No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

LEIF HALVORSEN,

Petitioner

v.

DEEDRA HART, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

Leif HALVORSEN, Petitioner-Appellant,
v.
Randy WHITE, Warden, Respondent-Appellee.

No. 15-5147
|
Filed August 20, 2018

Synopsis

Background: Following affirmance, in state court, of defendant's conviction for murder and death sentence, and denial of his petition for post-conviction relief, petitioner sought federal habeas relief, asserting claims that trial court error, ineffective assistance of counsel, and prosecutorial and juror misconduct violated his constitutional rights. The United States District Court for the Eastern District of Kentucky, David L. Bunning, J., denied petition. Petitioner appealed.

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

petitioner procedurally default claim that state trial court constructively amended indictment;

state trial court did not constructively amend indictment;

state appellate counsel's alleged ineffectiveness was not sufficient cause to excuse procedural default;

prosecutor did not commit misconduct in closing argument;

there was reasonable argument that trial counsel was not ineffective in presenting sufficient mitigation evidence at penalty phase;

petitioner procedurally defaulted on claim that right to impartial jury and right to individualized sentencing determination were violated; and

Kentucky Supreme Court's proportionality review did not violate defendant's Eighth Amendment or due process rights.

Affirmed.

*492 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

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BEFORE: ROGERS, COOK, and McKEAGUE, Circuit Judges.

Opinion

COOK, Circuit Judge.

In a petition for a writ of habeas corpus, state prisoner Leif Halvorsen claims that trial court error, ineffective assistance of counsel, and prosecutorial and juror misconduct violated his constitutional rights. Determining that the Kentucky Supreme Court did not unreasonably reject these claims, we deny his petition and AFFIRM the district court's judgment.

I. BACKGROUND

The Kentucky Supreme Court adduced the following facts. In January 1983, Leif Halvorsen and Mitchell Willoughby shot Joe Norman, Joey Durrum, and Jacqueline Greene in Greene's and Norman's house. *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 923 (Ky. 1986). Halvorsen and Willoughby had come to smoke marijuana with Norman, but after Willoughby and Norman began fighting over a bad check, Willoughby grabbed his gun and started shooting. *Id.* At trial,

Willoughby "took all of the blame" for the murders, and testified that he remembered shooting Norman two or three times, but not the other victims. *Id.*

Susan Hutchens's testimony filled in the gaps. *Id.* Halvorsen and Willoughby had asked her to pick up ammunition for their pistols earlier that day. *Id.* Later, she decided to visit Greene, and upon arrival, saw Willoughby, Halvorsen, and Norman talking in the driveway. Hutchens and Greene went inside to speak to Durrum. *Id.* Afterwards, Willoughby, Halvorsen, and Norman came inside and, "all of a sudden," the shooting began. *Id.*

Hutchens put her hands over her eyes and heard numerous shots. *Id.* When the shooting stopped, she opened her eyes and saw both Halvorsen and Willoughby wielding pistols. *Id.* Norman and Durrum lay dead on the floor, and Hutchens watched Willoughby shoot Greene twice more, killing her. Both men directed her to pick up the bullet casings while they dragged the bodies out of the house and into their van. *Id.* Police later found the bodies dumped by a bridge, bound with rope. *Id.* at 922.

In July 1983, a jury found Halvorsen and Willoughby guilty of murdering Norman, Durrum, and Greene. Following the jury's recommendation, the trial court sentenced Halvorsen to death for the Greene and Durrum murders, and life imprisonment for the Norman murder. The Kentucky Supreme Court affirmed Halvorsen's convictions and sentences, *Halvorsen*, 730 S.W.2d at 928, and the Supreme Court denied certiorari, *Halvorsen v. Kentucky*, 484 U.S. 970, 108 S.Ct. 468, 98 L.Ed.2d 407 (1987).

In February 1988, Halvorsen filed a petition for post-conviction relief. After a decade of delay, owing in part to a change of counsel and Halvorsen's filing an amended petition, the trial court conducted an evidentiary hearing that resulted in its denying all relief. Halvorsen's later state court appeals were similarly unsuccessful. ***493** *Willoughby v. Commonwealth*, Nos. 2006-SC-000071-MR, 2006-SC-000100-MR, 2007 WL 2404461, at *3 (Ky. Aug. 23, 2007); *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 12 (Ky. 2007).

In August 2009, Halvorsen filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, initially advancing thirty grounds for relief. About three years later, he unsuccessfully moved to add an additional eleven claims. The district court denied the motion without holding an evidentiary hearing, denied relief on all the habeas claims, and issued a partial certificate of appealability. We later expanded the certification, ultimately including ten claims. [1]

1 After oral argument, counsel filed a Notice of Clarification discussing two additional, uncertified claims which we do not consider.

II. STANDARD OF REVIEW

"In a habeas proceeding, we review the district court's legal conclusions de novo and its factual findings for clear error." *Henderson v. Palmer*, 730 F.3d 554, 559 (6th Cir. 2013).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), courts may grant a habeas writ only if the state court's adjudication of a claim either "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 "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." *Adams v. Bradshaw*, 826 F.3d 306, 310 (6th Cir. 2016) (citing *Nali v. Phillips*, 681 F.3d 837, 840 (6th Cir. 2012)); 28 U.S.C § 2254(d)(1)-(2). We may grant the writ under the "contrary to" clause only "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." *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014) (citing *Brown v. Payton*, 544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005)). Alternatively, we may grant the writ under the "unreasonable application" clause if, despite identifying the correct governing legal principle from the Supreme Court's jurisprudence, the state court "unreasonably applies that principle to the facts of the petitioner's case." *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007) (citing *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

III. ANALYSIS

A. Complicity Charges

At the end of the guilt phase of Halvorsen's trial, the state trial court instructed the jury that Halvorsen could be convicted either as a principal or as an accomplice to each of the three murders, even though the grand jury indicted Halvorsen only as a principal. Halvorsen objects to the court's addition of accomplice liability, arguing that it constructively amended the indictment and denied him due process by preventing trial counsel from developing a defense to all the charges against him. He proposes two grounds for relief: first, that the trial court erred by instructing the jury on accomplice liability, and second, that trial counsel was constitutionally ineffective for not anticipating or defending against the accomplice liability charge. He raised neither in state court.

1. Trial court error

Generally, before a court rules on the merits of a § 2254 petition, a "petitioner ***494** must have exhausted his available state remedies," and his "claims must not be procedurally defaulted." *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015) (citations omitted). A claim is procedurally defaulted when "a petitioner fails to present a claim in state court, but that remedy is no longer available to him." *Id.* The petitioner may avoid procedural default only if "there was cause for the default and prejudice resulting from the default," or if he can prove "that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).

Halvorsen first raised the issue of the trial court's complicity instruction in the district court. Because he never gave the state courts the opportunity to review or correct any error, the claim is procedurally defaulted. Conceding the default, Halvorsen maintains he can show cause to excuse it: the ineffective assistance of his appellate counsel who failed to allege this claim on direct appeal.

The excuse itself was not presented during Halvorsen's state court collateral review, but for good reason: until 2010—years after Halvorsen's claims finished percolating through the state court system—Kentucky did not recognize general ineffective assistance of appellate counsel claims. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010). Because we have previously permitted district courts to review the merits of these claims to ensure that a recognized federal right is not rendered non-cognizable, *see Boykin v. Webb*, 541 F.3d 638, 647–48 (6th Cir. 2008), we accept Halvorsen's invitation to address it here, examining whether his appellate counsel was constitutionally ineffective.

A successful ineffective assistance of counsel claim requires first, that a defense attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and second, that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* likewise governs claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

Thus, Halvorsen must demonstrate that appellate counsel's choice to leave unchallenged the state court's complicity instructions "fell below an objective standard of reasonableness" and, but for the error, there is a reasonable probability that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052. If he fails to prove either prong, his ineffective assistance of appellate counsel claim also fails. *Id.* at 697, 104 S.Ct. 2052.

We can resolve this argument by deciding that Halvorsen suffered no prejudice. *See id.*; *see also Hall v. Vasbinder*, 563 F.3d 222, 237 (6th Cir. 2009) (applying *Strickland*'s prejudice prong to a procedural default analysis). Halvorsen was indicted as a principal offender in the Norman, Durrum, and Greene murders under Ky. Rev. Stat. Ann. § 507.020. The indictment alleged that while committing first-degree robbery, Halvorsen intentionally shot each of the three victims with a pistol. At the trial's conclusion, the court instructed the jury to consider both principal and accomplice liability. The jury found Halvorsen guilty of Norman's murder under an accomplice instruction, and of the Durrum and Greene murders under a combination instruction.

An indictment is constructively amended when jury instructions or the presentation of evidence "so modif[ies]

essential elements of the offense charged such that ***495** there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Mize*, 814 F.3d 401, 409 (6th Cir. 2016) (quoting *United States v. Martinez*, 430 F.3d 317, 338 (6th Cir. 2005)). In federal cases, "[c]onstructive amendments are 'per se prejudicial because they infringe on the Fifth Amendment's grand jury guarantee.' " *Id.* (quoting *United States v. Hynes*, 467 F.3d 951, 962 (6th Cir. 2006)). Although a state prisoner petitioning for habeas relief is not protected by the federal guarantee of charge by indictment, he still has a "due process right to be informed of the nature of the accusations against him." *Lucas v. O'Dea*, 179 F.3d 412, 417 (6th Cir. 1999).

To support his argument, Halvorsen principally relies on *Lucas v. O'Dea*. *Lucas*, however, concerns only superficially similar circumstances: while Lucas and two other men were robbing a pawn shop, one of them shot and killed the store's owner. 179 F.3d at 415. A grand jury indicted Lucas for intentional murder, requiring the government to prove that he shot the store owner. *Id.* But the only witness to the crime was unable to identify which robber fired the fatal shot, and Lucas defended himself by asserting that he did not shoot the victim. *Id.* At the end of trial, the state court broadened the charge and instructed jurors to consider a different crime: wanton murder, a crime indifferent as to who fired the shot. *Id.* On habeas review, this circuit held that Lucas had been "deprived ... of his Fourteenth Amendment right to notice of the charges against him" because he had been indicted for one crime (intentional murder), and the jury was charged with another (wanton murder). *Id.* at 417.

Not so here. The trial court instructed Halvorsen's jury on complicity, and under Kentucky law, "amending the indictment to include an allegation that the defendant is guilty of the underlying charge by complicity does not constitute charging an additional or different offense." *Commonwealth v. McKenzie*, 214 S.W.3d 306, 307 (Ky. 2007) (citing *Commonwealth v. Caswell*, 614 S.W.2d 253, 254 (Ky. Ct. App. 1981)). Indeed, "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980). "Thus, to convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant." *Parks v. Commonwealth*, 192 S.W.3d 318, 327 (Ky. 2006) (citing Ky. Rev. Stat. § 502.020(1)). Similarly, this circuit has held that it does not violate due process to indict a defendant only as a principal offender of a substantive crime, and then convict him of aiding and abetting its commission. *Hill v. Perini*, 788 F.2d 406, 407 (6th Cir. 1986) (citing *Stone v. Wingo*, 416 F.2d 857 (6th Cir. 1969)).

Because the underlying argument would have failed on the merits, Halvorsen cannot show that appellate counsel's choice not to challenge the state court's complicity instructions prejudiced him. His ineffective assistance of appellate counsel claim fails, and cannot excuse the procedural default of his claim that the trial court erred by instructing the jury on complicity charges.

2. Ineffective assistance of trial counsel

Alternatively, Halvorsen asserts that because Kentucky law allowed Halvorsen to be tried as both a principal and an accomplice, his trial counsel was ineffective for arguing only that Halvorsen was not the shooter. Halvorsen first raised this issue ***496** when he moved to amend his habeas petition in district court four days after the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). He admitted that he had never raised the now procedurally defaulted claim in state court, but claimed that post-conviction counsel was ineffective for failing to do so. The *Martinez* decision, he contended, created a new framework under which this new ineffective assistance of post-conviction counsel claim establishes cause to excuse the default.

In *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) the Supreme Court ruled that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 566 U.S. at 9, 132 S.Ct. 1309. *Martinez* modified this holding in certain circumstances: if the first time a defendant can address a claim is at state court collateral review, but his constitutionally ineffective counsel fails to raise it, a federal habeas court can examine the claim under *Martinez*. *Id.*

Although the district court recognized that *Martinez* could theoretically excuse the default, the district court denied Halvorsen's motion, because

> [t]he only barrier faced by Martinez or Halvorsen alike to asserting their ineffective assistance claims was the need to argue for an exception to the *Coleman* rule, an argument Martinez made but Halvorsen did not. The Supreme Court's ultimate decision four years later in *Martinez* was not a condition precedent to making a viable argument for such an exception [to *Coleman*], but only to ensuring its success. Halvorsen chose to forego [sic] this argument three years ago, and he may therefore not make it now, long after the parties have thoroughly briefed their substantive claims on the merits as well as related questions regarding the necessity and propriety of permitting discovery and expanding the record with respect to them.

Essentially, the district court determined that Halvorsen bore responsibility for preserving any arguments he wished to pursue. We agree. We find no abuse of discretion in the district court's denial of leave to amend to raise a new claim almost thirty years after Halvorsen was convicted.

In a final attempt to resuscitate this claim, Halvorsen cites *Woolbright v. Crews*, where, applying *Martinez*, a panel of this court recognized that Kentucky prisoners' procedurally defaulted ineffective assistance of trial counsel claims could be excused if they showed that they lacked effective assistance of counsel in initial-review collateral proceedings. 791 F.3d 628, 635–36 (6th Cir. 2015). But *Woolbright* is distinguishable because, like Martinez, Woolbright actually argued his trial counsel's ineffectiveness in his initial habeas petition. *Id.* at 630–632.

Because Halvorsen has not shown caused excusing the procedural default, we do not reach the merits of the underlying claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

B. Prosecutorial Misconduct and Due Process

1. Due Process Issues

Halvorsen maintains that the prosecutor's closing argument during sentencing denied him a fair trial because the prosecutor (1) argued that Halvorsen presented a future danger to the community; (2) suggested that the imposition of the death penalty deters other crime; (3) compared him to notorious murderers; and (4) criticized Halvorsen for exercising his constitutional rights.

***497** The Kentucky Supreme Court reviewed the first three claims on direct appeal and found them meritless. *Halvorsen*, 730 S.W.2d at 925. "Brief portions of the argument were irrelevant," the court explained, "but on the whole, the argument was fair comment on the evidence." *Id.* The court also considered the "overwhelming nature of the evidence against Halvorsen," *id.*, and did not accept that the prosecutor's argument "could have added much fuel to the fire anyway." *Id.* (quoting *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977). Halvorsen did not raise the fourth claim in state court.

The Supreme Court has said that a conviction cannot stand when a "prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). AEDPA limits our review to correcting decisions contrary to or involving an unreasonable application of federal law as established by Supreme Court precedent. It follows that Sixth Circuit cases cannot "form the basis for habeas relief under AEDPA," *Parker v. Matthews*, 567 U.S. 37, 48–49, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam), and prove useful in this circumstance only to the extent that they accurately reflect *Darden*'s highly generalized standard. Our deference "reflects 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*, 562 U.S. 86, 102–03, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)

(quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment)).

Darden grants state courts significant leeway to evaluate prosecutorial misconduct claims on a case-by-case basis. *Parker*, 567 U.S. at 48, 132 S.Ct. 2148. Thus, we grant habeas relief only when misconduct is "so serious that it implicates a petitioner's due process rights." *Ross v. Pineda*, 549 F. App'x 444, 449 (6th Cir. 2013). The misconduct must so clearly violate *Darden* that the state court's failure to identify it was not just erroneous, but "objectively unreasonable." *Williams*, 529 U.S. at 409, 120 S.Ct. 1495.

Future dangerousness: At sentencing, the prosecutor asked the jury to consider that a murderer who is sentenced to life in prison may still pose a danger to society. Halvorsen points to the following passage in particular:

> I wonder if the anti-death penalty people have ever really considered—ever really considered the welfare of hundreds and thousands of people who are subjected to the risk of convicted murders. Is the inmate population safe? The young man convicted of burglary or larceny, theft, who goes to the penitentiary, is he safe? What prevents a convicted murderer with a life sentence from getting a shiv and holding it to the kid's neck, the young burglar's neck, and demanding escape? What prevents that?
>
> Well, that's easy to say—the answer, segregation from prison population. Well that's fine, but what about the prison officials, people like George Coons, people who have to handle the murderer with the multiple life sentence? That's a reality. That's in this world. Every second every person who is in this capacity of watching, of being in control, has to have a razor sharp sense of awareness in a penitentiary, because their laxness can be the opportunity, the chance, for the convicted murderer to effect his escape. That's reality.... Is it conceivable to ***498** you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is.

The district court decided that the Kentucky Supreme Court's conclusion was not objectively unreasonable, structuring its analysis around a multipart test sanctioned by this circuit in prosecutorial misconduct cases, and other Sixth Circuit precedent. Again, the Supreme Court has sharply critiqued this multipart approach, reminding us that "[t]he highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit." *Parker*, 567 U.S. at 49, 132 S.Ct. 2148.

Despite the flaws in its reasoning, the district court's conclusion is meritorious. Halvorsen cites no Supreme Court precedent suggesting that these comments clearly violate *Darden*—likely because none exists. Halvorsen also ignores the context of this passage—one of a handful in the middle of a thirty-eight-page closing argument—and fails to account for "their effect on the trial as a whole." *Darden*, 477 U.S. at 182, 106 S.Ct. 2464.

Further undermining his position, the Supreme Court endorses a jury's consideration of future dangerousness during sentencing. *See Wainwright v. Goode*, 464 U.S. 78, 86, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (noting that a state could constitutionally "enact a system of capital sentencing in which a defendant's future dangerousness is considered"); *California v. Ramos*, 463 U.S. 992, 1005–06, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (because there is no constitutional bar to considering future dangerousness at sentencing, the Court deferred to state's decision to permit juries to consider possibility of governor commuting a life sentence with no possibility of parole). These cases preclude us from determining that the Kentucky Supreme Court acted contrary to clearly established Supreme Court precedent.

Death Penalty as Deterrence: During his closing argument at sentencing, the prosecutor urged the jury to consider the deterrent effect of the death penalty:

> And his bargaining power, the throat of an innocent person whose job it is just to maintain the person. Well, our response to that person in the penitentiary, don't kill him now, Frank, because if you do we're going to give you a life sentence. Is that a deterrent to a person who's been convicted of murder, with a life sentence, multiple murders? Well I suggest to you that the death penalty is a needed, much needed deterrent for the inmate population of our penal institutions.
>
> ... Well what about the death penalty as a deterrent? Does it actually stand as a threat to the criminal who is out there right now, thinking about an armed robbery of

> a liquor store or the burglary of somebody's home? Do they kill the eye witness? Do they think about that and thus escape capture because nobody can identify them?
>
> Obviously nothing that occurs in a judgment or verdict will totally affect every citizen, every potential murderer or criminal. The death penalty conviction will not stop future murders in this community. It will not, totally. Won't stop them all. But it most certainly is a valuable and effective deterrent to individuals—to certain individuals—who really believe the death penalty will be enforced by Commonwealth Attorney's offices and juries, the citizens in the community. If they really believe that, then it can be a deterrent.

***499** Although Halvorsen argues that these ruminations on the death penalty as deterrence violated his due process rights, he fails to support his claim with Supreme Court precedent. Citations to a variety of circuit court decisions cannot form the basis of habeas relief, *Parker*, 567 U.S. at 48–49, 132 S.Ct. 2148, particularly when they employ the very same test for prosecutorial misconduct that the Supreme Court rejected in *Parker*. *See, e.g.*, *Goff v. Bagley*, 601 F.3d 445, 480 (6th Cir. 2010). Additionally, this circuit found a quite similar general deterrence argument to be proper in *Irick v. Bell*, because as of the time of petitioner's appeal in state supreme court, "the United States Supreme Court had never held that appeals to general deterrence are impermissible in sentencing arguments." 565 F.3d 315, 325 (6th Cir. 2009). Irick exhausted his state court direct appeals in 1988, two years after the Kentucky Supreme Court affirmed Halvorsen's convictions. If no clearly established law forbade references to general deterrence in 1988, we have no reason to disturb the Kentucky Supreme Court's 1986 determination that Halvorsen's entire trial was fundamentally fair despite the prosecutor's arguments that the death penalty generally works to deter crime.

Reference to Notorious Murderers: Next, Halvorsen asserts that he was denied a fair trial because the prosecutor compared him to Richard Speck, James Earl Ray, Charles Manson, and Gary Gilmore during sentencing.

> Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is. In the last few years, we saw Martin Luther King, the greatest black leader who ever lived, gunned down; the person caught, arrested [unintelligible] convicted, sentenced and placed in the extremely tight security of the Tennessee maximum prison in Brushy Mountains, and he escaped, and thank God he broke his ankle when he jumped down and he was gone for three days but they finally caught him.
>
> ... If the belief is that you'll never get the death penalty, then the value of the life, of the potential innocent victim eye witness, goes way down. The question of deterrence is easily resolved. As to the future threat of the convicted murderer to society, Gary Gilmore will never kill another college student, ever. Can the Illinois authorities guarantee that for Richard Speck? Can California authorities guarantee that about Charles Manson?

The district court rejected this argument for two reasons. First, Halvorsen supports his claim with circuit court cases, which cannot constitute "clearly established" federal law under AEDPA. Second, the prosecutor never compared Halvorsen to any member of this cast of characters—the prosecutor just listed a few notorious murderers, some of whom were not sentenced to death, and suggested that they could still commit crime.

Darden sets a high standard for defendants asserting prosecutorial misconduct. Prosecutors in *Darden* compared the defendant to an "animal" who "shouldn't be out of his cell unless he has a leash on him," and urged the jury to impose death to "guarantee" Darden would not commit "a future similar act." 477 U.S. at 180, 106 S.Ct. 2464. Halvorsen does not even clear that bar —much less the extra height imposed by AEDPA. The contested statements are part of a broader commentary on deterrence, during which the prosecutor never referred to Halvorsen, much less directly compared Halvorsen to any of the murderers. Isolated references to notorious ***500** killers, while undesirable, did not disturb the ultimate fairness of the trial as a whole, and do not provide grounds under AEDPA for granting habeas relief.

Constitutional rights: Finally, Halvorsen argues that the prosecutor improperly suggested that he exercised constitutional rights that the victims were denied:

> As far as mercy is concerned, it's kind of ironic. For three weeks you observed first hand the criminal justice system in this Commonwealth. Some of you didn't

know anything about the criminal justice system, some of you did. But you have observed—if you're not a student of the constitution of the United States—you've observed safeguards, every safeguard accorded to these defendants by the constitution. You've seen their rights protected, protections of a person charged with a crime, their right to be represented by an attorney.... You've seen their right to cross examine and confront witnesses who testified against them. That's the constitution. And you—you've seen their right exercised to be able to pick a jury of their peers. If they don't want certain men, strike-em; if they don't want certain women, strike 'em.... They have a right to have a judge preside over this trial and insure [sic] that it's conducted fairly. Some countries you don't have that. You're just guilty and you go to jail. And you're presumed innocent. You're not innocent but you're presumed innocent on July 5th when you start this trial, and you're presumed innocent until it's proven against you. A right that is very rare in this world.

Well these murderers enjoyed these rights. They enjoyed every one of them during this trial. What rights did their victims enjoy? Did they have attorneys? Did their victims have an impartial jury to decide their fate [ ]? Did they have a judge to insure [sic] that they had a fair trial? Now I'll tell you something. There sits the judge and the jury and the executioner of three people.

These defendants will ask for mercy through their lawyer and when they do, ask how much mercy they gave their victims.

This claim was not raised in state court and is procedurally defaulted. To excuse the default, Halvorsen again argues that his appellate counsel was ineffective for failing to raise it. As already discussed, an ineffective assistance of appellate counsel claim will succeed only if "counsel's representation fell below an objective standard of reasonableness" and 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 668, 694, 104 S.Ct. 2052. At bottom, "appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

The district court considered the argument insubstantial. The prosecutor's questions could not be read as criticizing Halvorsen's exercise of his constitutional rights, and therefore had not infected the trial with unfairness. It follows that appellate counsel could not have been ineffective for choosing not to broach the issue.

We agree. Kentucky law permits prosecutors "reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly." *Murphy v. Commonwealth*, 509 S.W.3d 34, 52 (Ky. 2017) (quoting *Lynem v. Commonwealth*, 565 S.W.2d 141, 145 (Ky. 1978)). Prosecutors may say that the defendant "had been given a lot of constitutional rights" during trial while "the victim had not been extended similar rights" as long as, on general review, closing arguments are not "prejudicial ***501** or sufficient to affect the outcome of the trial or the penalty." *Alley v. Commonwealth*, 160 S.W.3d 736, 742 (Ky. 2005). And in this case, the Kentucky Supreme Court examined the closing arguments and found no merit to Halvorsen's complaint of prosecutorial misconduct. "Brief portions of the argument were irrelevant, but on the whole the argument was fair comment on the evidence" and any irrelevant portions were outweighed by the "overwhelming nature of the evidence against Halvorsen." 730 S.W.2d at 925.

