

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120–21, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (internal citations omitted).

The Court notes this is not a case where a juror was exposed to media coverage of the criminal case being tried, which, as both parties point out on brief, is the common situation giving rise to extrajudicial-influence cases. *See, e.g., Mattox v. United States,* 146 U.S. 140, 150–51, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *Zuern v. Tate,* 336 F.3d 478, 486 (6th Cir.2003); *Goins v. McKeen,* 605 F.2d 947, 953 (6th Cir.1979). Nor does it involve exposure to media coverage about the defendant's past criminal history. *See, e.g., Marshall v. United States,* 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

The leading case in the area of extrajudicial influence on a jury is *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). In that case, during trial someone communicated with a juror who later became the jury foreman that the juror could profit by bringing in a verdict for the defendant. *Id.* at 228. The juror informed the judge, who advised the prosecutor of the contact but not the defendant's counsel. *Id.* When the defendant learned after trial of the contact, the trial court denied his motion for a new trial. *Id.* at 229. The Supreme Court reversed and held:

> ***11** In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reason, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Id. The Court set forth a procedure to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial ... with all interested parties permitted to participate." *Id.* at 230.

However, Thompson's case is distinguishable from *Remmer* in a significant respect. Thompson does not allege that any juror was exposed to a private communication, contact, or attempt to tamper with the jury, directly or indirectly. The alleged exposure to outside information was a public communication, a published media account of the Singleton case. *See Green v. Andrews,* No. 1:07CV2093, 2008 U.S. Dist. LEXIS 113557, at *22, 2008 WL 7811572 (N.D.Ohio May 30, 2008). Moreover, the discussion about the Singleton case came not from an outside party but occurred among the jurors themselves. *See Garcia v. Andrews,* 488 F.3d at 376.

To determine whether the extrajudicial influence alleged here warrants habeas relief, the Court turns to Dowdy's testimony at the evidentiary hearing. While Dowdy's memory of the deliberations was considerably faded, he testified that the Singleton case was "brought up" during the deliberations, which he stated lasted ten to twelve hours. He stated, "Just someone mentioned that it was—because it was prominent probably at that time. I don't know. It may have been. It was probably prominent at that time." He could not remember who brought it up,

when it was brought up, or what was said. He did not even testify how the unknown juror learned of the Singleton case. Dowdy's affidavit attaches an article about the case from the *St. Petersburg Times* newspaper and states, "[s]imilar news pieces ran in the media available in Graves County." However, Dowdy did not testify whether the unknown juror even read an article about the case or learned about it through other means. He testified that there was no newspaper article brought into the jury room but that one juror brought up the article. When asked whether other matters were discussed as well, Dowdy stated, "Oh, we discussed a lot. We brought out the evidence several times. It wasn't just—it wasn't just this piece here. I mean, we brought out all—we had the box of evidence in there.... We sat in there for 10, 12 hours."

Thompson asserts that the Singleton case was a topic of news at the time of the trial. However, a juror's reading the news of the day does not necessarily give rise to extraneous information. *United States v. Caro–Quintero,* 769 F.Supp. 1564, 1575 (C.D.Cal.1991). "The mere fact that local newspapers were in the jury room does not amount to extraneous influences on the jury. It cannot even be characterized as extrinsic evidence." *Id.* at 1575 (citing *United States v. Brewer,* 783 F.2d 841 (9th Cir.1986)).

***12** Moreover, based on Dowdy's testimony, the jury did not derive "specific knowledge about or a relationship with either the parties or their witnesses" from awareness or discussion of the Singleton case. *Garcia v. Andrews,* 488 F.3d at 376 (quoting *United States v. Herndon,* 155 F.3d at 635). Nor did Dowdy's testimony indicate that any juror had any personal knowledge of the parties, the witnesses, or the facts of the case. *See Hard v. Burlington N. R.R. Co.,* 870 F.2d 1454, 1462 (9th Cir.1989) ("It is expected that jurors will bring their life experiences to bear on the facts of a case.... While it is clearly improper for jurors to decide a case based on their personal knowledge of facts specific to the litigation, a basic understanding of x-ray interpretation falls outside the realm of impermissible influence.") (internal citation omitted). The Singleton case was not related to Thompson's trial. It did not involve any of the same parties, same witnesses, same court, or same facts in issue. Moreover, the Singleton case was similar to Thompson's trial only in that it involved the crime of murder. However, the facts and circumstances involved in the Singleton case, where a 70–year–old man committed murder shortly after being paroled, were not similar to the facts and circumstances in Thompson's case.

Furthermore, the Singleton case did not bring to bear or insert any "extra facts into the jury room" concerning Thompson's trial or penalty. *Doan v. Brigano,* 237 F.3d at 734. Taking Thompson's argument to its logical extension, he would suggest that the juror, in bringing up the Singleton case during deliberations, became a witness subject to cross-examination. However, jurors, "whose duty it is to consider and discuss the factual material properly before them," do not "become 'unsworn witnesses' within the scope of the confrontation clause simply because they have considered any factual matters going beyond those of record." *United States ex rel. Owen v. McMann,* 435 F.2d at 817. "[J]urors can take into account their own wisdom, experience, and common sense...." *Doan v. Brigano,* 237 F.3d at 734. A juror's discussion about a murder that occurred in another state is part of the personal experience every juror brings with him or her into the jury room. The "mere fact of infiltration of some molecules of extra-record matter" does not warrant habeas relief. *United States ex. rel. Owen v. McMann,* 435 F.2d at 818. The fact that a juror may have brought up the Singleton case as an example of someone committing murder while on parole is not the type of extraneous judicial information that should be subject to the "judicial sieve." *Doan v. Brigano,* 237 F.3d at 734. A comment about the possibility of Thompson committing a murder as a relatively old man if he were paroled is part of a "full and frank discussion in the jury room[.]" *Tanner v. United States,* 483 U.S. at 120 (internal citation omitted).

***13** Thompson primarily cites three cases which he contends are similar to the facts here and support his claim. However, each of these cases can be distinguished. In *Nevers v. Killinger,* 169 F.3d 352 (6th Cir.1999), a criminal trial of white police officers for the beating death of an African American man, the extraneous influences alleged by the defendants were (1) the jury's viewing of the "racially provocative" movie *Malcolm X,* which was provided to the jury by the court for viewing in the jury room as entertainment during a break; (2) a juror learning from news reports about the city's preparing for a possible riot in the event of an acquittal; and (3) jurors' exposure to and consideration of information that the defendants themselves were members of an undercover unit called STRESS with a reputation of harassing African American youths. *Id.* at 356, 369. The Sixth Circuit granted habeas relief, finding that the "issue at the heart of Nevers's prosecution was not what Nevers did, but why he did it." *Id.* at 372. The court held that "[t]he extraneous information that the jury was exposed to during the course of the trial, and particularly the information regarding STRESS, unquestionably had the potential for influencing how the jury viewed Nevers's testimony about his motivation for beating Green...." *Id.*

The Sixth Circuit did not separately discuss the alleged exposure to the movie *Malcolm X* or to news reports of preparation for a possible riot. Therefore, the Sixth Circuit's decision in *Nevers* turned on the jurors' consideration of information about the defendants themselves and its possible influence on the jury concerning one of the defendant's motive for the crime.

The extraneous influence alleged by Thompson, a juror's bringing up a separate crime that occurred in another state, is distinguishable from *Nevers*. The alleged extraneous influence did not concern Thompson himself or implicate his motive for the crime.

The other cases relied on by Thompson can be distinguished because each involved the media item itself being brought into the jury room, rather than a discussion of the issue among jurors. Thompson relies on *Waldorf v. Shuta,* 3 F.3d 705 (3d Cir.1993). However, in that case the Third Circuit found that the article "was physically present in the jury room just prior to the commencement of jury deliberations" and that jurors were "reading, commenting and circulating the article." *Id.* at 711. Thompson's reliance on *Wiley v. State,* 169 Tex.Crim. 256, 332 S.W.2d 725 (Tx.Crim.App.1960), is also unpersuasive because the Texas Court of Criminal Appeals found that "one of the jurors handed a newspaper to the foreman and asked him to read aloud ... [a] news story[.]" *Id.* at 726.

The Court finds that Thompson has failed to meet his burden on this claim of error. A discussion of a news story about an unrelated crime does not constitute extrajudicial evidence which would set aside a verdict. Accordingly, the Court concludes that there was no extraneous influence on the jury which warrants habeas relief. The Court denies relief on this claim of error.

B. Claim Two—Ineffective Assistance of Counsel

***14** Thompson next contends that his trial counsel was ineffective when, in closing argument of the penalty-phase trial, he referred to the possibility that Thompson would be eligible for parole in twenty-five years when in fact the Kentucky Parole Board had already decided that Thompson would serve out his previous life sentence. During closing arguments, Thompson's counsel stated as follows:

> We have a case now where it is not necessary to take a life. He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him? Because he doesn't even think about the P word—the Parole Board—until he is about seventy-five years of age. That is twenty-five New Years. Twenty-five Thanksgivings. Twenty-five Christmases. I'd like to think [that] I will be retired by then, we may have a colony on Mars by then. Twenty-five years.

Trial Tr. at 1281.

Thompson first raised this ineffective-assistance-of-counsel claim in his RCr 11.42 motion before the trial court. The Lyon Circuit Court denied the ineffective-assistance claim without an evidentiary hearing. The Kentucky Supreme Court affirmed on appeal. *Thompson v. Commonwealth,* 2010 Ky. Unpub. LEXIS 99, at *11. With regard to this claim, the Kentucky Supreme Court stated as follows:

> In an RCr 11.42 proceeding, the movant bears the burden of establishing that he was deprived of effective assistance of counsel. *Commonwealth v. Bussell,* 226 S.W.3d 96, 103 (Ky.2007). To prevail on a claim of ineffective assistance of counsel, the movant must first show that counsel's performance was deficient, meaning that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the movant must demonstrate that counsel's deficiency prejudiced the defendant. *Id.* This requires a showing that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Id.* at 694. We have also stated this standard as a determination of whether, absent counsel's errors, the jury would have had reasonable doubt with respect to guilt. *Brown v. Commonwealth,* 253 S.W.3d 490, 499 (Ky.2008).
>
> "In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky.2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky.2009). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 689. In considering an RCr 11.42 motion based on ineffective assistance of counsel claims, the trial court

must evaluate counsel's performance in light of the totality of the circumstances and the trial as a whole. *Strickland,* 466 U.S. at 695. In an appeal from a decision on an RCr 11.42 claim, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth,* 721 S.W.2d 694, 698 (Ky.1986).

***15** The comment in question ... was made in the context of arguing against the imposition of the death penalty. It was clearly made more to emphasize the probability of Thompson never getting out of prison than the possibility that he could someday be released from prison. Nevertheless, in reviewing the record, we can see there were strategic reasons justifying defense counsel's reference to the possibility of Thompson being paroled after twenty-five years. *See Hodge v. Commonwealth,* 116 S.W.3d 463, 473 (Ky.2003), *overruled on other grounds by Leonard,* 279 S.W.3d 151 (Tactical decisions "will not be second guessed in an RCr 11.42 proceeding.").

Had defense counsel brought up the serve-out on Thompson's prior life sentence, that would have likely drawn more attention to Thompson's prior conviction for the 1972 murder for hire, and perhaps prompted the Commonwealth to place more emphasis on the prior murder conviction in arguing its case. Further, the only defense offered by Thompson was that the murder of Cash was a spontaneous act, and not a calculated, premeditated act. In support of this defense, defense counsel argued that Thompson was getting close to possibly being paroled on his prior conviction and therefore had nothing to gain from planning and carrying out the murder of Cash. Presenting evidence of the serve-out on Thompson's prior conviction, although it was not ordered until 1993, would have contradicted this defense or confused the issue for the jury.

Also, at the time Thompson received the serve-out on his prior murder conviction, the Parole Board could have subsequently revisited the serve-out decision. 501 KAR 1:030, § 4(1)(d) (1993). Hence, there was still a possibility that Thompson could be paroled on the prior conviction.

Defense counsel argued strongly and passionately to the jury to consider the mitigating factors and not to impose the death penalty in his closing argument in this case. During his closing argument he stated,

> The Commonwealth knows it is not necessary to kill because Eugene Thompson will die in prison.... He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him?

In his opening statement, he stated unequivocally, "Eugene Thompson will die in prison and over the next several days, you will decide and the weight is on you to decide whether God will take him or the State will take him." As noted earlier, the responses elicited by defense counsel in his questioning of Thompson clarified that he had received a serve-out on his prior life sentence in 1993 and that he would "die in prison."

As for the affidavit of the juror claiming that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence" and "did not necessarily want to sentence Mr. Thompson to death," RCr 10.04 provides that a "juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, the self-serving affidavit produced over seven years after the trial cannot be used to establish Thompson's claim of ineffective assistance of counsel. *See Gall v. Commonwealth,* 702 S.W.2d 37, 44 (Ky.1985) (rejecting juror's testimony as basis for defendant's claim that jurors improperly considered parole).

***16** Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. *Strickland,* 466 U.S. at 689; *see also Haight v. Commonwealth,* 41 S.W.3d at 442. From our review of the totality of the circumstances in this case, we cannot say that defense counsel's single remark regarding the possibility of Thompson being paroled constituted ineffective assistance of counsel in this case.

Thompson v. Commonwealth, 2010 Ky. Unpub. LEXIS 99, at *4–10.

The standard governing an ineffective-assistance-of-counsel claim is stated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As the Supreme Court stated in that case, the Sixth Amendment guarantees a criminal defendant the assistance of an attorney whose performance ensures a fair trial and a reliable result. *Id.* at 685–86. To prevail on an ineffective-assistance claim, a convicted defendant must prove that counsel's performance was deficient and that he suffered prejudice as a result. *Id.* at 687; *see also Foust v. Houk,* 655 F.3d 524, 533 (6th Cir.2011). To demonstrate deficient performance, the defendant must prove that "counsel's representation fell below an objective standard of

reasonableness." *Id.* at 688. The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that "under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

To demonstrate prejudice, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In other words, he must show a " 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster,* 131 S.Ct. at 1403 (quoting *Harrington v. Richter,* 131 S.Ct. at 791). The defendant must show that the errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* ——U.S. ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

Because Thompson's ineffective-assistance claim was adjudicated on the merits by the Kentucky Supreme Court, § 2254(d) governs the standard of review. Thompson can only succeed on this claim by showing that the Kentucky Supreme Court unreasonably applied *Strickland* to his claim. When applying *Strickland* under § 2254(d), this Court's review of the performance prong is " 'doubly deferential.' " *Cullen v. Pinholster,* 131 S.Ct. at 1403 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). The Court must "take a 'highly deferential' look at counsel's performance," *id.* (citing *Strickland,* 466 U.S. at 689), "through the 'deferential lens of § 2254(d).' " *Id.* (citing *Knowles v. Mirzayance,* 556 U.S. at 123 n. 2). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter,* 131 S.Ct. at 788.

1. Performance

***17** Thompson argues that trial counsel's "presentation of misinformation regarding [his] parole eligibility" was deficient performance under the first prong of *Strickland.* Am. Pet. at 20. Under *Strickland,*

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac,* 456 U.S. 107, 133–134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana,* [350 U.S.] at 101. There are countless ways to provide effective assistance in any given case.

Strickland, 466 U.S. at 689. To establish that trial counsel's performance was deficient, Thompson must establish that counsel's representation was objectively unreasonable and overcome the "strong presumption" that his trial counsel made this decision "in the exercise of reasonable professional judgment." *Id.* at 690. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (citing *Strickland,* 466 U.S. at 690).

Respondent contends that the Court does not have to presume what trial counsel's strategy was. He points to Thompson's own statements in the state court proceedings that it was defense counsel's strategy not to argue the serve-out order in closing argument. Respondent points to a document Thompson filed in the RCr 11.42 proceeding, titled "Amendment Pursuant to CR 15.01," wherein Thompson stated:

> Since the original filing, Movant's counsel interviewed Movant's [defense] counsel, the Honorable Michael Williams. Regarding this claim, Williams stated that the reason he did not pursue this line of mitigation was that the Parole Board's serve-out decision was one that could be revisited, which, at the time of trial, was true. Hence, Williams felt he could not tenably argue that Movant truly had a serve out.

Answer at 20 (quoting trial court record at 55.) Further, on appeal to the Kentucky Supreme Court, Thompson stated that "trial counsel's stated reason he did not pursue this line of mitigation was that the Parole Board's serve-out decision could be revisited." Answer at 20 (quoting Appellant's Ky. Sup.Ct. Br., 09–SC–557, at 9).

***18** At trial, Thompson testified on his own behalf. On direct examination by defense counsel, Thompson testified as follows:

> Counsel: Do you ... do you understand that you are going to be staying in prison the rest of your life?
>
> Thompson: I will die in prison. I have been in now for almost twenty-seven years. I have no chance of ever getting out. I finally went up for parole on the life sentence that I was originally doing in November of 1993 and at that time, the Parole Board give me a serve-out on a life sentence which means that I will die in prison.

Trial Tr. at 1107 (ellipses in original). There was no follow-up question to this response, and no testimony or documentary evidence from the Kentucky Department of Corrections evidencing the serve-out order was introduced into evidence.[3] During closing argument, Thompson's trial counsel stated that, "The Commonwealth knows it is not necessary to kill because Eugene Thompson will die in prison. Did you ever hear anything different?" Trial Tr. at 1260–61. Immediately preceding the statements which Thompson disputes, trial counsel also stated, "We have a case now where it is not necessary to take a life. [Thompson] is going to die in prison in maximum security...." *Id.* at 1281. He also stated that Thompson would die in prison in his opening argument. *Id.* at 801. Respondent contends that defense counsel's decision not to call a member of the Parole Board or introduce documentary evidence of the serve-out order further evinces that it was trial counsel's strategy not to argue Thompson's serve-out in closing argument, rather than neglect or error. Moreover, Respondent contends that defense counsel's reference to Thompson not coming before the parole board for twenty-five years, when read in the context of the entire closing argument, was made in reference to the second most severe penalty the jury could impose, and that which defense counsel had urged at trial, life without the possibility of parole for twenty-five years.

[3] Thompson states in his traverse brief that he does not contend that his counsel was ineffective in not producing evidence of the serve-out. He states that he only argues that his statement during closing argument constituted ineffective assistance.

Thompson does not dispute that this was trial counsel's stated strategy. However, he claims that trial counsel's stated strategy "smacks of *post hoc* rationalization." Traverse Br. at 8 (citing *Wiggins v. Smith,* 539 U.S. 510, 526–27, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). However, the *post hoc* rationalization which the Supreme Court criticized in *Wiggins* was rationalization by the state court and prosecutors concerning trial counsel's strategy "that contradicts the available evidence of counsel's actions." *Harrington v. Richter,* 131 S.Ct. at 790 (citing *Wiggins,* 539 U.S. at 526–27). There is no such evidence in the record that contradicts counsel's own statements concerning his trial strategy. Moreover, Thompson does not dispute that the serve-out was revocable by the Parole Board at the time.

Based on a review of the record and there being no evidence to the contrary, trial counsel made a strategic decision not to emphasize the serve-out in closing argument. "[S]trategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690. Moreover, counsel must have "wide latitude ... in making tactical decisions." *Cullen v. Pinholster,* 131 S.Ct. at 1406 (citing *Strickland,* 466 U.S. at 689). It was not objectively unreasonable for trial counsel to avoid emphasizing the serve-out in closing argument, which would have allowed the prosecution to argue that the serve-out could be revisited by the Parole Board. Thompson does not dispute that at the time of his trial the Parole Board's serve-out order was revocable. To state that it was not would have subjected Thompson to rebuttal by the prosecution. While the Parole Board's reversal of its serve-out order may have been unlikely, opening the door to an argument that the Parole Board had the authority to revisit its serve-out order could have placed doubt in the jury's mind about the second harshest sentence it could have imposed, life without the possibility of parole for twenty-five years. *See Harrington v. Richter,* 131 S.Ct. at 790 ("[M]aking a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition...."). "So long as the jury receives accurate information, it may consider the possibility, speculative though it may be, that future decisions of state executive officials could lead to the defendant's early release." *Bedford v. Collins,* 567 F.3d 225, 235 (6th Cir .2009); *see also California v. Ramos,* 463 U.S. 992, 1001–02, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (holding that the Eighth and Fourteenth Amendments do not prohibit a jury instruction permitting a capital sentencing jury to consider the governor's power

to commute a life sentence without possibility of parole). The fact that counsel's decision ultimately proved unsuccessful does not mean that his representation was ineffective. *See Moss v. Hofbauer,* 286 F.3d 851, 859 (6th Cir.2002) (finding that an ineffective-assistance-of-counsel claim "cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken").

***19** Moreover, it was not unreasonable for the Kentucky Supreme Court to conclude that arguing the serve-out order could have focused more of the jury's attention on Thompson's prior murder-for-hire conviction or contradicted or confused Thompson's defense concerning lack of premeditation. While Thompson contends that this is speculation by the Kentucky Supreme Court, the state court's discussion of other tactical reasons for not arguing the serve-out is not unreasonable. As stated by the Supreme Court in *Cullen v. Pinholster,* the state court "was required not simply to give [the] attorneys the benefit of the doubt ... but to affirmatively entertain the range of possible reasons [trial] counsel may have had for proceeding as they did." *Cullen v. Pinholster,* 131 S.Ct. at 1407 (internal citation and quotation marks omitted).

In this case, by Thompson's own statement, counsel made a strategic decision not to argue the serve-out in closing argument. Thompson cannot overcome the strong presumption that his trial counsel rendered adequate assistance. Nor has Thompson shown that the Kentucky Supreme Court was objectively unreasonable in its application of *Strickland* in finding that counsel's performance was not deficient.

2. Prejudice

Even if Thompson could prove deficient performance, he must still demonstrate that the deficient performance prejudiced him, which requires him to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Kentucky Supreme Court ruled that Thompson could not show prejudice:

> Even if defense counsel's performance was deemed deficient for mentioning the possibility of Thompson being released on parole, given that Thompson killed Cash and escaped while he was incarcerated, it is unlikely that additional evidence of Thompson's serve-out would have held much sway in trying to convince the jury that Thompson being in prison for the rest of his life would be adequate to protect the public from Thompson. The Commonwealth would most assuredly have argued that being incarcerated did not stop Thompson from killing an innocent man in 1986.
>
> Further, the Commonwealth presented strong evidence of aggravating factors in this case, and the jury specifically found the following aggravating factors: the prior conviction of murder, the murder was committed while Thompson was incarcerated, and the victim was a corrections officer engaged in the performance of his duties at the time of his murder. Thus, we believe that the jury would still have recommended the death penalty in this case absent his counsel's mention of the possibility of parole.

Thompson v. Commonwealth, 2010 Ky. Unpub. LEXIS 99, at *10–11.

Thompson contends that in not arguing the serve-out order in closing argument counsel failed to present mitigation argument adequately. He further argues that the Kentucky Supreme Court only considered aggravating factors in its prejudice analysis and failed to consider the mitigating factors.

***20** In order to establish prejudice, " 'the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing.' " *Tibbetts v. Bradshaw,* 633 F.3d 436, 444 (6th Cir .2011) (quoting *Hill v. Mitchell,* 400 F.3d 308, 319 (6th Cir.2005)); *see also Broom v. Mitchell,* 441 F.3d 392, 410 (6th Cir.2006) (holding that "the failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation"). Thompson's counsel stated in closing argument that Thompson would die in prison, he stated in opening argument that Thompson would die in prison, and he elicited testimony from Thompson that the Parole Board had ordered him to serve out his life sentence on his prior conviction. The Court finds that emphasizing the serve-out during the closing does not differ substantially from the evidence and argument presented to the jury.

Moreover, the Sixth Circuit distinguishes cases where counsel has totally failed to conduct an investigation or present evidence of mitigation and those where the petitioner is dissatisfied with counsel's presentation of mitigation:

> [T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have *totally* failed

> to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by *Strickland* will be hard to overcome.

