**No. 18-5880**
**CAPITAL CASE**

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

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**VIRGINIA S. CAUDILL** **PETITIONER**

**v.**

**JANET CONOVER, Warden** **RESPONDENT**
**Kentucky Correctional Institution for Women**

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

**ANDY BESHEAR**
Attorney General of Kentucky

**MATTHEW R. KRYGIEL**
Assistant Attorney General
*Counsel of Record*
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601
(502) 696-5342

## FACTS AND OPINIONS BELOW

The offense conduct perpetrated by Caudill has been summarized by various appellate courts on multiple occasions. *Caudill v. Conover*, 881 F.3d 454 (6th Cir. 2018); *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003); *Caudill v. Commonwealth*, 2009 WL 1110398, 2006-SC-457 (Ky. April 23, 2009).

In short, on March 15, 1998, Caudill and her co-defendant, Jonathan Wayne Goforth, bludgeoned to death Lonetta White, age seventy-three (73), in her home in Lexington, Kentucky. White had been killed by up to fifteen blows to her head with a hammer-like instrument - causing skull fractures that drove fragments of bone into her brain. Goforth and Caudill had ransacked White's home and numerous items were stolen - including personal property, two guns, jewelry, and a mink coat. Caudill had known Mrs. White previously she had been to her home numerous times and was aware of her belongings due to her relationship with Mrs. White's son (the couple had a recent falling out due to Caudill's relapse into drug abuse and White's belief she had re-engaged in prostitution in order to procure drugs). Mrs. White's body was discovered in the trunk of her own burning automobile in a field several miles away (at a location familiar to Caudill and special to her ex-boyfriend – Lonetta White's son [Steve]). Mrs. White was burned beyond recognition and her remains had to be pried from the base of the trunk.

Caudill was found guilty of all indicted charges - Murder, Robbery in the First degree, Burglary in the First Degree, Arson in the Second Degree, and Tampering

with Physical Evidence. Caudill was sentenced to death for Mrs. White's murder, as well as, twenty (20) years for first-degree robbery, twenty (20) years for first-degree burglary, twenty (20) years for second-degree arson, and five (5) years for the tampering charge. After review by the Kentucky Supreme Court, Caudill's convictions and sentences were affirmed on direct appeal. *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003). Likewise, the Kentucky Supreme Court affirmed the denial of her post-conviction actions. *Caudill v. Commonwealth*, 2009 WL 1110398, 2006-SC-457 (Ky. April 23, 2009).

On January 31, 2014, the United States District Court for the Eastern District of Kentucky issued a memorandum opinion and order that denied Caudill's federal habeas petition. *Caudill v. Conover*, 2014 WL 349300, Case No. 5:10-cv-84 (E.D.Ky. 2014). The district court also denied a Certificate of Appealability (COA) as to all issues. Id. Ultimately, after two (2) issues were designated for a certificate of appealability by the United States Court of Appeals for the Sixth Circuit, the district court was affirmed as to each issue. *Caudill v. Conover*, 881 F.3d 454 (6th Cir. 2018). Caudill's petition seeking an *en banc* rehearing was also denied.

On August 30, 2018, the Petitioner filed a petition for a writ of certiorari seeking review of the two (2) issues before the Sixth Circuit (a *Batson* issue and an ineffective assistance of counsel issue regarding mitigation), as well as, review of the denial of a certificate of appealability as to one (1) additional issue (a *Brady* issue regarding failure to disclose an alleged plea deal).

## REASONS TO DENY CAUDILL'S PETITION

### I. The unanimous panel of the Sixth Circuit Court of Appeals correctly affirmed the finding that the Kentucky Supreme Court's review of Caudill's *Batson* claim was not an unreasonable determination of federal law.

In her habeas petition, Caudill raised a procedural error with regard to the trial court's *Batson* analysis. In particular, Caudill alleged that the trial court failed to properly investigate and make clear, detailed findings that it accepted the prosecution's facially-neutral explanation for using 8 out of 9 peremptory challenges on Caucasian males - thus circumventing the final step in the *Batson* analysis.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court adopted a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: (1) a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; (2) if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and (3) in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472 (2008).