Appellate counsel reasonably chose not to make an argument unsupported by law, and Halvorsen did not prove that he was prejudiced by this failure when these comments were but a small fraction of closing argument. The procedural default stands.

2. Eighth Amendment Issues

Halvorsen contends that during closing arguments at sentencing, the prosecutor asked the jury not to consider mitigation evidence, thereby denying him a fair hearing under the Eighth Amendment. Specifically, he points to three sentences nestled within the prosecutor's response to Halvorsen's defense that he was too intoxicated to have deliberately murdered the victims.

> Do we want to say to this community that with a verdict of a life sentence that it's less serious because they were on drugs? I don't think so. Do we want to establish a standard with a verdict that taking the lives of three human beings is less

> serious because a person consumes drugs and alcohol, but could still remember everything they did?

Although Halvorsen failed to raise this claim in state court and it cannot now be presented there, *McDaniel v. Commonwealth*, 495 S.W.3d 115, 121–22 (Ky. 2016), he proposes that he can overcome his procedural default by asserting that his appellate counsel was ineffective. Again, applying *Strickland*, a defendant will generally overcome the presumption of effective assistance of counsel only by showing that "ignored issues are clearly stronger than those presented." *Robbins*, 528 U.S. at 288, 120 S.Ct. 746 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate advocacy is not a "kitchen-sink" activity; it demands selectivity of argument. *See Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

"It is beyond dispute that in 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. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). True, particularly egregious prosecutorial misconduct can " 'constrain the manner in which the jury was able to give effect' to mitigating evidence." *DePew v. Anderson*, 311 F.3d 742, 748 (6th Cir. 2002) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 277, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998)). But Halvorsen does not establish that the prosecutor's remarks did anything of the sort, much less explain how raising this issue as an Eighth Amendment violation rather than a due process one would have resulted in the Kentucky Supreme Court's finding that any remarks were not "[b]rief" or mostly "irrelevant." *Halvorsen*, 730 S.W.2d at 925. He cites no cases to vindicate his position, omits critical phrases when quoting the prosecutor's closing argument in his brief, and ignores the context in which they were delivered—namely, a methodical explanation of how preposterous the prosecution found Halvorsen's alleged inability to appreciate "the ***502** criminality of [his] acts" or "conform his conduct to the law because of intoxication." The prosecutor explained that Halvorsen "didn't miss any shots" when murdering the victims, deliberately "gathered up the shells" to avoid being caught, removed other traces of evidence from the scene of the crime, and waited until dark to dispose of the corpses to avoid further incrimination. In no way was the prosecutor instructing the jurors to wholly ignore the mitigation evidence—he was just asking them to examine it critically.

We agree with the district court: Halvorsen does not show that, but for counsel's decision to omit the claim, he would have succeeded on appeal, and we therefore cannot excuse the procedural default of his Eighth Amendment claims. *See Allen v. Harry*, 497 F. App'x 473, 481–82 (6th Cir. 2012) (requiring that appellant demonstrate the substantial likelihood of a different result had counsel acted differently before excusing a procedural default).

C. Ineffective Assistance of Trial Counsel

Halvorsen argues that his trial counsel was constitutionally ineffective for failing to present sufficient mitigation evidence during the penalty phase. Specifically, Halvorsen argues that his counsel did not present evidence of brain damage caused by years of drug abuse and exposure to neurotoxins. Evidence of brain damage, Halvorsen contends, is the most forcefully sympathetic mitigation evidence, and should never be omitted in a capital case.

On post-conviction review in state court, Halvorsen claimed ineffective assistance of trial counsel, broadly asserting that his "[c]ounsel failed to adequately investigate, prepare and present relevant mitigating evidence at the penalty phase." On appeal, he also averred that mitigation evidence should have been presented at the guilt phase and argued anew at the penalty phase of the trial. The Kentucky Supreme Court disposed of the issue under *Strickland*'s prejudice prong, finding it unlikely that the additional mitigation evidence Halvorsen advanced would have changed the result because the proposed evidence was cumulative, contraindicated by reasonable strategy to keep Halvorsen from testifying, or non-prejudicial. *Halvorsen*, 258 S.W.3d at 5–7.

The standards created by *Strickland* and AEDPA are each highly deferential, and, taken together, "review is 'doubly' so." *Richter*, 562 U.S. at 105, 131 S.Ct. 770 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). "When § 2254(d) applies, the

question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102, 131 S.Ct. 770.

Halvorsen asserts that the jury failed to hear compelling mitigating evidence during his original trial: namely, Halvorsen suffered from organic brain damage because of years of persistent drug abuse and exposure to neurotoxins at his workplace. He argues that his trial counsel spoke only to Halvorsen and his parents, did not obtain a mental health or neurological evaluation for anything other than Halvorsen's competency to stand trial, and failed to investigate the "red flags" of chronic drug abuse, paranoia, sleep deprivation, and memory loss in that competency report.

In evaluating Halvorsen's post-conviction motion on appeal, the Kentucky Supreme Court determined that Halvorsen "failed to show that any omitted investigation ***503** would have probably changed the result." *Halvorsen*, 258 S.W.3d at 3–4. The court reviewed the "abundance of testimony [that] was offered at the RCr 11.42 hearing regarding [Halvorsen's] drug use" but determined that it was "cumulative of testimony that was presented at trial." *Id.* at 6. Specifically, the court noted that numerous witnesses testified to Halvorsen's depression after his divorce, increased drug usage, and sudden unemployment, and that trial counsel introduced medical and employment records. *Id.* at 4–5. The affidavits from specialists that Halvorsen introduced during post-conviction proceedings, while helpful, were "largely inconclusive" and would not have significantly moved the needle. *Id.* at 8. Dr. E. Don Nelson, a pharmacologist, testified that Halvorsen's long-term drug history and usage right before the murders would have impaired his judgment, but made no specific conclusions about any effects Halvorsen suffered from exposure to toxic solvents at his workplace. *Id.* And clinical psychologist Dr. Eric Y. Drogin broadly suggested that there was some evidence of drug-induced neuropsychological impairment, but more evaluation and testing was warranted. *Id.*

It is almost disingenuous for Halvorsen to contend that his jury heard nothing of his drug usage. The same jury sat in judgment for the guilt and penalty phases of the trial and considered "all evidence introduced in the guilt phase" during sentencing. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998) (citing *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988)). And a number of witnesses firmly established the narrative of Halvorsen's copious drug usage at trial. Halvorsen's codefendant, Mitchell Willoughby, testified that Halvorsen had ingested a variety of opiates in the days leading up to the murders. A friend, Jeff Luce, testified that he saw Halvorsen the day of the murder, and he "seemed kind of spacy, you know, like he wasn't comprehending very quick." The trial court even instructed the jury to consider Halvorsen's intoxication during deliberation.

At the penalty phase, trial counsel introduced additional evidence of Halvorsen's substance abuse through several witnesses. His father explored Halvorsen's history with drugs, beginning in high school and worsening with time after his divorce. His mother testified that drugs had affected his personality, and chronicled failed attempts at therapy and rehabilitation. Halvorsen himself testified that he began using marijuana at thirteen, graduating to LSD and amphetamines at fifteen or sixteen. He characterized his drug usage as a crutch for his spiraling depression, and, unable to kick the habit in the months leading up to the murders, he crashed a company truck, lost the job he had held for nine years, and was denied unemployment benefits. Halvorsen committed the murders a month later while binging on drugs and alcohol. He described the crime as sudden, "spur of the moment," and unpremeditated. Counsel also called Dr. David Atcher, an assistant professor of psychiatry at the University of Kentucky trained in drug abuse, to discuss the intoxication and withdrawal effects of all the drugs Halvorsen and Willoughby were taking.

Similarly, Halvorsen's argument that counsel improperly failed to investigate red flags in Halvorsen's competency report lacks merit. The author of the report, Dr. C. I. Schwartz, a psychiatrist familiar with Halvorsen from his prior rehabilitation treatment, found no evidence of any cognitive or perceptual dysfunction, and deemed Halvorsen competent to stand trial. After speaking with Halvorsen, trial counsel also did not believe that Halvorsen was suffering from any mental deficiencies and saw ***504** no reason to retain a mental health expert. Instead, he focused on other possible defenses.

During post-conviction proceedings, Dr. Nelson submitted a three-page report, briefly stating that Halvorsen was genetically predisposed to chemical dependency, and that he was involuntarily intoxicated and operating with impaired judgment during the shooting. He also noted that Halvorsen was exposed to industrial solvents at his factory job, and that those solvents could further impair judgment and mental functioning when in the body. Nelson did not, however, judge whether the solvents could still have been circulating in Halvorsen's system two weeks after he was fired. "In fact," the Kentucky Supreme Court concluded, "he made no specific findings in relation to [Halvorsen]." *Halvorsen*, 258 S.W.3d at 8. Dr. Drogin also prepared a psychological evaluation, concluding that Halvorsen's chronic substance abuse had impaired elements of Halvorsen's brain function and memory. The Kentucky Supreme Court failed to see how either expert's "largely inconclusive" findings may have changed the result at sentencing. *Id.*

Halvorsen also seeks to bolster his ineffective assistance claim by contending that his trial counsel admitted having "missed something" during a post-conviction evidentiary hearing. Even if this did not substantively misrepresent his counsel's testimony—which it does[2]—*Strickland* calls for "an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110, 131 S.Ct. 770. An adverse verdict at trial may lead "even the most experienced counsel" to "magnify their own responsibility for an unfavorable outcome" and perversely incentivize falling on the sword at the habeas stage to derail a death sentence. *Id.*

2 Halvorsen states that trial counsel "admitted that individuals who did drugs with Halvorsen should have been interviewed." There is no basis in the record for such an assertion. Trial counsel testified that "as a policy" he did not believe that interviewing drug users was productive, and, while there are exceptions to every rule, in Halvorsen's case specifically he didn't think it helpful. Halvorsen also asserts that trial counsel "admitted that he might have missed something in Halvorsen's competency evaluation." This too mischaracterizes his remarks. Trial counsel explained that he read the competency report and did not find a basis for hiring other psychiatric experts to evaluate Halvorsen: "I did not see where there was something else there. I maybe just overlooked it. I didn't see anything else." He also testified that he spoke to Dr. Schwartz, the author of the competency evaluation, about the impact that Halvorsen's drug abuse may have had on his "ability to function" and "know what [he] was doing."

Against this backdrop, Halvorsen theorizes that additional evidence of his drug abuse, positive commentary from coworkers and friends, and further examination by forensic psychologists, neurologists, and pharmacologists would have drastically altered the narrative at sentencing. But AEDPA forbids this kind of Monday morning quarterbacking, for "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 88, 131 S.Ct. 770. And Supreme Court precedent does not require such a deep dive into every possible nook and cranny of a defendant's background for the best possible mitigation evidence—the baseline for effective assistance is far lower. For example, in *Wiggins v. Smith*, the Supreme Court decided that counsel did not exercise reasonable professional judgment when he failed to investigate a defendant's family or social history beyond reviewing the presentence investigation report and Department of Social Services records even after learning that the defendant's youth was ***505** miserable, he grew up with an alcoholic mother who often abandoned him for days without food, was shuttled between foster homes as a child, suffered emotional difficulties in foster-care, and was frequently absent from school for long periods of time. 539 U.S. 510, 524–25, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). And in *Porter v. McCollum*, the Supreme Court determined that counsel was deficient when he presented no mitigation evidence about the defendant's mental health, personal history, family background, or military service, when simply consulting family members or any records at all would have revealed that defendant was a decorated Korean War veteran with severe post-traumatic stress, had an abusive childhood, and suffered from brain damage and alcohol abuse. 558 U.S. 30, 32–37, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam).

Trial counsel did much more than the attorneys in *Wiggins* and *Porter*, and there is certainly a reasonable argument that counsel satisfied *Strickland*. Thus, out of the deference to state court decisions mandated by AEDPA, we will not disturb the Kentucky Supreme Court's denial of relief on this claim.

D. Juror Misconduct

Halvorsen asserts that a juror named Walter Garlington incorporated a Bible in jury deliberations during both the guilt and penalty phases of the trial. This conduct, he argues, violated his Sixth Amendment right to an impartial jury, and his Eighth Amendment right to an individualized sentencing determination. Halvorsen relies on an affidavit from an investigator who interviewed Garlington in November 2003. *Willoughby*, 2007 WL 2404461, at *1. [3]

3 Here too, counsel misrepresents the record. The investigator claimed that Garlington "said while serving as a juror in Leif Halvorsen's case, he had his Bible with him all the time, even in the room where the jury deliberated Leif Halvorsen's convictions and sentences." Garlington also allegedly said that he read passages from the Bible to comfort the jury while they were sequestered and away from their families. Nothing in the affidavit suggests that Garlington admitted using the Bible to determine Halvorsen's guilt or sentence.

Halvorsen first raised this issue in 2004 through a Kentucky Rule of Civil Procedure 60.02(f) motion. *Id.* The state supreme court identified two problems with this approach. First, Rule 60.02(f) requires that a petitioner seek relief within a "reasonable time" of judgment, and Halvorsen's motion was filed "over twenty years after the trial" itself, and nearly "twenty years" after the Kentucky Supreme Court's decision on direct appeal. *Id.* at *2.

Second, and perhaps more important, Rule 60.02 was not the appropriate vehicle for raising this claim. In Kentucky, Rule 60.02 acts as a substitute for the common law writ of coram nobis—"not a separate avenue of appeal to be pursued in addition to other remedies," but "available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). A criminal defendant must first "avail himself of [Criminal Procedure Rule] 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *Id.* Rule 11.42 governs collateral attacks on convictions. Ky. R. Crim. P. 11.42. Halvorsen interviewed two jurors in 1985 and could have learned of any alleged jury misconduct then. *Willoughby*, 2007 WL 2404461, at *1. Since he did not file his Rule 11.42 motion until 1988, he had adequate time to include these allegations in his original collateral challenge. *See id.* at *3.

***506** Halvorsen raised this claim again in district court on habeas corpus review. The court determined that it was procedurally defaulted and denied Halvorsen's request for an evidentiary hearing.

AEDPA requires federal courts to give their state counterparts a "full and fair" opportunity to resolve any alleged constitutional violations of state prisoners' rights. *Hand v. Houk*, 871 F.3d 390 (6th Cir. 2017) (quoting *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990)). Thus, if a claim is not fairly presented to state courts because defendant violated a state procedural rule, the claim is procedurally defaulted and will be reviewed only upon a showing of cause and prejudice. *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1068 (6th Cir. 2015) (citing *Coleman*, 501 U.S. at 729, 750, 111 S.Ct. 2546). "A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir.2010) (en banc).

"A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.' " *Davila v. Davis*, —— U.S. ——, 137 S.Ct. 2058, 2064–65, 198 L.Ed.2d 603 (2017) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). To establish cause, the prisoner must point to an "objective factor external to the defense" that "cannot fairly be attributed" to the prisoner, and "impeded counsel's efforts to comply with the State's procedural rule." *Id.* (first quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); then quoting *Coleman*, 501 U.S. at 753, 111 S.Ct. 2546). Under this standard, a defendant could demonstrate cause by "showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray*, 477 U.S. at 488, 106 S.Ct. 2639.

Halvorsen first alleges that the claim is not defaulted, maintaining that he fully complied with Kentucky procedure because a defendant cannot raise a juror misconduct claim in a Rule 11.42 motion. He cites two cases for that theory—*Thompson v. Parker*, No. 5:11-CV-31, 2012 WL 1567378, at *3 (W.D. Ky. May 2, 2012), and *Bowling v. Commonwealth*, 168 S.W.3d 2, 9–10 (Ky. 2004). But both cases advance exactly the opposite proposition: defendants claiming that jurors considered improper information during sentencing should raise that claim in a Rule 11.42 motion. *See also Thompson v. Parker*, 867 F.3d 641, 646 (6th Cir. 2017). And Kentucky courts routinely deny review of juror misconduct claims incorrectly brought under Civil Rule 60.02 rather than Criminal Rule 11.42. *See, e.g.*, *Woodall v. Commonwealth*, No. 2004-SC-0931-MR, 2005 WL 2674989, at *2 (Ky. Oct. 20, 2005); *Simpson v. Commonwealth*, No. 2003-CA-002279-MR, 2006 WL 1560734, at *3 (Ky. Ct. App. June 9, 2006); *Turner v. Commonwealth*, No. 2004-CA-000261-MR, 2004 WL 2563668, at *2 (Ky. Ct. App. Nov. 12, 2004).

Alternatively, to overcome any procedural bar, Halvorsen argues that neither Garlington's voir dire nor his courtroom behavior provided Halvorsen with any reason to suspect misconduct. The two 1985 juror interviews revealed no impropriety, and no further juror interviews were permitted until 2001, when the Kentucky Supreme ***507** Court decided *Cape Publications, Inc. v. Braden*, 39 S.W.3d 823 (Ky. 2001), allowing defendants to interview jurors without first showing good cause.

Halvorsen had access to all the facts he needed to lodge a juror misconduct claim well before 2003. Garlington was clear about his religious convictions during voir dire, explaining that he was a pastor and quoting a biblical passage in response to questions about his views on the death penalty. At the end of the trial, with the court's permission, he led the courtroom in prayer, thanking God for "coming into the midst and guiding us all." In 1985, the trial court allowed Halvorsen to interview any jurors willing to discuss their experience. *Willoughby*, 2007 WL 2404461, at *2. Two agreed to an interview. *Id.* As the district court appropriately concluded, Halvorsen's failure to discover any evidence of juror misconduct at this time was not an "objective factor external to [the defense]."

Halvorsen argues that under *Williams v. Taylor*, a juror's refusal to answer questions post-trial establishes cause for his procedural default. This is incorrect. In *Williams*, a juror lied about not knowing a witness (her ex-husband) and the prosecutor (her divorce attorney) during voir dire. 529 U.S. at 440–41, 120 S.Ct. 1495. Unlike in this case, where the trial transcript is rife with evidence of Garlington referencing religion in the courtroom, the record in *Williams* contained "no evidence which would have put a reasonable attorney on notice" of any of these relationships. *Id.* at 442, 120 S.Ct. 1495. It was not until habeas counsel began interviewing the jury that petitioner discovered the truth. *Id.* at 443, 120 S.Ct. 1495.

Similarly, Halvorsen's suggestion that *Cape Publications* eliminated Kentucky's requirement that parties show good cause before interviewing jurors is meritless. That case said no such thing—it explained that unlike parties, news media may interview jurors without showing good cause. *Cape Publ'ns*, 39 S.W.3d at 826. *See also In re Bowling*, No. 2004-SC-1000-MR, 2005 WL 924323, at *3 (Ky. Apr. 21, 2005) ("*Cape Publications, supra,* was simply a freedom of the press decision and does not abrogate RFCC 32 or the authority of the circuit court to enforce that rule.")

Because Halvorsen's claim is procedurally defaulted and he has not demonstrated cause to excuse the default, we need not reach the merits of the underlying claim of juror misconduct.

E. Constitutionality of State Proportionality Review

Halvorsen argues that the Kentucky Supreme Court's proportionality review violates the Eighth Amendment and denied him due process because it (1) did not consider cases where the death penalty was not returned, and (2) considered cases predating *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), 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) (noting that before *Furman*, "the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive").

We disagree on both fronts. First, this circuit decided that the Kentucky Supreme Court need not compare the petitioner's case to others in which the death penalty was not imposed. *Wheeler v. Simpson*, 852 F.3d 509, 520–21 (6th Cir. 2017). And second, the Eighth Amendment

does not require proportionality review in capital cases. *Pulley v. Harris*, 465 U.S. 37, 43–46, 50–51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Inasmuch as Halvorsen alleges that Kentucky's proportionality-review statute creates a liberty interest protected by due process, that interest merely requires ***508** Kentucky to follow its own statute—which it did. *See Halvorsen*, 730 S.W.2d at 928; *Thompson*, 867 F.3d at 653. "[W]hen 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.* (quoting *Bowling v. Parker*, 344 F.3d 487, 522 (6th Cir. 2003)).

IV. CONCLUSION

For these reasons, we AFFIRM the district court's denial of habeas relief.

All Citations

746 Fed.Appx. 489

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No. 15-5147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 12, 2018
DEBORAH S. HUNT, Clerk

LEIF HALVORSEN,

Petitioner-Appellant,

v.

RANDY WHITE, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: ROGERS, COOK, and McKEAGUE, 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

*Judge Thapar recused himself from participation in this ruling.

2014 WL 5419373
Only the Westlaw citation is currently available.
United States District Court, E.D. Kentucky,
Central Division, at Lexington.

Leif HALVERSON, Petitioner
v.
Thomas L. SIMPSON, Warden, Kentucky State Penitentiary, Respondent.

Civil Action No. 08–484–DLB.
|
Signed Oct. 22, 2014.

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MEMORANDUM OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

DAVID L. BUNNING, District Judge.

*1 This matter is before the Court on Petitioner Leif Halverson's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On July 22, 1983, a Kentucky state-court jury convicted Halvorsen on three counts of first-degree murder for the deaths of Joe Durrum, Jacqueline Greene and Joe Norman. The trial court sentenced Halverson to death for Durrum and Greene's murders and life imprisonment for Norman's murder. Kentucky state courts affirmed Halverson's convictions and sentences on direct appeal and denied him post-conviction relief. Halvorsen is currently incarcerated at the Kentucky State Penitentiary in Eddyville, Kentucky.

In his § 2254 petition, Halverson contends that he is being held in violation of the United States Constitution because of errors that occurred both during his trial and on appeal. Halverson does not argue that he is innocent. He argues that his constitutional rights were violated because of juror and prosecutorial misconduct, improper jury instructions, ineffective assistance of trial and appellate counsel, and improper sentencing. Halverson's petition is fully briefed and ripe for review. For the following reasons, the Court will **deny** Halverson's habeas petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Trial in Fayette Circuit Court

On March 7, 1983, a Fayette County Grand Jury indicted Halvorsen, along with Mitchell Willoughby and Susan Hutchens, on three counts of intentional murder and two counts of robbery. The grand jury also charged Halverson and Hutchens with carrying a concealed weapon. Hutchens, who was present when the murders took place, pled guilty to two counts of hindering prosecution and testified at Halvorsen and Willoughby's joint trial. The trial took place in Fayette County Circuit Court with the Honorable Armand Angelucci presiding. The Kentucky Supreme Court provided the following factual summary:

> The bodies of Joe Norman and Joey Durrum were found on the side of the Brooklyn Bridge on the Jessamine–Mercer County line. The body of Jacqueline Greene was found in the Kentucky River below the bridge. Each of the victims had been shot to death. David Warner, who lived on the Jessamine County side of the Brooklyn Bridge, became suspicious when he noticed a light blue Ford van and a dark pickup truck lurking at various points around the bridge. At one point, the pickup truck parked on the bridge, a person got out of the passenger side, and Warner heard a big splash. Forty-five minutes later, Warner heard a noise that sounded like a car hitting a guardrail or a sign. He looked out to see the blue van and the pickup truck speeding off across the bridge toward Lexington. Warner called the police.
>
> When the police arrived, they found two of the victims on the side of the bridge, each bound with a blue-and-yellow rope that was attached to a heavy rock. The third victim was found in the river below the bridge, wrapped in a sheet that was also bound with a blue-and-yellow rope and attached to a heavy rock. A traffic sign near the bridge had been knocked over by a vehicle. It had paint smears on it and broken glass lying at its base.

*2 Officer William Foekele testified that around 1:30 p.m., on January 13, he was on Loudon Avenue in Lexington, looking for a car involved in another investigation, when he noticed a blue Ford van stopped at 215 Loudon Avenue. He wrote down the van's license number. On the following day, police learned that two of the victims had lived in the house at 215 Loudon Avenue. A truck belonging to the third victim was found parked at the house. When police entered, they found blood at various places in the house.

Upon learning that a blue Ford van was seen in the area where the bodies were discovered, Officer Foekele suspected that it was the same vehicle which he had seen near the house at 215 Loudon the day before. A registration check revealed that the van was registered to Halvorsen. Foekele then went to Halvorsen's home but saw no vehicles in the driveway. A neighbor indicated that two men and a woman had just left in a blue pickup truck and would probably return shortly. Police staked out all routes to the house, located and cornered the truck, and demanded that its occupants exit. The driver, Mitchell, jumped out immediately. Halvorsen, after hesitating, slid out of the passenger side. The officers found a .38–caliber revolver where he had been sitting. As the officers approached the truck, the woman, Susan Hutchens, threw her hands up and said, "The gun's in my purse." A 9–millimeter pistol was found sticking out of her purse.