Beuke v. Houk, 537 F.3d 618, 643 (6th Cir.2008) (quoting *Campbell v. Coyle,* 260 F.3d 531, 552 (6th Cir.2001)); *see also Moore v. Parker,* 425 F.3d 250, 255 (6th Cir.2005); *cf. Wiggins v. Smith,* 539 U.S. at 534–35 (due to minimal investigation, counsel presented no evidence of defendant's family history, which included severe childhood abuse); *Hamblin v. Mitchell,* 354 F.3d 482 (6th Cir.2003) (counsel failed to seek mitigating evidence and thus did not learn of defendant's unpleasant childhood); *Frazier v. Huffman,* 343 F.3d 780 (6th Cir.2003) (counsel presented no mitigating evidence except defendant's one-sentence statement).

Here, even though the Kentucky Supreme Court did not discuss mitigating factors in its prejudice analysis, Thompson's trial counsel did not fail to produce evidence of mitigation. Trial counsel presented compelling mitigation evidence, including extensive evidence of Thompson's troubled childhood, lack of a male role model, high temper and impulsiveness, and struggles in school, as well as expert testimony from Dr. Candace Walker, a psychiatrist from the Kentucky Correctional Psychiatric Center, that Thompson was diagnosed with anti-social personality traits due to abnormal brain functioning. However, there was also compelling evidence of aggravating factors. The jury specifically found two aggravating factors-Thompson's prior conviction of murder and the victim was a corrections officer engaged in the performance of his duties-which were established from Thompson's guilty plea. There was also evidence of the brutality of the murder and evidence that the murder was premeditated and intentional.

***21** This Court does not find that the Kentucky Supreme Court's determination that Thompson did not suffer prejudice was "objectively unreasonably" to warrant habeas relief under the deferential standard of 28 U.S.C. § 2254. For these reasons, Thompson's ineffective-assistance claim fails, and the Court will deny habeas relief as to this claim.

C. Claim Three—Improper Prosecutorial Argument

Thompson next contends that his trial was tainted by improper prosecutorial argument during closing arguments in his penalty-phase trial. He argues two claims of improper prosecutorial argument in his habeas petition. He states that on direct appeal he argued other claims of improper argument, which he does not argue in this action. However, Thompson states, "The others, while not necessarily improper in their own right, help to show why in totality the trial was unfair due to the prosecutor's statements." Am. Pet. at 30.

Respondent argues that Thompson's prosecutorial misconduct claim "was not preserved for review" in his direct appeal and was not raised in his RCr 11.42 motion as a claim of ineffective assistance of counsel for failing to object to the prosecutor's challenged statements. Answer at 32. However, Respondent also states that "it appears no 'claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retro-activity, or a statute of limitations.' " Answer at 2 (quoting Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts). Thompson did in fact raise both claims of improper prosecutorial argument in his direct appeal. Appellant's Ky. Sup.Ct. Br., 98–SC–27, at 84, 87. These claims were adjudicated by the Kentucky Supreme Court on the merits, and the deference requirements of 28 U.S.C. § 2254(d) apply.

Thompson states that the prosecutor's improper arguments were as follows:

> But there's also a burden that is being borne today and that is as a Commonwealth Attorney representing a person who is not here today—an empty chair—Charles Fred Cash taken from us by this man—this killer. This is a burden that is very very heavy. As a representative of the Commonwealth to speak on behalf of one that has been murdered. I am the last one on this earth to speak on behalf of Mr. Cash.

Am. Pet. at 32 (quoting Trial Tr. at 1254). Thompson argues that these comments improperly created the impression that the prosecution was acting on behalf of the victim, rather than seeking justice on behalf of the Commonwealth. With regard to this claim of error, the Kentucky Supreme Court stated as follows:

> Of course, a Commonwealth's Attorney is just that—a representative of the

> Commonwealth, not the victim, and it is improper for the Commonwealth's Attorney to suggest otherwise. Nonetheless, while perhaps approaching the line of impropriety, we conclude that these statements fall within the wide latitude afforded attorneys in presenting closing arguments.

***22** *Thompson v. Commonwealth,* 147 S.W.2d at 46. Thompson also contends that the following argument was improper:

> Like I have said before, the Commonwealth has done the best it can. It has done all it can ... I have tried to introduce the evidence as best as I could and this is something that I did not take lightly and I have never done this before—standing before a group of jurors asking that the ultimate penalty be imposed.

Am. Pet. at 32 (ellipses in original) (quoting Trial Tr. at 1256–57). Thompson contends that this argument suggested to the jury that the prosecutor and law enforcement officers involved in preparing the prosecutor's case had some expertise that the jurors did not have and that it had the effect of infringing upon the jury's decision-making authority. Thompson argues that by telling the jury that this was the only time he sought the death penalty, the prosecutor suggested that this was the worst case he had ever prosecuted. As to this claim of error, the Kentucky Supreme Court stated, "Nor do we agree with Appellant's assertion that the jury's decision-making authority was infringed upon. We find no error." *Thompson v. Commonwealth,* 147 S.W.2d at 47.

This Court must review Thompson's prosecutorial misconduct claims under the standard set forth in *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In evaluating a claim of prosecutorial misconduct, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Id.* at 181 (internal citation and quotation marks omitted). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Therefore, prosecutorial misconduct will form the basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly,* 416 U.S. at 643–45. The standard under *Darden* is "a very general one, leaving courts 'more leeway ... in reaching outcomes in case-by-case determinations[.]' " *Parker v. Matthews,* —— U.S. ——, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) (ellipses in original) (quoting *Yarborough v. Alvarado,* 541 U.S. at 664); *see also Harrington v. Richter,* 131 S.Ct. at 786 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.") (quoting *Yarborough v. Alvarado,* 541 U.S. at 664). Moreover, "the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power[,]" as would apply to a case on direct review. *Darden,* 477 U.S. at 181 (quoting *Donnelly,* 416 U.S. at 642).

With regard to the prosecutor's statements in closing argument, the Court agrees with the Kentucky Supreme Court that the first disputed statement was likely improper. *See Frazier v. Huffman,* 343 F.3d at 793 (holding that the "placing of an empty chair before the jury during the prosecutor's closing argument to 'represent' the victim was 'improper"). The second disputed statement was also likely improper. A prosecutor may not express a personal opinion concerning the guilt of the defendant or the credibility of witnesses "because such personal assurances of guilt or vouching for the veracity of witnesses by the state's representative exceeds the legitimate advocate's role by improperly inviting the jurors to convict the defendant on a basis other than a neutral independent assessment of the record proof." *Caldwell v. Russell,* 181 F.3d 731, 737 (6th Cir.1999) (internal citations omitted).

***23** However, regardless of whether these statements by the prosecutor were improper, in order to warrant habeas relief, the statements must have so infected the trial with unfairness as to make Thompson's conviction a denial of due process. *Darden,* 477 U.S. at 181. To determine whether the statements warrant habeas relief, the prosecutor's comments must be viewed in the context of the entire proceeding, and inappropriate prosecutorial comments, standing alone, will not justify reversal of a criminal conviction obtained in an otherwise fair proceeding. *United States v. Young,* 470 U.S. 1, 11–12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Bond,* 22 F.3d 662, 667 (6th Cir.1994).

Reading the prosecutor's closing argument in its entirety, the prosecutor's argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of

the accused such as the right to counsel or the right to remain silent." *Darden,* 477 U.S. at 182 (internal citation omitted). These statements were not " 'so pronounced and persistent that [they] permeate [d] the entire atmosphere of the trial or so gross as probably to prejudice the defendant.' " *Bates v. Bell,* 402 F.3d 635, 641 (6th Cir.2005) (quoting *Pritchett v. Pitcher,* 117 F.3d 959, 964) (6th Cir.1997)); *see also Donnelly,* 416 U.S. at 639. The prosecutor's closing argument included a long recitation of the evidence showing premeditation and a discussion of the aggravating factors presented. Each of the statements was brief and isolated. As such, "they do not appear to have been the product of a deliberate attempt to mislead the jury." *United States v. Tosh,* 330 F.3d 836, 842 (6th Cir.2003). Moreover, in concluding his argument, the prosecutor emphasized that the jury must decide the sentence based upon the evidence. He stated, "I'm going to turn it into your hands but I ask that when you go back there, you look at those exhibits and you consider all of the evidence and you write those three aggravators down on Verdict From Number Four...." Trial Tr. at 1258.

Thompson identifies other statements which he contends were not improper in their own right but when taken together with other statements show that the trial was unfair. However, having reviewed the record and taking into account the jury's finding of two aggravating factors and the strong evidence of premeditation, this Court finds that Thompson has failed to demonstrate that the Kentucky Supreme Court's decision regarding any of the prosecutor's statements was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. For these reasons, the Court denies habeas relief on this claim of error.

D. Claim Four—Inability to Question Jury

Thompson's next claim for relief is that the trial court erred in denying him an opportunity for meaningful *voir dire* of prospective jurors' potential impartiality as required by *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Thompson states that his defense counsel sought to ask the jury the following question of potential jurors during *voir dire:*

> ***24** If you sat as a juror and if you heard the evidence of aggravation and mitigation, and if you find that the Defendant has been convicted of a capital offense and the State has proven the aggravators, would you automatically vote for the death penalty in this or any case?

Am. Pet. at 37 (quoting Trial Tr. at 540). The trial court responded to defense counsel as follows:

> You are still asking the juror to commit to answering the question as to a verdict without having heard any mitigating evidence. The juror doesn't know what they are talking about—about mitigating evidence. They know that ... They know the areas of aggravating evidence. The Court has identified that for them ... So your [the Commonwealth's] objection is sustained.

Id. at 37 (ellipses in original) (quoting Trial Tr. at 541).

Thompson states that the trial court asked prospective jurors variations of the following question:

> In cases where the offense is capital murder and the punishment prescribed by law gives juries some options, there are four possible verdicts that the jury can consider and impose. The first is a sentence of not less than twenty years in the penitentiary. It can be more than twenty but not less than twenty. Secondly, a life sentence; third, life without the possibility of parole for twenty-five years and fourth is the death penalty. For a jury to consider and impose the last two forms of punishment, the jury must find from the evidence in the case, beyond a reasonable doubt, that certain aggravating circumstances existed at the time of the offense. In this case, the Commonwealth has identified areas that it intends to present evidence to the jury of aggravating circumstances. One, that Mr. Thompson, the defendant had a conviction for murder on his record at the time of the offense. Two, at the time of the offense, Mr. Cash was an employee of the prison as a prison guard and in the performance of his duties; and thirdly at the time of Mr. Cash's death, there was a robbery in

> connection with the offense. In addition to that evidence of aggravating circumstances, you will also hear evidence of mitigating circumstances. As a [prospective] juror in this case, can you consider all of the evidence in reaching your verdict in this case, that is to say, evidence of aggravating circumstances and evidence of mitigating circumstances?

Am. Pet. at 36–37 (quoting Trial Tr. at 532–33).

Thompson contends that by not being allowed to ask jurors his proposed question his counsel did not have sufficient information about the jurors' views on the death penalty to make valid decisions regarding challenges for cause and peremptory challenges. He argues that his defense counsel could not be sure that a juror who responded affirmatively to the trial court's question was stating "that he or she would seriously consider any and all of the sentences less than death in every case in which a jury had convicted a defendant of intentional murder and in which the aforementioned aggravators had been found beyond a reasonable doubt." Am. Pet. at 38. Since Thompson had already pleaded guilty to murdering Fred Cash, a prison guard who was on duty when he was killed, while Thompson was incarcerated for murder, he argues that two aggravating factors were already established. He contends that he was prevented from learning whether prospective jurors were in fact impartial or whether they would automatically vote for the death penalty upon proof beyond a reasonable doubt of the aggravating factors.

***25** The Kentucky Supreme Court addressed this issue as follows:

> Appellant also claims that he was not afforded the opportunity to adequately question jurors about their attitude towards the death penalty in light of the aggravators presented by the Commonwealth. The trial court did ask the prospective jurors whether they could consider the full range of penalties for Appellant where evidence would be presented of three aggravating factors, in addition to evidence of mitigating circumstances. Appellant requested the court to ask the jurors a slightly different question regarding their attitude towards the death penalty: that is, if they would automatically impose the death sentence if the three aggravators were proven beyond a reasonable doubt. The trial court denied defense counsel's request, determining that the proposed question impermissibly asked a prospective juror to commit to a verdict before hearing the evidence. The trial court also noted that it felt that the proposed question was essentially a re-wording of questions already being posed.
>
> Appellant claims that the trial court's ruling denied him due process of law because he was not able to intelligently exercise his peremptory challenges and challenges for cause in striking prospective jurors.
>
> Appellant's reliance on *Morgan v. Illinois* [, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992),] is misplaced. In *Morgan,* it was determined that the defendant should have been permitted to inquire whether a prospective juror would automatically impose the death penalty upon conviction; *i.e.,* if the prospective juror would recommend death regardless of any evidence in mitigation, so long as the defendant was proven guilty beyond a reasonable doubt. The question actually posed by the trial court in *Morgan*—that is, whether a prospective juror would "follow the instructions on the law"—was insufficient to satisfy the due process right to make meaningful inquiry into jurors' biases and views towards the death penalty. [*Id.* at 723.] *Morgan* concerns itself with the defendant's right to make inquiry; it does not set forth an affirmative right to ask certain specific questions of prospective jurors, as Appellant asserts. Where a defendant is seeking to determine prospective jurors' attitudes towards the death penalty, "it would be a game of semantics, not law, to conclude that the failure to phrase a question in a specific way is fatal where other questions are equally illuminating." [*McQueen v. Scroggy,* 99 F.3d 1302, 1330 (6th Cir.1996).]
>
> Here, Appellant's proposed question seeks to determine whether a prospective juror is so biased in favor of the death penalty, that he or she would automatically impose it upon a finding of aggravating circumstances. Essentially, Appellant was seeking to determine whether a prospective juror would consider evidence in mitigation, even where aggravating factors existed. We conclude that the permitted *voir dire* was sufficient and thorough enough to elicit the information sought by Appellant. After reciting the aggravating circumstances in the case, defense counsel asked the *voir dire* panel if "those facts that you will find make you believe that maybe there's already an opinion in your mind or in your head about what needs to be done?" Defense counsel was permitted to ask each juror whether he or she could consider all ranges of penalties. The trial court also engaged in questioning concerning jurors' attitudes towards the death penalty, specifically asking jurors whether they would consider all range of penalties in light of the evidence and whether they had

already formed an opinion based on the preliminary facts presented (which included a synopsis of the circumstances of the crime and the aggravators to be applied in the case).

***26** The extent of and scope of direct questioning during *voir dire* examination is a matter within the sound discretion of the trial court. [*Tamme v. Commonwealth,* 973 S.W.2d 13, 37 (Ky.1998) .] The trial court determined that the information sought by Appellant was already being elicited by other questions, and the record supports this conclusion. We find no abuse of discretion.

Thompson, 147 S.W.3d at 52–53 (footnotes omitted).

Thompson argues that the Kentucky Supreme Court's conclusion that Thompson's question was merely a slight variation of the question posed by the trial court was incorrect. Specifically, Thompson states that his counsel "wanted to determine whether, after the jurors determined that the Commonwealth had *proven* the existence of the aggravating circumstances, whether the jurors would then automatically impose death regardless of the mitigating evidence or even if there was a distinct lack of mitigating evidence." Am. Pet. at 41. He further argues that the importance of the trial court's inquiry regarding impartiality was "likely lost beneath the question's mountain of verbiage." Am. Pet. at 41. He asserts that the Kentucky Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding and involved an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d).

Respondent counters that Thompson seeks to expand the Supreme Court's ruling in *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492, too broadly. He argues that the issue in *Morgan v. Illinois* was the accused's ability to challenge potential jurors who would unwaveringly impose the death penalty after a finding of *guilt* and that Thompson fails to cite a single case that applies *Morgan v. Illinois* as Thompson seeks to apply it in the context of a sentencing hearing where guilt of the underlying crime is not at issue.

The Supreme Court has made clear that the trial court is entitled to deference in the process of jury selection "because [the trial judge] is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown,* 551 U.S. 1, 7, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007); *see also Rosales–Lopez v. United States,* 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (declaring that trial judges have "ample discretion in determining how best to conduct the *voir dire* "). This deference applies to trial courts faced with determining potential juror bias in death penalty trials. *See id.; Wainwright v. Witt,* 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Patton v. Yount,* 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Consequently, the Supreme Court has directed that the lower courts "respect the limited role of federal habeas relief in this area." *Uttecht,* 551 U.S. at 10. Moreover, § 2254(d) adds an additional layer of deference to the trial judge by requiring a court on habeas review to view the state appellate court's decision through a "deferential lens." *Pinholster,* 131 S.Ct. at 1403 (internal citation and quotation marks omitted).

***27** For an inquiry in *voir dire* "[t]o be constitutionally compelled ... it is not enough that such [*voir dire*] questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Mu'Min v. Virginia,* 500 U.S. 415, 425–26, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (citing *Murphy v. Florida,* 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)). The Constitution does not dictate a particular *voir dire* process; it demands only that the process be "adequate ... to identify unqualified jurors." *Morgan v. Illinois,* 504 U.S. at 729. To be adequate, *voir dire* need not establish juror partiality with "unmistakable clarity." *Wainwright v. Witt,* 469 U.S. at 424. It must only be sufficient to permit a trial judge to form "a definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426.

Thompson argues that his proposed questioning should have been allowed under *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492. The Supreme Court held in that case that a defendant facing imposition of the death penalty must be permitted on *voir dire* to ascertain whether prospective jurors would vote to "impose death regardless of the facts and circumstances of conviction." *Id.* at 735. The trial court in *Morgan* had posed variations of the following questions on *voir dire:* "Would you follow my instructions on the law even though you may not agree?"; "Do you know any reason why you cannot be fair and impartial?"; and "Do you feel you can give both sides a fair trial?" *Id.* at 723–24. The Supreme Court rejected these "general questions of fairness and impartiality" as insufficient to reveal potential bias toward the death penalty. *Id.* at 735–36. The Supreme Court stated that a juror "who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Id.* at 729. However, the Supreme Court did not

set forth specific questions that must be asked in *voir dire* to determine whether juror bias exists. *Id.* ("The Constitution ... does not dictate a catechism for *voir dire,* but only that the defendant be afforded an impartial jury.").

Having reviewed the entire *voir dire* in Thompson's trial, the Court concludes that the *voir dire* was adequate to seat an impartial jury. While Thompson might have preferred more specific inquiry into possible bias toward the death penalty, the trial court allowed enough questioning for Thompson's counsel to select an impartial jury. Defense counsel informed the venire panel that two of the aggravating factors—that Thompson was convicted of a prior murder and that the victim was a prison guard who was engaged in the performance of his duties at the time of the murder—would be established since Thompson had pleaded guilty to the murder. In individual *voir dire* of each prospective juror, the trial court described the four possible penalties and the three aggravating factors which would be put forth. The judge then asked each juror a question similar to the following: "So, those are the three aggravating factors. You will also hear evidence of mitigating circumstances. Can you consider all the evidence in reaching your decision this case?" Trial Tr. at 248. However, the inquiry did not end there. The trial court then asked slight variations of the following four questions of each potential juror in follow up:

> ***28** Can you consider and impose, based on the evidence you find and the court's instructions the entire range of punishment from a period of years of not less than twenty all the way to capital punishment?[;]
>
> Is there any of those penalties which you would automatically exclude regardless of the evidence?[;]
>
> Is there any ... are there any of those penalties that you would automatically say should be imposed in this case based on what you know now? [; and]
>
> Do you have a personal feeling that there is any type of crime for which the law should automatically prescribe capital punishment?

Id. at 249 (ellipses in original).

Therefore, the trial court asked each prospective juror in individual *voir dire* whether he or she would automatically impose any of the listed penalties based on what the jurors knew at that point. Defense counsel had already informed jurors that two of the aggravators would be proven based on Thompson's guilty plea. In addition, at defense counsel's request, the trial court asked each potential juror if he or she believed there was any type of crime for which the death penalty should be imposed automatically. Thus, it was not unreasonable for the Kentucky Supreme Court to find that the questioning in *voir dire* was sufficient to allow Thompson "to ascertain whether his prospective jurors ... had predetermined ... whether to impose the death penalty." *Morgan v. Illinois,* 504 U.S. at 736.

Therefore, the Kentucky Supreme Court's resolution of this claim was not contrary to or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; nor was its ruling on this issue based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Court therefore denies habeas relief on this claim of error.

E. Claim Five—Jury Instructions

Thompson next argues that, because the jury instructions stated that the verdict must be unanimous but were silent as to the whether the finding of mitigating circumstances had to be unanimous, the jury instructions improperly implied that the finding of mitigating factors had to be unanimous in violation of *Mills v. Maryland,* 486 U.S. 367, 384, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Thompson argues that an instruction permitting non-unanimity should have been given. As the Kentucky Supreme Court adjudicated this claim of error on the merits, the standard of review under § 2254(d)(1) applies to this claim. The relevant portions of the jury instructions are as follows:

> *INSTRUCTION NUMBER ONE:*
>
> The Defendant has previously pled guilty to the murder of Charles Fred Cash. From the evidence placed before you in [the] sentencing trial, you were acquainted with the facts and circumstances of the crime itself. You shall now determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall fix a sentence for the defendant. In considering such evidence as may be unfavorable to the Defendant, you will bear in mind that the law presumes a Defendant to be innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty. You shall apply the same presumption in determining whether there are aggravating circumstances bearing upon the question of what punishment should be fixed for the defendant in this case.
>
> ***29** *INSTRUCTION NUMBER TWO ENTITLED MITIGATING CIRCUMSTANCES:*

In fixing a sentence for the defendant for the offense of murder, you shall consider such mitigating or extenuating facts and circumstances as has [sic] been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true ... In addition to the foregoing, you shall consider those aspects of the defendant's character, background and those facts and circumstances of the particular offense of which he is guilty, to wit: the murder of Charles Fred Cash, about which he has offered evidence in mitigating [sic] of the penalty to be imposed upon him and which you believe from the evidence to be true.

INSTRUCTION NUMBER THREE ENTITLED AGGRAVATING CIRCUMSTANCES:

In fixing a sentence for the defendant for the offense of murder, you shall consider the following aggravating circumstances which you believe from the evidence beyond a reasonable doubt to be true ...

INSTRUCTION NUMBER FOUR ENTITLED AUTHORIZED SENTENCES:

You may fix the Defendant's punishment for the murder of Charles Fred Cash at Number One: Confinement in the penitentiary for a term of twenty years or more; or Two: Confinement in the penitentiary for life; or Three: Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five years of his sentence; or Four: Death. But you cannot fix his sentence at death or confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five years of his sentence unless you are satisfied from the evidence beyond a reasonable doubt that one of the statements listed in Instruction Number Three—Aggravating Circumstances—is true in its entirety, in which event you must state in writing, signed by the Foreperson, that you have found the aggravating circumstances to be true beyond a reasonable doubt. But even if you have found the aggravating circumstance or circumstances to be true beyond a reasonable doubt, you may still impose any of the four punishments for Murder as listed below.

INSTRUCTION NUMBER FIVE—REASONABLE DOUBT:

If you have a reasonable doubt as to the truth or existence of any aggravating circumstance listed in Instruction Number Three, you shall not make any finding with respect to it. If, upon the whole case, you have a reasonable doubt as to whether the defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

INSTRUCTION NUMBER SIX—UNANIMOUS VERDICT:

The verdict of the Jury must be in writing, must be unanimous and signed by one of you as Foreperson.

Trial Tr. at 1237–41.

The trial court attached to the jury instructions a Verdict Form setting forth four possible verdicts, numbered one to four. *Id.* at 1242–43. For numbers one and two, the form stated, "We, the jury, fix the Defendant, William Eugene Thompson's punishment for the murder of Charles Fred Cash at...." Possible verdict number one listed "confinement in the penitentiary for a term of ——years (not less than twenty)[,]" and possible verdict number two listed "confinement in the penitentiary for life." *Id.* at 1242. After each of the first two possible verdicts, there was a space for the jury foreperson to sign if either was the verdict selected by the jury. *Id.* at 1242.

***30** For possible verdict number three, the form stated, "We, the jury find beyond a reasonable doubt that the following aggravating circumstance or circumstances existed or exist in this case...." *Id.* The trial court instructed that, "there is a blank space at that point in the verdict form if the jury finds that to be the case, according to the instructions in the verdict form where the foreperson must write in the aggravating circumstance or circumstances the jury has found to be true beyond a reasonable doubt from the evidence in this case." After the blank space, the form states, "and fix the sentence of the defendant for the murder of Charles Fred Cash at confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five years of his sentence." *Id.* at 1243. After that there was a space for the jury foreperson to sign if that was the verdict selected by the jury.