The test under the under the AEDPA is whether the state court's disposition of the claim was a reasonable application of *Batson*. *Henderson v. Briley*, 354 F.3d 907, 910 (7th Cir. 2003).

Caudill asserted below that the trial court short-circuited the *Batson* analysis by failing to make adequate findings with regard to the prosecutor's neutral explanations for the strikes (Step #3 in the *Batson* Analysis – purposeful discrimination).[1] After the prosecutor supplied the reasons for the strikes (Step #2 of *Batson*), the trial court unequivocally announced it was accepting the prosecutors articulated, nondiscriminatory reasons for the strikes. No objections were lodged to the ruling in any form – nor were any attempts made for further examination of the prosecutor's reasons.

A trial court can fulfill its duty to rule at step three of the *Batson* framework by expressing a clear intention to uphold or reject a strike after listening to the challenge and the race-neutral explanation. See *Messiah v. Duncan*, 435 F.3d 186, 189 (2nd Cir. 2006); *United States v. Castorena–Jaime*, 285 F.3d 916, 929 (10th Cir. 2002); *Saiz v. Ortiz*, 392 F.3d 1166, 1180 (10th Cir.2004) ("While explicit rulings are preferable, we can conclude in this case that the trial court implicitly ruled that the explanations offered by the prosecution were credible, believable, and race-and/or gender-neutral."). The trial court's determination of the prosecutor's intent relies heavily on the trial judge's own personal observation of the prosecutor's demeanor. *Hernandez v. New York*, 500 U.S. 352, 365 (1991)("best evidence . . . will often be the demeanor of the attorney who exercises the challenge").

[1] The Warden reiterates that review of the record shows that Caudill's *Batson* challenge was related to sex discrimination only. No objection was made with regard to the race of the jurors. Nevertheless, when reviewing the issue in the Kentucky Supreme Court, the issue was analyzed as though an objection was lodged under both theories.

A judge is not required to engage in "a talismanic recitation of specific words in order to satisfy *Batson*.'" *Messiah*, at 198. ". . . [U]nambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the prosecutor's proper race-neutral explanation is pretextual." Id. "The trial court is not compelled to make intricate factual findings in connection with its ruling in order to comply with *Batson*." Id. "Although reviewing courts might prefer the trial court to provide express reasons for each credibility determination, no clearly established federal law required the trial court to do so." Id. The state trial court's failure to make explicit findings tracking the *Batson* standard does not relieve the District Court of its obligation to view the state court's findings as presumptively correct. *Smulls v. Roper*, 535 F.3d 853, 861 (8th Cir. 2008); *Stenhouse v. Hobbs*, 631 F.3d 888 (8th Cir. 2011).

In the instant case, the trial judge ruled by clearly accepting the reasons given for the strikes. The trial judge had already been through multiple days of jury selection and observed the questioning of counsel and their demeanor during the arduous process. The prosecutor referred to his notes with legitimate race/sex neutral reasons at the ready as soon as he was called upon to address Caudill's motion. He thoroughly explained the reasons for the strikes. An exhaustive review of the jury selection process in this case illustrates no inkling of intent by the prosecution to purposefully discriminate in this case. The lack of need for additional information from the parties, and their lack of any attempt to put forth any additional objection

or proof, during both *Batson* motions reflected the trial court's assuredness in a correct ruling. There is no requirement of a formalistic approach to fact-finding under *Batson* – a state court's failure to make detailed factual findings following a *Batson* challenge is not an unreasonable application of clearly established law. See *Smulls* at 860-861; *Hightower v. Terry*, 459 F.3d 1067 n. 9 (11th Cir., 2006) ("The trial court's overruling of Hightower's *Batson* objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make the common sense judgment—in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling—that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry.").