A ballistics expert positively identified several of the projectiles recovered from the victims' bodies as having come from the revolver and semi-automatic pistol found in the truck. Two 9–millimeter shell casings were additionally recovered at 215 Loudon. Fingerprints from both Willoughby and Hutchens were found on the 9–millimeter pistol. Hutchens' fingerprints were found on the refrigerator at 215 Loudon as well.

Also recovered from 215 Loudon, by the police, was a plastic blue-and-yellow rope identical to that found tied around the victims' bodies. Paint samples taken from Halvorsen's van matched the paint smears found on the highway sign near the bridge. A comparison between pieces of glass taken from a broken headlight on Halvorsen's van and pieces of broken headlight recovered from the base of the highway sign proved them to have come from the same headlight. Lastly, blood samples from Halvorsen's van were positively identified as having come from one of the victims.

At trial, Hutchens testified that in December 1982, she and Willoughby moved into the house at 215 Loudon, and Willoughby was employed by the victim, Joe Norman, to help him remodel the house. Willoughby and Hutchens moved out a month later when Norman refused to pay Willoughby for the work he had done.

Hutchens testified that on January 13 Willoughby and Halvorsen asked her to buy ammunition for their pistols. Later that day, she decided to go visit the victim, Jacqueline Greene, who lived at 215 Loudon with Joe Norman. When she arrived, Willoughby, Halvorsen, and Norman were standing in the driveway talking. Hutchens went into the house where Greene introduced her to the victim, Joey Durrum. Willoughby, Halvorsen, and Norman then came inside when "all of a sudden" the shooting began.

*3 Hutchens put her hands over her face, covering her eyes. She heard numerous shots. When the shooting was over, she opened her eyes to see Willoughby and Halvorsen each wielding a pistol. Norman and Durrum had fallen to the floor. Hutchens then saw Willoughby shoot Greene twice more, since she was still alive. Willoughby and Halvorsen then screamed at Hutchens to begin picking up the shell casings while they dragged the bodies of the victims through the hallway to the back door where they were placed in the van. Later, Halvorsen left in the van, and Willoughby left in the truck to get rid of the bodies.

Halvorsen v. Commonwealth, 730 S.W.2d 921, 922–23 (Ky.1986).

The jury found Halverson guilty of all three murder charges and guilty of carrying a concealed weapon; the trial court granted a directed verdict on the robbery charge. Halvorsen testified at the penalty phase. During his testimony, Halvorsen admitted shooting two of the victims, but claimed he did so because of extreme intoxication and duress. On August 31, 1983, the trial court followed the jury's recommendation and sentenced Halvorsen to death for Durrum and Greene's murders and life imprisonment for Norman's murder.

B. State court procedural history

1. Halvorsen's direct appeal to the Kentucky Supreme Court

Halvorsen appealed his conviction to the Kentucky Supreme Court, raising twenty-eight assignments of error. The court consolidated Halvorsen's appeal with Willoughby's. Two attorneys from the Kentucky Department of Public Advocacy represented Halvorsen. On December 18, 1986, the Kentucky Supreme Court affirmed Halvorsen's conviction and sentence. *Halvorsen,* 730 S.W.2d 921.

In denying Halvorsen's appeal, the Court held as follows: (1) the prosecutor did not commit reversible error by telling the jury its sentencing verdict was a "recommendation"; (2) the trial court's "combination" murder instruction did not violate due process or deprive Halvorsen of his right to a unanimous verdict; (3) the trial court did not err by choosing not to give a wanton murder instruction; (4) the prosecutor's closing argument during the penalty phase did not deprive Halvorsen of a fair trial; (5) the prosecutor's cross-examination of Willoughby did not result in comments about Halvorsen's decision not to testify; (6) the prosecutor did not introduce evidence of other crimes or bad acts that impermissibly prejudiced Halvorsen; (7) Halvorsen was not entitled to an instruction on extreme emotional disturbance; (8) the trial court properly instructed the jury on Halvorsen's intoxication defense; (9) the trial court was not required to *sua sponte* instruct the jury on nonstatutory mitigating factors; and (10) the trial court was not required to instruct the jury that Halvorsen's accomplice participation was a mitigating factor. *Id.* at 924–26. While the Kentucky Supreme Court did not provide an analysis for denying Halvorsen's other claims, it stated that it "reviewed the other assertions of error and are of the opinion none of them merits comment." *Id.* at 928.

***4** The Kentucky Supreme Court denied Halvorsen's petition for rehearing. On November 30, 1987, Halverson's convictions and sentences became final when the United States Supreme Court denied Halverson's petition for a writ of certiorari. *Halvorsen v. Kentucky,* 484 U.S. 970 (1987).

2. Halvorsen's state court post-conviction relief proceedings

On February 8, 1988, Halvorsen filed a motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure 11.42. Halvorsen's CR 11.42 Motion asserted that he received ineffective assistance of counsel for the following reasons: (1) counsel failed to adequately investigate and present relevant evidence in support of his guilt/innocence phase defense; (2) counsel failed to obtain an adequate psychological evaluation; (3) counsel acted negligently by trying a capital case without a co-counsel; (4) counsel failed to adequately consult with Halvorsen in the presentation of his defense at both the guilt/innocence and penalty phases; (5) counsel's use of the word "recommendation" in reference to the jury's verdict; (6) counsel failed to adequately present mitigating evidence at the penalty phase; (7) counsel failed to adequately advise Halvorsen of the advantages/disadvantages of the testifying at trial; (8) counsel failed to adequately interview prosecution witnesses; (9) counsel failed to adequately prepare defense witnesses; (10) counsel failed to adequately cross-examine critical witnesses; (11) counsel created a conflict of interest by allowing a client, Comprehensive Care, to evaluate Halvorsen; (12) counsel failed to seek a change of venue despite pretrial publicity; (13) counsel failed to adequately conduct voir dire; (14) counsel failed to adequately present a motion for separate trials; (15) counsel failed to conduct an adequate motion practice; (16) counsel failed to adequately object to improper evidence and prosecutorial comments/questions; (17) counsel failed to adequately request jury instructions and failed to object to improper jury instructions; (18) counsel failed to challenge the composition of the Fayette County grand and petit jury pools; (19) counsel failed to object to the disproportionality of Halvorsen's death sentence; (20) counsel failed to object to the reciprocal use of mutually supporting aggravating factors; (21) counsel failed to object to defective and misleading verdict use in the penalty phase; and (22) counsel failed to request funds to conduct a study on the application of Kentucky's death penalty statute.

In addition to his ineffective assistance of counsel claims, Halvorsen argued that his following constitutional rights were violated: (1) his Eighth Amendment right to rational sentencing and right to be free from cruel and unusual punishment, as well as his Fourteenth Amendment right to due process by the jury's use of intoxication and possibility of parole as aggravating factors; (2) his Fourteenth Amendment right to be indicted and tried by a jury representing a fair cross-section of the community; (3) his due process and equal protection rights because the

prosecutor sought capital punishment in a discriminatory and arbitrary fashion; (4) his due process right and right to be free from cruel and unusual punishment because the trial court failed to consider the disproportionality and arbitrariness of his death sentences; and (5) his due process right and right to be free from cruel and unusual punishment because the Kentucky Supreme Court improperly conducted its proportionality review.

*5 The Commonwealth filed its response on March 2, 1988. Several events then delayed adjudication of Halvorsen's CR 11.42 motion. First, Halvorsen's initial counsel withdrew and new counsel was appointed.[1] Halvorsen then filed a motion to supplement his CR 11.42 motion, which the court granted in part and denied in part. Based on that ruling, the following arguments were added to Halverson's CR 11.42 motion: (1) counsel lessened the jury's responsibility by telling the jury that they were not going to be the ones to impose the death penalty because that is carried out by the Commonwealth; (2) ineffective assistance of counsel for failure to seek a change of venue because Halvorsen's pretrial psychiatric evaluation was publicized; (3) additional arguments to buttress Halvorsen's ineffective assistance of counsel claim for failing to seek an independent psychological evaluation; (4) counsel failed to retain expert witnesses in a variety of fields; (5) counsel failed to go to the Commonwealth's office to look at evidence; (6) counsel failed to move for a separate trial given the conflict of interests between the two defendants; (7) the trial court failed to give a proper mitigation instruction in the penalty phase regarding accomplice liability.

On February 11–12, 1998, an evidentiary hearing was held on three issues: (1) whether counsel adequately investigated the case, interviewed witnesses, and consulted with experts; (2) whether counsel adequately advised Halvorsen on whether he should testify; and (3) whether counsel adequately discussed trial strategy with Halvorsen. Halvorsen's second set of co-counsel withdrew and a third set of co-counsel were appointed. Halvorsen filed a motion for an additional evidentiary hearing, which the court denied, and a motion to supplement the CR 11.42 hearing record, which the court granted. Issues related to funding for expert and investigative services also delayed the proceedings.

On October 30, 2002, the Fayette Circuit Court denied Halvorsen's CR 11.42 motion; a month later, it denied Halvorsen's CR 59.05 motion for reconsideration. Halvorsen appealed to the Kentucky Supreme Court. While that appeal was pending, Halvorsen filed a CR 60.02 motion in Fayette Circuit Court seeking relief from judgment. That motion raised two arguments: (1) jury misconduct because of the introduction of extraneous material into the jury room during capital sentencing deliberations, and (2) a First Amendment violation because a juror introduced Biblical passages into the trial.

On December 5, 2005, the Fayette Circuit Court denied Halverson's CR 60.02 motion as untimely; Halvorsen appealed. On August 23, 2007, the Kentucky Supreme Court issued separate opinions affirming the trial court's rulings on Halvorsen's CR 11.42 and CR 60.02 motions. *Halvorsen v. Commonwealth,* 258 S.W.3d 1 (Ky.2007); *Halvorsen v. Commonwealth,* Nos.2006–SC–000071–MR, 2006–SC–000100–MR, 2007 WL 2404461 (Ky. Aug. 23, 2007). The court denied a petition for rehearing.

C. Federal court procedural history

*6 On August 18, 2009, Halvorsen, by counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. # 25). In his petition, Halverson does not argue that he is innocent. To quote Petitioner's brief "[t]he evidence that [Halverson] shot Durrum and Greene ... was overwhelming." (Doc. # 25 at 146). This evidence included Hutchens's testimony that on the morning of the shooting Halverson asked her to purchase .38 hollow points for his handgun (TE 1736); Hutchens's testimony that Halverson was holding his .38 caliber handgun when the shooting stopped (TE 1745–46); the chief medical examiner and a forensic ballistics expert's testimony that established .38 caliber bullets from Halverson's gun caused fatal injuries to Durrum and Greene (TE 1303–38, 1517–54); and Glenda Tucker's testimony that on the day of the murders Halverson admitted killing three people (TE 1699).

In his petition, Halvorsen argues thirty (30) grounds for granting habeas relief;[2]

Claim 1: The jury's consideration of Biblical scriptures while deliberating Halvorsen's guilt and also while deliberating whether to sentence Halvorsen to death deprived Halvorsen of the right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution

Claim 2: The jury's use of Biblical scriptures when deliberating on whether to sentence Halvorsen to death deprived Halvorsen of the right to heightened reliability in the appropriateness of the decision to impose the death penalty, the right to guided discretion in the sentencing determination, the right to an individualized sentencing determination based on a reasoned consideration of the aggravating and mitigating circumstances, and the right to a sentencing decision by a jury that does not believe final responsibility for the death penalty rests somewhere other than where authorized by law, all guaranteed by the Eighth Amendment to the United States Constitution

Claim 3: The trial court's failure to excuse jurors who would hold it against Halvorsen if he did not testify, and whose ability to consider mitigating evidence and impose less than death was substantially impaired, violated Halvorsen's Sixth and Fourteenth Amendment right to a trial by an impartial jury at both the guilt and sentencing phase and his Eighth Amendment right to a trial before a jury that will "consider" and "give effect" to all proffered mitigating evidence

Claim 4: The prosecutor's numerous improper comments during his guilt—or—innocence phase closing argument deprived Halvorsen of his Fifth and Fourteenth Amendments right to due process

Claim 5: Halvorsen was denied his federal due process right to be informed of the nature of the charges against him, and thus was denied the ability to formulate a defense, when the trial court modified the charges against him by instructing the jury that it could convict him of intentional murder without finding that Halvorsen actually shot anyone, even though he was indicted only as the actual shooter

*7 Claim 6: Halvorsen was denied his right to due process under the Fourteenth Amendment to the United States Constitution when the trial court failed to instruct the jury on extreme emotional disturbance, thereby shifting the burden of proof on extreme emotional disturbance to the defense and allowing Halvorsen to be convicted, even though the prosecution did not prove an element of the offense—absence of extreme emotional disturbance

Claim 7: Halvorsen was denied his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, when trial counsel failed to request: 1) an instruction on extreme emotional disturbance generally; and, 2) that the jury be instructed that it must find that the prosecution proved absence of extreme emotional disturbance beyond a reasonable doubt in order to convict Halvorsen of murder

Claim 8: Kentucky's murder statute was unconstitutionally vague as applied to Halvorsen, in violation of the Fourteenth Amendment due process clause, because it failed to define extreme emotional disturbance

Claim 9: Halvorsen was denied his Fourteenth Amendment due process right to a unanimous verdict, as guaranteed by the Kentucky Constitution, when the jury was allowed to and did convict Halvorsen under an instruction that did not require it to determine if Halvorsen acted as a principal or an accomplice

Claim 10: The federal due process clause requires the prosecution to prove every element of the charged offense beyond a reasonable doubt. Halvorsen was denied this right when the trial court gave an accomplice instruction that allowed the jury to convict without finding the elements of accomplice liability, as defined by Kentucky law, had been proven

Claim 11: Halvorsen was denied his right to due process under the Fourteenth Amendment to the United States Constitution when the jury was instructed on accomplice liability and convicted Halvorsen under possible accomplice liability despite insufficient evidence that Halvorsen acted as an accomplice

Claim 12: Halvorsen was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel on direct appeal when direct appeal counsel failed to raise meritorious

claims. Direct appeal counsels' deficient performance in failing to raise these claims also serves as cause to excuse any potential barrier to reviewing the underlying merits of claims not raised on direct appeal

Claim 13: Halvorsen was denied his federal due process rights when he was convicted of intentional murder despite being insane at the time of the crime

Claim 14: Trial counsel's failure to conduct a reasonable investigation of the facts of the crime and Halvorsen's mental health, including evidence of extreme emotional disturbance, that could have posed a defense to intentional murder or could have resulted in a conviction for a lesser sentence, and trial counsel's objectively unreasonable defense, deprived Halvorsen of the effective assistance of counsel at the guilt—or—innocence phase of his death penalty trial

*8 Claim 15: Halvorsen was denied his Fourteenth Amendment due process right to a fair trial when the prosecution elicited irrelevant and prejudicial other bad acts testimony that Halvorsen stomped on his children's kitten and when the prosecutor elicited testimony that Halvorsen threatened to kill his mother, if she found about the murders, and to throw her body off the same bridge Halvorsen was accused of throwing the victims' bodies off

Claim 16: Halvorsen's Fourteenth Amendment due process right to a fair trial and his Fifth Amendment right to remain silent were violated when the prosecution used Halvorsen's codefendant to impermissibly comment on Halvorsen's refusal to testify

Claim 17: The prosecutor's numerous and repetitive improper comments during his sentencing phase closing argument deprived Halvorsen of his Fifth and Fourteenth Amendment right to due process

Claim 18: The prosecutor's improper comments during his sentencing phase closing argument deprived Halvorsen of his right to an individualized and reliable sentencing determination, as guaranteed by the Eighth Amendment to the United States Constitution

Claim 19: Halvorsen was denied his Eighth Amendment and federal due process right to notice of information used to obtain a death sentence and the opportunity to rebut that evidence when the prosecutor argued future dangerousness as a basis to impose death, despite providing no notice that he would do so and despite not presenting any evidence of future dangerousness

Claim 20: Halvorsen's death sentences violate the Eighth Amendment to the United States Constitution because no narrowing of death eligibility took place in his case and because the jury was allowed to sentence him to death without finding the existence of an aggravating circumstance enumerated under Kentucky law

Claim 21: Halvorsen was denied his right to due process under the Fourteenth Amendment to the United States Constitution when the trial court erroneously instructed the jury on the sole statutory aggravating circumstance

Claim 22: Halvorsen was denied his right to due process under the Fourteenth Amendment to the United States Constitution when he was sentenced to death despite insufficient evidence to support the sole statutory aggravating circumstance available under Kentucky law

Claim 23: Halvorsen was denied his Fourteenth Amendment due process rights when he was forced to make the Hobson's choice of foregoing his constitutional right to present mitigating evidence of the lack of significant history of prior criminal activity in order to preserve the constitutional right to not have unrelated charges used against him

Claim 24: Halvorsen was denied his Eighth and Fourteenth Amendment right to a reliable determination of whether he should be sentenced to death in a manner that does not tip the scales in favor of death by jury instructions that led the jury to believe less than death could be imposed only if the jury had a reasonable doubt as to whether to impose a death sentence and that

Halvorsen had the burden of proving less than death should be imposed

*9 Claim 25: Direct appeal counsel's failure to raise various sentencing phase issues on appeal deprived Halvorsen of his right to effective assistance of appellate counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. Direct appeal counsel's deficient performance also serves as cause to excuse any potential barrier to review of claims not raised on direct appeal

Claim 26: Trial counsels' failure to investigate, develop, and present readily available mitigating evidence, including the effects of severe drug abuse and toxic chemicals on Halvorsen's brain, deprived Halvorsen of the effective assistance of counsel at the sentencing phase of his death penalty trial

Claim 27: The Kentucky Supreme Court's failure to conduct meaningful proportionality review deprived Halvorsen of the Eighth Amendment right to procedures that lessen, or at least do not create, a substantial risk of arbitrary and capricious death sentences

Claim 28: The manner in which the Kentucky Supreme Court conducts proportionality review in capital cases does not conform with the Fourteenth Amendment due process clause of the United States Constitution

Claim 29: The Kentucky Supreme Court's refusal to disclose the data it has collected and relies upon in conducting its proportionality review of death sentences violates due process because it allowed Halvorsen's death sentences to be affirmed on evidence for which he had no opportunity to deny or explain

Claim 30: The cumulative effect of the errors in this case rendered Halvorsen's trial fundamentally unfair in violation of his Fourteenth Amendment right to due process of law

By separate motion, Halvorsen attacks the constitutionality of the Anti–Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which governs the Court's review of his petition. (Doc. # 27).

The Warden filed an answer/response, requesting that this Court deny Halvorsen's petition. (Doc. # 58). In accordance with the Court's order, the Warden also addressed Halverson's claim that AEDPA is unconstitutional. (Doc. # 46). Halvorsen filed his reply/traverse to the Warden's response on March 14, 2011. (Doc. # 73). The parties have filed multiple supplemental briefs (Docs. # 112, 121, 122) and notices of authority (Docs.# 102, 117, 120, 124, 126, 127, 133, 147, 157, 158, 159, 160).

Halverson also filed several discovery-related motions during the pendency of this petition, which the Court will summarize briefly. On August 18, 2009, he filed a motion to authorize him to view sealed documents in possession of the Kentucky Attorney General's Office. (Doc. # 26). According to Halverson, these documents related to his argument that the post-conviction proceedings in Kentucky were unreliable due to insufficient funding. The Court denied that motion. (Doc. # 46). The Fayette Circuit Court did grant a similar motion that permitted Halverson to view and copy the documents. (Doc. # 45).

*10 On June 15, 2011, Halverson filed three motions. The first motion sought to expand the record by including the following additional evidence: (1) affidavits in support of his ineffective assistance of direct appeal counsel claims (Claims 12 and 25); (2) affidavits in support of his claims relating to a lack of expert funding and his juror-Bible claims; (3) an affidavit on the standards of practice governing Kentucky capital cases at the time of Halvorsen's trial; (4) a custody evaluation report completed prior to Halverson's trial; and (5) material safety data sheets concerning chemicals Halverson was exposed to prior to the murders. (Doc. # 98). The Court granted the motion with respect to the affidavits related to Halverson's ineffective assistance of direct appeal counsel claims and denied the rest of the motion. (Doc. # 128).

The second motion sought the following discovery: (1) documents from the Fayette County or Estill County Commonwealth's Attorney's Office or from the Kentucky Attorney General's Office relating to the murder of Charles Murray;[3] (2) documents from the Fayette County Police, the Kentucky State Police, the Fayette County Commonwealth's Attorney's Office, or the Kentucky Attorney General's Office, concerning Halverson's physical and mental condition from the

date of his arrest until his trial commenced; and (3) permission to depose his trial counsel, the jurors at his trial, and his state post-conviction counsel. (Doc. # 99). The Court denied Halvorsen's motion because he failed to demonstrate "good cause" necessary for the Court to permit discovery as is required by Habeas Rules 6(a) and (b). (Doc. # 129).

The third motion requested an evidentiary hearing on the following issues: (1) the merits of nine (9) of his claims; (2) the effect of the state post-conviction trial court's denial of funding for expert assistance; (3) whether Claims 1 and 2 have been procedurally defaulted; and (4) further development of facts relevant to whether cause and prejudice exist to excuse any procedural default on fourteen (14) of his claims. (Doc. # 100). After analyzing the motion under the applicable habeas rules and case law, the Court denied relief. (Doc. # 141).

On November 19, 2012, the Court ordered the parties to refrain from filing any further motions, citing the interests of judicial economy and the Court's efforts to adjudicate the merits. (Doc. # 165). The Court then ordered that Halverson's petition stood submitted. *Id.*

II. STANDARD OF REVIEW

Halverson filed his petition after AEDPA's effective date, and therefore AEDPA governs this Court's review. AEDPA restricts a federal court's review of any claim that was "adjudicated on the merits in [s]tate court proceedings." 28 U.S.C. § 2254(d). This limitation imposes a "highly deferential standard ... and demands that state-court decisions be given the benefit of the doubt ." *Renico v. Lett,* 559 U.S. 766, 773 (2010) (internal citations and quotation marks omitted). Under 28 U.S.C. § 2254(d):

> ***11** An application for a 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—
>
> (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.

However, if a petitioner presented a claim to the state courts and they did not adjudicate it on the merits, a court will apply *de novo* review. *Van v. Jones,* 475 F.3d 292, 293 (6th Cir.2007). The decision reviewed is that of "the last state court to issue a reasoned opinion on the issue." *Joseph v. Coyle,* 469 F.3d 441, 450 (6th Cir.2006) (quoting *Payne v. Bell,* 418 F.3d 644, 660 (6th Cir.2005)). The Kentucky Supreme Court was the last state court to issue a reasoned opinion on the claims presented in this petition. *Halvorsen,* 730 S.W.2d 921; *Halverson,* 2007 WL 2404461; *Halvorsen,* 258 S.W.3d 1.

A. "Adjudicated on the merits"

Halvorsen attempts to limit the meaning of the term "adjudicated on the merits," and thus subject his claims to *de novo* review. He claims that when there is doubt whether a state court adjudicated a claim, federal courts must presume the state did not. He further suggests that there is not an adjudication on the merits (1) if the state court did not issue a "reasoned opinion," (2) when a state court does not address a prong or subsection of a claim, and (3) when a state court examines only state law, and does not expressly address a defendant's federal constitutional claim.

After Halverson filed his petition, the United States Supreme Court rejected these arguments. In *Harrington v. Richter,* the Court held that " § 2254(d) does not require a state court to give reasons before its decision can be deemed to be 'adjudicated on the merits.' " 131 S.Ct. 770, 785 (2010). The Court reached its decision by noting that "[t]he statute refers only to a 'decision,' which resulted from an 'adjudication.' " *Id.* at 784. Thus, there does not need to be "an opinion from the state court explaining the state court's reasoning." *Id.* Further, a state court does not need to explain that it adjudicated a claim "on the merits." Rather, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits." *Id.* at 784–85. The presumption holds unless there is a contrary indication or a showing that "there is some other explanation for the state court's decision." *Id.* at 785. And when a state court rejects a claim, it does not need to analyze each element of the claim for there

to be an adjudication on the merits, because " § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.* at 784.

***12** The Supreme Court has also rejected Halvorsen's argument that there is not an adjudication on the merits when a state court examines state law and does not expressly address a defendant's federal constitutional claim. In *Johnson v. Williams,* the Supreme Court held that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." 133 S.Ct. 1088, 1096 (2013). The Court based its conclusion on its recognition that "it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference." *Id.* at 1094. The Court then explained why state courts customarily do not discuss every claim a defendant raises: (1) state precedent at times fully incorporates a related federal constitutional right, and therefore the state court's discussion of state law is sufficient to cover the federal claim; (2) the defendant made only a fleeting reference to a Federal Constitutional provision insufficient to raise a federal claim; or (3) the federal claim is too insubstantial to merit discussion. *Id.* at 1094–95.

The presumption that a state adjudicated on the merits a rejected federal claim is not irrebuttable, but it is a "strong one," which can be overcome only in "unusual circumstances." *Id.* at 1096. To overcome the presumption, a petitioner typically must show that the state court "inadvertently overlooked" the federal claim. *See id.* at 1097. Absent that showing, this Court must presume that a rejected federal claim receives § 2254(d) deferential review.