For possible verdict number four, the form stated, "We, the jury find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist in this case." *Id.* at 1243. The trial court explained that for this verdict there was also a blank space for the jury to "write in what aggravating circumstance or circumstances you have found to be true from the evidence beyond a reasonable doubt." After the blank space, the form stated, "and we fix the sentence of the defendant, William Eugene Thompson, for the murder of Charles Fred Cash at death." After that there was a place for the foreperson to sign if that was the jury's selected verdict.

The Kentucky Supreme Court addressed this claim as follows:

> Appellant first maintains that, because the jury was informed that its verdict must be unanimous, the jury could have mistakenly believed that it was required to find the existence of mitigating factors unanimously as well, before such factors could be considered in arriving at a verdict. He argues that such an instruction permitting non-unanimity should have been given, and that the failure to so instruct the jury rendered its verdict so unreliable as to require reversal. This issue was not preserved; however, no such instruction was required and therefore, no error occurred.[75]
>
> FN75 *Tamme v. Commonwealth,* 973 S.W.2d 13, 37 ... ([Ky.]1998) ("The instructions did not imply that unanimity was required on mitigators and there is no requirement that a jury be instructed that their findings on mitigation need not be unanimous."); *see also Kordenbrock v. Scroggy,* 919 F.2d 1091, 1121 (6th Cir.1990).

Thompson, 147 S.W.3d at 47–48.

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence" offered by the defendant. *Boyde v. California,* 494 U.S. 370, 377–78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (citing, *inter alia, Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). "[I]n a capital case 'the sentencer [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Mills v. Maryland,* 486 U.S. at 374 (quoting *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1985)). To that end, it is unconstitutional for a state to require jurors to unanimously agree on mitigators. *See McKoy v. North Carolina,* 494 U.S. 433, 443–44, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) ("*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death."). However, the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of mitigating factors under a death penalty scheme. *Zant v. Stephens,* 462 U.S. 862, 884–91, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Kentucky has chosen not to require the trial judge to instruct the jury that its findings on the existence of any particular mitigating factor does not have to be unanimous. *Meece v. Commonwealth,* 348 S.W.3d 627, 719 (Ky.2011); *Stopher v. Commonwealth,* 57 S.W.3d 787, 803 (Ky.2001). Still, regardless of state law requirements, the Constitution forbids a trial court from instructing a jury that it has to reach a unanimous decision on the existence of any mitigating factor. *Mills v. Maryland,* 486 U.S. at 384. Further, sentencing instructions are constitutionally invalid if they create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence unless jurors unanimously agree that the mitigator is proven. *Adbur'Rahman v. Bell,* 226 F.3d 696, 711 (6th Cir.2000) (citing *Mills v. Maryland,* 486 U.S. at 384).

***31** In *Mills v. Maryland,* the verdict form stated, "Based upon the evidence we *unanimously* find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist ... and each mitigating circumstance marked 'no' has not been proven...." *Mills v. Maryland,* 486 U.S. at 387 (emphasis added). The verdict form contained a list of seven potentially mitigating circumstances and an eighth marked "other." *Id.* Next to each was written "yes" or "no," and the jury was to indicate its finding. *Id.* Thus, the jury instructions and verdict form rejected by the Supreme Court stated directly that the jury could not find a particular circumstance to be mitigating unless they unanimously concluded that the mitigating circumstance had been proven.

The jury instructions and verdict form used in Thompson's trial differ significantly from those used in *Mills v. Maryland.* The instructions and verdict form in the instant case did not directly state that the jury's finding of any mitigating factor had to be unanimous but were in fact silent as to whether the mitigating factors had to found unanimously. Thompson cites no Supreme Court case which applies *Mills v. Maryland* in the context at issue. The instructions and verdict form in this case are more similar to those presented in *Smith v. Spisak,* 558 U.S. 139, ——, 130 S.Ct. 676, 683–84, 175 L.Ed.2d 595 (2010), wherein the Supreme Court found penalty-phase jury instructions which were likewise silent as to whether the jury must be unanimous in finding mitigating factors were not improper under *Mills v. Maryland.* The jury instructions in that case were as follows:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances, which [Spisak] has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweighs the mitigating factors, then you must return that finding to the Court.
>
> .....
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.
>
> The judge gave the jury two verdict forms for each aggravating factor. The first of the two forms said:
>
> > "We the jury in this case ... do find beyond a reasonable doubt that the aggravating circumstance ... was sufficient to outweigh the mitigating factors present in this case.... We the jury recommend that the sentence of death be imposed...."
>
> ***32** The other verdict form read:
>
> > "We the jury ... do find that the aggravating circumstances ... are not sufficient to outweigh the mitigation factors present in this case ... We the jury recommend that the defendant ... be sentenced to life imprisonment...."

Smith v. Spisak, 130 S.Ct. at 683–84 (internal citations omitted). The Supreme Court held that these instructions did not violate *Mills v. Maryland* because the instructions "focused only on the overall balancing question," and not on whether "the jury must determine the existence of each individual mitigating factor unanimously." *Id.* at 684.

While the instructions and verdict forms in *Smith v. Spisak* are not identical to the ones in Thompson's case, they do not differ in substance with respect to mitigating factors, and the high court's reasoning therefore applies. The only instruction in Thompson's case that required unanimity was Instruction Number 6, stating, "The verdict of the Jury must be in writing, must be unanimous and signed by one of you as Foreperson." The Verdict Form did not make any reference to the mitigating factors, and the jury was not instructed to make any findings as to mitigating factors. Nor were they instructed that the mitigating factors must be proven beyond a reasonable doubt. They were instructed to "consider" the mitigating facts and circumstances "as you believe from the evidence to be true." Trial Tr. at 1238. The Verdict Form directed that the jury make a finding only as to the verdict and, with respect to possible verdicts numbers three and four imposing sentences for "confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five years of his sentence" and death, respectively, the jury was required to write on the form the aggravating circumstances it found to be true beyond a reasonable doubt.

Therefore, similar to the instructions in *Smith v. Spisak,* "[n]either the instructions nor the forms said anything about how—or even whether—the jury should make individual determinations that each particular mitigating circumstance existed," *id.* at 684, as was the case in *Mills v. Maryland.* The instructions expressly required unanimity as to the verdict only. The instructions in Thompson's case are similar to *Smith v. Spisak* and other cases which have held that requiring unanimity as to the results of weighing aggravating factors against mitigating factors is different from requiring unanimity as to a finding of a mitigating factor to be proven. *See Coe v. Bell,* 161 F.3d 320, 338 (6th Cir.1998) (finding that "requiring unanimity as to the *presence* of a mitigating factor" is a "far different matter" than requiring unanimity "as to the results of the *weighing* "). The instructions and verdict form here, read as a whole, did not meet, either through a direct statement or from what they implied, the standard as stated in *Mills v. Maryland:*

> ***33** a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.

Mills v. Maryland, 486 U.S. at 384. The instructions regarding mitigating circumstances which instructed jurors to "consider" the mitigating facts and circumstances "as you believe from the evidence to be true," along with the absence of a finding of mitigating circumstances in the verdict form, suggest that each juror could individually consider the mitigators without having to unanimously agree.

Therefore, the Court concludes that the Kentucky Supreme Court's rejection of this claim was not "contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1); *accord Woodall v. Simpson,* No. 5:06CV–P216–R, 2009 U .S. Dist. LEXIS 14328, at *79–80, 2009 WL 464941 (W.D.Ky. Feb. 24, 2009) (this court's rejection of claim involving almost identical jury instructions), *aff'd,* 685 F.3d 574 (6th Cir.2012). Therefore, the Court denies habeas relief as to this claim of error.

However, given the slight distinction in the wording of the jury instructions from those in *Smith v. Spisak,* as well as statements from the dissent on this issue in *Kordenbrock v. Scroggy,* 919 F.2d 1091 (6th Cir.1990), the Court believes that reasonable jurists could find the Court's analysis with respect to this claim to be debatable or wrong. Accordingly, the Court will grant a certificate of appealability with respect to this claim. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

F. Claim Six—Flawed Proportionality Review

Thompson next contends that the Kentucky Supreme Court's proportionality review process is unconstitutional. He argues that the Kentucky Supreme Court only compared his sentence to other capital cases where the death penalty was imposed but should also have compared it to similar cases where the death penalty was not imposed. He further complains that he did not receive access to the proportionality data compiled and relied on by the Kentucky Supreme Court.

Kentucky's proportionality statute provides that the Kentucky Supreme Court shall determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ky.Rev.Stat. § 532.075(3)(c). To aid the court in its proportionality determination, Ky.Rev.Stat. § 532.075(6) requires the Chief Justice of the Kentucky Supreme Court to assign to an administrative assistant who is an attorney the tasks of accumulating the records of all Kentucky felony offenses in which the death penalty was imposed after January 1, 1970, providing the court with summaries of those cases, and compiling any other data requested by the Chief Justice for the purpose of determining the validity of the death sentence.

***34** Comparative proportionality review, as opposed to inherent proportionality (which measures the proportionality of a sentence to the severity of the crime), is performed on appeal to ensure that a given death sentence is not disproportionate relative to other sentences imposed for similar crimes. As Thompson acknowledges, comparative proportionality review is not required by the Constitution. *Pulley v. Harris,* 465 U.S. 37, 43–44, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Bowling v. Parker,* 344 F.3d 487, 521 (6th Cir.2003); *Cooey v. Coyle,* 289 F.3d 882, 928 (6th Cir.2002); *see also Coe v. Bell,* 161 F.3d at 352 (finding no Eighth Amendment right to proportionality review). However, if a state adopts a scheme for such review, it must comport with due process. *Bowling v. Parker,* 344 F.3d at 521; *Greer v. Mitchell,* 264 F.3d at 691. The state court's failure to perform a statutory proportionality review is not reviewable in federal court as an issue of state law. *Pulley v. Harris,* 465 U.S. at 41; *Bowling v. Parker,* 344 F.3d at 521. Instead, federal habeas corpus review is limited to whether the state court engaged in proportionality review in good faith. *Walton v. Arizona,* 497 U.S. 639, 655–56, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled in part on other grounds by Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Citing the lack of direction in the statute regarding how the Kentucky Supreme Court is to conduct its proportionality review, the Sixth Circuit has expressed grave doubts regarding whether the statute even creates a liberty interest giving rise to a federal due process claim for alleged procedural lapses by the state supreme court in its review. *Bowling v. Parker,* 344 F.3d at 521–22.

In *Bowling v. Parker,* 344 F.3d at 521–22, the Sixth Circuit considered and rejected the identical argument advanced here by Thompson:

> Bowling argues that the Kentucky Supreme Court only compared Bowling's sentence to other crimes where the death penalty was imposed, but should have compared Bowling's sentence to similar crimes where the death penalty was not imposed. There is no clear support in Kentucky law for the proposition that the Kentucky Supreme Court must also consider those additional cases. In fact, Bowling notes this, stating that "Kentucky has limited review to cases in which the death penalty was imposed." Appellant Br. at 121.
>
> Bowling's recognition that Kentucky law does not require consideration of those additional cases reveals that he is actually arguing that Kentucky has an ineffective framework for assessing proportionality rather than a claim that Kentucky misapplied its own framework. This forecloses Bowling's due-process argument, however, for there is no violation of due process as long as Kentucky follows its procedures. We note that we also have

> specifically rejected this type of challenge to Ohio's proportionality statutes.

Id. (citing *Buell v. Mitchell,* 274 F.3d 337, 368–69 (6th Cir.2001)).

Thompson also complains about the Kentucky Supreme Court's refusal to share its underlying data. The Kentucky Supreme Court has held that a capital defendant does not have the right to the production of the court's proportionality research files for use in litigation. *Meece v. Commonwealth,* 348 S.W.3d at 728 (quoting *Hunt v. Commonwealth,* 304 S.W.3d 15, 52–53 (Ky.2009)); *Ex parte Farley,* 570 S.W.2d 617 (Ky.1978); *see also Skaggs v. Commonwealth,* 694 S.W.2d 672, 682 (Ky.1985) (holding that the "public advocate is not entitled to data compiled for this Court pursuant to KRS § 532.075(6)(a), (b) and (c)"). In determining that Thompson's sentence was not excessive or disproportionate, the Kentucky Supreme Court "reviewed those cases since 1970 in which the death penalty was imposed for a single murder and conclude[d] that the punishment herein is not excessive or disproportionate." *Thompson,* 147 S.W.3d at 55. The Kentucky Supreme Court identified two cases in particular that it considered, *Johnson v. Commonwealth,* 103 S.W.3d 687 (Ky.2003), and *Mills v. Commonwealth,* 996 S.W.2d 473 (Ky.1999), both involving a single murder victim. *Id.* Many, if not all, of the cases reviewed by the Kentucky Supreme Court should be reported. Thompson was free to examine the cases and make any arguments he deemed appropriate. There is no constitutional requirement that a court must share its legal research with an appellant.

***35** Thompson has failed to show that the Kentucky Supreme Court did not engage in proportionality review in good faith. Accordingly, habeas relief on this claim of error is denied.

G. Claim Seven–Cumulative Effect

Finally, Thompson argues that the cumulative effect of these errors rendered his trial fundamentally unfair. The Kentucky Supreme Court resolved this claim as follows: "Appellant received a fundamentally fair penalty proceeding and there was insufficient harmless error to create a cumulative effect that would mandate reversal for a new trial." *Thompson,* 147 S.W.3d at 55.

The Supreme Court has repeatedly stated that fundamentally unfair trials violate due process. *See, e.g., Riggins v. Nevada,* 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). However, "the law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." *Williams v. Anderson,* 460 F.3d 789, 816 (6th Cir.2006); *see also Sheppard v. Bagley,* 657 F.3d 338, 348 (6th Cir.2011) ("Post–AEDPA, [cumulative error] claim is not cognizable.") (citing *Moore v. Parker,* 425 F.3d 250, 256 (6th Cir.2005) (discussing cumulated evidentiary errors)). Accordingly, the Court will also deny habeas relief as to this claim.

VI. CERTIFICATE OF APPEALABILITY

In the event that Thompson wishes to appeal any aspect of this Court's decision, he is required to obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(a); Fed. R.App. P. 22(b). A district court must issue or deny a COA and can do so even though the petitioner has yet to make a request for such a certificate. *Castro v. United States,* 310 F.3d 900, 903 (6th Cir.2002) ("Whether the district court judge determines to issue a COA along with the denial of a writ of habeas corpus or upon the filing of a notice of appeal, the district judge is always required to comply with § 2253(c)(2) & (3) by 'indicat[ing] which specific issue or issues satisfy the denial of a constitutional right.' 28 U .S.C. § 2253(c)(2).").

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. at 483. The Supreme Court has recognized that the current version of § 2253 codified the standard set forth in *Barefoot v. Estelle,* 463 U.S. 880, 894, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), and stated:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot,* includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' " *Barefoot, supra,* at 893, and n. 4 ... ("sum[ming] up" the " 'substantial showing' " standard).

Slack v. McDaniel, 529 U.S. at 483–84. The Supreme Court further noted that the standard used to govern the COA analysis depended upon whether the lower court dismissed the petition after a substantive review of the merits, or merely dismissed the petition on procedural grounds. In the case of the former, the Court held "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When a district court denies such a motion on procedural grounds without addressing the merits of the motion, a certificate of appealability should issue if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the court erred in dismissing the petition or that the petitioner should be allowed to proceed further. *Id.* at 484–85. In such a case, no appeal is warranted. *Id.* at 485.

***36** This Court has reexamined the merits of the issues in light of *Slack's* more "straightforward" analysis to determine whether reasonable jurists could find its analyses with respect to these grounds debatable or wrong. With the exception of Thompson's claim number five that the jury instructions impermissibly implied that unanimity with respect to finding mitigating circumstances was required, it finds that none of the issues merits a COA. The claims presented in the petition were clear-cut, easily addressed, and provided no bases for granting federal habeas relief. The Court is persuaded that reasonable jurists would not debate the correctness of its assessment of these claims. The basis of the Court's decision to grant a COA with respect to claim number five is explained in the body of this Opinion.

VII. CONCLUSION

For the foregoing reasons, the Court concludes that Thompson is not entitled to habeas relief. The Court will enter a separate Order denying the petition and dismissing this action. The Court will also grant a COA as to claim number five and deny a COA as to all other claims by separate Order.

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at Paducah.

William Eugene THOMPSON, Petitioner,
v.
Phillip W. PARKER, Respondent.

Civil Action No. 5:11CV–31–R.
|
July 22, 2013.

Attorneys and Law Firms

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James H. Lawson, Kentucky Attorney General, Frankfort, KY, for Respondent.

MEMORANDUM OPINION AND ORDER

RUSSELL, Senior District Judge.

***1** This matter is before the Court on Petitioner William Eugene Thompson's motion to alter and amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (DN 44). Thompson seeks to alter and amend this Court's Memorandum Opinion and Order denying his amended petition for writ of habeas corpus under 28 U.S.C. § 2254 and denying a certificate of appealability (COA) on all but one of Thompson's claims (DNs 42 and 43). Respondent filed a response to the instant motion (DN 45). For the following reasons, the Court will deny the Rule 59(e) motion, except to the extent that the Court will expand the COA to include Thompson's sixth claim of error challenging Kentucky's proportionality review in his case.

I. *RELEVANT BACKGROUND*

The Court set forth the factual and procedural history in its December 10, 2012, Memorandum Opinion and will not repeat it here in full but will provide a summary where relevant to the Rule 59(e) motion. While serving a life sentence for murder in the minimum-security Western Kentucky Farm Center, Thompson killed Fred Cash, a corrections officer. After Thompson's first conviction and death sentence were overturned on direct appeal, he pleaded guilty and was convicted of the murder. A penalty-phase trial was held on February 2–11, 1998, to determine sentencing on the murder conviction. At the conclusion, Thompson was sentenced to death. The jury found the existence of the following two aggravating factors: Thompson's prior conviction of murder and that the victim was a corrections officer engaged in the performance of his duties at the time of his murder. *Thompson v. Commonwealth,* 147 S.W.3d 22, 45 (Ky.2004).

Following an unsuccessful direct appeal, Thompson filed a motion to vacate and set aside his sentence under Kentucky Rule of Criminal Procedure (RCr) 11.42. The Lyon Circuit Court denied the motion on May 15, 2009, finding an evidentiary hearing was not warranted. Thompson appealed the denial to the Kentucky Supreme Court, which affirmed on October 21, 2010. *Thompson v. Commonwealth,* No.2009–SC–557–MR, 2010 Ky. Unpub. LEXIS 99, at *11, 2010 WL 4156756 (Ky. Oct. 21, 2010).

Thompson filed a petition for writ of habeas corpus in this Court, and he subsequently filed an amended petition. His amended petition raised seven claims for relief. The Court entered a Memorandum Opinion and Order on December 10, 2012, denying the petition on each of the grounds raised. The Court granted a COA with respect to Thompson's fifth claim of error concerning the jury instructions and denied a COA with respect to the remaining claims.

Thompson now moves to alter or amend the judgment raising three grounds. He contends that the Court committed clear error in rejecting his claim that his trial counsel was ineffective when counsel referenced during his closing argument that Thompson would be eligible for parole in twenty-five years when in fact he had been ordered to serve out his life sentence on his previous murder conviction by the Kentucky Parole Board. Thompson also moves the Court to expand the COA to include his sixth claim of error, that Kentucky's proportionality review in his case was unconstitutionally limited in scope, and to expand the COA to include his seventh claim of error based on cumulative error.

II. *STANDARD OF REVIEW*

***2** Rule 59(e)[1] of the Federal Rules of Civil Procedure allows a district court to alter, amend, or vacate a prior judgment. *See* Fed.R.Civ.P. 59(e); *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir.1982). The purpose of Rule 59(e) is "to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir.2008) (quoting *York v. Tate*, 858 F.2d 322, 326 (6th Cir.1988)). A district court may amend a judgment where there is: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir.2005); *see also Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir.2006); *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir.1999).

1 Rule 59(e) states, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of a judgment."

The Sixth Circuit has explained that "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment." *Howard*, 533 F.3d at 475. *See also Roger Miller Music, Inc. v. Sony/ATV Publ 'g, LLC*, 477 F.3d 383, 395 (6th Cir.2007); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir.1988). "Rule 59(e) allows for reconsideration; it does not permit parties to effectively 're-argue a case.' " *Howard*, 533 F.3d at 475 (quoting *Sault Ste. Marie Tribe*, 146 F.3d at 374). The grant or denial of a Rule 59(e) motion is within the discretion of the district court. *Huff*, 675 F.2d at 122.

III. *ANALYSIS*

A. Claim Two–Ineffective Assistance of Counsel

Thompson contends that his trial counsel was ineffective when, in closing argument of the penalty-phase trial, he referred to the possibility that Thompson would be eligible for parole in twenty-five years when in fact the Kentucky Parole Board had already decided that Thompson would serve out his previous life sentence. In denying the habeas petition, the Court rejected this claim, finding that Thompson had not overcome the strong presumption that his trial counsel had rendered adequate assistance nor had he established that the Kentucky Supreme Court was objectively unreasonable in its application of the standard for establishing ineffective assistance as stated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thompson now contends that this Court's ruling on his ineffective-assistance claim was clear error. He requests the Court to alter, amend and set aside its Judgment and grant his habeas petition on this issue; or, alternatively, to order that his trial counsel be deposed or grant an evidentiary hearing on the issue; or to grant a COA.

During closing arguments, Thompson's trial counsel stated as follows:

> We have a case now where it is not necessary to take a life. He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him? Because he doesn't even think about the P word—the Parole Board—until he is about seventy-five years of age. That is twenty-five New Years. Twenty-five Thanksgivings. Twenty-five Christmases. I'd like to think [that] I will be retired by then, we may have a colony on Mars by then. Twenty-five years.

***3** Trial Tr. at 1281.

Thompson first raised this ineffective-assistance-of-counsel claim in his RCr 11.42 motion before the trial court. The Lyon Circuit Court denied the ineffective-assistance claim without an evidentiary hearing. The Kentucky Supreme Court affirmed on appeal. *Thompson v. Commonwealth*, 2010 Ky. Unpub. LEXIS 99, at *11, 2010 WL 4156756 . With regard to this claim, the Kentucky Supreme Court stated as follows:

> In an RCr 11.42 proceeding, the movant bears the burden of establishing that he was deprived of effective assistance of counsel. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky.2007). To prevail on a claim of ineffective assistance of counsel, the movant must first show that counsel's performance was deficient, meaning that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the movant must demonstrate that counsel's deficiency prejudiced the

defendant. *Id.* This requires a showing that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Id.* at 694. We have also stated this standard as a determination of whether, absent counsel's errors, the jury would have had reasonable doubt with respect to guilt. *Brown v. Commonwealth,* 253 S.W.3d 490, 499 (Ky.2008).

"In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky.2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky.2009). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 689. In considering an RCr 11.42 motion based on ineffective assistance of counsel claims, the trial court must evaluate counsel's performance in light of the totality of the circumstances and the trial as a whole. *Strickland,* 466 U.S. at 695. In an appeal from a decision on an RCr 11.42 claim, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth,* 721 S.W.2d 694, 698 (Ky.1986).

The comment in question ... was made in the context of arguing against the imposition of the death penalty. It was clearly made more to emphasize the probability of Thompson never getting out of prison than the possibility that he could someday be released from prison. Nevertheless, in reviewing the record, we can see there were strategic reasons justifying defense counsel's reference to the possibility of Thompson being paroled after twenty-five years. *See Hodge v. Commonwealth,* 116 S.W.3d 463, 473 (Ky.2003), *overruled on other grounds by Leonard,* 279 S.W.3d 151 (Tactical decisions "will not be second guessed in an RCr 11.42 proceeding.").