In Caudill's case, the record reflects that the trial court adequately and reasonably conveyed its decision that the prosecutor's race/sex-neutral justification for the peremptory strikes was credible and that Caudill failed to carry her burden on the ultimate issue of purposeful discrimination. *Caudill v. Commonwealth*, 120 S.W.2d 635, 657 (Ky. 2003). In so doing, the trial court adhered to the *Batson* three-step inquiry, and neither skipped the third step nor restricted counsel in their respective arguments. The Kentucky Supreme Court reviewed the record and found that nothing suggested the trial court failed to conduct a searching inquiry of the prosecutor's reasons for striking the jurors. Id. The Kentucky Supreme Court addressed the merits of the claim and found that the justification for peremptorily striking the jurors was not a pretext for racial or sexual discrimination. Id.

Caudill's continued focus is on the language from *Batson* noting that the required analysis will take "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". 476 U.S. at 93. However, as noted by the Sixth Circuit, Caudill is over-emphasizing this language – particularly in the habeas context. *Caudill v. Conover*, 881 F.3d 454, 459-460 (6th Cir. 2018). No controlling U.S. Supreme Court precedent existed that required the trial court to make detailed findings before reaching the ultimate determination of whether there was purposeful discrimination. To the contrary, the *Batson* inquiry was left intentionally flexible to account for the differing facts and circumstances of each underlying *Batson* claim brought before a trial judge. The Sixth Circuit noted the reasoning behind the rule and the fact that no U.S. Supreme Court precedent directs otherwise. From that basis, the Sixth Circuit correctly decided this issue.

## II. The Sixth Circuit Court of Appeals correctly affirmed the district court's findings with regard to Caudill's claim of ineffective assistance of counsel (re: mitigation evidence).

Caudill has also asserted that her petition should have been granted with regard to her second claim – an allegation of ineffective assistance of counsel with respect to the failure of her defense attorneys to call additional mitigation witnesses. Applying the well-known test identified by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)[2], the Sixth Circuit affirmed the district court's conclusion that the Kentucky Supreme Court reasonably applied *Strickland* to Caudill's case. See *Caudill v. Conover*, 881 F.3d 454 (6th Cir. 2018).

In *Strickland*, this Court emphasized that "even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). The combined effect of *Strickland* and § 2254(d) is " 'doubly deferential' " review. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2009)(quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). Put differently, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 131 S.Ct. at 788.

To evaluate whether counsel's investigation was deficient, a comparison is

[2] To succeed, a petitioner must show both incompetence and prejudice: (1) "[P]etitioner must show that 'counsel's representation fell below an objective standard of reasonableness,' " *Strickland*, 466 U.S. at 688, and (2) "[P]etitioner 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.]" *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); accord *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

made between the "net effect of the undiscovered and unpresented evidence, viewed cumulatively," *Morales v. Mitchell*, 507 F.3d 916, 936 (6th Cir.2007), with the "evidence trial counsel [discovered and] presented on Petitioner's behalf." *Haliym v. Mitchell*, 492 F.3d 680, 708 (6th Cir. 2007). Therefore, when examining a claim of ineffective assistance for failure to investigate a petitioner's background and introduce mitigating evidence, "it is best to begin with the evidence Petitioner actually presented in mitigation." *Lorraine v. Coyle*, 291 F.3d 416, 427 (6th Cir.2002). See also *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)(fundamental inquiry is whether counsel's actions were objectively reasonable); *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013).

As outlined by the Sixth Circuit in its opinion, at her trial, Caudill presented seven (7) witnesses as part of a comprehensive mitigation case. See RE 34, pgs. 94-95 [Page ID# 525-526]; RE 11 [Video A-9, 2/16/00, 15:11:00 *et seq*]; RE 47-10, pgs. 33-59, 86-108 [Page ID# 2052-2078, 2105-2127]. See also *Caudill v. Conover*, 881 F.3d 454, 460 (6th Cir. 2018). Caudill had two (2) attorneys, an investigator, a mitigation specialist, a forensic psychologist, and a neuropsychologist at her disposal during preparation for the sentencing phase of her trial. Ultimately, Caudill's attorneys called five (5) members of Caudill's family [her mother, brother, sister, cousin, and adult daughter] to testify regarding her family history (her father's alcoholism and verbal and physical abuse of the family), education (difficulties learning, drug abuse beginnings, and social issues that were exacerbated by Caudill being overweight and having glasses), employment history, abusive/problematic relationship history, and

long-standing substance abuse problems. Id.