B. Section 2254(d)(1)

Section 2254(d)(1) restricts a federal court's review of claimed legal errors. A federal court shall not grant habeas relief based on legal error unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Clearly established Federal law "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." *Yarborough v. Alvarado,* 541 U.S. 652, 660–661 (2004) (quoting *Williams v. Taylor,* 529 U.S. 362, 412 (2000)). It includes "not only bright-line rules but also the legal principles and standards flowing from precedent." *Mason v. Mitchell,* 543 F.3d 766, 772 (6th Cir.2008).

While the "contrary to" and "unreasonable application of" prongs are similar, they require a distinct analysis. A state court decision is "contrary to" Supreme Court precedent when "the state court confronts facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent[,]" or when "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams,* 529 U.S. at 406–07.

***13** A state court decision is an "unreasonable application of" Supreme Court precedent when a "state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of petitioner's case." *Wiggins v. Smith,* 539 U.S. 510, 520 (2003) (quoting *Williams,* 529 U.S. at 413). The state court's application of law "must be more than incorrect or erroneous"; it must be "objectively unreasonable." *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003). In other words, "[i]f fair minded jurists could disagree" about the state court's decision, habeas relief should not be issued. *Yarborough,* 541 U.S. at 664. Finally, a court must consider the rule's specificity: the more general the rule, the "more leeway courts have in reaching outcomes in case-by-case determinations." *Id.*

C. Section 2254(d)(2)

Section 2254(d)(2) restricts a federal court's review of claimed factual errors. A habeas court may grant relief on a factual error claim only if the state court made "an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254. A "[s]tate-court's factual findings ... are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence." *Rice v. Collins,* 546 U.S. 333, 338 (2006) (citing § 2254(e)(1)). Because the state court's factual determination must be unreasonable, it is no matter that a "federal habeas court would have reached a different conclusion in the first instance ... 'that does not suffice to supersede the trial court's ... determination." *Wood v. Allen,* 558 U.S. 290, 309 (2010) (quoting *Rice,* 546 U.S. at 341–42). Even if the petitioner shows that the state court has made an unreasonable determination of fact, he still must show that the state court based its decision

on that unreasonable determination before habeas relief is warranted. *Rice v. White,* 660 F.3d 242, 250 (6th Cir.2011).

III. AEDPA DOES NOT VIOLATE SEPARATION OF POWERS

Halverson argues that 28 U.S.C. § 2254(d)(1) is unconstitutional because it violates the separation of powers and operates as a suspension of the writ of habeas corpus. He contends that § 2254(d)(1) interferes with a federal court's duty to interpret the Constitution and usurps a federal court's jurisdiction to grant habeas relief. In Halverson's codefendant's petition, this Court recently held that AEDPA does not violate separation of powers. *Willoughby v. Simpson,* No. 08–179–DLB, 2014 WL 4269115, *13 (E.D.Ky. Aug. 29, 2014). Because the Court's analysis in *Willoughby* is directly applicable to Halverson's claim, the Court will reference it below:

> Neither the Supreme Court nor the Sixth Circuit have addressed the constitutionality of § 2254(d) as amended by the AEDPA. When other circuits have considered the statute's constitutionality, they have uniformly upheld the law. *See Bonomelli v. Dinwiddie,* 339 F. App'x 384 (10th Cir.2010); *Evans v. Thompson,* 518 F.3d 1 (1st Cir.2008), *cert. denied,* 129 S.Ct. 255 (2008); *Crater v. Galaza,* 491 F.3d 1119 (9th Cir.2007); *Mueller v. Angelone,* 181 F.3d 557 (4th Cir.1999); *Green v. French,* 143 F.3d 865 (4th Cir.1998), *overruled on other grounds by Williams v. Taylor,* 529 U.S. 362 (2000); *Lindh v. Murphy,* 96 F.3d 856 (7th Cir.1996), *rev'd on other grounds,* 521 U.S. 320 (1997). *But see Davis v. Straub,* 430 F.3d 281, 296–98 (6th Cir.2005) (Merritt, J., dissenting).

***14** In *Bowling v. Parker,* 882 F.Supp.2d 891 (2012), Judge Thapar, United States District Court Judge for the Eastern District of Kentucky, recently ... found that § 2254(d)(1) did not violate the separation of powers. The court began with two important and related basic tenants of our federal system. First, state courts are capable interpreters of federal constitutional law, and are bound by the Supremacy Clause to " 'guard and protect rights secured by the Constitution." *Id.* at 896 (*quoting Ex Parte Royall,* 117 U.S. 241, 251 (1886)). Second, lower federal courts derive their entire jurisdiction from statute, not Article III, and Congress is permitted to "expand or contract lower federal courts' power to grant habeas relief to state prisoners as it pleases." *Id.* at 897. The court then turned directly to whether § 2254(d) runs afoul of Article III.

> Judge Thapar concluded that § 2254(d) does not violate Article III as it does not infringe on federal courts' independent judgment to determine whether a prisoner's constitutional rights were violated. *Id.* at 899. Rather, the statute serves to limit the information federal habeas courts may consider in exercising independent judgment, as well as limit the availability of the remedy. *Id.* More particularly, federal courts remain free to determine that a prisoner's right has been violated, however the court may only grant habeas relief in limited circumstances. *Id.* Each of these limitations are constitutional in Judge Thapar's determination. *Id.*
>
> "[T]he Necessary and Proper Clause of Article I grants Congress the power to 'make laws for carrying into execution all judgments which the judicial department has power to pronounce." *Id.* at 898 (quoting *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 22 (1825) (Marshall, C.J.)). This clause allows Congress to limit the source of information that courts may consider in making its independent judgment, and also allows Congress to prescribe standards of review that courts must follow. *Id.* That same clause permits Congress to determine *when* a remedy is available for a violation of a constitutional right, though Congress may not dictate *how* courts interpret federal law nor compel a particular result. *Id.* at 899. Based on these considerations, Judge Thapar succinctly concluded that,
>
> > [u]nder § 2254(d)(1), federal courts still make independent determinations of whether a petitioner's rights were violated, then look to Supreme Court precedent to decide whether they can grant relief. The statute limits remedies rather than mandating a rule of decision. As a result, § 2254(d)(1) does not run afoul of Article III.
>
> *Id.*

Judge Thapar's well-reasoned conclusion in *Bowling* is consistent with all other circuits to consider the issue. As the Fourth Circuit held in *Green v. French,*

> 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. As the Seventh Circuit pointed out in Lindh in great detail, such a limitation upon the scope of a remedy is entirely ordinary and unexceptionable, even when the remedy is one for constitutional rights. See *Lindh,* 96 F.3d at 870–73. Moreover, even if section 2254(d) does limit the interpretive power of the lower federal courts in some sense, that limitation is tantamount to other such choice of law limitations which are widely accepted and have never been thought to raise Article III problems. *See Lindh* at 870–73 (discussing non-constitutional contexts-such as res judicata, *Erie,* and federal court certification of state law issues-where federal courts are often bound by another tribunal's interpretation of law).
>
> ***15** *Green v. French,* 143 F.3d 865, 874–75 (4th Cir.1998) (internal citations omitted), *rev'd on other grounds by Williams v. Taylor,* 529 U.S. 362 (2000). This Court agrees with Judge Thapar and all other circuits to decide the issue. Section 2254(d)(1) does not infringe on the court's independent judgment to determine whether a constitutional violation has occurred, but instead limits the court's ability to provide a remedy. This limitation does not breach the judiciary's independence. Ultimately, § 2254(d)(1) is constitutional.

Willoughby, 2014 WL 4269115, at *12–13.

Halverson also argues that § 2254(d)(1) operates as a suspension of the writ. Section 2254(d)'s plain language contradicts that argument. As the United States Supreme Court recently noted:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *It preserves authority to issue the writ* in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther.

Harrington, 131 S.Ct. at 786 (emphasis added) (citing *Felker v. Turpin,* 518 U.S. 651, 664 (1996)). That language in *Harrington* all but forecloses Halverson's argument. AEDPA preserves a federal court's ability to issue a writ of habeas corpus. 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State...."). On a habeas petition, § 2254(d)(1) permissibly limits both the information a court can consider and the remedy available; it does not act as a suspension of the writ nor dictate that a court reach a certain result. Because § 2254(d)(1) is constitutional, this Court will apply it to Halverson's claims that the state court "adjudicated on the merits."

IV. ANALYSIS

Claims 1 and 2—Juror misconduct

In his first set of claims (Claims 1 and 2), Halverson argues that he is entitled to habeas relief because the jury impermissibly used and relied on the Bible. Specifically, Halverson accuses Juror Garlington of incorporating the Bible into the jury's guilt and penalty phase deliberations. Halverson contends that the jury's conduct violated his Sixth Amendment right to an impartial jury. Further, he argues that it violated his Eighth Amendment rights to (1) heightened reliability in the jury's decision to impose the death penalty, (2) guided discretion in the sentencing determination, (3) an individualized sentencing determination, and (4) a jury that does not believe final responsibility for the death penalty rests somewhere other than where the law authorizes. As relief, Halverson

requests either a writ of habeas or an evidentiary hearing to determine the extent of the jury's use of the Bible and any prejudice that resulted. This Court has already denied Halverson's request to have an evidentiary hearing on Claims 1 and 2 because Halverson did not meet 28 U.S.C. § 2254(e)(2)'s requirements. (Doc. # 141). Therefore, this Opinion will discuss Claims 1 and 2 only as they relate to Halverson's request for habeas relief. Because Claims 1 and 2 are procedurally defaulted and Halverson has not established cause to excuse the default, the Court will not review them on the merits.

A. Applicable law

***16** Under the procedural default doctrine, a federal court is generally barred from reviewing a petitioner's federal constitutional claim "if the state judgment rests on a state-law ground that is both independent of the merits of the federal claim and an adequate basis for the state court's decision." *Munson v. Kapture,* 384 F.3d 310, 313–14 (6th Cir.2004) (internal citations and quotation marks omitted). The Sixth Circuit uses a four-part test to determine whether a petitioner's claim is procedurally defaulted:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that petitioner failed to comply with the rule.... Second, the court must decide whether the state courts actually enforced the state procedural sanction.... Third, the court must decide whether the state procedural ground is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim.... Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate ... that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir.1986). In conducting this inquiry, a court looks to the " 'last explained state court judgment[ ]' to determine whether relief is barred on procedural grounds." *Stone v. Moore,* 644 F.3d 342, 346 (6th Cir.2011) (quoting *Muson,* 384 F.3d at 315).

B. Halverson's claim is procedurally defaulted

In 2004, Halvorsen filed a CR 60.02 motion in Fayette Circuit Court raising the issues presented in Claims 1 and 2. (Brief for Appellant, 06–SC–100 at 9–24). Under CR 60.02(f), a court may relieve a party from a final judgment for any "reason justifying relief," so long as the motion is made "within a reasonable time." The trial court has discretion to determine whether a defendant filed the motion within a reasonable time. *Gross v. Commonwealth,* 648 S.W.2d 853, 858 (Ky.1983). The Fayette County Circuit Court denied Halverson's motion because he did not file it timely, and the Kentucky Supreme Court affirmed. *Halverson,* 2007 WL 2404461, at *1.

Halverson argues that Claims 1 and 2 are not procedurally defaulted because the Kentucky Supreme Court incorrectly upheld the trial court's ruling that he did not file his CR 60.02 motion within a "reasonable time." Halverson asserts that he filed his motion within a reasonable time because he filed it within one year of discovering the facts that formulated the basis for his claim. Specifically, Halverson contends that 2003 was the first time that he could have discovered the Bible's alleged during deliberations, "when Juror Garlington ... admitted that he carried a Bible with him at all times during the trial —including in the deliberation room—and that he prayed with the jurors daily during the trial." (Doc. # 25 at 78). By arguing that the Kentucky Supreme Court erred in ruling that he did not file his motion within a "reasonable time," Halverson asserts that there is not an adequate and independent basis for the state court's decision.

***17** The Kentucky Supreme Court held that Halverson did not file his motion timely for three reasons. First, Halverson filed his motion "over twenty years after the trial," which is "prima facie evidence to support the trial court's conclusion that Halvorsen's ... motion[ ][was]

not, in fact, filed within a reasonable time ." *Halverson,* 2007 WL 2404461, at *2. Second, the Court rejected Halverson's argument that he could not have learned of any alleged impropriety until 2003:

> Halvorsen and Willoughby contend that they were unable to make their allegations regarding Juror Garlington's alleged misconduct sooner because they did not learn of it until November 2003 when Garlington agreed to be interviewed by the DPA investigator. It is uncontested that the trial court gave permission for the jurors to be interviewed in 1985. At that time, many of the jurors refused to be interviewed; but two jurors were actually interviewed. And Juror Garlington's strong religious views surfaced during the trial, as is plainly evident from the astonishing fact that the trial court allowed Garlington to lead the courtroom in prayer at the conclusion of the case. So through due diligence and proper questioning, Halvorsen and Willoughby could have learned of any alleged jury misconduct approximately twenty years before they filed their CR 60.02 motion.

Id. Third, the Court recognized that Kentucky courts often deny CR 60.02 motions that are filed sooner after trial than Halverson's. *Id.* at *3.

The Kentucky Supreme Court's decision denying Halverson's CR 60.02 motion as untimely is an adequate and independent basis for its judgment. A state procedural rule can serve as an adequate and independent basis for a state-court decision if it is "firmly established and regularly followed." *Walker v. Martin,* 131 S.Ct. 1120, 1127–28 (2011) (internal citation omitted). As the Kentucky Supreme Court noted, Kentucky courts routinely reject CR 60 .02 motions due to defendants not filing them within a reasonable time. *Willoughby,* 2007 WL 2404461, at *3 (citing *Gross,* 648 S.W.2d at 858, which held that the trial court did not abuse its discretion in finding that a CR 60.02 motion filed five years after conviction was not filed in a reasonable time); *see also Commonwealth v. Carneal,* 274 S.W.3d 420, 433 (Ky.2008) (finding no abuse of discretion in trial court's decision to deny CR 60.02 motion as untimely when it was filed five years after judgment was entered); *Stoker v. Commonwealth,* 289 S.W.3d 592, 597 (Ky.App.2009) (ruling that a CR 60.02 motion filed eighteen years after conviction was not filed in reasonable time); *Reyna v. Commonwealth,* 217 S.W.3d 274, 276 (Ky.App.2007) (holding that a defendant's CR 60.02 motion filed four years after he entered a guilty plea was not filed timely). Thus, the state court's ruling in this case that Halverson did not file his motion timely is "firmly established and regularly followed" in Kentucky, and therefore the ruling serves as an adequate and independent basis for the state court's judgment.

***18** Reviewing the record shows that the first three factors for procedural default are met: (1) Halverson failed to comply with a state procedural rule, (2) the state courts actually enforced the CR 60.02 timeliness requirement, and (3) CR 60.02 is an "adequate and independent" basis for the state-court's decision. Therefore, unless Halverson can show "cause" for not following the state procedural rule, this Court is foreclosed from reviewing Claims 1 and 2 on the merits.

C. Halverson has not established cause for his procedural default

Cause for a procedural default exists when a petitioner "can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). A petitioner can show the impediment by demonstrating "that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.* (internal citations and quotation marks omitted).

Halverson argues that there is cause to excuse procedural default for Claims 1 and 2 because he was not able to conduct effective juror interviews prior to 2003. Halverson suggests that he was not able to effectively interview jurors because some of the jurors declined to be interviewed, those that were interviewed did not mention the Bible's use during deliberations, and local rules prevented him from interviewing jurors.

Halverson's arguments are unavailing. The trial court gave Halverson permission to interview the jurors in 1985. *Halverson,* 2007 WL 2404461, at *2. But as the Kentucky Supreme Court noted, "[a]fter trial, a juror is under no obligation to discuss his or her jury service with either the Commonwealth or defense." *Id.* Many jurors exercised their right to refuse an interview, but two granted interview requests. *Id.* Thus, it is inconsequential that a local rule impeded Halverson from interviewing jurors. And if the jurors who were interviewed did not mention the Bible's alleged use, it could be because Halverson's counsel never asked the question, because the jurors thought it too insignificant to mention, or because the Bible played no role during their deliberations. Either way, there was no "interference by officials [that] made compliance impracticable." *See Murray,* 477 U.S. at 488.

Further, as noted the Kentucky Supreme Court noted, Halverson could have discovered the basis for the jury misconduct claim from Juror Garlington's conduct at trial. *Halverson,* 2007 WL 2404461, at *2. During voir dire, Juror Garlington made known that he was a pastor and shared his religious views. In response to being asked whether he ever debated against the death penalty, Garlington responded:

> The Bible says if you live by the sword you'll die by the sword. Now the Bible also says that if a man—no man can take his life but Christ. Now if a man hasn't been saved, he's already committed himself. If a man is saved, then it doesn't matter, because he's with the Lord. Now if a man has done accepted Christ and he does wrong, he should be judged by the system. You follow what I'm saying.

*19 (TE 367). He then went on to explain:

> If he done wrong, then he should pay. As far as the death penalty, that's him and the federal government or whatever the case may be; if he's done wrong and he's found guilty and the facts prove it, then I have to vote that man gets the penalty, whatever it is.

(*Id.*). Garlington also expressed his religious views at the conclusion of trial:

> Let's all just bow our heads. Just for a moment for truly we all have been through a trying situation and we can see from our standpoint that justice has been done, and we want to say to you, *we want to say to God that we appreciate him coming into our midst and guiding us all.* We want to thank God for this.

(TE 2621) (emphasis added). As the record demonstrates, the first time Halverson could have discovered the facts to support Claims 1 and 2 was not in 2003, but during his trial. Halverson has not demonstrated cause for the procedural default of Claims 1 and 2; therefore, Claims 1 and 2 are procedurally defaulted.

Claim 3—The trial court's decision not to excuse three jurors for cause

In Claim 3, Halverson contends that the trial court's failure to excuse three jurors for cause violated his Sixth Amendment right to trial by an impartial jury and his Eight Amendment right to a jury that would consider and give effect to all mitigating evidence. As relief, Halverson asks for a new trial or a new sentencing phase. Because two of the jurors did not sit on the jury and because the trial court's decision not to excuse the third juror was reasonable, Claim 3 is denied.

A. State court decision

Halverson raised this claim on direct appeal. (Brief for Appellant, 84–SC–39 at 49–58). The Kentucky Supreme Court rejected the claim when it stated "[w]e have reviewed the other assertions of error and are of the opinion none of them merits comment." *Halvorsen,* 730 S.W.2d

at 928. Halverson concedes that he cannot overcome the presumption that a when a state court rejects a federal claim the claim has been adjudicated on the merits. (Doc. # 73 at 95). Thus, in order for this Court to grant habeas relief on Claim 3, Halverson must demonstrate that the state court's adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established" Supreme Court law. 28 U.S.C. § 2254(d).

B. Applicable law

The Sixth Amendment guarantees a defendant a jury that "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams v. Texas,* 448 U.S. 38, 45 (1980). To be impartial, a juror must be able to follow the law. *Wainwright v. Witt,* 469 U.S. 412, 423 (1985). A trial judge does not have to be right in determining that a juror is impartial, his decision just has to be "fairly supported by the record." *Bowling v. Parker,* 344 F.3d 487, 519 (6th Cir.2003) (citing *Witt,* 469 U.S. at 433) (internal citation and quotation marks omitted).

1. Jurors Ogden and Distler

***20** Halverson argues that the trial court should have excused Juror Ogden for cause because Ogden's responses during voir dire demonstrated that Ogden would hold it against Halverson if he did not testify. Halverson contends that the trial court should have excused Juror Distler for cause because she said in voir dire that illegal drug use would negatively impact her impartiality and that most violent crimes deserve the death penalty.

Halverson's claims with respect to Ogden and Distler fail because neither sat on the jury; Halverson dismissed both by exercising his peremptory challenges. If the jury that is ultimately impaneled is impartial, "the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross v. Oklahoma,* 487 U.S. 81, 88 (1988). A court deciding whether a jury was impartial looks only to "the jurors who ultimately sat." *Id.* at 86. Because Ogden and Distler did not sit on the jury, the trial court's decision not to strike them for cause is irrelevant to Halverson's Sixth Amendment claim.

Halverson argues that *Ross* doesn't apply, because under Kentucky law he is entitled to relief for using a peremptory challenge to excuse a juror that the trial court should have excused for cause. However, on habeas review, the issue is not whether Kentucky law warranted reversing Halverson's conviction, but whether he is being held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). The Sixth Circuit has not recognized an exception to *Ross* for habeas claims arising in Kentucky. In *Bowling v. Parker,* a petitioner convicted in Kentucky state court brought a habeas claim because he used three peremptory challenges on jurors that he argued the trial court should have dismissed for cause. 344 F.3d at 519. In rejecting the petitioner's claim, the Sixth Circuit cited *Ross* for its holding that there was "no constitutional violation here." *Id.* at 521. Likewise, Halverson's argument that he had to use a preemptory challenge on Ogden and Distler fails to raise a constitutional issue.

2. Juror Garlington

Halverson argues that the trial court should have dismissed Garlington for cause because he made statements during voir dire that showed his inability to impose less than the death penalty. Specifically, Halverson points to Garlington's answer when asked in which type of case he would impose the death penalty: "[B]rutal murder. By God, just walk up and just shoot somebody, you know and kill him." (TE 373).

A court should excuse a juror for cause when his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams,* 448 U.S. 38 at 45. Because the Kentucky Supreme Court adjudicated this claim on the merits, this Court can grant relief only if the Kentucky Supreme Court's judgment that Garlington was impartial "involved an unreasonable application of clearly established" Supreme Court law. 28 U.S.C. § 2254(d).

***21** The Kentucky Supreme Court was not objectively unreasonable when it affirmed the trial court's decision not to excuse Garlington for cause. While Garlington made statements that called into question his ability to serve on the jury, he also made statements from which the Kentucky Supreme Court could reasonably conclude that he was an impartial juror. Garlington stated that he would

not automatically vote for the death penalty, he would consider voting for a sentence of twenty years to life in prison, and he would consider mitigation and justification. (TE 365, 368–69, 372, 381–82). These statements all cut against Halverson's argument that Garlington was unable to impose less than the death penalty. Under § 2254(d)'s circumscribed standard of review, this Court rejects Halverson's claim that Juror Garlington should have been dismissed for cause.

Claim 4—Prosecutorial Misconduct

In Claim 4, Halverson argues that he is entitled to relief because the prosecutor made comments during the guilt phase that deprived him of due process. Halverson specifically points to the following: (1) the prosecutor's comments regarding the robbery charge; (2) the prosecutor's statement that the Commonwealth gave the jury all the evidence that it could; (3) the prosecutor alluding to other crimes and bad acts; and (4) the prosecutor's statements on how the bullets entered the victims' bodies. Because the Kentucky Supreme Court was not objectively unreasonable in determining that these comments did not deprive Halverson of a fair trial, Claim 4 is denied.

A. State court decision

Halverson raised prosecutorial misconduct on direct appeal. (Brief for Appellant, 84–SC–39 at 132–38). The Kentucky Supreme Court denied the claim when it stated "[w]e have reviewed the other assertions of error and are of the opinion none of them merits comment." *Halvorsen,* 730 S.W.2d at 928. Because the state court rejected the claim, there is a presumption the state court adjudicated it on the merits. *Harrington,* 131 S.Ct. at 785. Halverson argues that he can overcome that presumption because it is more likely that the state court did not decide the claim on its federal merits. Halverson points out that the Kentucky Supreme Court analyzed his arguments about improper comments during the sentencing phase, but not his arguments about improper comments during the guilt phase. Further, Halverson states that because the Kentucky Supreme Court cited only state law in denying his sentencing phase claim, it must have relied only on state law in addressing his guilt phase claim.

As discussed above, after Halverson filed his petition and reply, the United States Supreme Court addressed nearly this exact argument and rejected it. In *Johnson v. Williams,* the Supreme Court held that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." 133 S.Ct. at 1096. This presumption is a "strong one," which can be overcome only in "unusual circumstances." *Id.* And if state law "is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits." *Id.*

***22** Halverson has not overcome the strong presumption that the Kentucky Supreme Court adjudicated on the merits his claim of prosecutorial misconduct during the guilt phase. A review of Kentucky Supreme Court cases around the time that the court rejected Halverson's appeal shows that Kentucky followed United States Supreme Court law in evaluating prosecutorial misconduct claims. *See Slaughter v. Commonwealth,* 744 S.W.2d 407, 411–12 (Ky.1987) (citing *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974), in analyzing a claim of prosecutorial misconduct during closing arguments); *Smith v. Commonwealth,* 734 S.W.2d 437, 445 (Ky.1987) (citing *Smith v. Phillips,* 445 U.S. 209 (1982), in addressing a prosecutorial misconduct claim). Because Kentucky state law was "at least as protective as the federal standard," Halverson's claim of prosecutorial misconduct during the guilt phase "may be regarded as having been adjudicated on the merits." *See Johnson,* 133 S.Ct. at 1096. Therefore, Halverson must demonstrate that the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established" Supreme Court law. 28 U.S.C. § 2254(d).