***4** Had defense counsel brought up the serve-out on Thompson's prior life sentence, that would have likely drawn more attention to Thompson's prior conviction for the 1972 murder for hire, and perhaps prompted the Commonwealth to place more emphasis on the prior murder conviction in arguing its case. Further, the only defense offered by Thompson was that the murder of Cash was a spontaneous act, and not a calculated, premeditated act. In support of this defense, defense counsel argued that Thompson was getting close to possibly being paroled on his prior conviction and therefore had nothing to gain from planning and carrying out the murder of Cash. Presenting evidence of the serve-out on Thompson's prior conviction, although it was not ordered until 1993, would have contradicted this defense or confused the issue for the jury.

Also, at the time Thompson received the serve-out on his prior murder conviction, the Parole Board could have subsequently revisited the serve-out decision. 501 KAR 1:030, § 4(1)(d) (1993). Hence, there was still a possibility that Thompson could be paroled on the prior conviction.

Defense counsel argued strongly and passionately to the jury to consider the mitigating factors and not to impose the death penalty in his closing argument in this case. During his closing argument he stated,

> The Commonwealth knows it is not necessary to kill because Eugene Thompson will die in prison.... He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him?

In his opening statement, he stated unequivocally, "Eugene Thompson will die in prison and over the next several days, you will decide and the weight is on you to decide whether God will take him or the State will take him." As noted earlier, the responses elicited by defense counsel in his questioning of Thompson clarified that he had received a serve-out on his prior life sentence in 1993 and that he would "die in prison."

As for the affidavit of the juror claiming that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence" and "did not necessarily want to sentence Mr. Thompson to death," RCr 10.04 provides that a "juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, the self-serving affidavit produced over seven years after the trial cannot be used to establish Thompson's claim of ineffective assistance of counsel. *See Gall v. Commonwealth,* 702 S.W.2d 37, 44 (Ky.1985) (rejecting juror's testimony as basis for defendant's claim that jurors improperly considered parole).

Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. *Strickland,* 466 U.S. at 689; *see also Haight v. Commonwealth,* 41 S.W.3d at 442. From our review of the totality of the circumstances in this case, we cannot say that defense

counsel's single remark regarding the possibility of Thompson being paroled constituted ineffective assistance of counsel in this case.

***5** Even if defense counsel's performance was deemed deficient for mentioning the possibility of Thompson being released on parole, given that Thompson killed Cash and escaped while he was incarcerated, it is unlikely that additional evidence of Thompson's serve-out would have held much sway in trying to convince the jury that Thompson being in prison for the rest of his life would be adequate to protect the public from Thompson. The Commonwealth would most assuredly have argued that being incarcerated did not stop Thompson from killing an innocent man in 1986.

Further, the Commonwealth presented strong evidence of aggravating factors in this case, and the jury specifically found the following aggravating factors: the prior conviction of murder, the murder was committed while Thompson was incarcerated, and the victim was a corrections officer engaged in the performance of his duties at the time of his murder. Thus, we believe that the jury would still have recommended the death penalty in this case absent his counsel's mention of the possibility of parole.

Thompson v. Commonwealth, 2010 Ky. Unpub. LEXIS 99, at *4–11, 2010 WL 4156756.

It is undisputed that the standard governing an ineffective-assistance-of-counsel claim is stated in *Strickland v. Washington.* To prevail on an ineffective-assistance claim, a convicted defendant must prove that counsel's performance was deficient and that he suffered prejudice as a result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Foust v. Houk,* 655 F.3d 524, 533 (6th Cir.2011). To demonstrate deficient performance, the defendant must prove that "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that "under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

To demonstrate prejudice, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In other words, he must show a " 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster,* — U.S. —, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Harrington v. Richter,* — U.S. —, 131 S.Ct. 770, 797, 178 L.Ed.2d 624 (2011)). The defendant must show that the errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. "Surmounting *Strickland* 's high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

Thompson does not dispute that his ineffective-assistance claim was adjudicated on the merits by the Kentucky Supreme Court and, therefore, that § 2254(d) governs the standard of review. The standard under § 2254(d), on which the petitioner bears the burden of proof, is " 'difficult to meet' [and a] 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.' " *Cullen v. Pinholster,* 131 S.Ct. at 1398 (quoting *Harrington v. Richter,* 131 S.Ct. at 786; *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam)). Under § 2254(d), Thompson can only succeed on this claim by showing that the Kentucky Supreme Court unreasonably applied *Strickland* to his claim. When applying *Strickland* under § 2254(d), this Court's review of the performance prong is " 'doubly deferential.' " *Cullen v. Pinholster,* 131 S.Ct. at 1403 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). The Court must "take a 'highly deferential' look at counsel's performance," *id.* (citing *Strickland,* 466 U.S. at 689), "through the 'deferential lens of § 2254(d).' " *Id.* (citing *Knowles v. Mirzayance,* 556 U.S. at 123 n. 2). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Harrington v. Richter,* 131 S.Ct. at 788.

***6** With regard to *Strickland* 's performance prong, Thompson contends that this Court erred when it rejected his argument that trial counsel's stated reason for not emphasizing the serve-out—that at the time of trial the serve-out could be revisited by the Parole Board—was actually a *post hoc* rationalization rather than an actual reasonable trial strategy. Thompson maintains that the evidence, *i.e.,* trial counsel's performance, contradicts his statement regarding his claimed strategy. This Court found that trial counsel's presentation of Thompson's case on the whole did not contradict trial counsel's stated trial strategy. *See Wiggins v. Smith,* 539 U.S. 510, 526–27, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (holding that "courts may not indulge 'post hoc rationalization' for

counsel's decisionmaking that **contradicts** the available evidence of counsel's actions") (emphasis added). The Court finds that this conclusion is not clearly erroneous.

Thompson also argues that this Court clearly erred in relying on *Cullen v. Pinholster,* 131 S.Ct. at 1407, in stating that the state court must "affirmatively entertain the range of possible reasons that [trial] counsel may have had for proceeding as they did" because trial counsel's own explanation for his statement concerning parole reveals that it was not a tactical decision made for the reasons stated by the Kentucky Supreme Court. However, the Court finds that the Kentucky Supreme Court's analysis was not unreasonable. A reviewing court is not limited to trial counsel's subjective state of mind. In *Harrington v. Richter,* 131 S.Ct. at 790, the Supreme Court offered "strategic considerations" that may have justified counsel's failure to engage certain expert opinion.

> The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, *Wiggins,* 539 U.S. at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Strickland,* 466 U.S. at 688.

Harrington v. Richter, 131 S.Ct. at 790. Indeed, a reviewing court is required "not simply to give [the] attorneys the benefit of the doubt [citing *Pinholster v. Ayers,* 590 F.3d 651, 673 (9th Cir.2009)] but to affirmatively entertain the range of possible reasons [trial] counsel may have had for proceeding as they did." *Pinholster,* 131 S.Ct. at 1407 (citing *Pinholster v. Ayers,* 590 F.3d at 692 (Kozinski, C.J., dissenting)) (internal quotation marks omitted); *cf. Spencer v. Scutt,* No. 09–13362, 2013 U.S. Dist. LEXIS 15782, at *22, 2013 WL 451156 (E.D.Mich. Feb. 6, 2013) (rejecting state court's suggested strategy where it and counsel's stated strategy were "mutually exclusive"). Under § 2254(d), "the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Harrington v. Richter,* 131 S.Ct. at 788. The Court finds that Thompson failed to overcome his burden in establishing deficient performance under this standard, and the Court did not commit clear error.

*7 With regard to *Strickland* 's prejudice prong, Thompson disagrees with this Court's assessment that trial counsel's reference to the possibility of parole did not differ substantially from evidence and argument presented because trial counsel repeatedly stated that Thompson would die in prison and put into evidence through Thompson's testimony that he was given a serve-out by the Parole Board. For the reasons stated in the Memorandum Opinion, the Court finds no clear error.

Thompson also argues that the Court committed clear error when it cited case law from the Sixth Circuit which distinguishes cases where counsel has failed to conduct an investigation or present evidence of mitigation from those where the petitioner is merely dissatisfied with counsel's presentation of mitigation. Thompson cites to *Sears v. Upton,* —— U.S. ——, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), where the Supreme Court rejected a similar distinction made by the Supreme Court of Georgia. This point is well-taken. However, as Respondent points out, this is not a case where Thompson challenges the adequacy of the mitigation investigation. Instead, he challenges as erroneous one statement by trial counsel. The Court did not conclude that trial counsel's effort to present some mitigation evidence "foreclose[d][the] inquiry" into whether counsel's statement caused prejudice. *Id.* at 3266. Therefore, the Court finds this argument unpersuasive.

Finally, Thompson contends that the Court was in error in finding the Kentucky Supreme Court's prejudice analysis was not unreasonable because that court failed to reweigh the aggravating evidence against the mitigating evidence

in its opinion affirming the denial of his RCr 11.42 motion. However, "[i]n reviewing whether the state court's decision involved an unreasonable application of clearly established federal law, we examine the ultimate legal conclusion reached by the court," *Williams v. Roper,* 695 F.3d 825, 831 (8th Cir.2012) (citing *Harrington v. Richter,* 131 S.Ct. at 784), "not merely the statement of reasons explaining the state court's decision." *Id.* (citing, *inter alia, Gill v. Mecusker,* 633 F.3d 1272, 1291–92 (8th Cir.2011)). Absent a "conspicuous misapplication of Supreme Court precedent" that renders the decision "contrary to" clearly established law, *id.* (citing *Wright v. Sec'y for Dep't of Corr.,* 278 F.3d 1245, 1256 n. 3 (11th Cir.2002)), the proper question is whether there is "any reasonable argument" that the state court's judgment is consistent with *Strickland. Id.* at 831–32 (citing *Harrington v. Richter,* 131 S.Ct. at 788; *Premo v. Moore,* —— U.S. ——, ——, 131 S.Ct. 733, 740, 178 L.Ed.2d 649 (2011)). "If the state court 'reasonably could have concluded that [the petitioner] was not prejudiced by counsel's actions,' then federal review under [2254(d)] is at an end." *Id.* at 832 (citing *Premo v. Moore,* 131 S.Ct. at 744).

Here, while the Kentucky Supreme Court did not explicitly reweigh the mitigating factors presented at trial, in its analysis of Thompson's ineffective-assistance claim it stated, "Defense counsel argued strongly and passionately to the jury to consider the mitigating factors and not to impose the death penalty in his closing argument in this case." It further stated, "From our view of the totality of the circumstances in this case, we cannot say that defense counsel's single remark regarding the possibility of Thompson being paroled constituted ineffective assistance counsel in this case." Therefore, it is clear that the court did not disregard the mitigating evidence presented. The Court notes that the deference required by § 2254(d) applies when a state court gives no reason at all for its decision. *Harrington v. Richter,* 131 S.Ct. at 785 ("This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons for its decision before its decision can be deemed to have been 'adjudicated on the merits.' "). This Court undertook the reweighing of the aggravating and mitigating factors presented in its Memorandum Opinion denying the habeas petition and found that Thompson failed to demonstrate that the Kentucky Supreme Court's decision was "contrary to" or "an unreasonable application" of federal law. 28 U.S.C. § 2254(d)(1).

***8** Based on the above, and considering the highly deferential standard of review required by *Strickland* and § 2254(d), this Court finds that it was not clear error to deny habeas relief on Thompson's claim of ineffective assistance of counsel. Accordingly, the Court will deny the motion to alter or amend the judgment as to the ineffective-assistance claim.

To the extent Thompson moves in the alternative for an evidentiary hearing or to depose trial counsel, the Court denied his motion for an evidentiary hearing on this issue for the reasons stated in its Memorandum Opinion and Order entered on May 2, 2012 (DN 30). Thompson demonstrates no reason to alter or vacate that decision. The Court also sees no reason to expand the COA on this issue.

B. Claim Six–Flawed Proportionality Review

Thompson next moves the Court to amend its order to expand the COA to include Claim Six. Thompson asserts that Kentucky's proportionality review in his case "was unconstitutionally limited in scope, which rendered the review process meaningless in violation of the Eight[h] Amendment and the Due Process Clause of the Fourteenth Amendment." Thompson states that the Sixth Circuit granted a COA on the same legal issue and attaches an order entered June 19, 2012, by a panel of the Sixth Circuit granting Petitioner–Appellant Roger L. Wheeler's motion to expand the COA to include his claim challenging Kentucky's proportionality review. Thompson argues, "The granting of a certificate of appealability by a panel of the Court of Appeals suggests that reasonable jurists could debate the resolution of the claims and thus a COA should be granted on this claim." The Sixth Circuit having granted a COA on the same issue in another case, the Court will grant the motion to expand the COA to include his sixth claim of error challenging Kentucky's proportionality review in his case.

C. Claim Seven–Cumulative Error

Thompson also moves to expand the COA to include his seventh claim of error based on cumulative error. While apparently conceding that cumulative error claims are not cognizable in the Sixth Circuit, Thompson argues that the Court should grant a COA on this claim because there is a split in the circuits. However, the Court sees no reason to alter or vacate its prior decision denying a COA on the cumulative-error issue.

IV. *CONCLUSION*

For the foregoing reasons, **IT IS ORDERED** that Thompson's motion to alter and amend (DN 44) is **DENIED,** except to the extent that he seeks to expand the COA to include one additional claim of error. The motion to expand the COA to include his sixth claim of error challenging Kentucky's proportionality review in his case is **GRANTED.**

All Citations

Not Reported in F.Supp.2d, 2013 WL 3816705

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No. 13-6085

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 18, 2017
DEBORAH S. HUNT, Clerk

WILLIAM EUGENE THOMPSON,

Petitioner-Appellant,

v.

PHILIP W. PARKER, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BOGGS, GRIFFIN, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

862 S.W.2d 871
Supreme Court of Kentucky.

William Eugene THOMPSON, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 87–SC–239–MR.
|
Sept. 30, 1993.
|
As Amended Oct. 1, 1993.

Synopsis
Defendant was convicted in the Lyon Circuit Court, Willard Paxton, J., of murder, first-degree robbery and first-degree escape, and received consecutive sentences of, respectively, death, 20 years and ten years. Defendant appealed. The Supreme Court held that: (1) statutorily required "reasonable" notice of motion for change of venue was not given, warranting denial of motion made two days before trial; (2) trial court did not err in restricting individual voir dire; (3) trial court abused its discretion in denying challenges for cause of venire persons who had strong, preconceived notions about defendant's guilt, based on knowledge from several sources, and some of whom had preconceived opinion about severity of punishment to be administered; and (4) defendant's prior conviction for willful murder was improperly used as aggravating circumstance under statute listing "prior record of conviction" for capital offense as aggravating circumstance for which death penalty may be imposed.

Reversed and remanded.

Stephens, C.J., concurred in part and filed opinion dissenting in part.

Wintersheimer, J., filed dissenting opinion.

Attorneys and Law Firms

***872** Oleh R. Tustaniwsky, Donna L. Boyce, Dept. of Public Advocacy, Frankfort, for appellant.

Chris Gorman, Atty. Gen., David A. Sexton, Carol C. Ullerich, Asst. Attys. Gen., Frankfort, for appellee.

OPINION OF THE COURT

This is a direct appeal from the judgment of the Lyon Circuit Court which sentenced the appellant, William Eugene Thompson, to death following a conviction of murder. He also received consecutive terms of twenty years for first degree robbery and ten years for first degree escape.

FACTS

Appellant had been convicted of murder, in 1974, in Pike County and was serving time therefor. Prior to the incident which led to the indictment, conviction and this appeal, appellant had been transferred from the Kentucky State Reformatory to the Western Kentucky Farm Center in Lyon County. He had been assigned to daily duties at the dairy, and had been working there about five weeks before the homicide. His supervisor, who later became his victim, was Fred Cash.

On the morning of the crime, May 9, 1986, appellant was picked up to go to work by Cash between 4:00 and 4:30 a.m. The evidence shows that, although it was a warm day, appellant wore street clothes under his normal prison work garb, and he wore brown suede shoes rather than regulation work boots. He concealed a razor in his pocket and procured both an extra jacket and eye glasses, which he did not need. After arriving at the farm, Cash directed appellant to help him start a tractor by pulling it with the prison van. When appellant had difficulty with hooking the chain to the van, Cash took the chain away and hooked it to the van himself. He told appellant that it should not be that difficult to hook the chain to the van.

Appellant took the statement as criticism. His eyes welled up with tears. He immediately picked up a hammer and struck Cash in the head, as Cash was kneeling. Appellant admitted to striking Cash one time, but a pathologist testified that Cash suffered ***873** twelve hammer blows, all to the head. Appellant then pulled Cash's body into a stall in a nearby barn, where he further bludgeoned Cash. Appellant then searched the body and removed Cash's keys, wallet and knife. He then took the dairy van and drove to Princeton, where, in a gas station, he shaved his mustache and goatee and changed his hairstyle. Appellant had previously divested himself of his prison clothes. He

bought a bus ticket to Indianapolis, Indiana. When the bus stopped at Madisonville, an interim stop, appellant was arrested.

Appellant expressed his desire to plead guilty, and wanted to accept the death penalty. No formal guilty plea was entered, however, and over a month before the trial, appellant began to cooperate with his counsel. Although he did not testify at the guilt phase of his trial, he did testify at the penalty phase. With the exception of the multiple blows, appellant admitted virtually all of the other events leading up to and including the murder. At closing argument, appellant's counsel admitted to the jury that appellant killed Cash, rifled his corpse for valuables and escaped custody in the farm vehicle. Other facts will be addressed as is appropriate to the appellant's arguments discussed herein.

Although appellant raises thirty-six alleged errors in his brief, we will discuss only six of those issues. We have carefully considered all issues raised, and find the other thirty have no merit.

CONTENTIONS

The arguments we have chosen to discuss are: (1) Was it error for the trial court to deny appellant's motion for a change of venue; (2) Was it error for the trial court to restrict voir dire examination; (3) Was it error for the trial court to fail to excuse, for cause, certain members of the jury panel; (4) Was it error for the trial court to refuse to instruct the jury on theft and second degree escape; (5) Was it error for the trial court to refuse to give a definition of extreme emotional disturbance; and (6) Was it error for the trial court to admit, as an aggravating circumstance, evidence of appellant's murder conviction which was in the process of being appealed.

I. WAS IT ERROR FOR THE TRIAL COURT TO DENY A CHANGE OF VENUE?

[1] The trial of this case had been set for several months to begin on October 8, 1986. On October 6, 1986, two days before the trial, appellant filed a verified "Petition for Change of Venue." KRS 452.210. Filed with the petition and requisite affidavits was an extensive array of newspaper articles, transcripts of local radio broadcasts concerning this case and a copy of a letter to the editor in a local paper, signed by 150 local residents, which referred to the Pike County conviction.

On October 7, 1986, one day before the trial, appellant filed the results of a sampling type public opinion poll of jury eligible citizens of Lyon County. Basically, it showed that a high percentage of Lyon County citizens knew about the case (94%), thought that appellant was guilty (44%), and preferred the death penalty for appellant (52%). The Commonwealth, caught short because of the very late notice, filed four citizen affidavits which, in effect, opined that appellant could receive a fair trial in Lyon County.

A hearing before the trial judge was held on October 8, 1986. The issue of the lack of reasonable notice of the filing of the petition was raised at the hearing, by the prosecution. The trial court denied the petition for the sole reason that reasonable notice of the motion was not given, as is required by KRS 452.220(2). The trial court did not reach the merits of the petition. Interestingly enough, in subsequently denying appellant's motion for a new trial, the judge stated that "one of the few motions filed by the defendant in this case that *may have had merit was a motion for change of venue.*" (Emphasis added.)

A majority of this Court believes the narrow ruling of the trial judge was correct. Although KRS 452.220(2) does not define "reasonable," we have said, in *Shelton v. Commonwealth,* 280 Ky. 733, 134 S.W.2d 653 (1939) that it was not error to deny a motion for a change of venue filed on the day of the trial. See also *Russell v. Commonwealth,* Ky., 405 S.W.2d 683 (1966). The majority of ***874** this Court feels that the delay in filing the motion was due solely to appellant's own actions, and following *Miller v. Watts,* Ky., 436 S.W.2d 515, 518 (1969) that "unwarranted delay in making the motion amounts to a waiver of the right to seek a change of venue." The majority believes that appellant was aware of the pre-trial publicity, the feelings of the community about the case, and that such a delay constituted a waiver of the right to file a petition two days before the trial.

Moreover, it is a fundamental proposition of law that this Court will not overrule the decision of a trial judge in these matters unless it is shown that the trial court abused its discretion. *Kordenbrock v. Commonwealth,* Ky., 700 S.W.2d 384 (1985). *Grooms v. Commonwealth,* Ky., 756 S.W.2d 131 (1988). Under the facts of this case, no such abuse of discretion has been shown, and therefore, on this point the judgment is affirmed.

II. WAS THE TRIAL COURT IN ERROR IN

RESTRICTING INDIVIDUAL VOIR DIRE?

In the case of *Grooms v. Commonwealth,* Ky., 756 S.W.2d 131 (1988), which arose from the same circuit court as the case *sub judice,* this Court described the issue of the right of counsel to conduct individual voir dire examination. We said:

> We do not hold that counsel for appellant had any absolute right to question prospective jurors ... because the extent of direct questioning by counsel during voir dire is a matter within the discretion of the trial court. *Grooms* at 134.

[2] [3] In relation to the questioning of jurors, in the presence of other jurors, as to what a prospective juror has heard about the case, we have said that such questioning "poses the danger of bringing that information to the ears of the other prospective jurors. The *better* procedure is to question jurors separately and out of the presence of each other on *such matters.* " *Id.* (Emphasis added.) In other words, the ultimate question of whether individual voir dire is to be conducted is within the discretion of the trial court. However, in this case, where the prior knowledge of the case is the subject matter, the "better practice" is for the line of questioning to be conducted outside of the presence of other jurors (whether conducted by the court or by counsel). *Grooms* was decided following the trial of this case.

[4] The first twenty-five venirepersons were questioned as a group, and then by individual counsel. It is a fair statement that most of the individual voir dire inquiries covered capital punishment and pre-trial publicity. The trial court—in advance—precluded counsel from asking what kind of evidence or crimes would justify a death penalty, as well as, under what circumstances a sentence less than death would be appropriate.

Following the exhaustion of the first panel, the trial court, apparently impatient at appellant's counsel's questioning on the two restricted issues, ruled that the next fifteen venirepersons could not be *individually examined* about pretrial publicity on the death penalty. The trial judge, himself, questioned that venire about the issues. The court explained that this change of procedure was "out of convenience to the jurors" and because he believed counsel were asking inappropriate questions.

While we have some questions about the reason given by the trial court for changing horses in the middle of the stream, it is clear that the court adequately questioned the second venire about pre-trial publicity and about their view on the death penalty. That fact, coupled with our familiar rule that the conduct of individual voir dire is within the sound discretion of the trial court, leads us to conclude that there was no error here. We suggest, on any retrial, that the voir dire be conducted following what we consider to be the "better practice."

III. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO EXCUSE CERTAIN MEMBERS OF THE JURY PANEL FOR CAUSE?

[5] The question of whether a juror should be excused for cause is a matter within the sound discretion of the trial court. If the trial court abuses its discretion by improperly failing to sustain a challenge for ***875** cause, we have held it reversible error. If the defendant peremptorily excuses that juror, the defendant is thereby prevented from using a peremptory challenge to another juror. *Grooms, supra; Marsch v. Commonwealth,* Ky., 743 S.W.2d 830 (1988); *Rigsby v. Commonwealth,* Ky., 495 S.W.2d 795 (1973), *overruled on other grounds by, Pendleton v. Commonwealth,* Ky., 685 S.W.2d 549 (1985). With these principles to guide us, we shall examine the various challenged jurors.

[6] Venireman Virgil Peek knew both the Commonwealth Attorney and the chief investigating officer in the crime. While he stated that he was in favor of the death penalty, he would limit it to if the proof is beyond the shadow of a doubt. However, he stated, and reiterated several times that he was a strong believer in the "eye for an eye" theory. His final view on the imposition of the death penalty is obvious, as expressed by his own statement:

> ... but I believe that a person should be—should receive what he has accomplished. In other words, we've got them over there at the penitentiary that has killed people, you know. Alright, you put them in there and they stay ten years, and turn them right back out, and they commit the same things again. You understand? When do we ever learn?