The family's testimony was buttressed by Dr. Peter Schilling (forensic psychologist). RE 34, pg. 95-105 [Page ID#526-536]; RE 11 [Video A-9, 2/16/00, 16:40:00 et seq]; RE 47-10, pgs. 88-108 [Page ID# 2107-2127]. Dr. Schilling corroborated much of the testimony from Caudill's family and added greater detail – a forensic history spanning from her formative years until the time of the murder. Id. Dr. Schilling performed a number of tests (discussed during his testimony – including results that showed Caudill to have an average IQ but wide variations that suggested brain damage, a learning disability, or both) and concluded that the abusive nature of Caudill's father branded a theme of abuse that spread into all of Caudill's relationships with men. Id. Dr. Schilling went into a more detailed history of Caudill's abusive relationships with men, including when a boyfriend (Thomas Garrett) broke Caudill's wrist, nose, and jaw and had repeatedly struck her in the face. Id. He also described a similar incident where Caudill suffered a head injury and lost consciousness. Id. Caudill's sexual exploitation and prior prostitution were also noted. Id. Dr. Schilling indicated, based on test scores and biographical evidence, that Caudill had an issue with submissiveness in her relationships with men (creating the inference that perhaps she acted at Goforth's direction). Lastly, Dr. Schilling spoke to Caudill's long-standing substance abuse issues and in particular her addiction to crack cocaine. Id.

Finally, a pastor (Carolyn Whirley) who conducted a non-denominational ministry at the Fayette County Detention Center testified on Caudill's behalf. RE

34, pg. 95 [Page ID#526]; RE 11 [Video A-9, 2/16/00, 16:40:00 et seq]; RE 47-10, pgs. 54-59 [Page ID# 2073-2078]. She stated that Caudill attended group services and met with her individually. Id. Caudill also encouraged other inmates to attend and read related literature to them. Id.

Caudill went to great lengths in her petition to attempt to suggest that the mitigation case was haphazard and flung together at the last minute. However, a review of record shows that, to the extent that any problems did occur, they were related to the investigator's inability to get documents that the mitigation team had sought (through no fault of his own), or involved Caudill's lack of motivation to assist her mitigation team (particularly in regard to family members). RE 34, pg. 103 [Page ID#534].

In addition, as noted in *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky.1998), when a jury sits in both phases of a capital murder trial, all evidence introduced in the guilt phase may be considered by the jury during the penalty phase. From that basis, evidence from the guilt-phase of the trial, in particular Caudill's own testimony, was also able to be considered. See RE 47-8, pgs. 19-134 [Page ID# 1585-1700]. Caudill gave a history of her employment and education background, as well as, her history of substance abuse. Id. In the months prior to the murder of Lonetta White, Caudill noted that she and Thomas Garrett had moved to Illinois and made an effort to get clean (which worked for a period of time). Id. However, Garrett relapsed and Caudill returned to Lexington and was staying with a former boyfriend, Steve White (Lonetta White's son). Id. Caudill detailed how Garrett committed

suicide shortly thereafter and that Garrett's grandmother blamed the suicide on Caudill. Caudill's guilt for Garrett's suicide caused her to relapse. Id.

Steve White, the murder victim's son, also testified about his relationship history with Caudill – which had started approximately seven (7) years prior to the time of this trial. See RE 47-6, pgs. 3-123 [Page ID# 938-1058]. He described how they dated off and on for quite some time and reconnected in the time prior to the murder. Id. White described her as his girlfriend and he provided her with money, food, and a car – with one of the requirements that she stay sober. Id. He stated that they talked about getting married and having children – even going so far as White paying for an operation Caudill would need in order to get pregnant. Id. When Caudill relapsed after Garrett's suicide, because she knew he was upset, she disappeared. Id. He ultimately found her, but based on some items at his house (cigarettes) and in the back seat of his car (a pair of men's pants), he believed she was prostituting and possibly using his house/car. Id. At that point, they had a heated argument and Caudill left. He would not see her again until after she murdered his mother. Id.