B. Applicable law

A prosecutor's comments do not infringe on a defendant's constitutional rights when they are "undesirable or even universally condemned." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (citation omitted). Rather, they must "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly,* 416 U.S. at 643. A prosecutor's comments render a trial fundamentally unfair and deny a defendant due process when they likely have "a bearing on the outcome of the trial in light of the strength of the competent proof of guilt." *Pritchett v. Pitcher,* 117 F.3d 959, 964 (6th

Cir.1997) (citing *Angel v. Overberg,* 682 F.2d 605, 608 (6th Cir.1982)).

The Sixth Circuit uses a two-part test to determine whether a prosecutor's comments deprived a defendant of due process. *Moore v. Mitchell,* 708 F.3d 760, 799 (6th Cir.2013). First, a court determines whether the comments were improper. *Id.* If they were, the Court considers four factors to decide if the comments were flagrant: "(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the petitioner, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally made, and (4) the total strength of the evidence against the defendant." *Id.* (quoting *Bates v. Bell,* 402 F.3d 635, 641 (6th Cir.2005)).

C. Analysis

1. Robbery charge comment

Halverson argues that the prosecutor improperly told the jury that Halverson was guilty of robbery, despite the trial judge granting a directed verdict on that issue. Halverson states that in doing so the prosecutor expressed his personal opinion, made statements that had no basis in the record, and argued Halverson was guilty of an offense despite knowing that the evidence did not support guilt.

***23** The Court must view the prosecutor's comments in the context of the entire record. *United States v. Beverly,* 369 F.3d 516, 543 (6th Cir.2004) ("In examining prosecutorial misconduct, it is necessary to view the conduct at issue within the context of the trial as a whole."). The grand jury indicted Halverson for robbery. Although Hutchens testified that she searched and took property from the victims after Halvorsen and Willoughby stopped shooting, Kentucky law does not allow one to be found guilty of robbery for taking property from a corpse. Accordingly, the trial court granted a directed verdict for Halverson.

Reviewing the record it is clear that the prosecutor's comments about the robbery charge were made to rebut arguments made by defense counsel. During closing arguments, Willoughby's counsel was the first to bring up the robbery charge:

> Well now when we started this case, there were six charges presented to you that were going to be proven beyond all doubt. Ladies and gentlemen, you heard the Judge say that he'd dismissed two of those charged, because there just wasn't evidence to substantiate it. They're gone. They not only cannot be proven to you beyond all doubt, they didn't even meet the first standard. *Does that, therefore, mean you need to ask a question about the rest of the charges?*

(TE 2239–40) (emphasis added). The prosecutor responded to defense counsel by stating the following:

> Since Mr. Maloney brought it up, I want to mention about the robbery charge, which is no longer before you, because he implied to you or suggested to you that because I said that we would prove this robbery beyond any doubt and that isn't before you, that somehow you've got to question this entire case. Well ladies and gentlemen, I told you that the case would be proven to you because it would be shown that the defendants took the personal property of the victims and they did, and when I say they I—I include these defendants and I include Susan Hutchens, who's a defendant in this case, although not here today, and they did take it.
>
> Well, in some of these legal things that go on in the court —in the court proceeding, the Judge decides—decided that that is not robbery, because it wasn't proven that that happed before they were killed as opposed to after they were killed. We may have a difference of opinion, but that's not the point. The point is that it was proven to you the facts. It was proven to you that they took the property and that was proven to you beyond all doubt. Now if there is a discrepancy about the law of robbery, it really isn't relevant to whether or not this case of murder is proven to you beyond any doubt.

(TE 2256–57). As evidenced by the transcript, defense counsel brought up the directed verdict on the robbery charge to cast doubt on the remaining charges; the

prosecutor's comments about the robbery charge were made to rebut that argument.

When considered in this context, the prosecutor's statements were proper—and they certainly did not rise to the level of rendering the trial unfair. A prosecutor has " 'wide latitude' during closing argument to respond to the defense's strategies, evidence and argument." *Bedford v. Collins,* 567 F.3d 225, 233 (6th Cir.2009) (quoting *United States v. Henry,* 545 F.3d 367, 377 (6th Cir.2008)). Here, the prosecutor's comments about the robbery charge were in response to defense counsel's argument that the directed verdict on the robbery charge meant that the jury "need[ed] to ask a question about the rest of the charges." (TE 2240). The prosecutor's response pointed out that to establish the robbery charge he had to prove that the defendants took property from the victims, that the court decided that there was not a robbery because the victims were dead when the property was taken, and that the directed verdict on the robbery charge had no bearing on the murder charge. All of these statements were true, isolated, and would have clarified rather than confused the jury. And considering the strength of the evidence in this case, it is not rational to think that these statements had any bearing on the jury's verdict. Thus, the Kentucky Supreme Court's denial of this claim was reasonable.

2. Trial by innuendo

***24** Halverson argues that the prosecutor impermissibly suggested additional evidence of guilt by telling the jury "we gave you all the proof ... that we could give to you." (TE 2254). He suggests that this comment establishes prosecutorial misconduct that violated his due process rights.

Like the prosecutor's statements about the robbery charge, this comment was proper when viewed in context. *See United States v. Wells,* 623 F.3d 332, 338 (6th Cir.2010) (holding that a prosecutor's comments must be considered in proper context to determine whether they were likely to mislead the jury). Below is the prosecutor's statement in full:

> We put on a lot of proof in this case, a lot of it which now Mr. Jarrell can call window dressing, because it may not seem necessary in light of the fact that Mitchell Willoughby has now testified and given us some additional insight into what went on. But we didn't rely on that happening; We didn't figure he was going to do that; We didn't know what he was going to say. So we gave you all the proof that there was, all the proof that is that we could—that we could give to you.

(TE 2254). Rather that suggesting additional evidence of guilt, the prosecutor was apparently explaining why the Commonwealth put on the evidence that it did and why its evidence differed from Willoughby's testimony: "we didn't rely on [Willoughby testifying]; ... [w]e didn't know what he was going to say." *Id.* Like the robbery charge, this comment was isolated, true and clarified for the jury why the prosecutor put on certain evidence. And again, the evidence of Halverson's guilt was overwhelming. Thus, it was not unreasonable for the Kentucky Supreme Court to conclude that this comment did not affect the trial's outcome.

3. Comment on other crimes

Halverson claims that the prosecutor suggested that he committed other crimes for which he was not charged. Specifically, Halverson points to the following question the prosecutor posed to the jury: "to what extent did they [Halverson and Willoughby] have to go to come up with the drugs?" (TE 2257).

Viewed in the context of the trial, this statement was not improper and certainly did not render the trial fundamentally unfair. The prosecutor's comment was a response to Halverson and Willoughby's trial strategy. Throughout the trial, Halverson and Willoughby highlighted their drug use leading up to the murders. Both defense attorneys used the drug use as part of their defense in closing arguments. (TE 2223–24, 2239–40). Willoughby testified extensively on the drug use. (TE 1922–26). During his testimony, Willoughby admitted that he regularly carried a gun because some of the "dope dealers" he purchased from were "pretty shady characters." (TE 1922). Because the defendants introduced evidence of their drug use and used that drug use as part of their trial strategy, any comment on it was proper. *See Bedford,*

567 F.3d at 233 (holding that the prosecution is allowed to respond to the defense's strategies and evidence). The prosecutor's question, "to what extent did they [Halverson and Willoughby] have to go to come up with the drugs?," was a fair response to Willoughby's testimony that his dealings with "shady" dope dealers caused him to carry a gun when he made drug purchases. Further, the prosecutor's comment was isolated, and as has been discussed, the evidence of Halverson's guilt was overwhelming. Therefore, it was reasonable for the Kentucky Supreme Court to conclude that it did not affect the outcome of the trial.

4. The prosecutor's comments about the gunshot wounds

***25** Halverson argues that the prosecutor impermissibly discussed how Halverson and Willoughby inflicted the gunshot wounds. He asserts that the prosecutor's comments were unsupported personal opinion because they were not based on testimony. Halverson takes issue with the prosecutor opining on the order Halverson and Willoughby fired the shots.

Halverson's arguments do not stand up to the record. During closing argument, counsel is permitted to discuss the evidence and is given considerable leeway to draw "reasonable inferences" therefrom. *United States v. Collins,* 78 F.3d 1021, 1040 (6th Cir.1996). Hutchens testified as to where Halverson and Willoughby were in relation to the victims before they fired the shots. (TE 1709–51). The medical examiner, Dr. Greg Nichols, testified to the location of the entrance and exit wounds, the trajectory of the bullets, which shots were lethal, and whether the wounds were pre- or postmortem. (TE 1298–1339). The prosecutor made clear that he was suggesting, not telling, the jury the order in which Halverson and Willoughby fired the shots. He told the jury the following: "this wound is *probably* shot first ... the first shot ... is *probably* ... number three." (TE 2281–82). The prosecutor's inferences about the order in which Halverson and Willoughby fired the shots were proper and reasonable based on Dr. Nichols and Hutchens's testimony. Accordingly, it was reasonable for the Kentucky Supreme Court to deny this claim.

Claim 5—Failure to indict as an accomplice

In Claim 5, Halverson argues—for the first time in any court—that the Commonwealth violated his due process right to be informed of the nature of the charges against him. Specifically, Halverson asserts that he was denied due process when the trial court instructed the jury that he could be found guilty of murder as an accomplice, when the grand jury indicted him only as a principal. Because Halverson did not raise this argument in state court and has not established cause for the default, Claim 5 is denied.

A. Procedural default

To properly assert a federal claim in a habeas petition, a petitioner must first have exhausted state remedies by presenting the claim to the state courts. *Pudelski v. Wilson,* 576 F.3d 595, 605 (6th Cir.2009). To "fairly present" a claim to the state courts the petitioner must have "asserted both the factual and legal basis for the claim[ ]." *McMeans v. Brigano,* 228 F.3d 674, 681 (6th Cir.2000) (citing *Franklin v. Rose,* 811 F.2d 322, 324–25 (6th Cir.1987)). If the petitioner did not present the claim to the state court, but a state procedural rule now prohibits the state court from considering it, the claim is procedurally defaulted. *Martin v. Mitchell,* 280 F.3d 594, 603 (6th Cir.2002) (citing *Coleman v. Thompson,* 501 U.S. 722, 752–53 (1991)). Procedural default bars federal court review of the claim, "unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or that failing to review the claim would result in a fundamental miscarriage of justice." *Williams v. Anderson,* 460 F.3d 789, 806 (6th Cir.2006).

***26** Halverson concedes that he "never presented [Claim 5] in state court," (Doc. # 73 at 106), and that "[t]his claim is exhausted by virtue of the fact that no avenue remains to present it in state court," (Doc. # 25 at 122). This Court agrees that state procedural rules now bar Halverson from presenting this, and all claims in this petition, to the Kentucky state courts. CR 12.04(b) (an appeal must be filed within thirty days after entry of judgment); CR 11.42(10) (motion for post-conviction relief must be filed within "three years after the judgment becomes final."); CR 60.02 (motion for relief from judgment must be filed "within a reasonable time."). Therefore, unless Halverson can demonstrate cause, Claim 5 is procedurally defaulted.

B. Cause for procedural default

To demonstrate cause, Halverson's argues that his appellate counsel was ineffective for not raising claim

5 on direct appeal. Ineffective assistance of appellate counsel can constitute cause. *Hinkle v. Randle,* 271 F.3d 239, 245 (6th Cir.2001) (citing *Lucas v. O'Dea,* 179 F.3d 412, 418 (6th Cir.1999)). Halverson did not raise ineffective assistance of appellate counsel in state court. His failure to raise that claim would normally result in procedural default and foreclose him from relying on it as a means to demonstrate cause for his failure to raise *this* claim. *Edwards v. Carpenter,* 529 U.S. 446, 453 (2000) (holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted"). However, at the time of Halverson's post-conviction proceeding, Kentucky did not recognize ineffective assistance of appellate counsel claims. *Boykin v. Webb,* 541 F.3d 638, 647 (6th Cir.2008) (citing *Bowling v. Commonwealth,* 80 S.W.3d 405, 421 (Ky.2002)). Therefore, the Sixth Circuit has held that federal courts should address a Kentucky prisoner's ineffective assistance of appellate counsel claim even if he did not raise it in state court. *Boykin,* 541 F.3d at 648. AEDPA also directs this Court to consider Halverson's ineffective assistance of appellate counsel claim. 28 U.S.C. § 2254(b)(1)(B)(I) (stating that a court may grant habeas relief despite an applicant's failure to exhaust state remedies if "there is an absence of available State corrective process.").

To resolve whether Halverson has established cause for his procedural default of Claim 5, this Court must determine whether Halverson's appellate counsel was ineffective for failing to raise claim 5. *Willis v. Smith,* 351 F.3d 741, 745 (6th Cir.2003). If counsel's performance was not constitutionally ineffective, there is no cause. *Id.* Determining whether Halverson's appellate counsel was ineffective requires the Court to analyze Claim 5's merits. *Id.* Because the state did not adjudicate Claim 5 on the merits, *de novo* review applies. *Werth v. Bell,* 692 F.3d 486, 493 (6th Cir.2012).

1. Ineffective appellate counsel standard

***27** The standard for evaluating a claim for ineffective assistance of appellate counsel is the two-prong *Strickland* standard. *Smith v. Robbins,* 528 U.S. 259, 285 (2000). First, a petitioner must demonstrate that his counsel's performance was deficient. *Id.* Courts apply a "strong presumption" appellate counsel provided effective representation. *Harrington,* 131 S.Ct. at 787 (internal citations and quotation marks omitted). To prove deficient performance, a petitioner must show "that his counsel was objectively unreasonable, in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith,* 528 U.S. at 285. Appellant counsel is permitted to select from claims "in order to maximize the likelihood of success on appeal." *Id.* at 288. This means that only when "ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (citation omitted).

Second, a petitioner must establish that he was prejudiced by his counsel's deficient performance, which requires showing "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* at 285–86 (citing *Strickland,* 466 U.S. at 694). For Halverson to show a reasonable probability that he would have prevailed on his appeal, he must demonstrate that the "likelihood of a different result ... [is] substantial, not just conceivable." *Harrington,* 131 S.Ct. at 792.

2. Analysis

To demonstrate ineffective assistance of appellate counsel, Halverson must establish both deficient performance and prejudice. *Allen v. Harry,* 497 F. App'x 473, 481 (6th Cir.2012). Therefore, if this Court finds that Halverson has not demonstrated one prong, it need not address the other. *Id.* Even assuming *arguendo* that Halverson's appellate counsel was unreasonable for not arguing that Halverson was not informed of the nature of the charges against him, Halverson has not demonstrated that this decision prejudiced him.

The Commonwealth indicted Halverson, along with Willoughby and Hutchens, on three counts of intentional murder pursuant to K.R.S. § 507.020. The relevant part of the indictment charged the co-defendants with committing "the offense of Capital Murder by shooting [Norman, Durrum, Greene] with pistols when ... [s]aid killing was intentional and the acts of the Defendants resulted in the deaths of more than one person." (TR 2). The jury convicted Halverson of Norman's murder under an accomplice instruction, meaning that the jury found that Halverson did not cause his death. The jury convicted Halverson of Durrum and Greene's murders under a combination instruction, which meant that the jury could not determine whether Halverson caused their deaths. Halverson argues that the indictment did not adequately

put him on notice that he would have to formulate a defense for accomplice liability, resulting in a violation of his federal due process rights.

***28** The Fourteenth Amendment's Due Process Clause requires that states give criminal defendants fair notice of the charges against them. *Watson v. Jago,* 558 F.2d 330, 338 (6th Cir.1977) (citing *In re Oliver,* 333 U.S. 257, 273 (1948)). Fair notice "requires that the offense be charged with precision and certainty so as to apprise the accused of the crime of which he stands charged. Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial." *Combs v. Tennessee,* 530 F.2d 695, 698 (6th Cir.1976). Due process is satisfied so long as a defendant is given "fair notice of the charges against him to permit adequate preparation of his defense." *Williams v. Haviland,* 467 F.3d 527, 535 (6th Cir.2006) (quoting *Koontz v. Glossa,* 731 F.2d 365, 369 (6th Cir.1984)).

Halverson cites *Lucas v. O'Dea* to support his argument. 179 F .3d 412 (6th Cir.1999). In *Lucas,* the Sixth Circuit affirmed the district court's grant of habeas relief because the defendant was not adequately informed of his charges. *Id.* at 418. The state charged the defendant in *Lucas* with intentional murder under KRS § 507.020 for shooting a store owner during a robbery. *Id.* at 415. The jury ultimately convicted the defendant under a wanton murder instruction, which allowed the jury to return a guilty verdict even if it found that he did not "fire the shot that killed [the store owner]." *Id.* The court held that "the variance from the indictment to the jury instruction constituted a constructive amendment that deprived [the defendant] of his Fourteenth Amendment right to notice of the charges against him." *Id.* at 417 (citing *Combs,* 530 F.3d at 698).

The Sixth Circuit decided *Lucas* over a decade after Halverson's appeal and its facts are materially different. The defendant in *Lucas* was charged with intentional murder, but the jury convicted him of wanton murder. 179 F.3d at 417. Additionally, the jury instructions stated that it was "immaterial which one of [the perpetrators] fired the shot that killed [the store owner]," so long as the jury found that the defendant participated in the robbery and wantonly caused the victim's death. *Id.* at 415. The Sixth Circuit ruled this variance "sufficiently material to constitute a constructive amendment." *Id.* at 417. Here, the grand jury charged Halverson with intentional murder and the jury found him guilty of intentional murder. Thus, unlike in *Lucas,* the jury convicted Halverson under the level of mental culpability charged in the indictment. The accomplice instruction did allow the jury to convict Halverson even if it found that he did not fire the shot that killed the victims. But, unlike in *Lucas,* the jury still had to find that Halverson assisted, encouraged, and/or held himself in readiness to assist Willoughby, with the *intent* to cause the victims' deaths. (Instructions 8 and 15). Thus, the jury instructions in Halverson's trial more closely tracked the indictment than did the jury instructions in *Lucas.*

***29** The Sixth Circuit has routinely rejected claims that a defendant indicted as a principal cannot be convicted as an accomplice. *Hill v. Perini,* 788 F.2d 406, 407 (6th Cir.1986) ("[A] defendant may be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor without violating federal due process."); *United States v.. Moore* 460 F.2d 1265, 1265 (6th Cir.1972) (holding that it was proper for the court to give an aiding and abetting instruction when the defendant was indicted as a principal); *United States v. Lester,* 363 F.2d 68, 72 (6th Cir.1966) (noting that "it has long been held that an indictment need not specifically charge 'aiding and abetting' "). As Sixth Circuit case law demonstrates, there is not a reasonable probability that Halverson would have prevailed on his due process claim.

Further, Kentucky case law and the indictment itself undermine Halverson's argument that he was not put on notice that the jury could convict him as an accomplice. In *Hogan v. Commonwealth,* the Kentucky Supreme Court held that when the Commonwealth indicts multiple defendants as principals, it can convict them individually as accomplices. 20 S.W.2d 710, 710 (Ky.1929). And in *Neal v. Commonwealth,* the court stated that "[t]o indict both the principal and the aider and abettor as principals *gives notice* that the Commonwealth can or will attempt to prove that one did the act and the other aided and abetted." 302 S.W.2d 573, 578 (Ky.1956) (emphasis added). In this case, the indictment accused all three defendants (Halverson, Willoughby and Hutchens), not just one of them individually, of shooting the victims and intentionally causing their deaths. Based on *Hogan* and *Neal,* that was sufficient to put Halverson on notice that the state would put on evidence that he was an accomplice and that the jury could convict him as such.

Because neither case law nor the facts support Halverson's argument that the state failed to put him on notice of the charges against him, there is not a reasonable probability that this argument would have prevailed on appeal. Halverson therefore has not demonstrated ineffective assistance of appellate counsel, and as a result has not established cause for failing to raise Claim 5 in state court. Accordingly, Claim 5 is procedurally defaulted and is denied.

Claim 6—Failure to instruct on EED

In Claim 6, Halverson asserts that the trial court denied him due process by not instructing the jury on extreme emotional disturbance (EED). Halverson argues that he presented sufficient EED evidence, so the trial court should have included the element in the jury instructions. Because the Kentucky Supreme Court was reasonable in determining that Halverson was not entitled to an EED instruction, Claim 6 is denied.

A. This claim is not procedurally defaulted

*30 The Warden asserts that this claim is procedurally defaulted because it was not fairly presented to the Kentucky courts. However, a review of Halverson's direct appeal brief shows that he did "assert both the factual and legal basis for" this claim. *McMeans,* 228 F.3d at 681. In Claim 12 of his direct appeal brief, which asserts denial of due process, Halverson states: "[T]he trial court did not give [Halverson] this defense of extreme emotional disturbance in either the 'principal' or the 'accomplice' murder instructions for any of the victims." (Brief for Appellant, 84–SC–39 at 125). That argument "fairly presented" the "factual and legal basis" for Claim 6 to the Kentucky Supreme Court. *See McMeans,* 228 F.3d at 681. Therefore, this Court will review Claim 6 on the merits.

B. State court decision

On direct appeal, the Kentucky Supreme Court rejected Halverson's argument that the trial court should have given the jury an EED instruction:

> There was absolutely no evidence supportive of Halvorsen's complaint that the trial court should have sua sponte given the jury instructions on extreme emotional disturbance other than the bare assertion that seeing one of the victims threaten his friend, Willoughby, gives rise to a reasonable inference that he became extremely disturbed.

Halverson, 730 S.W.2d at 926. The Kentucky Supreme Court again discussed the lack of EED evidence in addressing Halverson's CR 11.42 motion:

> In the instant case, Appellant failed to present any [EED] evidence. As outlined hereinabove, Appellant's evidence was merely that he turned to drugs after his divorce. Thus, this case is more akin to *Slaughter v. Parker,* wherein the evidence established, at most, that Slaughter panicked during the crime. Slaughter presented no evidence of mental illness or extreme emotional disturbance. The Sixth Circuit found this to be a material factor distinguishing Slaughter from Gall. A similar distinction exists in this case.

Halvorsen, 258 S.W.3d at 6. Because Claim 6 was clearly adjudicated on the merits, § 2254 deference applies.

C. Applicable law

To determine on habeas review whether a jury instruction infringed on a defendant's constitutional rights, a court asks "whether the instruction was erroneous and, if so, whether the instruction 'so infected the entire trial that the resulting conviction violates due process.' " *Clarke v. Warren,* 556 F. App'x 396, 409 (6th. Cir.2014) (quoting *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). Due process demands that a defendant not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

D. Analysis

EED is included in Kentucky's statutory definition of murder. Kentucky's murder statute, enacted in 1975, reads as follows:

> A person is guilty of murder when:
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; *except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance* for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime ...

***31** K.R.S. § 507.020(1)(a). While EED is included in the murder statute, at the time of Halverson's conviction, a murder instruction did "not require the jury to find that the defendant was not acting under the influence of [EED] unless there [was] something in the evidence to suggest that he was." *Gall,* 607 S.W.2d at 109. The state had the burden of proof on EED, but "in order to justify an instruction on the lower degree there must [have been] something in the evidence sufficient to raise a reasonable doubt whether the defendant is guilty of murder or manslaughter." *Id.* at 108. Therefore, the EED instruction was not automatic; for it to be included in the jury instructions there had to be some evidence that the defendant was acting under EED.

Halverson suggests that Sixth Circuit and Supreme Court case law holds that he was entitled to an EED instruction, regardless whether he presented evidence on this issue. However, Halverson cites case law indicating that he was not entitled to an EED instruction unless he presented some evidence that he was acting under the influence of EED. *See Parker v. Matthews,* 132 S.Ct. 2148, 2151 (2012) ("The Kentucky Supreme Court's decision in *Gall* ... placed the burden of producing evidence on the defendant, but left the burden of proving the absence of [EED] with the Commonwealth *in those cases* in which the defendant had introduced evidence sufficient to raise a reasonable doubt on the issue.") (emphasis added); *Matthews v. Parker,* 651 F.3d 489, 502 (6th Cir.2011), *reversed on other grounds by Parker,* 132 S.Ct. 2148 ("For [EED] to be included as an element of murder, Petitioner had to introduce sufficient evidence ... to raise a reasonable doubt regarding whether he was under the influence of [EED] when he committed the crimes.").

Halverson argues that there was evidence that he was acting under EED. He points to Willoughby's testimony that Norman pointed a bayonet at Willoughby. Halverson contends that the trial court should have automatically given him an EED instruction because it gave Willoughby an EED instruction. In reviewing the Kentucky Supreme Court's resolution of this issue, it is irrelevant whether this Court "would have reached a different conclusion in the first instance." *Wood,* 558 U.S. at 309. Under § 2254, this Court can grant Halverson relief only if the Kentucky Supreme Court's ruling on this issue was unreasonable.