Goldia Parrish was related to a prison employee and knew many other employees of the prison. She had detailed knowledge of the facts of the case, including the fact that appellant was incarcerated due to a prior murder he had committed. She stated "I think he might be guilty." Also she believed that whoever killed Mr. Cash "should have

the penalty." She also stated she would not consider mitigating evidence such as background, poverty, alcoholism, etc. Appellant's challenge for cause was denied and Parrish was struck by a peremptory challenge.

V.T. Holt initially claimed that he knew nothing about the case and had never discussed it. Following extreme questioning by appellant's counsel, he admitted he had signed a letter to the editor of the local paper which, among other things said:

> ... the man accused of murdering Fred Cash was not simply a murderer, but a murderer for hire, yet he was classified as eligible for the Farm Center, a minimum security institution.
>
> He and two others were convicted of killing a man's wife by shooting, stabbing and beating her to death for a sum of money. This alone proves his regard for human life, yet he was at the Farm Center!

A challenge for cause was denied and this man actually sat on the jury.

Betty Guess knew and was related to several prison employees. She had business dealings with the prosecution. She discussed the case with a relative of the victim. She assumed appellant was guilty and was uncertain if she would consider mitigating evidence.

Hylan Galusha was a friend of the chief investigating officer and two of his best friends and his two brothers worked at the prison. He discussed this case with his two brothers. A challenge for cause was denied and he also sat on the jury.

Appellant exhausted his peremptory challenges on jurors he had challenged for cause. He also challenged for cause, albeit unsuccessfully, six of the twelve jurors who sat on the case. If the action of the trial court in failing to grant a challenge for cause constitutes an abuse of discretion, the rule of *Marsch, Rigsby* and *Grooms* comes into play.

[7] We will not belabor this opinion with the obvious, viz., that our law and our constitutions demand that a jury must be fair and impartial. The probability of bias or prejudice is determinative in ruling on a challenge for cause. *Pennington v. Commonwealth,* Ky., 316 S.W.2d 221 (1958).

It is clear that venirepersons Peek, Parrish, Holt, Guess, and Galusha had strong, pre-conceived notions about the guilt of appellant, based on knowledge from several sources. Some had a preconceived opinion about the severity of the punishment to be administered. It cannot be argued that each of the venirepersons was impartial. By their own words, they were not and could not be fair and impartial jurors.

For the trial court to deny each of the challenges for cause was a clear abuse of his ***876** discretion and the case is reversed on this basis.

IV. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO INSTRUCT THE JURY ON THEFT AND SECOND DEGREE ESCAPE?

[8] Appellant was charged with murder, first degree robbery, and first degree escape. Appellant tendered instructions to the trial court on theft by unlawful taking and second degree escape. Appellant argued that the instructions were proper because his defense was that the killing of Cash was not to effectuate a robbery or escape. Thus, a reasonable jury could doubt that defendant is guilty of first degree robbery and first degree escape, but could conclude that he is guilty of lesser offenses. The trial court rejected appellant's tendered instructions.

KRS 515.020(1) lists the elements of robbery in the first degree as:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 520.020(1) defines escape in the first degree as an escape "from custody or a detention facility by the use of force or threat of force against another person."

"It is well established, however, that if the evidence points only to the conclusion that the accused is guilty of but one offense, it is not necessary or proper to give instructions embracing lower degrees." *Cox v. Commonwealth,* Ky., 491 S.W.2d 834, 836 (1973).

As previously stated, appellant virtually admitted to murdering Cash and in closing argument appellant's

counsel did admit that appellant killed Cash.

The murder of Cash certainly qualifies as a use of force, an element of first degree escape, and as a physical injury, an element of first degree robbery. As such, the jury could have concluded but one thing—appellant was guilty of all counts charged, or he was not guilty of the charges.

Instructions on theft and second degree escape were not warranted by the evidence presented. For this reason, a majority of this Court affirms as to this issue.

V. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO GIVE A DEFINITION OF EXTREME EMOTIONAL DISTURBANCE?

[9] In the guilt-innocence phase of appellant's trial, the jury was instructed on the offense of murder and first degree manslaughter. Under the instruction for murder, the trial court basically parroted the murder statute, KRS 507.020, by stating that appellant would be guilty of murder if he killed Fred Cash "not while acting under the influence of extreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be." The manslaughter instruction instructed the jury to find appellant guilty of manslaughter in the first degree if the jury did not find appellant guilty of murder and the jury finds beyond a reasonable doubt that appellant "killed Charles Fred Cash" and "[t]hat he did so with the intention of causing Charles Fred Cash's death." Appellant asserts that he was entitled to an instruction defining the term "extreme emotional disturbance."

Before an instruction concerning extreme emotional disturbance is justified "there must be something in the evidence sufficient to raise a reasonable doubt whether the defendant is guilty of murder or manslaughter." *Gall v. Commonwealth,* Ky., 607 S.W.2d 97, 108 (1980), *overruled on other grounds by, Payne v. Commonwealth,* Ky., 623 S.W.2d 867 (1981). An examination of the case before us reveals that the extent of appellant's emotions was that he felt "uneasy" and "upset" because he believed Cash was criticizing his work. In *McClellan v. Commonwealth,* Ky., 715 S.W.2d 464, 468, 469 (1986), this Court defined extreme emotional disturbance as

> ***877** a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.

Appellant's being "upset" and "uneasy" does not constitute extreme emotional disturbance as defined in *McClellan.*

The Court reversed and remanded *McClellan* for several reasons. In *McClellan* we stated that in a subsequent trial the jury should be instructed as to a definition of extreme emotional disturbance. However, *McClellan* is distinguishable from the case presented before this Court today. In *McClellan* there was a significant issue as to whether McClellan was acting under an extreme emotional disturbance. In the instant case, there is no such issue. Appellant was said to be "uneasy" and "upset". No evidence was presented that his emotions ranged beyond upset and uneasy. Under this specific factual situation, a majority of the Court does not believe that an instruction defining extreme emotional disturbance was necessary.

VI. WAS IT ERROR FOR THE TRIAL COURT TO ADMIT, AS AN AGGRAVATING CIRCUMSTANCE, EVIDENCE OF APPELLANT'S MURDER CONVICTION WHICH WAS IN THE PROCESS OF BEING APPEALED?

[10] KRS 532.025(2)(a)(1) lists "a prior record of conviction for a capital offense" as an aggravating circumstance for which the death penalty may be imposed. During appellant's trial, the Commonwealth introduced evidence of this aggravator through the testimony of the Lyon Circuit Clerk. The clerk testified that he had certified records showing that appellant was convicted in Pike County, in 1974, of willful murder under KRS 435.010.[1]

[1] Since 1974 KRS 435.010 has been repealed. "Murder" is currently classified under KRS 507.020.

Appellant argues that the conviction from Pike County was improperly used as an aggravator because the 1974 conviction was not final. Appellant's trial for murder, robbery and escape was in 1986. In 1987, this Court stated that appellant's appeal from the Pike County willful murder conviction "has never been dismissed. It is still pending." *Thompson v. Commonwealth,* Ky., 736 S.W.2d 319, 321 (1987).

The language in KRS 532.025(2)(a)(1) refers to an aggravator as being a "prior record of conviction." It has long been held by Kentucky courts that a "conviction, which of course means the final judgment" cannot be relied upon as a conviction if an appeal is being taken because "an appeal in a criminal case suspends the judgment, and this does not become final until a termination of the appeal." *Foure v. Commonwealth,* 214 Ky. 620, 283 S.W. 958, 962 (1926). See also *Commonwealth v. Duvall,* Ky., 548 S.W.2d 832 (1977) (conviction that is being appealed is not final and cannot be used for impeachment purposes). More recently this Court has held that a prior conviction cannot be utilized under the truth-in-sentencing statute or the persistent felony offender statutes if an appeal is pending. *Melson v. Commonwealth,* Ky., 772 S.W.2d 631 (1989).

Because appellant's appeal of the 1974 conviction was pending, it was improper for it to be used as an aggravating circumstance in KRS 532.025. As to this issue, a majority of the Court reverses.

For the foregoing reasons this case is reversed and remanded for retrial in conformity with the opinion of this Court.

COMBS, LAMBERT, REYNOLDS, and SPAIN, JJ., concur.

STEPHENS, C.J., concurs in majority opinion with exception to Issue I and Issue II, and files a separate dissenting opinion with respect to Issue I and Issue II.

WINTERSHEIMER, J., files a separate dissenting opinion.

LEIBSON, J., not sitting.

***878** STEPHENS, Chief Justice, dissenting.

I respectfully dissent from the Opinion of the majority.

I. WAS IT ERROR FOR THE TRIAL COURT TO DENY A CHANGE OF VENUE?

In reading the briefs and the appropriate part of the transcript in this case, I felt an overwhelming sense of *deja vu.* The atmosphere surrounding this case, the action (or lack of it) by the trial judge, the uncontroverted evidence of the attitude of the community as shown by the poll taken by appellant, to me, all raise the specter of the trial and conviction of Fred Grooms. *Grooms v. Commonwealth,* Ky., 756 S.W.2d 131 (1988).

I dissented in that case, and the reasons set forth, *Id.* at 142, 143, are identical, except for a numerical difference in the poll. I will not overburden this opinion by repeating that verbiage. I will simply refer to it and incorporate it, by reference, in this dissent.

The highly charged atmosphere of the potential jurors in this case is identical to that in *Grooms.* Ultimate fairness mandates a change of venue in this case as I believed it did in *Grooms.* On retrial, if the proof is the same, I would order a change of venue.

II. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO GIVE A DEFINITION OF EXTREME EMOTIONAL DISTURBANCE?

A definition of extreme emotional disturbance should have been given to the jury. Repeatedly, this Court has required such a definition.

In *McClellan v. Commonwealth,* Ky., 715 S.W.2d 464 (1986), this Court stated that

> [w]ithout some standard or definition a jury is left to speculate in a vacuum as to what circumstances might or might not constitute extreme emotional disturbance. Since the General Assembly did not define the term, it becomes necessary for the court to do so.

McClellan at 467. On retrial in *McClellan,* it was ordered that the jury "be instructed as to the definition of the state of mind which constitutes an extreme emotional disturbance." *Id.* at 469.

Three years later in *Dean v. Commonwealth,* Ky., 777 S.W.2d 900, 909 (1989), we stated that "[w]hether extreme emotional disturbance is used as an element of the murder, manslaughter, or mitigating circumstance instructions, the jury should be instructed as to its definition."

Two years after *Dean* we reiterated:

> there should have been a separate instruction on extreme emotional disturbance so that the jury could understand how to apply extreme emotional distress to differentiate the two intentional homicide crimes; intentional murder and manslaughter in the first degree.

Holbrook v. Commonwealth, Ky., 813 S.W.2d 811, 815 (1991). As in *Holbrook,* the jury in the case presently before the Court was entitled to a definition of extreme emotional disturbance so that they could properly differentiate between murder and first degree manslaughter.

For these reasons, on retrial I would require an instruction be given to the jury which defines extreme emotional disturbance.

WINTERSHEIMER, Justice, dissenting.

I respectfully dissent from the majority opinion because I do not believe the trial judge abused his discretion in refusing to strike several jurors for cause, and there was a sufficient aggravating circumstance to permit the punishment given in this case.

The majority opinion states that five members of the original jury panel had strong preconceived notions about the guilt of the defendant and the severity of punishment to be administered and were therefore not fair and impartial jurors.

It should be recognized that Juror Peek was struck by the defense and did not serve, and Juror Parrish did not serve. Juror Holt did serve, as did Juror Guess and Juror Galusha. My review of the record indicates no dissatisfaction with the decision of the trial judge to allow Jurors Holt and Guess to serve. Juror Galusha was not challenged. I can find no abuse of discretion on the part of the trial judge in accepting the jury.

***879** None of the jurors were closely related to the corrections system as contemplated by *Ward v. Commonwealth,* Ky., 695 S.W.2d 404 (1985). None of the jurors could have been struck for cause pursuant to *Marsch, supra, Grooms, supra, Rigsby, supra,* or *Peters v. Commonwealth,* Ky. 505 S.W.2d 764 (1974).

This case reveals a common theme in regard to the level of awareness of most jury panel members. Generally, as well as in this case, most of those called for jury duty who actually read or heard about the particular crime involved have a very marginal ability to remember the true facts or even newspaper accounts of any details. Here, many of the prospective jurors said they did know the prosecutor when actually they only recognized his name and his capacity as an elected public official. A review of the views of the jurors about capital punishment does not disclose anything that would prevent or substantially impair the performance of their duty as jurors in accordance with the instruction of the court and their oath as jurors. *Cf. Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The answers given by the jurors in this case do not rise to the level that would require their being stricken as jurors, and consequently, there was no abuse of discretion by the trial judge in refusing to excuse them pursuant to the standards set out in *Marsch.*

As with many other aspects of the trial of any case, the decision as to whether a particular person should serve as a juror should primarily rest with the sound discretion of the trial judge.

Although there is a facial attractiveness to the argument that this first murder conviction which was still pending on appeal should not have been used in the sentencing phase, it is arguable as to prejudice under these circumstances. *Cf. Abernathy v. Commonwealth,* Ky., 439 S.W.2d 949 (1969). K.R.S. 532.025(2)(a)(1) simply requires "a prior record of conviction." If the legislature had intended to allow only the use of convictions which had been affirmed on direct appeal, it could have so stated. Other states have concluded that the pendency of appeal or post-conviction proceedings does not eliminate the possibility of the use of a prior conviction in a death penalty sentencing hearing. *See Peterson v. Commonwealth,* 225 Va. 289, 302 S.E.2d 520 (1983), cert. denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176; *State v. Jordan,* 126 Ariz. 283, 614 P.2d 825, cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); *Spaziano v. State,* Fla., 433 So.2d 508 (1983), affirmed, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *cf. State v. Pollard,* Ky., 735 S.W.2d 345 (1987).

Here the 1974 willful murder conviction was used because it was "essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

I believe it is open to serious question whether in this case the use of the earlier conviction as an aggravating factor was at all prejudicial. Here the jury determined that Thompson had committed the murder during the commission of first-degree robbery and that he was a prisoner who murdered a prison employee.

I would affirm the conviction.

All Citations

862 S.W.2d 871

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147 S.W.3d 22
Supreme Court of Kentucky.

William Eugene THOMPSON, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

Nos. 1998–SC–0277–MR, 2001–SC–0869–MR.
|
Aug. 26, 2004.
|
Rehearing Denied Nov. 18, 2004.

Synopsis

Background: Defendant was convicted in the Lyon Circuit Court, Willard Paxton, J., of capital murder, first-degree robbery, and first-degree escape, and was sentenced to death, 20 years, and 10 years, respectively. Defendant appealed. The Supreme Court, 862 S.W.2d 871, reversed and remanded. Upon remand, defendant pled guilty to all three charges and was again sentenced to death. Defendant appealed. The Supreme Court, 56 S.W.3d 406, remanded for a retrospective competency hearing. Upon remand, defendant was found competent to enter plea. Defendant appealed.

Holdings: The Supreme Court, Johnstone, J., held that:

[1] evidence supported finding that defendant was competent to plead guilty to charged offenses;

[2] retrospective competency hearing provided adequate procedural due process safeguards to determine the issue of defendant's competency;

[3] crime scene photographs and murder weapon were admissible during sentencing;

[4] defendant's guilty plea was made voluntarily, intelligently, and with the understanding of the charges against him;

[5] Commonwealth did not exceeded its boundaries during closing argument in penalty phase;

[6] evidence was sufficient to prove existence of aggravating factors;

[7] trial court did not abuse its discretion by excusing several prospective jurors for cause based upon their views of the death penalty; and

[8] death sentence was neither excessive nor disproportionate to the penalty imposed in other similar capital cases, considering both the crime and this particular defendant.

Affirmed.

Attorneys and Law Firms

***30** Oleh R. Tustaniwsky, Susan Jackson Balliet, Assistant Public Advocates, Department of Public Advocacy, Frankfort, Counsel for Appellant.

Gregory D. Stumbo, Attorney General of Kentucky, Connie Vance Malone, David A. Smith, Michael G. Wilson, Assistant Attorneys General, Criminal Appellate Division, Office of the Attorney General, Frankfort, Counsel for Appellee.

Opinion

Opinion of the Court by Justice JOHNSTONE.

Appellant, William Eugene Thompson, appeals from a sentence of death imposed by the Lyon Circuit Court. Appellant was convicted of murder, robbery in the first degree, and escape in the first degree. Appellant was originally tried before a jury in Lyon County, and was found guilty and sentenced to death, twenty years, and ten years, respectively. On direct appeal, this Court reversed that conviction and remanded, determining that the trial court had refused to grant five valid strikes for cause and erroneously used a prior murder conviction still pending on appeal as an aggravator.[1]

1 *Thompson v. Commonwealth,* Ky., 862 S.W.2d 871 (1993).

Upon remand, Appellant pled guilty to all three charges. A second penalty phase trial was conducted, at which Appellant was again sentenced to death. Appellant waived jury sentencing of the non-capital offenses, and was sentenced to two consecutive terms of imprisonment totaling twenty years. The appeal in Case No.

1998–SC–0277–MR stems from the trial court's ruling that Appellant was competent to enter a guilty plea. The appeal in Case No. 2001–SC–0869–MR stems from the trial court's acceptance of Appellant's guilty plea, and the trial court's acceptance of the sentencing jury's recommendation of death.

***31** At the time of this crime, Appellant was serving a life sentence for murder. He was transferred to the Western Kentucky Farm Center, a minimum security prison facility that includes an inmate-operated dairy farm. During the early morning hours of May 9, 1986, Appellant and his supervisor, Fred Cash, reported to work at the dairy barn. According to Appellant, he became enraged outside a calf barn while he and Mr. Cash were attempting to start some equipment. Appellant admits striking Mr. Cash once to the head with a hammer. Little is known about exactly what transpired thereafter, as Appellant claims to have "blacked out." However, the evidence reveals that Mr. Cash's skull was crushed by numerous blows to the head with a hammer and his body was dragged into a calf's stall. According to Appellant, upon realizing what he had done, he removed Mr. Cash's pocketknife, keys and wallet, and left the Farm Center in the prison dairy truck. Appellant fled to the nearby town of Princeton, where he purchased a ticket and boarded a bus bound for Madisonville. The authorities apprehended Appellant in Madisonville.

[1] Appellant appeals as a matter of right, presenting twenty-nine claims of error. For convenience sake, we have grouped Appellant's claims into various categories. Many of Appellant's cited errors are unpreserved. Nonetheless, in light of the penalty imposed in this matter and pursuant to KRS 532.075(2), we will consider even unpreserved issues. The standard of review of unpreserved errors in a case in which the death penalty has been imposed is as follows:

> Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.[2]

2 *Johnson v. Commonwealth*, Ky., 103 S.W.3d 687, 691 (2003), *citing Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 668 (1991).

Competency Hearing

[2] After hearing oral argument on Appellant's original appeal, we held that the trial court failed to hold the competency hearing required by KRS 504.100(3) before accepting Appellant's guilty plea.[3] Instead of reversing Appellant's conviction, we remanded the case to the trial court to determine whether a retrospective competency hearing was possible and, if possible, to hold the hearing.[4] On remand, the trial court concluded that it was possible to hold a meaningful retrospective competency hearing. At the conclusion of the hearing, the trial court found that Appellant was competent to enter a guilty plea. As provided for in our order, Appellant now appeals the trial court's ruling, which has been consolidated with his appeal from his guilty plea and sentence.[5] We first address the trial court's finding that holding a retrospective competency hearing would not violate Appellant's due process rights.

3 *Thompson v. Commonwealth*, Ky., 56 S.W.3d 406 (2001).

4 *Id.* at 410.

5 *Id.*

In our opinion and order remanding the case for a retrospective competency hearing, we provided significant guidance to ***32** the trial court. "The test to be applied in determining whether a retrospective competency hearing is permissible is whether the quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation."[6] Further, we stated that

6 *Thompson*, 56 S.W.3d at 409 (internal quotation marks omitted).

> [a] retrospective competency hearing, may satisfy the requirements of due process provided it is based on

evidence related to observations made or knowledge possessed at the time of trial. Other factors bearing on the constitutional permissibility of a retrospective hearing include: (1) the length of time between the retrospective hearing and the trial; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the trial date; and (4) the availability of the recollections of non-experts—including counsel and the trial judge—who had the ability to observe and interact with the defendant during trial.[7]

7 *Id.* (internal quotation marks and citations omitted).

Based on the quantity and quality of the evidence available, the trial court concluded that a meaningful retrospective competency hearing could be held. This evidence included the written transcript of the January 12, 1995 hearing in which Appellant withdrew his plea of not guilty and entered an unconditional guilty plea. The record also contains the competency evaluation report by Dr. Candace Walker, who was the psychiatric expert from the Kentucky Correctional Psychiatric Center (KCPC) who examined Appellant prior to the January 12 hearing. Additionally, the trial judge, who was the same judge who accepted Appellant's guilty plea, had available his own recollections of the hearing and his own observations of Appellant's behavior as well as that of trial counsel. Finally, the record contains defense counsels' assertions that Appellant was competent to plead guilty.[8]

8 *See Lopez v. Walker,* 239 F.Supp.2d 368, 374 (S.D.N.Y.2003). (Defense counsel's representations as to defendant's competency or incompetency are particularly important.)

We agree with the trial court's conclusion that there was sufficient evidence available to conduct a meaningful competency hearing on remand.[9] We now turn to the retrospective hearing itself.

9 *See Reynolds v. Norris,* 86 F.3d 796, 803 (8th Cir.1996) (holding that a meaningful hearing could be held based on similar evidence in the record and other evidence available to be heard at the hearing).

[3] [4] To be competent to plead guilty, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him."[10] Competency determinations are made based on a preponderance of the evidence standard.[11] A review of the evidence introduced at the retrospective competency hearing shows that ***33** there was substantial evidence to support the trial court's ruling that Appellant was competent to plead guilty on January 12, 1995.

10 *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960).

11 *See Mozee v. Commonwealth,* Ky., 769 S.W.2d 757, 758 (1989) (strongly implying that this is the standard); *accord Allen v. Mullin,* 368 F.3d 1220, 1239 (10th Cir.2004); *United States v. Morrison,* 153 F.3d 34, 46 (2nd Cir.1998); *see also Cooper v. Oklahoma,* 517 U.S. 348, 355, 116 S.Ct. 1373, 1377, 134 L.Ed.2d 498, 506 (1996). ("A State may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence.")

[5] [6] [7] The trial court reviewed Dr. Walker's competency evaluation report. The report was completed and transmitted to defense counsel and the trial court a few days before the January 12 hearing. The report concluded that Appellant was competent to plead guilty. During the retrospective hearing, the trial court—relying on the record from the January 12 hearing—noted that defense counsel had agreed with the report's conclusion and had affirmatively stated that competency was no longer an issue for the defense. The trial court reviewed the *Boykin* colloquy it held with Appellant before accepting his guilty plea. The trial court heard the testimony of the Commonwealth's Attorney who prosecuted the case against Appellant. (Defense counsel was absent. From the record, it does not appear that either defense counsel was subpoenaed to testify at the retrospective hearing.) And finally, the trial court reviewed the deposition of Dr. Walker made in preparation for the retrospective hearing and introduced into evidence. In the deposition, Dr. Walker was extensively questioned by the Commonwealth and cross-examined by the defense. Little of this evidence places Appellant's competency in doubt and most of it supports the trial court's ultimate ruling that Appellant was competent to plead guilty. Thus, we conclude that the trial court's ruling was supported by substantial evidence and, therefore, was not clearly erroneous.[12] Finally, we note that competency claims raised on appeal may be based on violations of both procedural and substantive due process.[13] "A procedural competency claim is based upon a trial court's alleged

failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent."[14] "Claims involving these principles raise similar but distinct issues: the issue in a substantive competency claim is whether the defendant was in fact competent to stand trial, but the issue in a procedural competency claim is whether the trial court should have conducted a competency hearing."[15] Thus, the underlying trial court error, which was a failure to hold the competency hearing required by KRS 504.100 or a hearing that was adequate to protect Appellant's due process rights, concerned a violation of *procedural* due process.

12 *United States v. Branham,* 97 F.3d 835, 855 (6th Cir.1996) (competency determinations are findings of fact).