During Caudill's post-conviction review, she has presented a myriad of individuals she alleged could have and should have been called to testify on her behalf – including other family members, teachers, and old acquaintances/boyfriends. RE 34, pg. 95 [Page ID# 526]. With the exception of those that testified, Caudill did not allege that her counsel were actually aware of the identity of these individuals at the time of trial, knew the substance of their knowledge, or their willingness to testify -

only that further investigation would have uncovered it (investigation apparently hampered in part by Caudill herself). Id. Caudill also argued that medical records should have been sought to show her injuries at the hands of Thomas Garrett (injuries that had already been noted by Dr. Schilling). Id. at 96 [Page. ID# 527].

The overwhelming majority of the "missing" testimony was cumulative – and merely repeated or expanded on all of the themes already before the sentencing jury – Caudill's abusive father/troubled childhood, her pleasant disposition when not on drugs, her cognitive deficits, her violent relationships with husbands and boyfriends, and her substance abuse issues. Caudill's defense counsel put forth a vivid picture of the relevant mitigating factors in this case.

Caudill has also argued that defense counsel should have called their neuropsychologist, Dr. Christopher Allen, to testify. As noted by the district court and the Sixth Circuit, while Dr. Allen could testify to matters Dr. Schilling has indicated he could not, it would not have been wise to do so. RE 34, pgs. 97-105 [Page ID# 528-536]. Defense counsel suggested in chambers he might try to back door some of Dr. Allen's conclusions by getting them into evidence via Dr. Schilling – but he did not intend to call him to testify. Id. Particularly, counsel noted his only intent to note anything available from Dr. Allen would be to get into evidence that Caudill may have had a previous head injury or learning disability. Id. Nonetheless, calling Dr. Allen to testify would have come with great peril. Id. Dr. Allen's report indicated that Caudill had contradicted her mother, brother, and sister, and expressed no emotional difficulties related to her early childhood. Id. Rather, she only indicated

some difficulty later in her childhood when her father was drinking (when Caudill was between the ages of ten and fifteen years of age), but that he was only abusive towards their mother. Id. In fact, Caudill asserted that he was never abusive to her or her siblings at any time. Testimony from Dr. Allen detailing Caudill's assertions to him would have severely undercut the testimony from her family. Id. As noted by the district court, "[i]t is difficult to imagine testimony more damaging to Caudill's mitigation case than her own statements made to a defense psychologist which suggested that her mother and siblings had either exaggerated or lied about the childhood abuse and its effects upon her, which formed the very basis for her mitigation case". RE 34, pg. 102 [Page ID# 533]. Dr. Allen also reviewed Dr. Schilling's personality testing and noted the permissible conclusion that Caudill was not rule-bound and could put her own needs and feelings ahead of others. Id. This testimony would have painted Caudill as selfish and exploitative, and someone who was not inclined to conform her behavior to the law. Id. Dr. Allen's testing also put Caudill's cognitive abilities within normal limits – while noting that her cerebral dysfunction was probably caused by her history of drug abuse and/or possibly a traumatic brain injury – as opposed to something she was born with – situations over which Caudill had some degree of control (who she dated or what she put into her body) and would garner less sympathy. Id.

Ample mitigation evidence was presented to the jury – illustrating a full and complete investigation by defense counsel. Caudill's post-conviction complaints are nothing more than second-guessing in light of her penalty verdict. The entirety of

the evidence Caudill has alleged should have been presented was either cumulative and repeated themes already put forth with sufficient detail, or was damaging because it undercut her mitigation case and painted her in a more negative light. The jury had a full picture of Caudill's life history. As explained by this Court in *Eddings v. Oklahoma*, 455 U.S. 1004, 115 (1982), "Evidence of a difficult family history or emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight." (Citations omitted). Such is the case for Caudill.