Reviewing the record, the Kentucky Supreme Court was reasonable in holding that Halverson did not produce sufficient evidence to warrant an EED instruction. Halverson did not automatically deserve the same instruction as Willoughby because he was not standing in Willoughby's shoes when he decided to start shooting. Willoughby testified that Norman pointed a bayonet at him; in contrast, there was no testimony that anyone threatened Halverson. Further, the veracity of Willoughby's claim was called into question by Hutchens's testimony that never mentioned Norman making a theat. (TE 1745). And unlike Willoughby, Halverson did not testify about his mental state at the time of the murders. Because there was no evidence that Halverson was acting under EED, the trial court's decision not to give an EED jury instruction was reasonable and did not relieve the state from proving each element of murder beyond a reasonable doubt. Therefore, Claim 6 is denied.

Claim 7—Ineffective assistance of counsel with respect to EED

***32** In Claim 7, Halverson asserts that he was denied effective assistance of counsel because his trial counsel failed to request both an instruction on extreme emotional disturbance and an instruction that the jury must find that the prosecution failed to prove absence of EED beyond a reasonable doubt. Because Halverson's counsel was not unreasonable for not requesting an EED instruction, and because his counsel's decision not to request an EED instruction did not render the trial unfair, Claim 7 is denied.

A. State court decision

Halverson brought this claim on appeal from the trial court's denial of his CR 11.42 Motion. (Brief for Appellant, 2004–SC–17 at 32). In addressing the merits of this claim, the Kentucky Supreme Court stated:

> In the instant case, Appellant failed to present any such evidence. As outlined hereinabove, Appellant's evidence was merely that he turned to drugs after his divorce. Thus, this case is more akin to *Slaughter v. Parker,* 24 wherein the evidence established, at most, that Slaughter panicked during the crime. Slaughter presented no evidence of mental illness or extreme emotional disturbance ... Therefore, it was not ineffective assistance of counsel for trial counsel to refrain from requesting an EED instruction based not only on the evidence, but also on the law.

Halvorsen, 258 S.W.3d at 10.

B. Applicable law

The Sixth Amendment guarantees criminal defendants the right to counsel. *Strickland,* 466 U.S. at 684. For that reason, the Supreme Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.' " *Id.* at 686 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970)). To prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-part test: (1) counsel's performance was objectively unreasonable, and (2) the unreasonable performance prejudiced the defendant. *Strickland,* 466 U.S. at 687.

Under the first prong of the *Strickland* test, the defendant must demonstrate that "counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (quoting *Strickland,* 466 U.S. at 687). The Supreme Court has not articulated specific guidelines for appropriate attorney conduct, but "instead [has] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Wiggins,* 339 U.S. at 521 (quoting *Strickland,* 466 U.S. at 688). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington,* 131 S.Ct. at 787. Under the second prong of the *Strickland* test, the defendant must establish "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. An individual has been prejudiced when his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993) (quoting *Strickland,* 466 U.S. at 687).

***33** On federal habeas review, establishing ineffective assistance of counsel is "all the more difficult." *Harrington,* 131 S.Ct. at 787. In *Harrington,* the Supreme Court recently emphasized the highly deferential standard for analyzing an ineffective assistance claim on habeas review:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's action were reasonable.

> The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (internal quotations omitted). Because the Kentucky Supreme Court adjudicated Halverson's ineffective assistance of counsel claim on the merits, the Court will review it under that deferential standard.

C. Analysis

Halverson fails to satisfy either *Strickland* prong. First, trial counsel was not unreasonable in not requesting an EED instruction because there was no evidence to support EED. As the Kentucky Supreme Court stated in its adjudication of this claim: "In the instant case, Appellant failed to present any [EED] evidence. Appellant's evidence was merely that he turned to drugs after his divorce." *Halvorsen,* 258 S.W.3d at 6. Halverson, nor anyone else, testified as to Halverson's mental state during the murder (at least insofar as is relevant to EED), and there was no evidence that any of the victims threatened Halverson. Because there was no evidence that Halverson was acting under EED, Halverson's trial counsel was not unreasonable for not requesting an EED instruction.

Second, it is highly unlikely that counsel's decision to not request an EED instruction prejudiced the defendant. Because there was no EED evidence, there is no reason to believe that the trial court would have granted the request. Even if the trial court had given an EED instruction, the lack of evidence makes it highly unlikely that the jury would have found Halverson was acting under EED. This is especially true since the jury found that Willoughby, who was the one supposedly threatened, was not acting under EED. Because counsel's decision to not request an EED instruction did not render the trial fundamentally unfair, Halverson has not established prejudice. *Lockhart,* 506 U.S. at 366. Halverson has not satisfied either *Strickland* prong and therefore Claim 7 is denied.

Claim 8—Kentucky's definition of EED

In Claim 8, Halverson argues that because Kentucky's murder statute does not define EED, it was unconstitutionally vague as applied to him, and therefore violated his due process rights. Halverson has not alleged sufficient facts demonstrating why Kentucky's murder statute left him unable to understand what conduct it prohibited, nor has he cited sufficient case law to support his argument. Therefore, Claim 8 is denied.

A. State court decision

***34** The Warden argues that this claim is procedurally defaulted. However, Halverson argued on direct appeal that EED was unconstitutionally vague as it is defined in K.R.S. § 532.025(2)(b)(2). (Brief for Appellant, 84–SC–39 at 217). In that section, EED is listed as a mitigating circumstance that must be included in the jury instructions in every case where the death penalty is authorized and the evidence supports the instruction. K.R.S. § 532.025(2)(b)(2). While a close call, Halverson's argument on appeal was sufficient to put the Kentucky state courts on notice of the factual and legal basis for Halverson's claim in this petition. *See McMeans,* 228 F.3d at 681. Further, both arguments require essentially the same legal analysis. *See Schneider v. Delo,* 85 F.3d 335 (8th Cir.1996). Therefore, this claim is not procedurally defaulted. Further, Halverson concedes that the Kentucky Supreme Court adjudicated this claim on the merits. Accordingly, § 2254 review applies.

B. Applicable law

Due process requires that criminal statutes be defined so "that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Staley v. Jones,* 239 F.3d 769, 791 (6th Cir.2001) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). A criminal statute violates due process when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application .... " *Connally v. General Const. Co.,* 269 U .S. 385, 291 (1926).

C. Analysis

Halverson was convicted under K.R.S. § 507.020, which reads:

> A person is guilty of murder when:
> (a) With intent to cause the death of another person, he causes the death

> of such person or of a third person; *except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance* for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime ...

At the time of Halverson's trial, EED was not defined by statute, and the Kentucky Supreme Court had given little guidance on EED, simply stating "we know it when we see it." *Edmonds v. Commonwealth,* 586 S.W.2d 24, 27 (Ky.1979). It was not until *McClellan v. Commonwealth,* that the Kentucky Supreme Court provided a more detailed explanation of EED and held that juries receiving an EED instruction must be given this new definition. 715 S.W.2d 464, 468–69 (Ky.1986). The Kentucky Supreme Court later held that the *McClellan* decision was to have prospective, rather then retroactive, application. *Smith v. Commonwealth,* 734 S.W.2d 437 (Ky.1987).

***35** Halverson argues that *McClellan* warrants reversal of his conviction. His argument fails for two reasons. First, *McClellan* dealt with the sufficiency of jury instructions. Halverson was neither entitled to nor did he receive an EED jury instruction. Therefore, *McClellan* does not apply to Halverson. Second, *McClellan* would not entitle Halverson to relief even if it was applicable. Federal habeas courts do not grant relief based on state law questions. *Estelle,* 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). *McClellan* held that juries must be instructed on the state of mind that constitutes EED; it did not hold that K.R.S. § 507.020 was unconstitutionally vague. 715 S.W.2d at 469. Because *McClellan* dealt with a state law question, it cannot serve as a basis to grant Halverson relief.

The sole issue Claim 8 raises for this Court is whether K.R.S. § 507.020 was unconstitutionally vague as it applied to Halverson. Other than the bare assertion that it failed to provide "notice of what is and what is not [EED]," Halverson offers no factual arguments in support of his claim that K.R.S. § 507.020 was unconstitutional as applied to him. And it would be a difficult argument for him to make considering he offered no EED evidence at trial. Further, whether EED should have had a more precise definition does not go to the concerns implicated by the void-for-vagueness doctrine. EED does not forbid or require the doing of an act, *see Connally,* 269 U.S. at 291; rather, it mitigates murder to manslaughter. K.R.S. § 507.020 does not leave an ordinary person guessing as to what conduct is prohibited. To the contrary, it defines precisely what is prohibited: intentionally causing the death of another person. *See Matthews,* 651 F.3d at 522 (holding that "it does not appear that the Supreme Court would consider [Kentucky's undefined EED instruction] so egregiously vague as to violate due process."). Because K.R.S. § 507.020's definition of EED was not unconstitutionally vague as applied to Halverson, Claim 8 is denied.

Claim 9—Halverson's conviction under the combination instruction

In Claim 9, Halverson argues that he was denied the Kentucky Constitution's guarantee of a unanimous verdict. He suggests that the jury's verdict was not unanimous because it convicted him for Durrum and Greene's murders under instructions that did not require it to determine whether Halverson was a principal or an accomplice. Halverson argues that the denial of a unanimous verdict violated his federal due process rights. Because there was sufficient evidence upon which the jury could have found Halverson guilty as a principal or an accomplice, Claim 9 is denied.

A. State court decision

***36** This issue was raised by Halverson on direct appeal. The Kentucky Supreme Court rejected the argument with the following analysis:

> Without merit is the contention that the instruction rendered the jury's verdict non-unanimous since it did not require the jury to indicate which crime it was finding Halvorsen or Willoughby guilty of. A verdict cannot be attacked as being non-unanimous where both theories are supported by sufficient evidence. *Wells v.. Commonwealth,* 561 S.W.2d 85 (Ky.1978). The nature of the evidence of Willoughby and Halvorsen's participation in the killing of the victims, in our opinion, amply supports either instruction. The death penalty was imposed for the murders of Greene and Durrum. These victims were shot eight and five times, respectively; three wounds on each were characterized as lethal. Two pistols of different caliber were involved. Greene had two wounds from a .38 Special and two wounds from a 9-millimeter characterized as fatal. Durrum had a fatal wound from a .38 Special and one from a 9-millimeter. Another fatal wound could not be identified as to the caliber of the gun. Thus it was impossible to determine that either appellant was only a principal or only an accomplice. The instruction conformed to the evidence.

Halverson, 730 S.W.2d 921. Because Claim 9 was adjudicated on the merits, AEDPA applies.

B. Applicable law

When there are multiple grounds for conviction, a general verdict is not invalid "because one of the possible bases of conviction was ... unsupported by sufficient evidence." *Griffin v. United States,* 502 U.S. 46, 56 (1991). As long as one theory is supported by the evidence, "the presumption of law is that the court awarded sentence on the good count only." *Id.* at 50 (citations omitted). Jury instructions need not require jurors "to agree upon a single means of commission," because " 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." *Schad v. Arizona,* 501 U.S. 624, 631–32 (1991) (quoting *McKoy v. North Carolina,* 494 U.S. 433, 449 (1989) (Blackmun, J., concurring)).

A federal court grants habeas relief only if a person is being held in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Yet, Halverson contends that under *Hicks v. Oklahoma,* Kentucky's guarantee of a unanimous verdict is a due process right, and therefore Kentucky law applies to his claim. 447 U.S. 343 (1980). Because it does not change the outcome, this Court will apply Kentucky law without deciding the question. In Kentucky, "when presented with alternate theories of guilt in an instruction, the Commonwealth does not have to show that each juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented in the instruction." *Burnett v. Commonwealth,* 31 S.W.3d 878, 883 (Ky.2000), *rev'd on other grounds by Travis v. Commonwealth,* 327 S.W.3d 456, 463 (Ky.2010). When one theory is unsupported by the evidence, the jury's verdict is not unanimous. *Boulder v. Commonwealth,* 610 S.W.2d 615, 617 (Ky.1980), *overruled on other grounds by Dale v. Commonwealth,* 715 S.W.2d 227 (Ky.1986).

C. Analysis

***37** The jury convicted Halverson for Durrum and Greene's murders under instructions 9 and 16. Those instructions allowed the jury to convict Halverson if they were "unable to determine whether he acted as a principal or accomplice in the murder of [Durrum/Greene]." (TR 250, 258). Halverson suggests that because "there is no doubt [he] delivered fatal wounds to Durrum and Greene," the jury could only find that he was an principal. (Doc. # 73 at 139). He argues that because there was no evidence that he was an accomplice, the jury's verdict was not unanimous.

After reviewing the accomplice statute and instruction, this Court disagrees with Halverson that there was not sufficient evidence for the jury to find that Halverson was an accomplice in Durrum and Greene's murders. Kentucky's accomplice liability statute, enacted in 1975, reads as follows:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

K.R.S. § 502.020. The accomplice liability instruction permitted the jury to convict Halverson for the murders of Durrum and/or Greene if they found that Willoughby intentionally killed Durrum and/or Greene, and that Halverson was present and assisted, encouraged, and/or held himself in readiness to assist Willoughby with the intent to cause Durrum and/or Greene's death. (Instructions 8 and 15).

There was sufficient evidence upon which the jury could conclude Halverson was an accomplice to Durrum and Greene's murders. Durrum and Greene each had at least one fatal wound from Halverson's gun and one fatal wound from Willoughby's gun. *Halverson,* 730 S.W.2d at 925; (TE 1552–54). There was no testimony as to who delivered the fatal wound to Durrum; there was testimony that Willoughby may have been the one to deliver the fatal wound to Greene. *Halvorsen,* 730 S.W.2d at 923 ("Hutchens then saw Willoughby shoot Greene twice more, since she was still alive."). Because there were fatal wounds to each victim from both Willoughby and Halverson's gun, but no conclusive testimony as to who delivered *the* fatal wound, there was sufficient evidence from which a juror could have found that Halverson aided Willoughby in intentionally causing Durrum and Greene's deaths.

***38** While the evidence supported principal and accomplice liability, this Court agrees with the Kentucky Supreme Court that it "was impossible to determine that either appellant was only a principal or only an accomplice." *Halverson,* 730 S.W.2d 921. A principal's identity is uncertain when there is "no direct evidence of who delivered the fatal blow." *United States v. Horton,* 921 F.2d 540, 544 (4th Cir.1990). The sole eyewitness in *Horton* did not see who delivered the fatal wound, and therefore the court ruled his testimony did not "rule out the possibility that [another defendant] was the principal." *Id.* Because it was uncertain who was the actual principal, the court held it was proper to give an aiding and abetting instruction. *Id.* Likewise, because there was no direct evidence in this case whether Halverson or Willoughby discharged the fatal shot, it was proper for the court to give a combination principal-accomplice instruction. Because the evidence supported both principal and accomplice liability, the jury's verdict cannot be attacked for being nonunanimous. Accordingly, Claim 9 is denied.

Claim 10—Accomplice liability instruction

In Claim 10, Halverson argues that he was denied his due process right to have the prosecution prove every element of murder beyond a reasonable doubt. In support, he states that the accomplice instruction did not properly define the accomplice liability elements. Both parties state that Halverson did not bring this claim in state court. (Doc. # 73 at 143); (Doc. # 58 at 73). However, the Warden also notes that "this claim was essentially raised during the direct appeal." (Doc. # 58 at 73). The parties cannot concede whether Claim 10 was brought in state court because that issue determines both whether this Court can review Claim 10 and whether AEDPA applies. *Moore v. Mitchell,* 708 F.3d 760, 782 (6th Cir.2013) (noting that it is "well established that parties may not stipulate to a standard of review."). After reviewing the record, the Court determines that Halverson did bring Claim 10 on appeal and that the Kentucky Supreme Court rejected it. Therefore, the Court will review Claim 10 under § 2254 deference. Because the accomplice instruction given by the trial court sufficiently defined the elements of accomplice liability, Claim 10 is denied.

A. State court decision

In Halverson's direct appeal brief, he argued that the combination principal-accomplice instructions (instructions 9 and 16) violated his due process rights because "although [they] referr[ed] to [instructions 8 and 15]," they "contain [ed] no statement of the elements of the offense—murder—either for liability as a principal or an accomplice." (Brief for Appellant, 84–SC–85 at 109). In this petition, Halverson changes his argument slightly, suggesting that the accomplice liability instructions [instructions 8, 15 and 18] were defective because they did not properly list the elements of accomplice liability. Thus, on direct appeal Halverson argued that the *combination instructions* (which incorporated the accomplice instructions) did not contain the elements of accomplice liability, while here he argues that the *accomplice liability instructions* did not contain the elements of accomplice liability.

***39** While not identical, both arguments raise the same issue: Halverson was convicted of murder under instructions that did not properly list the elements of accomplice liability. Because Halverson "asserted both the factual and legal basis" for Claim 10 in his direct appeal brief, the claim was "fairly presented" to the Kentucky Supreme Court and it is not procedurally defaulted. *McMeans,* 228 F.3d at 681. Further, the Kentucky Supreme Court clearly addressed this claim on the merits. On Halverson's direct appeal, the Court stated:

> [Halvorsen and Willoughby] complain that the "combination" instruction does not list the elements of principal or accomplice liability. This complaint is without merit since the "combination" instruction specifically refers to, and incorporates by reference, two prior instructions which consecutively listed the elements of principal and accomplice liability. Instructions are proper if, when read together and considered as a whole, they submit the law in a form capable of being understood by the jury. *Thomas v. Commonwealth,* Ky., 412 S.W.2d 578 (1967).

Halverson, 730 S.W.2d at 925. By determining that the combination instruction was proper, the Court necessarily determined that the accomplice liability instruction was proper. Because Claim 10 was adjudicated on the merits, this Court will apply AEDPA deference.

B. Applicable law

To determine on habeas review whether a jury instruction deprived a defendant of due process, a court asks "whether the instruction was erroneous and, if so, whether the instruction 'so infected the entire trial that the resulting conviction violates due process.' " *Clarke,* 556 F. App'x at 409 (quoting *Cupp,* 414 U.S. at 147). A defendant seeking habeas relief "must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Clarke,* 556 F. App'x at 409 (quoting *Waddington v. Sarausad,* 555 U.S. 179, 190–91 (2009)).

C. Analysis

Halverson argues that the trial court failed to instruct the jury on the statutory meaning of accomplice liability, and that this allowed the jury to convict Halverson without the prosecution proving the elements of murder beyond a reasonable doubt. Resolving this issue requires analyzing the elements of accomplice liability and comparing them to the definition of accomplice liability given in the jury instructions.

K.R.S. § 502.020, enacted in 1975, reads as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

*40 (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Halverson's jury instructions stated that he was guilty as an accomplice to each murder if, at the time Willoughby intentionally caused the victim's death, he "was then and there present or nearby and was assisting or encouraging or holding himself in readiness to assist ... Willoughby; and that in doing so ... Halverson also intended to cause [the victim's] death ..." (Instructions 8, 15 and 18). The combination instructions (9 and 16) then incorporated this definition of accomplice liability. The question for this Court is whether the Kentucky Supreme Court was unreasonable in determining that the difference between the accomplice statute and the jury instructions did not relieve the prosecution of its burden to prove murder beyond a reasonable doubt.

With regard to the *mens rea* element, the jury instructions tracked the accomplice liability statute. The accomplice liability statute requires that when causing a result is an element of an offense, the person "acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense." K.R.S. § 502.020. The instructions required the jury to find "Halverson ... intended to cause [the victim's] death." Halverson was convicted of murder under K.R.S. § 507.020, which requires that a person intentionally cause the death of another. Thus, the trial court properly instructed the jury on the *mens rea* element of accomplice liability.

Halverson takes issue with the *actus reus* element of the accomplice liability instruction. The statute states that a person is guilty of accomplice liability if he "[s]olicits, commands, or engages in a conspiracy with such other person to commit the offense; or [a]ids, counsels, or attempts to aid such person in planning or committing the offense." K.R.S. § 502.020. The jury instructions stated Halverson was guilty if he "was then and there present or nearby and was assisting or encouraging or holding himself in readiness to assist ... Willoughby." The difference in semantics between *soliciting, aiding, counseling* and *attempting to aid* in the statutory definition and *assisting, encouraging* or *holding himself ready to assist* in the jury instructions, is not so much that it relieved the prosecution of its burden of proving every element of its case beyond a reasonable doubt. *See Waddington,* 555 U.S. at 190–91.

*41 Halverson cites recent Kentucky Supreme Court case law that encourages Kentucky trial courts to be more precise when giving accomplice liability instructions. (Doc. # 25 at 155) (citing *Beaumont v. Commonwealth,* No. 20007–SC–000486, 2009 WL 1451934 (Ky. May 21, 2009); *Hudson v. Commonwealth,* 979 S.W.2d 106, 109 (Ky.1998); *Barbour v. Commonwealth,* 824 S.W.2d 861, 863 (Ky.1992)). Those cases are no help to Halverson for two reasons. First, they were not the law when Halverson was convicted. Second, they deal with state law issues. *Estelle,* 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Because the Kentucky Supreme Court was reasonable in determining that the accomplice liability instruction properly listed the elements of accomplice liability, Claim 10 is denied.

Claim 11—Evidence of accomplice liability

In Claim 11, Halverson argues that he was denied due process because the jury convicted him of accomplice liability despite insufficient evidence that he acted as an accomplice. (Doc. # 25 at 158). He asserts that there was no evidence that he was an accomplice in any of the three murders. Specifically, he suggests that there is no evidence that he aided Willoughby in causing Norman's death, and that because he shot Durrum and Greene, he could not be convicted as an accomplice in their deaths. Halverson never raised this argument in state court and has not

demonstrated cause for the default; therefore, Claim 11 is denied.

A. Procedural default

Halverson concedes that this claim was never before the state court: "Kentucky did not resolve [Claim 11] on its federal constitutional merits—the claim was not before it ...." (Doc. # 73 at 147). After reviewing the record, this Court agrees. Therefore, Claim 11 is procedurally defaulted unless cause exists to excuse the default. To demonstrate cause, Halverson argues ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test ." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). Therefore, this Court must determine if Halverson's appellate counsel was ineffective for not raising Claim 11, which requires it to conduct a *de novo* review of Claim 11's merits. *Willis,* 351 F.3d at 745; *Werth,* 692 F.3d at 493. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

B. Analysis

A court faced with a due process challenge to the sufficiency of the evidence asks whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). This standard is applied " 'with explicit reference to the substantive elements of the criminal offense as defined by state law.' " *Brown v. Palmer,* 441 F.3d 347, 351 (6th Cir.2006) (quoting *Jackson,* 443 U.S. at 324 n. 16).

***42** The jury convicted Halverson for Durrum and Greene's murders under a combination principal-accomplice instruction; the jury convicted Halverson for Greene's murder under an accomplice instruction. (TR 296–97). Halverson argues that while the state put on sufficient evidence that he was a principal in Durrum and Greene's murders, no evidence supported a finding that he acted as an accomplice to any of the murders. (Doc. # 25 at 158). The Kentucky Supreme Court stated the following about the evidence on accomplice liability:

> The nature of the evidence of Willoughby and Halvorsen's participation in the killing of the victims, in our opinion, amply supports either [a principal or accomplice] instruction. The death penalty was imposed for the murders of Greene and Durrum. These victims were shot eight and five times, respectively; three wounds on each were characterized as lethal. Two pistols of different caliber were involved. Greene had two wounds from a .38 Special and two wounds from a 9–millimeter characterized as fatal. Durrum had a fatal wound from a .38 Special and one from a 9–millimeter. Another fatal wound could not be identified as to the caliber of the gun. Thus it was impossible to determine that either appellant was only a principal or only an accomplice. The instruction conformed to the evidence.

Halverson, 730 S.W.2d at 925.

To determine whether there is sufficient evidence that Halverson was an accomplice to murder, the Court must examine both Kentucky's accomplice liability and murder statutes. Kentucky's accomplice liability statute, K.R.S. § 502.020, states:

> 1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
>
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
>
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
>
> (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Kentucky's murder statute, K.R.S. § 507.020, requires the state to prove, in relevant part, that a defendant intentionally caused the death of another person. Because "a person is presumed to intend the logical and probable consequences of his actions," his state of mind "may be inferred from actions preceding and following the charged offense." *Id.* (quoting *Parker v. Commonwealth,* 952 S.W.2d 209, 212 (Ky.1997)).

***43** The Commonwealth presented abundant evidence from which a rational trier of fact could have concluded that Halverson aided Willoughby with the intent to cause Greene, Durrum and Norman's deaths. Hutchens testified to the following: that she helped Halverson buy ammunition for his gun on the day of the shootings (TE 1736); that Halverson was holding a .38 caliber handgun when the shooting stopped (TE 1745–46); and that Halverson helped Willoughby drag the victims' bodies out of the house (TE 1749). Tucker testified that on the day of the murders Halverson admitted to killing three people. (TE 1699). Bullets from both Halverson and Willoughby's gun caused fatal injuries to Durrum and Greene. *Halverson,* 730 S.W.2d at 925; (TE 1525, 1554). Yet, there was no direct evidence as to who delivered the fatal shot to any of the victims.