13 *Vogt v. United States,* 88 F.3d 587, 590 (8th Cir.1996), *cert. denied,* 502 U.S. 1092, 112 S.Ct. 1164, 117 L.Ed.2d 411 (1992).

14 *McGregor v. Gibson,* 248 F.3d 946, 951 (10th Cir.2001).

15 *Id.* at 590–91.

[8] [9] The purpose of the competency hearing—the procedural due process right—is to ensure that the substantive due process violation does not occur, *i.e.,* the Commonwealth does not try an incompetent criminal defendant.[16] We therefore conclude our discussion of the competency issue with an examination of the procedural safeguards required by statute at competency hearings, and whether these were provided at Appellant's retrospective hearing.

16 *Vogt,* 88 F.3d at 590.

KRS 504.080 sets forth the procedural requirements for a competency hearing when a hearing is required by ***34** KRS 504.100.[17] One of the statute's requirements is that the examining psychiatrist must be present at the hearing unless the doctor's presence is waived by the defendant.[18] Additionally, the hearing must be "an *evidentiary* hearing with the right to examine the witnesses."[19] Finally, the statute implies a right to call independent experts retained by the defendant who "participated in" the competency evaluation.[20] These rights and requirements likewise apply to any retrospective competency hearing.

17 *Gabbard v. Commonwealth,* Ky., 887 S.W.2d 547, 551 (1994).

18 KRS 504.080(3).

19 *Id.* (emphasis in original).

20 *See* KRS 504.080(5).

The retrospective hearing was clearly an evidentiary hearing in which Appellant was present. Defense counsel had the opportunity to both call and cross-examine witnesses. While Dr. Walker did not appear at the hearing itself, she was deposed and defense counsel had ample opportunity to cross-examine her conclusions and question her methods. Her deposition was introduced at the retrospective hearing. Thus, the procedural safeguards required by statute were afforded at the retrospective hearing. Because these safeguards are equal to or go beyond what is required by the United States and Kentucky Constitutions, we conclude that the retrospective hearing provided adequate procedural safeguards to determine the issue of Appellant's competency to plead guilty.[21] On appeal, Appellant argues that he was denied procedural due process at the retrospective hearing because the trial court denied his motion for funds for an independent expert to examine Appellant. This expert, who was retained to examine Appellant prior to entering his guilty plea, never examined or observed Appellant because Appellant refused to meet with him. Thus, the expert never "participated in" the competency evaluation of Appellant prior to the January 12 hearing and no argument can be made that the expert's presence was required by KRS 504.080. The trial court denied the funds on grounds that the expert's testimony would not be relevant because a current examination would have little bearing on the question of Appellant's mental state seven years before. The trial court did not abuse its discretion in denying Appellant's motion for expert funds on these grounds.[22]

21 *See Medina v. California,* 505 U.S. 437, 453, 112 S.Ct.

2572, 2581, 120 L.Ed.2d 353, 368 (1992).

22 *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 381 (1999), *cert. denied*, 528 U.S. 1166, 120 S.Ct. 1186, 145 L.Ed.2d 1092 (2000). (A trial court's denial of funds for the assistance of experts is reviewed for abuse of discretion.)

For the reasons stated above, we affirm the trial court's ruling on remand that Appellant was competent to enter an unconditional guilty plea on January 12, 1995.

Evidentiary Issues

Refusal to Allow Jury to Rehear Testimony

[10] About three hours into deliberations, the jury foreman requested that the jury be permitted to rehear Appellant's testimony. The trial court responded that the transcript had not yet been prepared by the court reporter, and that the jury would have to rely on its own recollections in deliberations. No objections were entered to the trial court's decision. Appellant now argues that the trial court's denial of the jury's request constitutes reversible error. According to Appellant, ***35** the jury's request indicated possible confusion or misunderstanding, and that he was prejudiced when the jury eventually rendered its decision without the benefit of rehearing his testimony.

[11] "Any decision to allow the jury to have testimony replayed during its deliberations is within the sound discretion of the trial judge."[23] We find no abuse of discretion in this case. The jury foreman made a plain request to the trial judge to rehear Appellant's testimony, and did not elaborate as to the reason for the request. The trial court was not presented with any indication that the jury was confused about Appellant's testimony, nor did the jury state or imply that a verdict could not be reached without a transcript or recording of the testimony. Moreover, the request was never reiterated. Having no reason to suspect that the jury was confused or unable to continue deliberations, we conclude that the trial court did not abuse its discretion in denying the jury's request to rehear Appellant's testimony.

23 *Baze v. Commonwealth*, Ky., 965 S.W.2d 817, 825 (1997).

Admission of Crime Scene Photographs and Murder Weapon

Appellant's next claim is that photographs of the crime scene and the actual murder weapon were improperly admitted into evidence. The admitted photographs depicted the crime scene, the bloodstained stall in which Mr. Cash's body was eventually found, and Mr. Cash's corpse. Appellant contends that the photographs and the bloody weapon were rendered irrelevant by his guilty plea, and that their gruesome nature served only to inflame and incite the jury to recommend death.

At the outset, the Commonwealth asserts that this issue is unpreserved for review. The record reflects that, at the time the photographs and weapon were admitted, defense counsel entered a renewed objection. Apparently, defense counsel was reiterating an objection that had been entered previously by Appellant's former counsel; however, the basis of the objection was not restated and the record does not include the actual pretrial motion. Nonetheless, it is clear from the transcript that the trial court was aware of and familiar with the basis of the objection, and that a pretrial motion objecting to the photographs had been denied.[24] Of course, the burden rests with Appellant to provide to this Court a complete and comprehensive record upon which to base appellate review. However, out of an abundance of caution and in light of the penalty imposed in this case, we will consider the admissibility of the photographs and weapon as if the issue had been properly and fully preserved at trial.

24 Upon defense counsel's renewed objection to the showing of the photographs to the jury, the trial court responded as follows: "Let the record show that prior to the trial in pretrial motions, objections to the showing of these photographs to the jury has (sic) been raised by the defense. That objection has been denied by the court."

[12] Appellant first argues that the photographs were so heinous and gruesome that any relevancy to the proceedings was outweighed by the possibility that the photographs would inflame and incite the jury to recommend death. The crime to which Appellant pled guilty is, by its nature, violent and gruesome. It necessarily follows that the evidence introduced by the prosecution to prove its case during the penalty phase will be disturbing, as well. However, Appellant does not contend that the photographs failed to portray the crime scene or the victim's body accurately. ***36** [25] An otherwise admissible photograph does not become inadmissible solely because it is gruesome and the crime is heinous.[26] Therefore, the trial court did not err in refusing to exclude

the photographs simply because they were gruesome.

25 *See Johnson v. Commonwealth*, Ky., 103 S.W.3d 687, 696 (2003).

26 *Barnett v. Commonwealth*, Ky., 979 S.W.2d 98, 102 (1998). *See also Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488, 496 (1995).

[13] [14] Appellant raises an alternative argument regarding the admissibility of the photographs and the murder weapon: Appellant challenges the relevancy of the exhibits in light of his guilty plea. The Commonwealth, however, has a right to prove its case to the jury with competent evidence even when the defendant pleads guilty.[27] In this case, Appellant stated that he did not remember anything past the first hammer blow to Mr. Cash's head. The photographs were presented to the jury in an effort by the Commonwealth to challenge Appellant's credibility by depicting the crime scene, the distance Appellant had to drag Mr. Cash's body to the stall, the number of wounds inflicted upon Mr. Cash, and to corroborate certain testimony of the prosecution's witnesses. The murder weapon was used to apprise the jury of the circumstances of the crime and to corroborate witness Dale Watson's testimony that the hammer was the weapon depicted in the photographs of the crime scene.

27 *Gall v. Commonwealth*, Ky., 607 S.W.2d 97, 107 (1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 824 (1981).

[15] "An appellate court should reverse a trial court's ruling under KRE 403 only if there has been an abuse of discretion."[28] In making its determination, the trial court must weigh the probative value of the evidence against the risk of undue prejudice. Here, the photographs and the hammer were admitted to corroborate the testimony of several key witnesses. More importantly, the trial court correctly noted that a sufficient amount of evidence must be presented to the jury in a penalty phase proceeding where no trial has occurred, as the jury cannot be expected to make its determination without a comprehensive understanding of the serious nature of the charge. We conclude that the trial court based its decision on sound reasoning, and therefore no abuse of discretion occurred.

28 *Barnett*, 979 S.W.2d at 103.

Admission of Allegedly Prejudicial Evidence from Appellant's First Trial

[16] Next, Appellant enters a general challenge to virtually all evidence admitted by the Commonwealth. Relying on *Old Chief v. United States*,[29] Appellant argues that all evidence of the crime beyond a recitation of the elements to which he confessed is inadmissible. In *Old Chief*, the U.S. Supreme Court concluded that, when a defendant has offered to stipulate to a prior conviction, evidence of the conviction is still relevant, though its relevance was outweighed by undue prejudice and therefore inadmissible under FRE 403. Appellant further argues that the guidelines set forth in *Boone v. Commonwealth*[30] require the trial court to prohibit any evidence of Appellant's crimes beyond the description of the crimes, including the elements, and the fact that Appellant had pled guilty to said crimes.

29 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

30 Ky., 821 S.W.2d 813, 814 (1992).

***37** Appellant's reliance on both *Old Chief* and *Boone* is misplaced. Both cases involved situations in which a guilt phase trial was held, thus providing the court with a certain body of evidence from which to extract evidence for purposes of sentencing. Here, no guilt phase trial ever occurred, as Appellant pled guilty. While the types of admissible evidence delineated in *Boone* are guidelines for the trial court, we do not agree with Appellant that *Boone* should be read as a strict limitation on the types of evidence admissible in a penalty phase trial where the defendant has pled guilty. Nor does *Boone* itself purport to create such a strict limitation: the Court in *Boone* provided a list of what types of evidence "might be pertinent."[31] Here, because no guilt phase trial occurred, the types of admissible evidence set forth in *Boone* alone were insufficient in this case to adequately apprise the jury of the nature of Appellant's crimes. As noted in *Boone* itself, the sentencing jury cannot be expected to fix punishment "in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of an appropriate penalty."[32] With that principle in mind, the trial court must use its discretion in admitting relevant evidence that will sufficiently inform the jury of the

crimes committed, while avoiding undue prejudice. Here, we conclude that the trial court violated neither *Boone* nor *Old Chief* in admitting evidence of Appellant's crimes. The evidence admitted—including the testimony of pathologist Roberta Conrad to which Appellant objects particularly—was relevant and reasonably calculated to inform the jury of the nature of the crimes and did not unduly prejudice Appellant. Accordingly, we find no error.

31 *Id.* at 814.

32 *Boone*, 821 S.W.2d at 814, *citing from Commonwealth v. Reneer*, Ky., 734 S.W.2d 794, 797 (1987).

Admission of So–Called Blood Spatter Evidence

Appellant's final evidentiary claim involves so-called blood spatter evidence, the admission of which Appellant challenges with three distinct arguments. The Commonwealth sought to establish that blood spatters were found inside the calf stall in which Mr. Cash's body was found. The presence of blood spatters inside the stall would tend to support the Commonwealth's theory that Appellant beat Mr. Cash both inside and outside the calf stall. Defense counsel entered an objection to the admission of this evidence, and the trial court entertained extensive and lengthy arguments in chambers concerning the matter. The Commonwealth asserted that blood spatter evidence was relevant to undermine Appellant's credibility, as Appellant testified at his original trial that no assault occurred in the stall. The trial court ultimately prohibited any expert evidence concerning the possibility of an additional assault in the calf stall or the presence of blood spatters in the calf stall, on the grounds that it had not been admitted at the first trial.[33] The trial court did permit the Commonwealth to admit photographs of the crime scene, as well as the testimony of investigating officers as to what they observed in the calf stall, including the presence of fresh blood. However, the trial court sternly and unequivocally prohibited the Commonwealth from allowing the investigating officers to conclude that the presence of blood spatters in the calf stall indicated that a second assault occurred.

33 *See* n.14, *infra.*

***38** The testimony at the heart of Appellant's claims of error is that of Sheriff Ronald Murphy, who was the investigating officer and personally observed Mr. Cash's body in the calf stall. The trial court permitted Sheriff Murphy to testify that he found Mr. Cash's body in the stall and observed "bloody spots around the body and around the straw there and around the head." Sheriff Murphy further testified that he noticed a curry comb "laying right close to his head and it had blood spots all over it" and that the "straw around the upper part of his body had blood specks all over it." Finally, the Commonwealth asked Sheriff Murphy if the blood on the hay and on the curry comb appeared to be fresh blood, and the witness replied in the affirmative. Appellant now objects to the admission of this testimony on two grounds.

Appellant first challenges the admission of Sheriff Murphy's testimony on grounds that it was inadmissible because it was not introduced at his first trial. The trial court had ordered that the Commonwealth would not be permitted to introduce evidence that had not been introduced at the first trial.[34] Appellant argues that the admission of the testimony of Ronald Murphy, an investigating officer, violated this order. Without analyzing whether a violation of this order would even constitute reversible error, we conclude that this argument is without merit because the Commonwealth did not introduce any new evidence.

34 By order dated January 13, 1998, the trial court ruled: "... the Commonwealth has advised the Court and counsel for the Defendant that it does not intend to introduce any new evidence at the penalty phase other than the evidence presented at the original trial."

Ronald Murphy's testimony was limited to his own observations when he found Mr. Cash's body in the stall. After reviewing his testimony at both proceedings, we conclude that his testimony at the penalty phase proceedings did not substantively expand the testimony he gave at Appellant's first trial. Nor did Sheriff Murphy testify as to blood spatters in relation to the second assault theory as Appellant argues; rather, Sheriff Murphy merely stated that he observed fresh blood on the hay and the curry comb that were found inside the stall with Mr. Cash's body. Having determined that no new evidence was admitted, we find no error.

[17] Appellant next argues that Sheriff Murphy's testimony constitutes expert testimony on blood spatters within the meaning of KRE 702, and therefore it was error for the trial court to admit such testimony without the benefit of a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[35] Further, Appellant argues that it was an abuse of discretion for the trial court to deny his

motion for a continuance for the purpose of refuting Sheriff Murphy's expert testimony. We find both arguments to be without merit.

35 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[18] Upon review of Sheriff Murphy's testimony, we do not believe that he testified as an expert witness, and therefore KRE 702 and *Daubert* have no application. Sheriff Murphy testified as to his observations upon entering the stall: that he observed blood on the hay and the curry comb near Mr. Cash's body, and that in his opinion the blood was fresh. We simply do not agree with Appellant's characterization of Sheriff Murphy's testimony as expert testimony based on "scientific, technical, or other specialized knowledge" within the meaning of KRE 702. Murphy never testified regarding blood spatter patterns; in fact, the term "blood spatter" is not to ***39** be found once in the entirety of his testimony. His testimony was limited to his own observations. It does not take an expert to identify blood around a dead body, nor to give an opinion as to whether blood appears fresh. Whether a witness is a qualified expert is a matter within the sound discretion of the trial court.[36] Here, as Sheriff Murphy's testimony was limited solely to his personal observations on the morning of the murder, we are not persuaded that the trial court in any way abused its discretion. Accordingly, no abuse of discretion occurred when the trial court denied Appellant's motion for a continuance.

36 *Cormney v. Commonwealth,* Ky.App., 943 S.W.2d 629, 634 n. 2 (1997).

Admission of Statements and Items Seized from Appellant's Person

[19] Appellant next claims that the trial court erroneously permitted the Commonwealth to introduce statements he made to police at the time of his arrest and items seized from his person. This issue is unpreserved. Defense counsel filed no motions to suppress the statements made by Appellant after he was apprehended at the Madisonville bus station or to suppress the knife, bus ticket, and bloody shoes found on Appellant at the time of the arrest. Rather, Appellant now argues that the trial court should have conducted a suppression hearing on its own motion.

[20] [21] [22] At the outset, it should be noted that the entry of a valid guilty plea effectively waives all defenses other than that the indictment charged no offense.[37] Further, a guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.[38] Where a defendant has entered an unconditional plea of guilty, he may not later challenge allegedly improper lineup identifications or the police's failure to provide *Miranda* warnings.[39] Accordingly, Appellant now is unable to challenge the constitutionality of his arrest and the admission of certain pieces of evidence due to his unconditional plea of guilty.

37 *Quarles v. Commonwealth,* Ky., 456 S.W.2d 693, 694 (1970).

38 *Centers v. Commonwealth,* Ky.App., 799 S.W.2d 51, 55 (1990), *citing White v. Sowders,* 644 F.2d 1177 (6th Cir.1980).

39 *Thomas v. Commonwealth,* Ky., 459 S.W.2d 72 (1970).

Interestingly, Appellant essentially concedes this conclusion. Rather, according to Appellant, the principle set forth in *Quarles* and its progeny—that a valid guilty plea waives all defenses other than that no offense has been charged by the indictment—does not apply in situations where only the sentence, not the validity of the guilty plea, is being challenged. Appellant insists that *Sanders v. Commonwealth*[40] is inapplicable to this issue, as the Commonwealth proposes, because the suppression issue there related only to the defendant's guilt. Furthermore, Appellant notes that the court in *Sanders* specifically stated that a valid guilty plea does not waive a right to appeal the sentence.[41] Here, Appellant argues that a suppression hearing should have been conducted to limit the evidence introduced during the penalty phase, and such a challenge is not waived by entry of a valid and unconditional guilty plea.

40 Ky.App., 663 S.W.2d 216 (1983).

41 *Id.* at 218.

[23] [24] Unfortunately, we cannot reach the merits of this

novel issue because *40 no motion to suppress was ever presented to the trial court. Of course, in capital cases, we will review even unpreserved errors pursuant to *Sanders*.[42] However, such an analysis is necessarily predicated upon a determination that an error actually occurred. Here, no error occurred because the trial court has no duty to conduct a suppression hearing on its own motion. We find this argument similar to Appellant's assertion, *infra*, that the trial court should have, *sua sponte*, offered him an opportunity to withdraw his guilty plea. The trial court must ensure a fair trial; the trial court is not burdened by the duty to try the case on behalf of defense counsel. Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived.[43] Hence, absent a defense motion to suppress, the trial court committed no error in admitting the evidence to which Appellant now objects.

42 Ky., 801 S.W.2d 665, 668 (1991).

43 *Bell v. Commonwealth*, Ky.App., 473 S.W.2d 820, 821 (1971).

Arguments Relating to Appellant's Plea of Guilty

Validity of Guilty Plea

[25] Appellant raises two issues surrounding his plea of guilty to capital murder, first-degree robbery, and first-degree escape. First, Appellant argues that his due process rights were violated when the trial court accepted his guilty plea because he failed to admit each element of both the murder and robbery charge. After a review of the record and considering the totality of the circumstances surrounding Appellant's guilty plea, we conclude that Appellant's guilty plea was made voluntarily and with understanding of the charges and, therefore, no due process violation occurred.

Appellant contends that he never admitted to one element required for the murder charge and one element required for the first-degree robbery charge, and therefore the trial court should not have accepted his guilty plea. The element of murder, as defined by KRS 507.020, which Appellant claims he did not admit is "to cause the death of another." Appellant denies admitting to the trial court that he administered the fatal blow to Cash. At his first trial, Appellant testified that he remembered striking Cash one time with the hammer, but does not remember any subsequent blows. Thus, according to Appellant, he never admitted that he dealt the fatal blow to Cash; Appellant also raises the possibility that another inmate could have administered subsequent blows to Cash.

Appellant makes a similar claim with respect to the first-degree robbery charge. He argues that he did not admit to all the elements of first-degree robbery: that crime requires the actor to be "in the course of committing a theft" and Appellant claims that he did not admit to being in the course of committing a theft when he removed money from Cash's wallet.[44] Appellant told the trial court that he did not form the intent to take anything from Cash until after Cash was unconscious. By virtue of this statement, Appellant opines, he was not in the course of committing a theft when he assaulted Cash and therefore his guilty plea to first-degree robbery is invalid.

44 KRS 515.020.

[26] In asserting that he did not specifically admit to each element of the *41 charges, we believe that Appellant is essentially challenging the sufficiency of the evidence against him. It is well-settled law in Kentucky that a voluntary, intelligent plea of guilty precludes a post-judgment challenge to the sufficiency of the evidence.[45] Therefore, the relevant inquiry becomes whether Appellant's guilty plea was voluntary and intelligent. Appellant argues that his guilty plea was not voluntary because the record reflects that he entered the plea with an apparent lack of understanding of the charges. To support this contention, Appellant points to his own statements during the plea colloquy. While explaining the crimes to the trial court, Appellant repeatedly impressed that he did not pre-plan Cash's murder, that he did not kill Cash in order to effectuate an escape plan, and that he did not decide to take Cash's wallet until after he assaulted Cash.[46] Appellant argues that these statements evidence that he did not fully understand the charges against him, and therefore the trial court erred in concluding that the guilty plea was voluntary and intelligent.

45 *Taylor v. Commonwealth*, Ky.App., 724 S.W.2d 223, 225 (1986). *See also Menna v. New York*, 423 U.S. 61 n. 2, 96 S.Ct. 241 n. 2, 46 L.Ed.2d 195 n. 2 (1975) ("[a] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent it quite validly removes the issue of factual guilt from the case").

46 When asked to explain the crimes, Appellant made the following statements: "I know that there are those that believe that I done this for the purpose of escaping and there are those that will always believe that ... I had less than three and a half years to the Parole Board and for me to do that intentionally, I just had to want to throw my life completely away ... I had nothing planned. If I had anything planned or it was done intentionally with the amount of hours that I had after the thing happened, I probably would not have gotten caught at that particular time. But I made some bad decisions and I done things that, you know, that it is just simply ridiculous to say that it was planned."

The trial court asked Appellant what he did after striking Mr. Cash with the hammer, to which Appellant replied: "I realized ... what had happened and the escape and the robbery came afterwards. Yes, I did go in his pockets, I would assume, and got his wallet, me thinking that he may have had some money on him or something like this, but I just basically got into the truck and left .... But I can tell you, that did not happen because I wanted to escape."

[27] [28] [29] A trial court may not accept a plea of guilty without an affirmative showing that the plea is entered intelligently and voluntarily.[47] The trial court must be satisfied that the defendant has a full understanding of what the guilty plea connotes and its consequences.[48] In reviewing the validity of a guilty plea, an appellate court must examine the totality of the circumstances and determine whether an intelligent plea was entered voluntarily and with understanding of the charges.[49]

47 RCr 8.08; *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274, 279 (1969).

48 *Fontaine v. United States,* 526 F.2d 514, 516 (6th Cir.1975).

49 *Kotas v. Commonwealth,* Ky., 565 S.W.2d 445, 447 (1978), *citing Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

After a thorough review of the record, we are not persuaded that Appellant lacked a full understanding of the charges against him. Appellant signed a motion to enter a guilty plea in this matter, as well as a statement waiving his rights as a criminal defendant. Appellant stated to the trial court that he freely signed and fully understood both documents. In addition to a discussion concerning Appellant's ***42** waiver of rights form, which alone would satisfy the requirements of *Boykin,*[50] the trial court engaged in an extensive colloquy with Appellant. Appellant again was reminded of his rights as a criminal defendant and in particular the rights specified in *Boykin,* he was apprised of the nature of the charges against him, he was made aware of the penalties which he faced and the aggravators that would be applied against him, and he was questioned as to whether he was satisfied with his legal representation. Moreover, he was given the opportunity to explain, in his own words, the crimes to which he pled guilty. In response to the trial court's questions, Appellant made numerous declarations of guilt before the trial court; this Court has recognized that solemn declarations in open court carry a strong presumption of veracity.[51] In reviewing the totality of the circumstances, we also bear in mind the lengthy procedural history of this matter: we find it difficult to believe that Appellant lacked an understanding of the charges against him when he had already endured an entire trial and appeal on the same three charges. In light of the foregoing, and with particular regard being paid to the thorough and lengthy plea colloquy conducted by the trial court, we conclude that Appellant entered his guilty plea knowingly and voluntarily. Therefore, Appellant may not now challenge the sufficiency of the evidence against him. Accordingly, Appellant's due process rights have not been violated.

50 *Commonwealth v. Crawford,* Ky., 789 S.W.2d 779, 780 (1990).

51 *Centers,* 799 S.W.2d at 54.