Further, it is equally important to bear in mind that, in a death penalty case where the aggravating factors are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigating evidence. *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000) overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005); *Bonin v. Calderon*, 59 F.3d 815 at 836 (9th Cir.1995). In considering the potential prejudice of omitting additional testimony, it's important to keep in mind the State's evidence on the other side of the scale. In this case, the circumstances surrounding Mrs. White's murder were very violent and horrific, as was the subsequent burning of her body - to the extent that her unrecognizable corpse had to be pried from the trunk of her own car at a location which was selected to project unimaginable spite. It was against this backdrop that Caudill's mitigation case was judged.

When affirming the district court, the Sixth Circuit referenced Caudill's undoubted guilt, as well as, evidence that suggested she was the mastermind behind the crime. *Caudill v. Conover*, 881 F.3d 454, 463-465 (6th Cir. 2018). Caudill had both motive and opportunity, and evidence showed she not only lacked remorse, but outwardly mocked Mrs. White as she begged for her life. Citing to *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009), the Sixth Circuit agreed with the district court and found Caudill's attempt to show prejudice to be unpersuasive.

## III. THE LOWER COURTS CORRECTLY DECLINED TO ISSUE A COA WITH REGARD TO THE ALLEGED *BRADY* VIOLATION.

Caudill has asserted that this Court should grant her petition to determine if the Sixth Circuit erred by failing to grant a certificate of appealability (COA) with regard to alleged favorable treatment for a jailhouse informant (Cynthia Ellis) in exchange for her testimony – in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

On the contrary, the Sixth Circuit was correct when it denied a COA on this issue – as no *Brady* violation occurred. Caudill brought this issue to the Kentucky courts during her post-conviction proceeding. The Kentucky Supreme Court denied the claim, noting that the parameters of any plea deal was a matter of public record and that defense counsel was aware of the deal and cross-examined Ellis about it during Caudill's trial. From that basis, it was indicated that materials known to defense counsel and readily available do not fall into the type of materials covered by *Brady*.

Citing *United States v. Agurs*, 427 U.S. 97, 103 (1976), the district court stated the instances covered by *Brady*, however, each involved information known to the prosecution and unknown to the defense. Because the defense was aware of the agreement, no violation could have occurred. Further, it was also concluded that nothing involving Ellis deprived Caudill of a fair trial or prejudiced her – as it was factually "clear that Ellis did not receive any concrete consideration for her testimony in the form of an agreement to reduce charges or to a reduced sentence". *Caudill v. Conover*, 2014 WL 349300, *10 (E.D.Ky. 2014). Instead, the Commonwealth simply agreed to indicate at her sentencing that Ellis cooperated on two cases – however, no promises were made for reduced charges and no sentencing recommendation was made. Based on these circumstances, reasonable jurists would not find the district court's assessment debatable or wrong – and it was proper for the lower courts to decline to issue the COA.

## CONCLUSION

Based on the foregoing, Caudill's petition should be denied.

Respectfully submitted,

**ANDY BESHEAR**
Attorney General of Kentucky

*/s/ Matthew R. Krygiel*
**MATTHEW R. KRYGIEL**
Counsel of Record
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Respondent

**FILING/PROOF OF SERVICE**

The foregoing Application was mailed November 5, 2018 to the Clerk of this Court for filing.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 5th day of November, 2018, a copy of this Brief was mailed via United States Postal Service, postage prepaid, to Hon. Dennis J. Burke, Assistant Public Advocate, Department of Public Advocacy, 2202 Commerce Parkway – Suite D, LaGrange, Kentucky 40031; and Hon. J. Robert Linneman, Santen & Hughes, LPA, 600 Vine Street – Suite 2700, Cincinnati, Ohio 45202 - Counsel for Petitioner.

*/s/ Matthew R. Krygiel*

**MATTHEW R. KRYGIEL**
**COUNSEL OF RECORD**
**ASSISTANT ATTORNEY GENERAL**
**1024 CAPITAL CENTER DRIVE**
**FRANKFORT, KY 40601**
**(502) 696-5342**
**COUNSEL FOR RESPONDENT**