Halverson is incorrect in arguing that because there is evidence that he shot Durrum and Green, the jury could not convict him as an accomplice in their deaths. To convict Halverson of accomplice liability for Durrum and Greene's murders, the state simply had to prove that Halverson aided Willoughby in intentionally causing their deaths and that either Halverson or Willoughby fired the fatal shot. *See Commonwealth v. Wolford,* 4 S.W.3d 534, 540 (Ky.1999) (holding that for an instruction under KRS § 502.020 to be appropriate "[a]ll that is required is that the appellees agreed to act in concert to achieve a particular objective and that at least one of them fired the fatal shots."); *Gill,* 7 S.W.3d at 368–69 (noting that under an accomplice instruction, "the jury's verdict does not turn on who struck the actual fatal blow. When two like-minded souls conspire to set a fire, it does not matter who throws the gasoline and who strikes the match."). The evidence that Halverson was holding a .38 caliber handgun during the shooting and helped Willoughby drag the bodies out of the house was sufficient for a "rational tried of fact" to find Halverson guilty as an accomplice to all three murders. *Jackson,* 443 U.S. at 319. Halverson's decision to increase his level of participation by firing fatal shots at Durrum and Greene does not shield him from accomplice liability.

Because there was overwhelming evidence that Halverson acted as an accomplice to all three murders, his appellate counsel was not unreasonable in failing to raise this claim on appeal. Further, there is not a reasonably probability that Halverson would have prevailed if his appellate counsel had raised the claim. Therefore, Halverson has not demonstrated ineffective assistance of appellate counsel. *See Smith,* 528 U.S. at 285–86. As a result, he has not established cause for failing to raise Claim 11 in state court. Accordingly, Claim 11 is denied.

Claim 12—Ineffective assistance of appellate counsel

Halverson argues that his appellate counsel was ineffective for not raising the arguments presented in Claims 5, 6, 8, 10 and 11 in this petition. However, this Court has already determined that Halverson's appellate counsel raised Claims 6, 8 and 10 on direct appeal. *Supra* Part IV, Claims 6, 8 and 10. The Court's conclusion that appellate counsel raised those claims obviates Halverson's argument that appellate counsel was ineffective for *not* raising them. Furthermore, this Court has already held under *de novo* review that Halverson's counsel was not ineffective for not raising Claims 5 and 11. In Claim 5 the Court held that appellate counsel was not ineffective for deciding not to argue that the state failed to put Halverson on notice of the charges against him. *Supra,* Part IV, Claim 5. And in Claim 11, the Court held that appellate counsel was not ineffective for deciding not to argue that there was

insufficient evidence of accomplice liability. *Supra,* Part IV, Claim 11. In light of these conclusions, Claim 12 is denied.

Claim 13—Insanity defense

***44** Halverson argues that he was denied due process because he was insane at the time of the crimes. He points to evidence that he suffers from addiction and states that due to his addiction, he was involuntarily intoxicated when he committed the murders. Halverson asserts that this involuntary intoxication is sufficient to support an insanity defense. Because there was no evidence before that jury that Halverson was insane at the time of the crimes, Claim 13 is denied.

A. Procedural default

The Warden argues that this claim is procedurally defaulted because Halverson did not raise it in state court. Although Halverson does not cite any of his state court briefs raising the insanity issue, he argues that this claim is not procedurally defaulted because the state court addressed it on its own. To support that argument, Halverson points to the Kentucky Supreme Court's decision on Halverson's CR 11.42 motion. In that decision, the Kentucky Supreme Court considered whether Halverson's trial counsel was ineffective for failing to obtain an independent expert psychologist. *Halverson,* 258 S.W.3d at 6. In holding that Halverson's counsel was not ineffective, the Kentucky Supreme Court stated "[i]n the instant case, the evidence presented at the RCr 11 .42 hearing, summarized above, is wholly insufficient to have raised an issue concerning [Halverson's] sanity." *Id.* at 7.

To seek habeas relief on a federal claim, a petitioner must first have exhausted state remedies by presenting the claim to the state courts. *Pudelski v. Wilson,* 576 F.3d 595, 605 (6th Cir.2009). If the petitioner did not present the claim to the state courts, it is procedurally defaulted. *Martin v. Mitchell,* 280 F.3d 594, 603 (6th Cir.2002). The failure to present the claim in state court is excused, however, when the state court decides *sua sponte* to address the claim on its merits. *See Schad v. Arizona,* 501 U.S. 624, 630 fn. 2 (1991); *Jones v. Dretke,* 375 F.3d 352, 354 (5th Cir.2004) (citation omitted). This exception is based on AEDPA's policy that States have " 'an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Jones,* 375 F.3d at 354–55 (quoting *Picard,* 404 U.S. at 275).

The Court agrees that, although Halverson did not raise the issue, the Kentucky Supreme Court addressed whether he was insane at the time of the murders. In its analysis, the court determined that Halverson's counsel was not ineffective for failing to obtain an independent expert psychologist. *Halverson,* 258 S.W.3d at 6–8. In making that determination, the court held that Halverson's case was distinguishable from *Ake v. Oklahoma,* 470 U.S. 68 (1985). *Halverson,* 258 S.W.3d at 6–8. In *Ake,* the U.S. Supreme Court ruled that when an indigent defendant makes a preliminary showing of insanity at the time of the offense, the constitution requires that the state provide a psychiatric's assistance. 470 U.S. at 74. The Kentucky Supreme Court held that *Ake* was inapplicable because there was insufficient evidence to "raise [ ] an issue concerning [Halverson's] sanity." *Halverson,* 258 S.W.3d at 7. Thus, in distinguishing *Ake,* the Kentucky Supreme Court addressed on the merits Halverson's sanity at the time of the murders. Therefore, this claim is not procedurally defaulted. Because it was addressed on the merits, AEDPA deference applies.

B. Applicable law

***45** With the insanity defense there is no "baseline for due process ... the insanity rule ... is substantially open to state choice." *Clark v. Arizona,* 548 U.S. 735, 752 (2006). Under Kentucky law "the jury ... is the final arbiter of the ultimate question of the defendant's sanity (or insanity)." *Cannon v. Commonwealth,* 777 S.W.2d 591, 593 (Ky.1989) (citing *Tunget v. Commonwealth,* 198 S.W.2d 785 (Ky.1947)). To establish insanity, a defendant must "prove to the satisfaction of the jury that at the time the offense was committed, as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Edwards v. Commonwealth,* 554 S.W.2d 380, 383 (Ky.1977) (citing K.R.S. § 504.020).

C. Analysis

Halverson argues that he was insane under Kentucky law because he was involuntarily intoxicated at the time of the murders. To demonstrate that he was involuntarily intoxicated at the time of the murders, Halverson cites to a 2002 report prepared by Dr. E. Don Nelson, who

opined that "Mr. Halverson was under the influence of cocaine, valium, alcohol, marijuana, Tussinoex, and Demerol at the time of the shooting." (TR 1273). To support his argument that being involuntarily intoxicated renders one insane, Halverson cites to K.R.S. § 501.080(2), which states that involuntary intoxication can be a defense to a criminal charge. Halverson also cites *Prather v. Commonwealth,* in which the Kentucky Supreme Court held that it is improper to instruct a jury that it cannot find a defendant insane based on a voluntary drug addiction. 287 S.W. 559, 560 (Ky.1926).

None of the above-mentioned arguments support Halverson's claim. Under Kentucky law, the jury determines whether an individual is insane during the commission of an offense. *Cannon,* 777 S.W.2d at 593. Dr. Nelson's 2002 report was not available to the jury. Therefore, it cannot be used by Halverson to support his argument that the jury should have found him insane. Further, Kentucky's involuntary intoxication defense is of no help to Halverson. The jury instructions informed the jury that they could find Halverson guilty of murder only if they found that he "was *not so intoxicated* that by reason of his intoxication he did not have the intention to cause Norman, Durrum, and/or Greene's deaths." (Instructions 3, 9, 16). By finding Halverson guilty of all three murders, the jury made an explicit finding that Halverson was not so intoxicated that he lacked the requisite intent. Finally, *Prather* does not support Halverson's claim. *Prather* held that it is improper to instruct a jury that it cannot find a person insane based on a voluntary drug addiction. 287 S.W. 559 at 560. Halverson's jury never received an insanity instruction; thus, *Prather* does not apply.

Other than testimony concerning Halverson's drug use, there is no evidence in the *trial record* upon which the jury could have found that Halverson was insane at the time of the murders. Therefore, the Kentucky Supreme Court was reasonable in concluding that there was insufficient evidence of insanity. Accordingly, Claim 13 is denied.

Claim 14—Ineffective assistance of counsel at the guilt phase

***46** Halverson also claims that he received ineffective assistance of counsel at the guilt phase. He asserts that his trial counsel's performance was deficient for five reasons: (1) he failed to conduct an adequate investigation; (2) he put on an objectively unreasonable defense; (3) he failed to educate himself before deciding not to retain experts to evaluate Halverson's potential insanity or diminished capacity; (4) he undermined his own defense by eliciting testimony that Halverson shot the victims; and (5) he failed to follow through with his chosen defense. (Doc. # 25 at 196). Halverson has not demonstrated ineffective assistance of counsel with respect to the his counsel's investigation and defense. The rest of the arguments are procedurally defaulted. Accordingly, Claim 14 is denied.

A. Applicable law

To prevail on an ineffective assistance of counsel claim, a convicted defendant must set forth facts to satisfy a two-part test: (1) counsel's performance was objectively unreasonable, and (2) counsel's unreasonable performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. Under the first prong, courts apply a " 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington,* 131 S.Ct. at 787 (quoting *Strickland,* 466 U.S. at 688). Under the second prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. An individual has been prejudiced when his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart,* 506 U.S. at 369 (quoting *Strickland,* 466 U.S. at 687).

In a habeas petition, establishing ineffective assistance of counsel is "all the more difficult." *Harrington,* 131 S.Ct. at 787. In *Harrington,* the Supreme Court emphasized the highly deferential standard for analyzing an ineffective assistance claim on habeas review:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts guard against the danger of

> equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's action were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (internal quotations omitted).

B. Analysis

1. Failure to conduct an adequate investigation

Halverson argues that his trial counsel was ineffective for failing to investigate possible mental health and lesser culpability defenses. Specifically, he argues that trial counsel failed to speak to his sister, friends and coworkers; to retain sufficient experts; and to obtain his mental health and medical treatment records. Halverson asserts that an adequate investigation would have better developed the defenses of EED, duress, insanity and the inability to form the intent for murder.

a. State court decision

***47** Halverson raised the issue of his counsel's investigation in his CR 11.42 motion. (Brief for Appellant, 04–SC–17 at 7). The Kentucky Supreme Court addressed the prejudice prong of Halverson's argument, stating that Halverson "failed to show that any omitted investigation would have probably changed the result." *Halverson,* 258 S.W.3d at 3–4. Because the Kentucky Supreme Court adjudicated on the merits whether Halverson's counsel's investigation prejudiced him, that prong will be addressed under *Strickland* and AEDPA's deferential review.

In concluding Halverson's trial counsel's investigation did not prejudice Halverson, the Kentucky Supreme Court provided a thorough analysis:

> We first examine the RCr 11.42 testimony in the context of evidence of extreme emotional disturbance. At the time of Appellant's crimes, Kentucky law regarding extreme emotional disturbance was still in its infancy and largely undefined. Our subsequent refinement of EED jurisprudence has narrowed the circumstances which may establish EED. However, Appellant failed to present any evidence at his RCr 11.42 hearing that would have supported a finding of EED even under our earliest and most expansive interpretation of EED.
>
> Specifically, Appellant's parents, who had testified at trial, also testified at the post-conviction hearing. However, with the exception of Appellant's sister, a psychologist, and a therapist in an outpatient drug rehabilitation program, the additional witnesses who testified at the post-conviction hearing were either former co-workers or casual acquaintances, most of whom had encountered Appellant in drug-related interactions. The substance of these witnesses' testimony was cumulative and demonstrated only that after Appellant's marriage ended, he became depressed and began a downward spiral into heavy drug abuse.
>
> Oscar "Clark" Hessell testified to Appellant's increased drug usage after his divorce. Henry Mazyck, another co-worker testified to a drastic change in Leif's character after his divorce. Buford Disponette testified that Appellant did contract work for him several years before the murders and that Appellant changed when he began doing hard drugs after his divorce. Appellant's sister, Debra Mauldin testified that Appellant became depressed when his marriage failed and he began heavy drug usage, and Susan Craft, Appellant's ex-wife, gave similar testimony.
>
> Additional witnesses who testified at Appellant's 11.42 hearing were Dr. Eric Drogin, a psychologist and Edwin Hackney, a therapist in the Comprehensive Care Center's outpatient drug rehabilitation program. Dr. Drogin had never met Appellant and gave general testimony regarding potential avenues that should be explored to support mitigation for a defendant with a history of drug abuse. Hackney testified that Appellant had been diagnosed with substance and alcohol abuse as well as with an anti-social personality disorder while in his drug rehabilitation program, but that his treatment was terminated at the end of 1982 due to Appellant's failure to have contact with the agency since July of 1982.
>
> ***48** Appellant's depression over his divorce and his increased drug usage were brought out at trial through the testimony of Appellant's father, a former co-worker, Jeff Luce, and through cross-examination of witnesses for the Commonwealth. Additionally,

Appellant's father had testified to a recent hospital stay resulting from Appellant's drug use and to the fact that Appellant had lost his job a couple of weeks before the murders. Trial counsel introduced some of Appellant's medical records and employment records through this witness. Even assuming deficient performance by trial counsel, Appellant has not shown any prejudice. Failure to identify additional witnesses to present cumulative testimony cannot be regarded as prejudicial.

Likewise, an examination of the RCr 11.42 testimony concerning duress reveals no additional evidence that could have been presented at trial. The only RCr 11.42 testimony that even remotely relates to duress was the testimony of Darrell Bachtelle, a former co-worker, Susan Craft, Appellant's ex-wife, and Appellant himself. Bachtelle merely testified that Appellant began to change when he started hanging out with Mitchell Willoughby. Craft testified that Appellant was easily manipulated. However, Appellant, himself, testified at the penalty phase of trial that he was frightened of Willoughby and that he was acting under Willoughby's influence at the time of the murders. So, again, no additional evidence was unearthed in the RCr 11.42 proceeding that that would have supported a finding of duress. Nevertheless, Appellant argues that trial counsel should have raised the issue of Willoughby's influence over him at the guilt/innocence phase as opposed to the penalty phase. Trial counsel testified, however, that he did discuss this possibility with Appellant, but the only way to elicit this evidence was from Appellant himself. Trial counsel testified that a strategic choice was made to keep Appellant off the stand, inter alia, so that he could argue innocence based on the fact that no one actually witnessed Appellant discharge a firearm. Furthermore, Willoughby made statements taking all the responsibility for the shootings. As such, Appellant has not overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Duress is not a defense to intentional murder nor is it an available defense for one who intentionally or wantonly placed himself in a situation in which it was probable that he would be subjected to coercion. Therefore, eliciting evidence of duress at the penalty phase as opposed to the guilt/innocence phase was reasonable trial strategy.

It is true that an abundance of testimony was offered at the RCr 11.42 hearing regarding Appellant's drug use. Darrell Bachtelle testified that he worked with Appellant for about two years and could not recall a time that Appellant was not under the influence of intoxicants. Clark Hessell testified that he had observed Appellant ingesting drugs including downers, Quaaludes and cocaine. Steve Meadows was a childhood friend of Appellant's who testified that when he would occasionally run into Appellant it was obvious that Appellant was on drugs. Appellant's friend, Lee Story, testified that he had witnessed Appellant smoke marijuana and inject various drugs. In addition to this testimony concerning Appellant's general drug usage, two witnesses testified that they had seen Appellant in a state of drug intoxication as recently as two weeks prior to the murders. Buford Disponette also saw Appellant three or four days before the murders, but gave no specific testimony regarding Appellant's state of mind or appearance. Finally, an acquaintance, Matthew Estepp, testified that he had seen both Appellant and his co-defendant Willoughby earlier the same day of the murders. Estepp stated that he saw Appellant inject liquid morphine and melted Demerol and that Estepp had purchased and injected morphine that day as well. While Estepp's testimony would have been relevant evidence of Appellant's intoxication the day of the murders, it was cumulative of testimony that was presented at trial. At trial, Willoughby testified to the drugs that he and Appellant had used the day in question. Accordingly, Appellant has not demonstrated that he was prejudiced by the failure to put on additional drug abuse evidence.

***49** *Halvorsen,* 258 S.W.3d at 4–6.

b. Analysis

Halverson argues that his counsel should have called additional witnesses, including his sister, co-workers, and friends, because they could have testified as to Halverson's drug abuse and therefore aided in establishing either an insanity defense or a defense that Halverson could not form the *mens rea* for murder. Several witnesses testified at trial about Halverson's drug use. Jeffrey Luce, a witness who had known Halverson since the fifth grade, testified that he was with Halverson a few hours before the murder and stated that Halverson's demeanor was "funny ... like something was wrong with him," and that Halverson "seemed kind of spacy ... like he wasn't comprehending very quick." (TE 2134–35). Willoughy testified extensively about Halverson's drug use prior to and on the day of

the murders. He testified that he was doing drugs with Halverson "pretty heavy" in the month leading up to the murders; that during that month Halverson had used demerol, morphine, cocaine, acid, and quaaludes; that the drug use picked up a few weeks before the murder; and that on the day of the murders he and Halverson had used alcohol, marijuana and cocaine. (TE 1922–45, 1960). Hutchens testified that she was doing drugs with Halverson nearly every day, and that on the day of the murders Halverson had been drinking a clear liquid and had purchased a bottle of whiskey. (TE 1728, 1756, 1770).

As the Kentucky Supreme Court recognized, the additional witnesses Halverson suggests his counsel should have called would have merely provided cumulative testimony of Halverson's drug use. *Halverson,* S.W.3d at 4. Failing to put on this cumulative evidence did not render the trial fundamentally unfair and it is not probable that doing so would have changed the result; therefore, counsel's decision not call these additional witnesses did not prejudice Halverson. *See Wong v. Belmontes,* 558 U.S. 15, 22–23 (2009) (holding that a habeas petitioner did not prove his counsel's investigation prejudiced him because, in part, the evidence the petitioner pointed to was "cumulative" and "would have offered an insignificant benefit, if any at all.") Because counsel's decision not to call additional witnesses did not prejudice Halverson, this Court does not need to review whether that decision was unreasonable. *See Allen,* 497 Fed. Appx. at 481.

Halverson further suggests that his counsel should have sought additional expert assistance because doing so would have helped developed the defenses of EED, duress and insanity. With respect to this claim, the Kentucky Supreme Court held that trial counsel acted reasonably. *Halverson,* 258 S.W.3d at 7 ("We fail to discern how the[ ] facts should have reasonably alerted trial counsel of the need for additional experts."). Reviewing that holding under the deferential standard of *Strickland* and AEDPA, the Court finds that Halverson has failed to show that his attorney was deficient in consulting experts. Halverson's counsel relied on a state-appointed expert, Dr. Schwartz, who was Halverson's physician and found him competent to stand trial. *Halverson,* 258 S.W.3d at 7. Dr. Schwartz provided the following evaluation of Halverson in his competency report:

> ***50** During my examination ... Mr. Halverson was tense, mildly depressed, and subdued. He was alert, in contact with reality, and fully oriented and showed no disturbances of behavior. There was no evidence of cognitive or perceptual dysfunction. His intellectual capacity was estimated at bright normal.

(TR 77). As the Kentucky Supreme Court noted, "[t]rial counsel testified that he relied on Dr. Schwartz's competency evaluation and simply did not believe that Dr. Schwartz's report suggested the need for any further evaluation." *Halverson,* 258 S.W.3d at 6. Counsel's decision to rely on Dr. Schwartz's testimony provides a "reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington,* 131 S.Ct. at 788. Therefore, the Kentucky Supreme Court's conclusion that Halverson's counsel was not deficient withstands AEDPA review.

Even if counsel was unreasonable for not consulting with further experts, Halverson has not established that the Kentucky Supreme Court was unreasonable in holding that he "failed to demonstrate any prejudice from the lack of additional experts at trial...." *Halverson,* 258 S.W.3d at 7. Halverson has not shown how the help of additional experts would have resulted in a reasonable probability of success on the defenses of EED, duress, intoxication and insanity. With respect to EED, the only two witnesses who were with Halverson during the shooting (Willoughby and Hutchens) testified at trial, and they presented little to no testimony upon which a jury could have found that Halverson was acting under EED. Willoughby testified that Norman pointed a bayonet at him, but he did not testify that Halverson was threatened. Further, Halverson did not testify at to his state of mind during the shooting. Because there was no EED evidence, presenting experts on EED would have been merely academic. *See Halverson,* 258 S.W.3d at 10 ("It was not ineffective assistance of counsel for trial counsel to refrain from requesting an EED instruction based not only on the evidence, but also on the law.") Duress was inapplicable because it is not a defense to intentional murder. *Halverson,* 258 S.W.3d at

6 (citing K.R.S. § 501.090, in stating that "[t]he defense [of duress] is unavailable if the defendant intentionally or wantonly placed himself if a situation in which it was probable that he would be subjected to coercion."). Finally, with respect to intoxication and insanity because of intoxication, three witnesses testified as to Halverson's drug use and demeanor on the day of the murders. Yet, the jury's verdict found that Halverson "was *not so intoxicated* that by reason of his intoxication he did not have the intention to cause [the victims'] deaths." (Instructions 3, 9, 16). It is unlikely that additional cumulative evidence on this issue would have changed that result or been helpful. Because Halverson has not demonstrated ineffective assistance of counsel for failure to investigate possible defenses, this part of Claim 14 is denied.

2. Counsel's defense

***51** Halverson argues that his counsel put on an objectively unreasonable defense. Specifically, he suggests that it was objectively unreasonable for his counsel to argue that he did not shoot anyone. The Kentucky Supreme Court ruled that Halverson did not overcome the presumption that it was sound trial strategy for his counsel to argue innocence. *Halverson,* 258 S.W.3d at 5 (citing *Strickland,* 446 U.S. at 689). Because this *Strickland* claim was adjudicated on the merits, it receives deferential review. *Harrington,* 131 S.Ct. at 787.

Halverson's trial counsel made a strategic decision to argue that Halverson did not shoot anyone. *Halverson,* 258 S.W.3d at 5. As a result, he decided that Halverson should not take the stand. *Id*. This was reasonable because there was no eyewitness testimony that Halverson fired a gun. Hutchens testified that she did not see Halverson shoot anyone (TE 1797, 1818). In Willoughby's pre-trial statements he took the blame for the shootings (TE 1965), and at trial Willoughby testified that he was not sure if Halverson brought his gun with him to the murder scene (TE 2008). Willoughby further testified that the murders were not planned. (TE 1915, 1950). The question for this Court is not whether Halverson's counsel made the best decision, but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington,* 131 S.Ct. at 787. Because there was no eyewitness testimony that Halverson shot anyone, and because Willoughby made pretrial statements that he was solely responsible for the shootings, Halverson's counsel's decision to argue that Halverson did not shoot anyone was not objectively unreasonable. Because counsel's decision was not objectively unreasonable, this Court does not need to review whether it prejudiced Halverson. *See Allen,* 497 F. App'x at 481. Therefore, this part of Halverson's ineffective assistance of counsel claim is denied.

3. Remaining Claims

Halverson's remaining claims raise the following arguments concerning his trial counsel: (1) he failed to educate himself before deciding not to retain experts to evaluate Halverson's potential insanity or diminished capacity; (2) he undermined his own defense by eliciting testimony that Halverson shot the victims; and (3) he failed to follow through with his chosen defense. (Doc. # 25 at 196). Halverson has not pointed to anywhere in his briefs below where he raised these three arguments. The Warden correctly asserts that they are therefore procedurally defaulted. Halverson has not attempted to argue cause for the default. (*See* Doc. # 73 at 170). Therefore, these three claims will not be reviewed on the merits and are denied. *Williams,* 460 F.3d at 806 (holding that failing to present a claim in state court bars a federal court from reviewing that claim on habeas).

Claim 15—Other act evidence

Halverson argues that he was denied his due process right to a fair trial because the prosecution elicited bad acts testimony. Halverson points to Tucker and Hutchens's testimony that he threatened to kill his mother, as well as Hutchens's testimony that he stomped on his childrens' kitten. He also challenges the prosecutor asking Willoughby whether Tucker and Hutchens had reason to lie about Halverson's threat to his mother and the prosecutor's comment in closing about the threat. Because it was not unreasonable for the Kentucky Supreme Court to determine that this testimony did not deprive Halverson of a fair trial, Claim 15 is denied.