Failure to Offer Opportunity to Withdraw Guilty Plea

Appellant next claims that he should have been afforded an opportunity to withdraw his guilty plea once it was determined that a jury would fix his punishment. Appellant entered his unconditional plea of guilty pursuant to RCr 8.08 at a hearing held on January 12, 1995. At the same hearing, but before the plea was accepted, the trial court considered a motion in which the Commonwealth sought to demand the empanelment of a jury for the sentencing phase pursuant to RCr 9.26, despite the fact that Appellant had validly waived his right to jury sentencing. The trial court denied the motion, and the Commonwealth stated its intent to appeal that decision. Understanding that this Court would soon determine the issue conclusively, the trial court agreed to

postpone sentencing Appellant until a decision in *Commonwealth v. Johnson*[52] was rendered. Thereafter, the Court of Appeals considered the Commonwealth's appeal in this matter and remanded for jury sentencing in light of *Johnson.*

52 Ky., 910 S.W.2d 229 (1995) (holding that RCr 9.84 requires a jury verdict on sentencing in capital cases absent an agreement of all parties).

Appellant now argues that the trial court should have offered him an opportunity to withdraw his guilty plea before the jury-sentencing phase commenced. What is conspicuously and inexplicably absent, however, is a defense motion to withdraw the guilty plea. Appellant acknowledges that the lack of a motion to withdraw renders this issue unpreserved, but nonetheless asks us to review the trial court's failure to re-question him as to his guilty plea for palpable error.

[30] The Appellant's arguments are without merit. Absent a defense motion, a trial court is not required to *sua sponte* offer defendants an opportunity to withdraw guilty pleas. The fact that the applicable law concerning jury sentencing in ***43** capital cases shifted during the pendency of this case in no way creates a duty in the trial court to re-question Appellant about his plea. Therefore, we conclude that no reversible error occurred.

Challenges Concerning Statutory Aggravators

Appellant makes several claims of error with respect to the use of aggravating circumstances during the penalty phase proceedings. Specifically, Appellant alleges that: (1) the trial court erred in permitting the Commonwealth to use heinousness as an aggravator; (2) that Appellant's prior capital conviction was improperly used as an aggravator; and (3) that the trial court erred in failing to direct a verdict for failure to prove all elements of the aggravators.

Heinousness as an Aggravator

[31] Appellant first claims that his Eighth Amendment rights were violated when the Commonwealth urged the jury to impose the death penalty based on the heinousness of the crime. This issue is unpreserved for appellate review, and therefore we will consider the matter under the test set forth in *Sanders.*[53] Appellant contends that the Commonwealth emphasized the heinousness of the crime to such a degree that it essentially asked the jury to base a sentence of death on the heinousness of the crime. Appellant bases this argument solely on the Commonwealth's Attorney's use of the word "heinous" four times in its opening statement.

53 *Id.*

[32] We have reviewed the Commonwealth's Attorney's opening statement and find no error. During his opening, the Commonwealth's Attorney stated to the jury: "The crimes are heinous and the Commonwealth seeks a punishment that befits the nature of these heinous acts." Later in opening statement, the Commonwealth's Attorney twice referred to Appellant's actions as "heinous." Attorneys are afforded much leeway in making opening statements and closing arguments.[54] It must also be remembered that attorneys are presenting arguments to the jury, not evidence. We do not agree that the Commonwealth exceeded its boundaries in referring to Appellant's crimes as "heinous."

54 *Wager v. Commonwealth,* Ky., 751 S.W.2d 28, 30 (1988); *Lynem v. Commonwealth,* Ky., 565 S.W.2d 141, 145 (1978).

[33] Furthermore, we do not believe that the Commonwealth's Attorney's use of the word "heinous" to describe the crimes elevated "heinousness" to the level of an aggravating circumstance. The Commonwealth's Attorney enumerated for the jury three statutory aggravators under KRS 532.025(2)(a) that were being applied in this case; heinousness was not among them. The trial court instructed the jury only on those three statutory aggravators. While Appellant is correct in stating that the use of heinousness as an aggravator would be unconstitutional,[55] there is simply no evidence whatsoever that heinousness was used in this case as an aggravating factor.

55 *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

Prior Conviction as an Aggravator

Error is next cited where the trial court allowed the admission of Appellant's 1974 willful murder conviction as an aggravator because it was not a capital conviction as required by KRS 532.025(2)(a)(1). Appellant challenges the trial court's ruling on two grounds: (1) that his 1974

conviction was not a capital conviction as required by KRS 532.025(2)(a)(1), and (2) that the absence ***44** of a record in the 1974 willful murder case left Appellant with no way to be heard in a challenge to the validity of the prior conviction.

[34] Appellant was convicted in 1974 of willful murder. He argues that the conviction was not a capital conviction as required by KRS 532.025(2)(a)(1) because, at the time of sentencing, a federal moratorium against the death penalty was in place, as a result of the U.S. Supreme Court holding in *Furman v. Georgia.*[56] Hence, according to Appellant, the conviction was not a capital conviction because the death penalty was not an option at that time. We can dispense with this argument without determining whether a murder conviction obtained during the federal moratorium against the death penalty is nonetheless a capital conviction for purposes of KRS 532.025(2)(a)(1). "A statutory aggravating circumstance serves to place the appellant in the class eligible for the death penalty."[57] Appellant was already eligible for the death penalty.[58] Thus, we need not decide whether the 1974 willful murder conviction was a "capital" conviction for purposes of KRS 532.025(2)(a)(1). Furthermore, we find no merit to Appellant's assertion that this issue renders KRS 535.010 and KRS 532.025(2)(a)(1) unconstitutionally vague.

56 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

57 *Bevins v. Commonwealth,* Ky., 712 S.W.2d 932, 935 (1986). *See also Zant v. Stephens,* 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

58 KRS 532.025(2)(a)(5).

[35] Appellant also challenges the use of his 1974 conviction as an aggravator on the grounds that no record of that trial exists. Appellant argues that he was never afforded an effective appeal due to the absence of a trial record, rendering the conviction constitutionally infirm, and therefore improperly admitted as an aggravator in the present matter. Of course, as stated above, this argument does not warrant reversal as the jury properly found the presence of another statutory aggravating factor, which alone would authorize imposition of the death penalty. However, we will briefly address Appellant's statement in his brief that this Court "affirmed the 1974 conviction, despite the absence of any record," in violation of Section 115 of the Kentucky Constitution, which entitles all criminal defendants to one appeal "upon the record." To state that Appellant was never afforded the opportunity of an effective appeal is materially misleading and hints at serious impropriety on the part of this Court. In an unpublished opinion rendered in May of 1994, this Court unanimously voted to affirm Appellant's 1974 willful murder conviction.[59] While noting the unusual procedural circumstances of the case due to apparent limitations of the record, this Court, after careful consideration as evidenced by the lengthy review of the procedural and factual history of the case, determined that "the record on appeal in this case as approved and settled by the Pike Circuit Court pursuant to CR 75.13, is sufficient to provide for effective appellate review of the proceedings in the trial court leading to the appellant's conviction of the crime of willful murder and his sentence to life imprisonment."[60] Appellant was convicted by a jury and enjoyed effective appellate review; thus, the introduction of this conviction as a statutory aggravating factor was not improper.

59 *Thompson v. Commonwealth,* Ky., 86-SC-566-TG (1994).

60 *Id.* at 10.

***45** *Directed Verdict*

[36] [37] Appellant next claims that the trial court erroneously denied his motion for a directed verdict because the Commonwealth failed to prove all elements of the aggravators applied. The appropriate standard for determining whether a trial court should grant a motion for a directed verdict is whether, drawing all fair and reasonable inferences in favor of the Commonwealth, the evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty; if so, a directed verdict should be denied.[61] The trial court denied Appellant's motion, explaining that the Commonwealth had offered proof of the aggravators. We agree. The jury found two aggravators beyond a reasonable doubt in this case, and substantial evidence was offered to prove each. The Commonwealth called the clerk of the Pike Circuit Court to testify regarding Appellant's prior murder conviction; the Commonwealth likewise proved that Appellant was incarcerated and that Mr. Cash was a prison employee at the time of the murder. The trial court did not err in denying Appellant's motion for a directed verdict.

61 *Commonwealth v. Benham,* Ky., 816 S.W.2d 186, 188 (1991).

Jury Sentencing Over Defense Objection

Appellant argues that the trial court erroneously allowed jury sentencing over defense objection. In actuality, Appellant is challenging this Court's decision in *Commonwealth v. Johnson,* and asks us to reverse that decision.[62] We decline to do so. *Johnson* requires a jury verdict on sentencing in capital cases except upon the agreement of all parties.[63] In this case, the Commonwealth never agreed to waive jury sentencing. Therefore, the trial court properly denied Appellant's motion in opposition of jury sentencing.

62 Ky., 910 S.W.2d 229 (1995).

63 *Id.* at 231.

Hearing Concerning Effect of *Woodall* Case

Appellant next claims the trial court erred in denying a motion by which he requested a hearing to consider the effect a trial in a nearby county might have on his sentencing proceedings. Appellant alleges that the capital murder trial of Robert Keith Woodall, which began shortly after Appellant's penalty phase proceedings, was so sensational and shocking that the trial court should have conducted a hearing to determine if that matter would affect Appellant's sentencing trial. We find no merit to this argument. The motion presented to the trial court did not allege that Appellant would be prejudiced by the Woodall trial in some way; rather, it discussed the conflicts that existed because defense counsel was assigned to both trials. The motion was denied, and we conclude that the trial court did not abuse its discretion in doing so.

Claims of Prosecutorial Misconduct

[38] [39] Appellant claims that he was denied a fair trial due to improper comments made by the Commonwealth's Attorney during opening and closing statements. He directs this Court's attention to six separate instances of alleged misconduct during either opening or closing statements. In reviewing allegations of prosecutorial misconduct, "the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor."[64] Particularly, in reviewing opening and closing statements for prosecutorial misconduct, ***46** the arguments must be considered as a whole.[65]

64 *Maxie v. Commonwealth,* Ky., 82 S.W.3d 860, 866 (2002).

65 *Young v. Commonwealth,* Ky., 25 S.W.3d 66, 74–75 (2000).

Appellant's first claim of prosecutorial misconduct is that the Commonwealth's Attorney improperly used the terms "heinous" and "vicious" to describe the crimes and Appellant, essentially imploring the jury to consider the heinous nature of the crimes as an aggravating circumstance. Appellant is simply rehashing an argument previously raised in this appeal and addressed, *supra.* We find no error.

[40] [41] Appellant next claims that the prosecuting attorney made comments that created the impression that the prosecution was acting on behalf of the victim rather than the Commonwealth.[66] Of course, a Commonwealth's Attorney is just that—a representative of the Commonwealth, not the victim, and it is improper for the Commonwealth's Attorney to suggest otherwise. Nonetheless, while perhaps approaching the line of impropriety, we conclude that these statements fall within the wide latitude afforded attorneys in presenting closing arguments.[67]

66 During closing argument, the Commonwealth's Attorney stated: "[T]here's also a burden that is being borne today and that is as a Commonwealth Attorney representing a person who is not here today—an empty chair—Charles Fred Cash taken from us by this man—this killer. That is a burden that is very very heavy. As a representative of the Commonwealth to speak on behalf of one that has been murdered. I am the last one on this earth to speak on behalf of Mr. Cash."

67 *Bowling v. Commonwealth,* Ky., 873 S.W.2d 175, 178 (1993), *cert. denied,* 513 U.S. 862, 115 S.Ct. 176, 130 L.Ed.2d 112 (1994).

[42] [43] Appellant cites error where the Commonwealth's

Attorney made statements improperly urging the jury to sentence based on sympathy for the victim, which also served to glorify and enlarge the victim.[68] While the victim may be described to the jury, the victim may not be glorified or enlarged.[69] Reading the prosecution's closing argument as a whole, we conclude that Mr. Cash was not improperly glorified or enlarged in the minds of the jury. Appellant's other claims with respect to this portion of the Commonwealth's closing argument are equally without merit.

68 During his closing, the prosecutor argued the following: "You are here today to impose a punishment and that punishment is death because life has not deterred this defendant.... Charles Fred Cash is serving an eternal sentence because of this man. Why should this defendant's fate be any different than Mr. Cash's? Death brought us to this place.... Justice dictates a finding and a fixing of punishment of death. They will ask for mercy. When they ask for mercy, I want you to remember Fred Cash. When they cry for leniency, remember Fred Cash. That's all any prosecutor can ask."

69 *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293, 302–03 (1997).

[44] Appellant's next claim of prosecutorial misconduct is that the Commonwealth's Attorney improperly suggested that he had "done [his] part" ' in prosecuting Appellant and that the jury was the "final link."[70] We do not agree that the *47 prosecuting attorney's statements constitute a suggestion that the jury was simply the "last link" in a chain, or that the Commonwealth's comment rendered the death penalty a foregone conclusion. Nor do we agree with Appellant's assertion that the jury's decision-making authority was infringed upon. We find no error.

70 The portion of the Commonwealth's closing argument to which Appellant objects is the following: "Ladies and Gentlemen, I stand before you just as a man. I'm not trying to lay any kind of guilt trip on you whatsoever. I'm not trying to arouse any passion. I didn't create those exhibits. I have tried to introduce the evidence as best I could and this is something that I did not take lightly and I have never done this before—standing before a group of jurors and asking that the ultimate penalty be imposed." Then, later in the argument, the prosecuting attorney concluded: "I carry a note with me and I have carried it every day in this trial. It's from my son. He said, do the best you can, Dad. I've done that. I've done all I can do. I'm going to turn it into your hands but I ask that when you go back there, you look at those exhibits and you consider all of the evidence and you write those three aggravators down on Verdict Form Number Four and you fix this killer's punishment at death."

According to Appellant, the Commonwealth improperly insinuated that Appellant should be sentenced to death for exercising his right to be sentenced before a judge and jury, where the victim was simply murdered senselessly.[71] Again, we find no error in these statements.

71 The Commonwealth's Attorney argued the following during his closing: "William Eugene Thompson has been represented by very able and very competent counsel. He has presented evidence in his own behalf. In short, we have spent a considerable amount of time in this matter. But you know, that is as it should be because that is only just and proper, plus it is the law. William Eugene Thompson has received a fair trial, done according to proper legal procedures.... There in that early morning hour, Charles Fred Cash, a correctional employee, in the course of performing his duty at the Western Kentucky Farm Center, a complex operated by the Department of Corrections, received no trial. That morning, this Defendant, a convicted killer acted as Fred Cash's judge, acted as his jury and he acted as his executioner."

Finally, Appellant alleges that the Commonwealth's Attorney improperly vilified him by using the terms "mean," "evil," and "vile" to describe him. Upon review of the entire argument, we do not agree that these comments rise to the level of prohibited vilification or abuse of a defendant.[72] Accordingly, we find no error.

72 *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 544–45 (1988).

Jury Instructions

[45] [46] Appellant argues that the jury instructions were constitutionally defective. He raises sixteen distinct claims of error with respect to the jury instructions given during the penalty phase proceedings. All but one issue are unpreserved and will be reviewed pursuant to *Sanders*.[73] In determining if an error occurred, it is necessary to set forth the appropriate analytical framework to be used in challenges to jury instructions:

73 Ky., 801 S.W.2d 665, 668 (1991).

> [T]he proper inquiry in such cases is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents a consideration of the constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependant upon a single hypothetical "reasonable" juror who might have interpreted the instruction.[74]

74 *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329 (1990).

[47] Appellant first maintains that, because the jury was informed that its verdict must be unanimous, the jury could have mistakenly believed that it was required to find the existence of mitigating factors unanimously as well, before such factors could be considered in arriving at a verdict. He argues that such an instruction ***48** permitting non-unanimity should have been given, and that the failure to so instruct the jury rendered its verdict so unreliable as to require reversal. This issue was not preserved; however, no such instruction was required and therefore, no error occurred.[75]

75 *Tamme v. Commonwealth,* Ky., 973 S.W.2d 13, 37 (1998). ("The instructions did not imply that unanimity was required on mitigators and there is no requirement that a jury be instructed that their findings on mitigation need not be unanimous.") *See also Kordenbrock v. Scroggy,* 919 F.2d 1091, 1121 (6th Cir.1990).

Appellant next claims that the format of the verdict forms could have led the jury to believe that, once an aggravator had been found beyond a reasonable doubt, the only permissible sentence would be death. This argument is wholly without merit. An examination of the jury instructions reveals that the jury was informed it could recommend a sentence other than death even if aggravating factors had been found beyond a reasonable doubt. Instruction Four—Authorized Sentence plainly states: "But even if you have found the aggravating circumstance or circumstances to be true beyond a reasonable doubt, you may still impose any of the four punishments for Murder listed above." Thus, we find no error.[76]

76 *See Foley v. Commonwealth,* Ky., 942 S.W.2d 876, 888–89 (1996).

Appellant next raises a similar argument: that the jury should have been instructed that it did not have to recommend death even if it found no mitigating circumstances or even, in the alternative, if the jury found that the aggravating circumstances outweighed the mitigating circumstances. Again, the instructions themselves belie this contention: the jury was instructed "if upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment." The jury was properly instructed that the finding of aggravating circumstances, even coupled with the absence of any mitigating factors, did not require imposition of the death penalty.[77]

77 *Id.* at 889.

[48] Appellant next cites error where the trial court did not instruct the jury on non-statutory mitigating circumstances. The jury was instructed to consider mitigating factors that had been presented in the evidence,

> including those aspects of the defendant's character, background and those facts and circumstances of the particular offense of which he is guilty, to wit: the murder of Charles Fred Cash, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true.

Nothing in the instructions prohibited the jury from considering all evidence of mitigation that was presented, nor was defense counsel prevented from arguing evidence of mitigation. Such a "catch-all" provision in the mitigation instruction has been determined to be adequate, and there is no need to instruct the jury on specific non-statutory mitigators.[78]

78 *Tamme,* 973 S.W.2d at 37.

Appellant next contends that he was entitled to a directed

verdict on mitigating circumstances, because the Commonwealth did not present any evidence to rebut the instructed statutory mitigators or the non-statutory mitigators. Therefore, according to Appellant, the trial court should have directed a verdict and ordered the jury that it *must* consider all of the mitigation ***49** evidence, in lieu of the tendered instruction which stated that the jury need only consider such evidence in mitigation that "you believe to be true." This issue is unpreserved as no motion for a directed verdict was presented to the trial court. Regardless, this claim does not warrant reversal as no error occurred. "There is no evidence that Kentucky law considers it appropriate, and there is no case holding that the United States Constitution requires (or even allows) directed verdicts on mitigating circumstances."[79] In rejecting a claim that a directed verdict should have been granted as to a capital defendant's mitigating circumstance of intoxication, the Sixth Circuit explained why Kentucky's status as a "non-balancing" state with respect to capital sentencing defeats the argument:

79 *McQueen v. Scroggy*, 99 F.3d 1302, 1331 (6th Cir.1996). *See also Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 493 (1999).

> [I]n Kentucky, a jury can refuse to give the death penalty as an act of mercy, even if there are no mitigating circumstances, or it can impose it even in the presence of a mitigating circumstance, so long as the defendant is "death qualified" by the presence of one statutory aggravating factor. Therefore, even a directed verdict on the issue of intoxication would not per se exclude the possibility of the jury recommending the death sentence.[80]

80 *Id.* at 1332.

Therefore, we conclude that no error occurred.

Appellant's contention that the instructions failed to state the burden of proof regarding the existence of aggravating circumstances is without merit. The instructions clearly apprised the jury that the existence of any aggravating factor had to be found beyond a reasonable doubt.

Appellant raises ten additional arguments concerning the penalty phase instructions, as enumerated below. Each is essentially a plea to overturn long-established precedent, and we decline to do so. First, Appellant challenges the trial court's failure to inform the jury about parole. However, it would have been clear and reversible error to admit such evidence.[81] Appellant cites error where the jury was not instructed that it should not be influenced by passion or prejudice. No such instruction is required.[82] No error occurred where the jury was not requested to put in writing its findings as to whether each mitigating circumstance did or did not exist, as there is no such requirement.[83] The trial court was not required to define the concept or role of mitigating circumstances to the jury, nor to set forth for the jury the standard of proof required.[84] The trial court also was not under a duty to instruct the jury that it could reject the death penalty based on its sympathy for Appellant.[85] Likewise, a burden of proof instruction regarding the existence of aggravating circumstances and that such factors must outweigh the mitigating factors is not required under Kentucky law where the jury has been otherwise properly instructed to weigh the evidence.[86] An instruction requiring that ***50** the aggravators outweigh the mitigators beyond a reasonable doubt is also not required under Kentucky law.[87] An instruction limiting the jury's consideration to only those aggravating factors enumerated in KRS 532.025 is not required.[88] The allegation that "reasonable doubt" should have been defined for the benefit of the jury is without merit; this Court has consistently held that reasonable doubt need not be defined, in accordance with RCr 9.56(2).[89] No error occurred where the trial court did not inform the jury of the consequences of its sentence, *i.e.* that a death sentence would actually result in electrocution.[90] Appellant's argument regarding an instruction concerning the presumption of innocence is without merit; the jury was instructed that any aggravating factor had to be determined beyond a reasonable doubt. Finally, residual doubt of guilt is not a mitigating circumstance and no error occurred because the jury was not so instructed.[91]

81 *Mills*, 996 S.W.2d at 493, *citing Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 164 (1995).

82 *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 169 (1996).

83 KRS 532.025(3); *Smith v. Commonwealth*, Ky., 734 S.W.2d 437, 451 (1987).

84 *Tamme*, 973 S.W.2d at 37–38.

85 *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

86 *Smith v. Commonwealth*, Ky., 599 S.W.2d 900, 912 (1980). ("So long as we have properly instructed jurors to weigh the evidence in their deliberations, without the court having to encroach on their prerogatives, we do not need to instruct the jury on the weight of aggravating and mitigating circumstances.")

87 KRS 532.025; *Bowling*, 942 S.W.2d at 306.

88 *Smith*, 599 S.W.2d at 911. ("The court properly declined to instruct the jury that it could not consider any aggravating factors not enumerated in KRS 532.025(2). Such an instruction would have been improper.")

89 *Id.* at 911. ("Counsel for appellant offered instructions in which 'reasonable doubt' was attempted to be defined; however, the trial court refused to give them, and properly so.")

90 *Bowling*, 942 S.W.2d at 306. ("Such an instruction is not required by law and its omission cannot be considered error. A jury selecting death as a sentence must be presumed to know that death will be the result of that sentence.")

91 *Bussell v. Commonwealth*, Ky., 882 S.W.2d 111, 115 (1994).

Sentencing

Appellant raises three arguments with respect to the trial judge's sentencing. First, Appellant claims that the trial court did not consider non-statutory mitigators. However, Appellant fails to provide any evidence that the trial judge failed to consider evidence of mitigation. In fact, the trial court stated on the record, during the sentencing hearing, that it had considered all of the evidence, arguments, and motions presented. This argument is unfounded.

[49] Appellant next cites error where the trial court failed to make specific written findings regarding mitigating circumstances. This argument is also without merit; the trial court is not required to make specific findings of mitigating factors.[92]

92 *Bowling*, 942 S.W.2d at 306.

Likewise, Appellant's contention that there is no articulated standard of review for the trial court in determining sentence is without merit.[93] The trial court acted within its discretion in upholding the jury's sentencing recommendation.

93 *Id.*

Jury Selection Issues

Excusal of Five Jurors Based on Attitudes Toward the Death Penalty

Appellant asserts that the trial court deprived him of a fair and impartial jury by improperly excusing five prospective jurors based on their opposition to the death penalty. The basis of this contention is that the trial court inadequately questioned prospective jurors CM, BC, RD, WH, and JS after they expressed their reservations.

***51** [50] [51] [52] A prospective juror may be excluded for cause because of his or her views on capital punishment if those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[94] The mere expression of reservations or scruples about capital punishment is not enough to determine that person's position "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal."[95] The excusal of jurors for cause is a matter within the sound discretion of the trial court.[96]

94 *Caudill v. Commonwealth*, Ky., 120 S.W.3d 635, 654 (2003) (*quoting Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

95 *Id.* (*quoting Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)).

96 *Furnish v. Commonwealth*, Ky., 95 S.W.3d 34, 44 (2002), *cert. denied*, 540 U.S. 844, 124 S.Ct. 115, 157

L.Ed.2d 80 (2003).

[53] [54] [55] [56] In response to questioning by the court, CM stated that she could not put anybody to death because of her religious beliefs. BC stated repeatedly that she did not believe in capital punishment and would not impose it under any circumstances. RD told the court that she would automatically exclude the death penalty from consideration. WH also stated that he did not believe in capital punishment and would not consider it. After hearing the range of possible punishments, JS initially stated that she had a problem with the death penalty because of her religious beliefs, but that circumstances might modify that feeling. She went on to say that neither twenty years' imprisonment nor life imprisonment was enough punishment for murder. She stated that life without the possibility of parole was enough. We are convinced that the prospective jurors unequivocally stated their inability to impose the death penalty under any circumstances. In the case of JS, although she stated that circumstances might affect her opposition to capital punishment, she also stated that she could not consider the minimum sentence either.[97] There was no abuse of discretion.

97 *See Grooms v. Commonwealth*, Ky., 756 S.W.2d 131, 137 (1988).

Failure to Excuse Jurors for Cause

[57] Appellant also argues that he was denied a fair and impartial jury by the trial court's failure to excuse six jurors for cause because of their attitudes in favor of the death penalty.

[58] [59] [60] [61] Prospective jurors should be excused for cause if they would automatically impose the death penalty upon a finding of guilt.[98] Jurors must be able to consider the entire range of penalties for intentional murder and cannot favor the death penalty to the exclusion of all other penalties prescribed by law.[99] The test for determining whether a juror should be stricken for cause is "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict."[100] Agreement and immediate embracement with the law when it is presented in its most abstract or extreme manner is not a prerequisite for ***52** qualification.[101] "The fact that some potential jurors expressed a tendency toward the most severe penalty when presented with specific situations does not automatically preclude their service."[102] Again, the determination of this matter is within the sound discretion of the trial court.

98 *Caudill, supra,* (*citing Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)).

99 *Id.* at 655.

100 *Mabe v. Commonwealth*, Ky., 884 S.W.2d 668, 671 (1994).

101 *Id.*

102 *Bowling v. Commonwealth*, 873 S.W.2d at 177.

In this case, the trial court conducted a thorough individual voir dire. The court informed each juror of the entire range of penalties and the existence of aggravating and mitigating factors. The court inquired as to whether each juror would be able to consider these issues and follow the court's instructions pertaining to them. The court also discerned the extent to which the jurors may have been affected by publicity. Counsel for both the Commonwealth and defense were permitted to ask follow-up questions. There was some confusion among the jurors regarding the use of mitigating evidence, however, the court cleared this up when it explained that mitigating evidence does not go to guilt or innocence, but rather to fixing the severity of punishment. The six jurors at issue were all able to articulate that they could consider the entire range of penalties as well as the evidence of aggravating and mitigating factors in determining punishment. The jurors also expressed that they would be able to follow the instructions of the court in accordance with the law and that neither their attitude nor their judgment was affected by any outside influence. There was no abuse of discretion.

Refusal to Grant Additional Peremptory Challenges

Appellant argues that he was denied a fair and impartial jury by the trial court's refusal to grant him additional peremptory challenges.

[62] Appellant was granted the amount of peremptory challenges required by RCr 9.40. The decision to grant additional peremptories is within the sound discretion of the trial court.[103] The trial court did not abuse its discretion.

103 *Tamme*, 973 S.W.2d at 26.

Morgan claim

[63] Appellant also claims that he was not afforded the opportunity to adequately question jurors about their attitude towards the death penalty in light of the aggravators presented by the Commonwealth. The trial court did ask the prospective jurors whether they could consider the full range of penalties for Appellant where evidence would be presented of three aggravating factors, in addition to evidence of mitigating circumstances. Appellant requested the court to ask the jurors a slightly different question regarding their attitude towards the death penalty: that is, if they would automatically impose the death sentence if the three aggravators were proven beyond a reasonable doubt. The trial court denied defense counsel's request, determining that the proposed question impermissibly asked a prospective juror to commit to a verdict before hearing the evidence. The trial court also noted that it felt that the proposed question was essentially a re-wording of questions already being posed. Appellant claims that the trial court's ruling denied him due process of law because he was not able to intelligently exercise his preemptory challenges and challenges for cause in striking prospective jurors.

[64] Appellant's reliance on *Morgan v.* ***53** *Illinois* is misplaced.[104] In *Morgan,* it was determined that the defendant should have been permitted to inquire whether a prospective juror would automatically impose the death penalty upon conviction; *i.e.,* if the prospective juror would recommend death regardless of any evidence in mitigation, so long as the defendant was proven guilty beyond a reasonable doubt. The question actually posed by the trial court in *Morgan*—that is, whether a prospective juror would "follow the instructions on the law"—was insufficient to satisfy the due process right to make meaningful inquiry into jurors' biases and views towards the death penalty.[105] *Morgan* concerns itself with the defendant's right to make inquiry; it does not set forth an affirmative right to ask certain specific questions of prospective jurors, as Appellant asserts. Where a defendant is seeking to determine prospective jurors' attitudes towards the death penalty, "it would be a game of semantics, not law, to conclude that the failure to phrase a question in a specific way is fatal where other questions are equally illuminating."[106]

104 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

105 504 U.S. at 723, 112 S.Ct. at 2226, 119 L.Ed.2d at 499.

106 *McQueen*, 99 F.3d at 1330.

Here, Appellant's proposed question seeks to determine whether a prospective juror is so biased in favor of the death penalty, that he or she would automatically impose it upon a finding of aggravating circumstances. Essentially, Appellant was seeking to determine whether a prospective juror would consider evidence in mitigation, even where aggravating factors existed. We conclude that the permitted voir dire was sufficient and thorough enough to elicit the information sought by Appellant. After reciting the aggravating circumstances in the case, defense counsel asked the voir dire panel if "those facts that you will find make you believe that maybe there's already an opinion in your mind or in your head about what needs to be done?" Defense counsel was permitted to ask each juror whether he or she could consider all ranges of penalties. The trial court also engaged in questioning concerning jurors' attitudes towards the death penalty, specifically asking jurors whether they would consider all range of penalties in light of the evidence and whether they had already formed an opinion based on the preliminary facts presented (which included a synopsis of the circumstances of the crime and the aggravators to be applied in the case).

[65] The extent of and scope of direct questioning during voir dire examination is a matter within the sound discretion of the trial court.[107] The trial court determined that the information sought by Appellant was already being elicited by other questions, and the record supports this conclusion. We find no abuse of discretion.

107 *Tamme*, 973 S.W.2d at 25.

Death Qualification

Finally, Appellant argues that death qualification of a jury is unconstitutional. This Court and the United States

Supreme Court have rejected this argument.[108]

108 *Lockhart v. McCree,* 476 U.S. 162, 165, 106 S.Ct. 1758, 1760, 90 L.Ed.2d 137, 142 (1986); *Buchanan v. Kentucky,* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); *Sanders v. Commonwealth,* Ky., 801 S.W.2d 665, 672 (1991).

Double Jeopardy

[66] Appellant claims that he was exposed to double jeopardy where the parole board ordered a serve-out of his sentence from the 1974 willful murder conviction ***54** because of the murder of Mr. Cash, and then Appellant was sentenced to death for the same crime. Appellant argues that he is being punished twice for the same crime in violation of his Constitutional rights.

Appellant waived this issue. Defense counsel presented the question of double jeopardy to the trial court, at which time the trial court instructed defense counsel to submit a written memorandum. Defense counsel did not submit a memorandum and the issue was not thereafter considered.

[67] Regardless, Appellant's contention is without merit. Double jeopardy does not apply to parole or probation revocation proceedings because the threat of a negative parole board finding does not rise to the level of being "put in jeopardy" in the Constitutional sense.[109] In other words, a parole or probation hearing simply is not the equivalent of a criminal prosecution because a conviction could not flow from such a proceeding.[110] Therefore, we conclude that double jeopardy does not bar the Commonwealth from sentencing Appellant to death for the murder of Mr. Cash where that behavior was also used adversely against Appellant at his parole hearing.[111]

109 *United States v. Miller,* 797 F.2d 336, 340 (6th Cir.1986) (concluding that double jeopardy did not preclude the Government from prosecuting defendant for illegal activity where it had previously and unsuccessfully attempted to have defendant's probation revoked for the same activity). *See also United States v. Whitney,* 649 F.2d 296, 298 (5th Cir.1981) (noting that "parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of a criminal law ... [but] to determine whether a parolee or probationer has violated the conditions of his parole or probation").

110 *Id.* at 340.

111 *Cf. St. Clair v. Roark,* Ky., 10 S.W.3d 482, 487 (2000). ("Nor is it double jeopardy to impose a separate penalty for one offense while using the same offense as an aggravating circumstance authorizing imposition of capital punishment for another offense.")

Proportionality Review

[68] Pursuant to KRS 532.075, we have reviewed the death sentence imposed herein. Our review of the record and consideration of counsels' arguments indicates that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.[112] Rather, the sentence was based on Appellant's own admission of the crimes and the substantial evidence presented in support of two statutory aggravating factors.

112 KRS 532.075(3)(a).

Contrary to Appellant's assertion, the evidence of mitigation did not outweigh the evidence of aggravation. While defense counsel did present a significant amount of evidence in mitigation, especially concerning Appellant's background and mental state, the evidence of aggravation was substantial and compelling. The sentencing jury found the existence of two statutory aggravating factors beyond a reasonable doubt, and there was ample evidence to support this finding.[113]

113 KRS 532.075(3)(b).

[69] Our review indicates that this sentence of death is neither excessive nor disproportionate to the penalty imposed in other similar capital cases, considering both the crime and this particular defendant.[114] In conducting a proportionality review, we must consider not only whether other criminal defendants received the death penalty for similar crimes, but also whether Appellant's sentence is disproportionate ***55** in relation to *this* crime.[115] We have reviewed those cases since 1970 in which the death penalty was imposed for a single murder and conclude that the punishment herein is not excessive or disproportionate. In particular, we have considered the cases of *Johnson v. Commonwealth*[116] and *Mills v. Commonwealth,*[117] both involving a single murder victim. Nor do we believe that the death sentence is

disproportionate with respect to Appellant and the crimes to which he pled guilty. The fact that the victim was an employee of the prison facility, that the victim was beaten repeatedly and viciously to the head with a hammer, then dragged and left to perish in a barn stall, that Appellant thereafter robbed the victim and escaped from the prison facility, and the admitted lack of any cognizable motive are significant to this determination. Therefore, there was no error.

114 KRS 532.075(3)(c).

115 KRS 532.075; *See also McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir.1996).

116 Ky., 103 S.W.3d 687 (2003).

117 Ky., 996 S.W.2d 473 (1999).

Constitutionality of Death Penalty

Appellant asks this Court to declare Kentucky's death penalty statute unconstitutional. The constitutionality of the death penalty statute is well settled.[118]

118 *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 682 (1985).

Appellant's assertion that Kentucky's death penalty statute operates in a discriminatory and arbitrary fashion is without merit. Its application cannot be considered arbitrary in light of the guidelines for its imposition set forth in KRS 532.035 and KRS 532.075.[119]

119 *Bowling*, 942 S.W.2d at 306. *See also Tamme*, 973 S.W.2d at 40.

Appellant was not denied effective assistance of counsel, rational sentencing, due process or equal protection of the law where he was denied access to this Court's compilation of KRS 532.075 data.[120]

120 *Harper v. Commonwealth*, Ky., 694 S.W.2d 665, 670–671 (1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986).

Kentucky's proportionality review is constitutional and comports with statutory requirements and the federal Constitution.[121] Appellant asserts that KRS 532.075 is unconstitutional because it lacks sufficient articulated standards, thus denying him procedural due process of law; this argument has been presented, considered and rejected by this Court on numerous occasions.[122]

121 *Sanders*, 801 S.W.2d at 683.

122 *Id.; See also Foley*, 942 S.W.2d at 890; *Bowling*, 873 S.W.2d at 182.

Cumulative Error

Appellant received a fundamentally fair penalty proceeding and there was insufficient harmless error to create a cumulative effect that would mandate reversal for a new trial.

For all of the foregoing reasons, the judgments and sentences imposed by the Lyon Circuit Court are affirmed.

All concur.

All Citations

147 S.W.3d 22

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Supreme Court of Kentucky.

William Eugene THOMPSON, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2009-SC-000557-MR.
|
Oct. 21, 2010.
|
As Modified on Denial of Rehearing Jan. 20, 2011.

Synopsis
Background: Following affirmance of his convictions and death sentence, 147 S.W.3d 22, defendant filed a motion to vacate, set aside, or correct sentence. The Lyon Circuit Court, Roger Crittenden, Special Judge, denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that defense counsel's comment during closing argument did not constitute ineffective assistance of counsel.

Affirmed.

On Appeal from Lyon Circuit Court, No. 86-CR-00033; Roger Crittenden, Special Judge.

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MEMORANDUM OPINION OF THE COURT

*1 This is a matter of right appeal in a death penalty case from an order denying Eugene Thompson's RCr 11.42 motion alleging ineffective assistance of counsel. Thompson argues that his trial counsel was ineffective because counsel mentioned in his closing argument the possibility that Thompson could be released on parole after twenty-five years, when Thompson had already received a serve-out on his previous life sentence. From our review of the record, we adjudge that the trial court properly found that Thompson's trial counsel did not render ineffective assistance. Thus, we affirm.

While serving a life sentence for a 1972 murder committed in Pike County, Eugene Thompson was transferred in April 1986 from the Kentucky State Reformatory to the Western Kentucky Farm Center in Lyon County, a minimum security prison that operated a dairy farm. On May 9, 1986, while Thompson was working on the dairy farm with corrections officer Fred Cash, Thompson bludgeoned Cash to death with a hammer; stole his wallet, keys, and a knife; and fled in a prison dairy truck. Thompson drove to the nearby town of Princeton, where he purchased a ticket and boarded a bus bound for Madisonville. Thompson was apprehended by authorities in Madisonville.

Thompson's original conviction, for which he was sentenced to death, was reversed by this Court on direct appeal, and remanded for a new trial. *Thompson v. Commonwealth,* 862 S.W.2d 871 (Ky.1993). Thereafter, Thompson pled guilty in 1995 to murder, robbery in the first degree, and escape in the first degree, and was sentenced on the non-capital offenses to two consecutive terms of imprisonment totaling twenty years. A new jury trial was held in Graves County (on motion for change of venue) only on sentencing for the murder conviction. Pursuant to this trial, which was held on February 2 -11, 1998, Thompson was again sentenced to death.

On direct appeal, this Court remanded the case to the trial court for a retrospective competency hearing. *Thompson v. Commonwealth,* 56 S.W.3d 406 (Ky.2001). After holding the competency hearing, the trial court found that Thompson was competent to enter his guilty plea. On his subsequent direct appeal, this Court affirmed the convictions and death sentence. *Thompson v. Commonwealth,* 147 S.W.3d 22 (Ky.2004).

On May 18, 2006, Thompson filed an RCr 11.42 motion

to vacate his sentence, alleging several claims of error, including ineffective assistance of counsel and that the jury improperly considered extra-judicial information in deciding his sentence. Finding that an evidentiary hearing on the matter was not warranted, the trial court denied the motion on May 15, 2009. This appeal followed.

[1] Thompson's chief claim of error is that his trial counsel was deficient for mentioning in his closing argument the possibility that Thompson could be released on parole after twenty-five years. The record established that in 1993, Thompson received a serve-out by the Kentucky Parole Board on his prior life sentence for the 1972 murder. In Thompson's closing argument, defense counsel stated as follows:

> *2 We have a case now where it is not necessary to take a life. He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him ? Because he doesn't even think about the P word-the Parole Board-until he is about seventy-five years of age. That is twenty-five New Years. Twenty-five Thanksgivings. Twenty-five Christmases. I'd like to think and I will be retired by then, we may have a colony on Mars by then. Twenty-five years.

Thompson argues that when his trial counsel referred to the possibility that he could be paroled in twenty-five years, he left the jury with the false impression that he could someday be released on parole and thus made it more likely that the jury would give him the death penalty. The trial court rejected this argument, reasoning that it was a matter of trial strategy and that the court would not second-guess defense counsel's trial strategy.

In an RCr 11.42 proceeding, the movant bears the burden of establishing that he was deprived of effective assistance of counsel. *Commonwealth v. Bussell,* 226 S.W.3d 96, 103 (Ky.2007). To prevail on a claim of ineffective assistance of counsel, the movant must first show that counsel's performance was deficient, meaning that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the movant must demonstrate that counsel's deficiency prejudiced the defendant. *Id.* This requires a showing that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Id.* at 694. We have also stated this standard as a determination of whether, absent counsel's errors, the jury would have had reasonable doubt with respect to guilt. *Brown v. Commonwealth,* 253 S.W.3d 490, 499 (Ky.2008).

"In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky.2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky.2009). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 689. In considering an RCr 11.42 motion based on ineffective assistance of counsel claims, the trial court must evaluate counsel's performance in light of the totality of the circumstances and the trial as a whole. *Strickland,* 466 U.S. at 695. In an appeal from a decision on an RCr 11.42 claim, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth,* 721 S.W.2d 694, 698 (Ky.1986).

During Thompsons sentencing trial, Thompson himself testified as follows on direct:

> *3 Defense counsel: Do you .... do you understand that you are going to be staying in prison the rest of your life?
>
> Thompson: I will die in prison. I have been in now for almost twenty-seven years. I have no chance of ever getting out. I finally went up for parole on the life sentence that I was originally doing in November of 1993 and at that time, the Parole Board give me a serve-out on a life sentence which means that I will die in prison.

The four authorized penalties for capital murder at the time of Thompson's trial were: imprisonment for a term of twenty years or more, life, life without the possibility of parole for twenty-five years, and death. As evidence that the jury relied on defense counsel's remark about the possibility that Thompson could be released on parole in deciding to sentence Thompson to death, Thompson filed an affidavit of one of the jurors in the record in 2005. The affidavit stated that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence." The affidavit also stated that the jury "did not necessarily want to sentence Mr. Thompson to death" and that "[a]n option of

life without parole would have been preferable to the death penalty."

The comment in question that Thompson "doesn't even think about the P word-the Parole Board-until he is about seventy-five years of age" was made in the context of arguing against the imposition of the death penalty. It was clearly made more to emphasize the probability of Thompson never getting out of prison than the possibility that he could someday be released from prison. Nevertheless, in reviewing the record, we can see there were strategic reasons justifying defense counsel's reference to the possibility of Thompson being paroled after twenty-five years. *See Hodge v. Commonwealth,* 116 S.W.3d 463, 473 (Ky.2003), *overruled on other grounds by Leonard,* 279 S.W.3d 151 (Tactical decisions "will not be second guessed in an RCr 11.42 proceeding.").

Had defense counsel brought up the serve-out on Thompson's prior life sentence, that would have likely drawn more attention to Thompson's prior conviction for the 1972 murder for hire, and emphasized the fact that not only was this Thompson's second murder, but he committed it while in prison for the prior murder. Further, the only defense offered by Thompson was that the murder of Cash was a spontaneous act, and not a calculated, premeditated act. In support of this defense, defense counsel argued that Thompson was getting close to possibly being paroled on his prior conviction and therefore had nothing to gain from planning and carrying out the murder of Cash. Presenting evidence of the serve-out on Thompson's prior conviction, although it was not ordered until 1993, would have confused the issue for the jury.

Also, at the time Thompson received the serve-out on his prior murder conviction, the Parole Board could have subsequently revisited the serve-out decision. 501 KAR 1:030, § 4(l)(d) (1993). Hence, there was still a possibility that Thompson could be paroled on the prior conviction.

***4** Defense counsel argued strongly and passionately to the jury to consider the mitigating factors and not to impose the death penalty in his closing argument in this case. During his closing argument he stated,

> The Commonwealth knows it is not necessary to kill because Eugene Thompson will die in prison.... He is going to die in prison in maximum security and as I said the first day, the question is: is the State going to do it or is God going to take him?

In his opening statement, he stated unequivocally, "Eugene Thompson will die in prison and over the next several days, you will decide and the weight is on you to decide whether God will take him or the State will take him." As noted earlier, the responses elicited by defense counsel in his questioning of Thompson clarified that he had received a serve-out on his prior life sentence in 1993 and that he would "die in prison."

As for the affidavit of the juror claiming that the jury "was afraid that Mr. Thompson might be released from prison if he was to receive anything less than a death sentence" and "did not necessarily want to sentence Mr. Thompson to death," RCr 10.04 provides that a "juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, the self-serving affidavit produced over seven years after the trial cannot be used to establish Thompson's claim of ineffective assistance of counsel. *See Gall v. Commonwealth,* 702 S.W.2d 37, 44 (Ky.1985) (rejecting juror's testimony as basis for defendant's claim that jurors improperly considered parole).

Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. *Strickland,* 466 U.S. at 689; *see also Haight v. Commonwealth,* 41 S.W.3d at 442. From our review of the totality of the circumstances in this case, we cannot say that defense counsel's single remark regarding the possibility of Thompson being paroled constituted ineffective assistance of counsel in this case.

Even if defense counsel's performance was deemed deficient for mentioning the possibility of Thompson being released on parole, given that Thompson killed Cash and escaped while he was incarcerated, it is unlikely that additional evidence of Thompson's serve-out would have held much sway in trying to convince the jury that Thompson being in prison for the rest of his life would be adequate to protect the public from Thompson. In fact, the Commonwealth argued this exact point - that being incarcerated did not stop Thompson from killing an innocent man in 1986 - in its closing argument.

Further, the Commonwealth presented strong evidence of aggravating factors in this case, and the jury specifically found the following aggravating factors: the prior conviction of murder, the murder was committed while Thompson was incarcerated, and the victim was a corrections officer engaged in the performance of his duties at the time of his murder. Thus, we believe that the jury would still have recommended the death penalty in this case absent his counsel's mention of the possibility of

parole.

*5 [2] Thompson's second argument that the jurors considered improper outside information in deliberating Thompson's sentence is not a proper ground for an RCr 11.42 motion. Issues that could have or should have been raised on direct appeal cannot be raised in a motion pursuant to RCr 11.42. *Leonard,* 279 S.W.3d at 156 (quoting *Thacker v. Commonwealth,* 476 S.W.2d 838, 839 (Ky.1972)).

[3] Finally, Thompson argues that he was at least entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. When a movant has raised an allegation of ineffective assistance of counsel, the trial court need not always conduct an evidentiary hearing. "Even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing." *Stanford v. Commonwealth,* 854 S.W.2d 742, 743 (Ky.1993). Whether an RCr 11.42 movant is entitled to an evidentiary hearing is determined under a two-part test. First, the movant must show that the "alleged error is such that the movant is entitled to relief under the rule." *Hodge v. Commonwealth,* 68 S.W.3d 338, 342 (Ky.2001). In other words, the court must assume that the factual allegations in the motion are true, then determine whether there " 'has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.' " *Id.* (*quoting Lay v. Commonwealth,* 506 S.W.2d 507, 508 (Ky.1974)). "If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises 'an issue of fact that cannot be determined on the face of the record.' " *Hodge,* 68 S.W.3d at 342 (quoting *Stanford,* 854 S.W.2d at 743-44). To do this, the court must "examin[e] whether the record refuted the allegations raised." *Hodge,* 68 S.W.3d at 341. "An evidentiary hearing is not required to consider issues already refuted by the record in the trial court." *Haight,* 41 S.W.3d. at 442. "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanborn v. Commonwealth,* 975 S.W.2d 905, 909 (Ky.1998), *overruled on other grounds by Leonard,* 279 S.W.3d 151.

In this case, Thompson did not raise an issue of fact relating to his claim of ineffective assistance of counsel that could not be determined on the face of the record. As discussed above, the record affirmatively refuted Thompson's claim. Hence, Thompson's RCr 11.42 motion was properly denied without an evidentiary hearing.

For the reasons stated above, the order of the Lyon Circuit Court is affirmed.

MINTON, C.J.; ABRAMSON, NOBLE, SCHRODER, SCOTT, and VENTERS, JJ., sitting. All concur. CUNNINGHAM, J., not sitting.

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