A. State court decision

***52** Halverson presented this claim to the Kentucky Supreme Court on direct appeal (Brief for Appellant, 84–SC–39 at 85–95). In addressing the argument, the court stated:

> [T]he testimony that Halvorsen took drugs and stamped on a kitten immediately after the killing was admissible, since it was incidental to relevant testimony in regard to Halvorsen's activities between the time of the killings and the time he and Willoughby left to get rid of the victims' bodies and other evidence of the crimes. Tucker's testimony about Halvorsen's statement that he would kill his mother arose out of, and was incidental to, relevant testimony regarding Halvorsen's admission to Tucker that he and Willoughby had killed three people. This assertion of error has no merit.

Halvorsen, 730 S.W.2d at 926. Halverson argues that the legal component of the claim should be reviewed *de novo* because in addressing the claim the Kentucky Supreme Court did not cite federal law. He further argues that because the Kentucky Supreme Court did not expressly address Hutchens's testimony about Halverson's threat, that part of this claim should be reviewed de novo. However, the United States Supreme Court has since rejected these arguments. *Johnson,* 133 S.Ct. at 1096. Halverson has not demonstrated the "unusual circumstances" needed to overcome the "strong" presumption that a federal claim denied by the state court has been adjudicated on the merits. *Id.* Thus, § 2254 deference applies.

B. Applicable law

A federal habeas court does not review whether evidence was introduced in violation of state law. *Estelle,* 502 U.S. at 67–68; *Coleman v. Mitchell,* 244 F.3d 533, 542 (6th Cir.2001) (holding that a habeas court does "not pass upon errors in the application of state law, especially rulings regarding the admission or exclusion of evidence."). State evidentiary rulings are reviewed by a federal habeas court only to determine if they "violate the petitioner's due process rights." *Coleman,* 244 F.3d at 542. An evidentiary ruling violates due process if it is "so egregious that it results in a denial of fundamental fairness." *Id.* A defendant is denied fundamental fairness when the admitted evidence is "material in the sense of a crucial, critical highly significant factor." *Brown v. O'Dea,* 227 F.3d 642, 645 (6th Cir.2000).

C. Analysis

Halverson cites to two pieces of testimony that deprived him of due process. First, he points to Tucker and Hutchens's testimony that Halverson threatened to kill his mother and the prosecutor's question to Willoughby whether he had heard Halverson say this. During her testimony, Tucker stated that when she stopped by Halverson's house on the day of the murders, she heard Halverson tell Hutchens that "he would kill [his mother] and throw her off the bridge." (TE 1701). Hutchens confirmed this during her testimony, by telling the jury that Halverson told her "I'll shoot [my mother] and throw her off the bridge." (TE 1768). The prosecutor then asked Willoughby several times whether he had heard Halverson threaten to kill his mother, to which Willoughby said he did not remember. (TE 2010–12). Second, Halverson references Hutchens's testimony that Halverson stomped on his daughter's kitten. (TE 1754–55). Both Halverson's threat that he would kill his mother and killing the kitten occurred in the time between the murders and Halverson's attempt to get rid of the victims' bodies by throwing them over a bridge. (TE 1754–55, 1768).

***53** It was not objectively unreasonable for the Kentucky Supreme Court to conclude that the testimony Halverson cites did not deprive Halverson of a fundamentally fair trial. Testimony that Halverson threatened his mother and stomped on a kitten was certainly damaging. But it was also relevant, as it concerned Halverson's conduct immediately after the murders and just prior to his attempt to coverup the crime. Even if the testimony was improper, it is unlikely that it had an impact on the jury's verdict. In light of the overwhelming evidence presented against Halverson, it was not unreasonable for the Kentucky Supreme Court to determine that the testimony Halverson cites in this claim was not a "crucial or critical factor in the jury's decision to convict" him. *Brown,* 227 F.3d at 642. Therefore, Claim 15 is denied.

Claim 16—Comment on Halverson not testifying

Halverson argues that the prosecutor violated his Fifth Amendment privilege against self-incrimination. To establish his self-incrimination claim, Halverson points to a number of questions the prosecutor asked Willoughby and suggests that the questions could be answered only if he took the stand. Halverson contends that these questions amounted to an indirect comment on his decision not to testify. Because a reasonable jury would not take these questions as comments on Halverson's decision not to testify, Claim 16 is denied.

A. State court decision

Halverson raised this issue on direct appeal. (Brief for Appellant, 84–SC–39 at 83–85). The Kentucky Supreme Court denied Halverson's claim, stating:

> Halvorsen complains that the prosecutor's questioning of his codefendant, Willoughby, made "oblique references" to his failure to testify and therefore constituted unfair comment on same. Willoughby was asked a number of questions about matters he had asked Halvorsen or about other witnesses' statements incriminating Halvorsen. Willoughby simply denied asking questions or could not remember. We do not consider these matters comment on failure to testify, particularly since at this stage of the trial Halvorsen had not elected to decline to take the witness stand.

Halvorsen, 730 S.W.2d at 925–26. Because this claim was presented to the Kentucky Supreme Court and adjudicated on the merits, AEDPA review applies.

B. Applicable law

The Fifth Amendment prohibits the prosecution from commenting on a defendant's decision not to testify. *Griffin v. California,* 380 U.S. 609, 615 (1965). This includes both direct and indirect comments. *Bagby v. Sowders,* 894 F.2d 792, 797 (6th Cir.1990). Indirect comment on a defendant's decision not to testify does not warrant automatic reversal. *Id.* Rather, reversal is warranted only when the indirect comments "were manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." *United States v. Hines,* 398 F.3d 713, 717 (6th Cir.2005) (quoting *Bagby,* 894 F.2d at 797–98).

C. Analysis

***54** Halverson takes issue with the prosecutor's following questions: (1) whether Willoughby talked with Halverson about Hutchens's testimony that Halverson threatened his mother (TE 2011–12); (2) whether Willoughby asked Halverson why he had six .38 caliber shells in his pocket when he was arrested (TE 2017); (3) whether Halverson told Willoughby that he appreciated the statement that Willoughby gave to the police (TE 2017); (4) whether Halverson spoke with Willoughby about Tucker's testimony (TE 2019); and (5) whether Willoughby ever asked Halverson why he shot Greene four times (TE 2019). Halverson argues that these questions amounted to indirect comment on his decision not to testify because only he could have provided the answers to these questions.

Halverson contends that the Kentucky's Supreme Court's resolution of this issue was an unreasonable application of clearly established law. He supports that argument by pointing to two parts of the court's analysis: (1) the court's reference to the fact that Halverson had not yet taken the stand; and (2) the court's noting that Willoughby either denied asking Halverson questions or said he could not remember asking them. *Halverson,* 730 S.W.2d at 925–26. Halverson makes it seem as if these were the sole reasons the Kentucky Supreme Court denied his claim. However, Halverson ignores the court's conclusion that "[w]e do not consider these matters comment on failure to testify...." *Id.* at 926. Thus, the Kentucky Supreme Court applied the correct Fifth Amendment standard: if the prosecutor's questions were not comment on Halverson's failure to testify, there was no Fifth Amendment violation.

The Kentucky Supreme Court was reasonable in determining that the prosecutor's questions were not "manifestly intended by the prosecutor as a comment on Halverson's decision not to testify." *See Bagby,* 894 F.2d at 798. It appears that the prosecutor's

questions were asked in an effort to either impeach Willoughby or establish Halverson's guilt. Willoughby testified that he did not remember whether Halverson had threatened to kill his mother. (TE 2011–12). The prosecutor pressed Willoughby on this point by asking him if he had talked to Halverson about Hutchens and Tucker's testimony that Halverson did make the threat. (TE 2019). Willoughby's answer could have impeached him by demonstrating that he did remember Halverson making the threat. The prosecutor's remaining questions were all asked after Willoughby admitted that he had exchanged letters with Halverson prior to trial. (TE 2016–17). These questions concerned whether Halverson had talked with Willoughby about the following: why Halverson was carrying .38 caliber bullets when he was arrested, whether Halverson appreciated Willoughby's statement to the police, and why Halverson shot Greene four times. Willoughby's potential answers could have been strong evidence of Halverson's guilt, as they would have constituted admissions by Halverson. Therefore, it does not appear the prosecutor asked them with the intent to comment on Halverson's decision not to testify. Because the Kentucky Supreme Court reasonably concluded that the prosecutor's questions did not violate Halverson's right against self-incrimination, Claim 16 is denied.

Claim 17—Sentencing phase closing arguments

***55** In Claim 17, Halverson argues that the prosecutor made comments during the sentencing phase that deprived him of due process. Specifically, Halverson challenges the prosecutor's closing statement on six grounds: (1) it incited the passions and prejudices of the jury; (2) it suggested that Halverson would have killed anyone who had been present at the scene; (3) it urged the jury to consider religion; (4) it criticized Halverson for exercising his constitutional rights; (5) it made victim impact arguments that were not based on the evidence; and (6) it told the jury that Halverson showed no remorse.

Halverson raised all of these claims, except claims three and four, on direct appeal. (Brief for Appellant, 84–SC–39 at 139–64). The Kentucky Supreme Court denied the claims, holding:

> Both Halvorsen and Willoughby complain that repeated misconduct by the prosecutor during the penalty phase closing argument deprived them of a fair trial. Our examination of the closing argument has convinced us that this complaint is without merit. Brief portions of the argument were irrelevant but on the whole, the argument was fair comment on the evidence.
>
> Considering the overwhelming nature of the evidence against Halvorsen and Willoughby, including their own admissions, we quote from *Timmons v. Commonwealth,* 555 S.W.2d 234, 241 (Ky.1977), which concluded:
>
> > We do not think that the prosecutor's argument exceeded the bounds of propriety, nor do we think that it could have added much fuel to the fire anyway.
>
> The same comment applies here.

Halvorsen, 730 S.W.2d at 925.

Halverson argues that § 2254 does not apply because there is no indication that the Kentucky Supreme Court addressed the federal claim. However, the United States Supreme Court rejected this argument in *Johnson v. Williams,* holding that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." 133 S.Ct. at 1096. To overcome this presumption, Halverson simply argues that the Kentucky Supreme Court did not cite federal law in its decision. That is insufficient to surmount the "strong" presumption required by *Johnson,* which can be overcome only in "unusual circumstances." *See id.* at 1096. Therefore, AEDPA deference applies to this claim.

A. Applicable law

A prosecutor's comments do not infringe on a defendant's constitutional rights even if they are "undesirable or even universally condemned." *Darden,* 477 U.S. at 18. Rather, they must "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly,* 416 U .S. at 643. When a defendant challenges a prosecutor's statements made during the sentencing phase, the Court must consider those statements against any attendant aggravating and mitigating circumstances. *Bates,* 402 F.3d at 648. Sentencing phase comments deprive a defendant of due process when they are "so egregious that they effectively 'foreclos[e] the jury's consideration of ... mitigating evidence.' " *Id.* at 649 (quoting *DePew v. Anderson,* 311 F.3d 742, 748 (6th Cir.2002)).

*56 When a defendant argues that a prosecutor's comments during the sentencing phase deprived him of due process, the issue is "whether the constitutional error influenced the jury's decision between life and death." *Bates*, 402 F.3d at 641. The Sixth Circuit uses a two-part test to determine whether a prosecutor's comments deprived a defendant of due process. *Moore v. Mitchell*, 708 F.3d 760, 799 (6th Cir.2013). First, a court determines whether the comments were improper. *Id.* To do so, the court must view the comments in context. *See Beverly* 369 F.3d at 543. If improper, a court must then consider the following four factors to decide whether the comments were flagrant: "(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the petitioner, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally made, and (4) the total strength of the evidence against the defendant." *Id.* (quoting *Bates*, 402 F.3d at 641). The flagrancy inquiry requires the court to consider the cumulative effect of all improper comments. *Young*, 470 U.S. at 11.

B. Analysis

The Court will address each of Halverson's arguments in turn, analyzing whether the Kentucky Supreme Court was objectively unreasonable in concluding that the comments were not improper; and if necessary, whether the court was objectively unreasonable in holding that the comments were not flagrant. For those claims not raised below, the Court will determine whether cause exists for the procedural default.

1. Inciting the passion and prejudice of the jury

A prosecutor cannot make statements designed to "incite the passions and prejudice of the jurors." *Gall v. Parker*, 231 F.3d 265, 315 (6th Cir.2000). According to Halverson, the prosecutor's following comments during his sentencing phase closing argument impermissibly incited the jury's passion and prejudice: (1) telling the jury they must send a message to the community, (2) telling the jury that the death penalty is necessary to deter others, (3) invoking the names of mass murderers, (4) suggesting Halverson would kill inmates or prison guards if sentenced to less than death, and (5) arguing Halverson could not be rehabilitated. The statement Halverson challenges is below:

What they don't realize is that the Kentucky State Penitentiary in Eddyville is a city within a few acres, and you're not taking the person out of this world with a life sentence.

What should we expect of an individual who has committed a ghastly act of murder and is sentenced to life? What do you expect? Do you think that he's suddenly rehabilitated upon entry into the penitentiary? He's transformed? You think that happens? Do you think that he miraculously loses his rage or his callousness and he grasps the concept somewhere in this time period that the human life is the most precious thing on earth?

I wonder if the anti-death penalty people have ever really considered—ever really considered the welfare of hundreds of thousands of people who are subject to the risk of convicted murderers. Is the inmate population safe? The young man convicted of burglary or larceny, theft, who goes to the penitentiary, is he safe? What prevents a convicted murderer with a life sentence from getting a shiv and holding it to the kid's neck, the young burglar's neck, and demanding escape? What prevents that?

*57 Well, that's easy to say—the answer, segregation from prison population. Well that's fine, but what about the prison officials, people like George Coons, people who have to handle the murderer with the multiple life sentence? That's a reality. That's in the real world. Every second every person who is in this capacity of watching, of being in control, has to have a razor sharp sense of awareness in a penitentiary, because their lawness can be the opportunity, the chance, for the convicted murdered to effect his escape. That's reality.

And his bargaining power, the throat of an innocent person whose job it is just to maintain the person. Well, our response to that person in the penitentiary, don't kill him now, Frank, because if you do we're going to give you a life sentence. Is that a deterrent to a person who's been convicted of murder, with a life sentence, multiple murders? Well I suggest to you that the death penalty is needed, much needed deterrent for the inmate population of our penal institution.

Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further

tragedy? Well, I hope you understand that it is. In the last few years, we saw Martin Luther King, the greatest black leader who ever lived, gunned down; the person caught, arrested, tried, convicted, sentenced and placed in the extremely tight security of the Tennessee maximum prison in Brushy Mountains, and he escaped, and thank God he broke his ankle when he jumped down and he was gone for three days but they finally caught him.

As to the future threat of the convicted murderer to society, Gary Gilmore will never kill another college student, ever. Can the Illinois authorities guarantee that for Richard Speck? Can California authorities guarantee that about Charles Manson?

> Kentucky citizens, ladies and gentlemen of the jury, have a right to be protected from any person who kills innocent people for no reason. They have a right to be guaranteed—guaranteed that a convicted murderer under our law will never kill again. That's not murder. That's protection of society.

Do we want to say to this community that with a verdict of a life sentence that it's less serious because they were on drugs? I don't think so. Do we want to establish a standard with a verdict that taking the lives of three human beings is less serious because a person consumes drugs and alcohol?

Understand that by your verdict you are going to set a standard as to when the death penalty should be recommended to a judge.

By your verdict, do you want to set—or do you want to establish a standard whereby the value of a person's life is rendered meaningless because they took a Valium? Or because they had a stolen ring, if it was? Or because he was not kind to an employee? Do you want that standard set?

Do you want to set a standard with your verdict that the death penalty is appropriate only if the victims are rich and powerful or influential?

***58** Well do you want to establish a standard in this community that you can murder three people in cold blood and have no legitimate fear of the death penalty? Do we want that standard in Lexington? A life sentence in this case tells these defendants and potential defendants that you're safe if you limit your victims to three. Well where do you draw the line in Fayette County? Is it at five, four, five, six victims before the death penalty is appropriate.

Do we want to set a standard in this community where a murderer risks no greater penalty for killing an innocent witness than he risks by killing his first and second victims? Do we want that standard?

(TE 2533–37, 2550, 2558–60).

First, the Court addresses Halverson's argument that the prosecutor impermissibly told the jury that they needed to send a message and that the death penalty is necessary for deterrence. Sixth Circuit case law illustrates the permissible bounds for a prosecutor's comments regarding the death sentence and deterrence. In three cases, the Sixth Circuit Court of Appeals held that the prosecutor's comments during closing were proper. *Irick v. Bell,* 565 F.3d 315 (6th Cir.2009); *Beuke v. Houk,* 537 F.3d 618 (6th Cir.2008); *Hicks v. Collins,* 384 F.3d 204 (6th Cir.2004). In *Irick,* the Sixth Circuit held that it was permissible for the prosecutor to tell the jury the following during closing:

> [W]ith your verdict, you make a statement about things whether you realize it or not. You will make a statement about the value of Paula's life. You will make a statement about what this man did and your willingness to tolerate it. You will make a statement to everybody else out there what is going to happen to people who do this sort of thing. Some of you may believe that punishment is a deterrence. Some of you may not. I don't know. I personally believe that it is.... [T]here comes a time in society when we have a right to defend ourselves. I suggest to you that it is more than a right to defend ourselves in this kind of a situation where there is a child involved. We have a duty to defend ... our families, and our homes and our children. That is what this case is about.

565 F.3d at 324–25. The Court held that the prosecutor's deterrence argument was proper because "[as of 1988], the United States Supreme Court had never held that appeals to general deterrence are impermissible in sentencing arguments." *Id.* at 325.

In *Bueke,* the court held that the prosecutor's statements were proper because they permissibly gave the jury "general background information on the death penalty and the need to punish guilty people." 537 F.3d at 647. The prosecutor "began his closing argument with broad statements about the death penalty in general, noting that 'our society will take a life' in order 'to let a message ring out' to '[c]riminals and potential criminals in this community [that] we won't tolerate this.' " *Id.* The prosecutor also told the jury that "the death penalty sends 'a message of justice[ ] to the law-abiding people in the community,' and '[t]he only way [the public] can be satisfied ... is if capital punishment is measured out.' " *Id.* In *Hicks,* the prosecutor told the jury during closing arguments that " 'it is time you sent a message to the community' and 'the people in the community have the right to expect that you will do your duty.' " 384 F.3d at 219. The court held that the prosecutor's statements "were arguably proper general references to the societal need to punish guilty people," and "were not misleading, inflammatory, or prejudicial." *Id.*

***59** In contrast to the above three cases, the Sixth Circuit held that a prosecutor's comments were "highly improper" in *Bates v. Bell.* 402 F.3d 635, 641 (6th Cir.2005). In *Bates,* the prosecutor told the jury that they would be "accomplice[s]" to murder if they did not vote for the death penalty. *Id.* at 642. The prosecutor assured the jury that "[i]f you, based on the law and the facts of this case, choose not to execute the defendant, you have passively issued a warrant of execution for someone else." *Id.* The prosecutor then went on to say "[p]lease don't put Wayne Lee Bates back in the general population of the prison of the State of Tennessee and allow him to escape and come out and execute someone else like he executed [the victim]." *Id.* at 643. The court held that by repeatedly telling "the jurors [they] would be responsible for ... murder[,]" and that by suggesting they would be "accomplices" to the defendant's future crimes, the prosecutor's conduct was improper. *Id.* at 644.

Under AEDPA deference, it was not unreasonable for the Kentucky Supreme Court to determine that the prosecutor's comments in this case were not improper. Unlike the prosecutor in *Bates,* the prosecutor in this case never told the jury they would be accomplices to murder if they didn't vote for the death penalty, nor did he mention Halverson by name or tell the jury that Halverson would escape and commit further murders. By appealing to a verdict's deterrent effect, the prosecutor's comments in this case are comparable to *Irick:* "[w]ell I suggest to you that the death penalty is needed, much needed deterrent for the inmate population of our penal institution." (TE 2533–35). And as in *Beuke* and *Hicks,* the prosecutor's comments at Halverson's trial referred to the jury's duty to impose the death sentence when proper: "Kentucky citizens, ladies and gentlemen of the jury, have a right to be protected from any person who kills innocent people for no reason. They have a right to be guaranteed —guaranteed that a convicted murderer under our law will never kill again. That's not murder. That's protection of society." (TE 2537). While the prosecutor's comments may have been undesirable, they did not "infect the trial with unfairness." *Donnelly,* 416 U.S. at 643. As the Sixth Circuit noted in *Irick,* "[before 1988], the United States Supreme Court had never held that appeals to general deterrence are impermissible in sentencing arguments." 565 F.3d at 325. Therefore, it was reasonable for the Kentucky Supreme Court to decide in 1986 that the prosecutor's comments in this case were not improper.

Halverson asserts that it was improper for the prosecutor to reference James Earl Ray, Richard Speck, Gary Gilmore and Charles Manson. In support of this argument, he points out that both the District of Columbia and the Eight Circuit Court of Appeals have held that it is improper to compare defendants to well-know mass murderers. *United States v. Phillips,* 476 F.2d 538, 538–39 (D.C.Cir.1973); *Newlon v. Armontrout,* 885 F.2d 1328 (8th Cir.1989). Halverson's argument fails for two reasons. First, neither of these cases are binding on this court and neither meets AEDPA's requirement of "clearly established" United States Supreme Court law. 28 U.S.C. § 2254. Second, the prosecutor never compared Halverson to Ray, Speck, Gilmore or Manson. Rather, he spoke about how not all of them received the death penalty and the impact that had on their ability to escape from prison. To be sure, the prosecutor never used Halverson's name during this section of his closing argument. Therefore, even if undesirable, using the above-mentioned names did not violate Halverson's due process rights.

*60 Halverson's final two arguments relate to the prosecutor's suggestion that Halverson could not be rehabilitated and would kill inmates or prison guards if sentenced to less than death. Again, the prosecutor never mentioned Halverson by name during this part of the closing. The prosecutor spoke generally about a convicted murderer's potential for violence in prison, as well as his incentive to escape. As Halverson states in his reply, "this entire speech applied equally to anyone convicted of murder. No attempt was made to tie it to Halverson's crimes or his drug abuse." (Doc. # 73 at 239). With respect to rehabilitation, the prosecutor posed a rhetorical question: whether the jury thought murderers are suddenly rehabilitated once they enter prison. (TE 2533). These comments provide permissible "general background information on the death penalty and the need to punish guilty people," that the Sixth Circuit wrote about in *Beuke.* 537 F.3d at 647.

Even assuming *arguendo* that the prosecutor's comments were improper, they were not so flagrant so as to deny due process. The comments spanned only a few paragraphs out of nearly forty pages in the closing argument transcript. Further, the heinous nature of Halverson's crime makes it unlikely that the prosecutor's comments "influenced the jury's decision between life and death." *Bates,* 402 F.3d. Halverson, along with Willoughby, was found guilty of killing three people, binding them with rope, and throwing their bodies over a bridge. Based on the abhorrent nature of the crime, even if the prosecutor's comments were improper, it was not objectively unreasonable for the Kentucky Supreme Court to hold that they were not flagrant.

2. Suggesting Halverson would have killed anyone at the scene

Halverson argues that the following statement made by the prosecutor violated his due process rights:

> But for the grace of God, there weren't any other witnesses, because Angie Greene could have been there, or Russell Durrum could have been there, or the friends of Jackie or Joey. They could have all been there. And how many victims would there have been? Do you think there would have been any spared?

(TE 2540). In support of this assertion, Halverson cites Sixth Circuit case law holding that it is improper for a prosecutor to express opinions having no basis in the record. *United States v. Francis,* 170 F.3d 546, 551 (6th Cir.1999); *Bates,* 402 F.3d at 644.

Halverson's argument fails because prosecutors have "leeway to argue reasonable inferences from the evidence." *Byrd v. Collins,* 209 F.3d 486, 535 (6th Cir.2000) (quoting *United States v. Collins,* 78 F.3d 1021, 1040 (6th Cir.1996)). The evidence at trial established that Halverson and his accomplices shot and killed all other persons present at the scene. There was then testimony at trial that Halverson threatened to kill his mother if she found out about the murder and that Halverson continued to carry his murder weapon. Thus, the evidence provided a reasonable inference that if more people were present at the murder scene, Halverson and Willoughby would have shot them as well. As a result, it was reasonable for the Kentucky Supreme Court to conclude that this statement was not improper.

3. The prosecutor urged the jury to consider religion

*61 Halverson argues that the prosecutor impermissibly urged the jury to base its decision on religion. Halverson never raised this argument in state court. Therefore, it is procedurally defaulted unless he establishes cause. *Martin,* 280 F.3d at 603. To excuse the procedural default, Halverson asserts ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of this claim's merits. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

Halverson cites the following statement made by the prosecutor:

> I've heard the argument by people expressed that they are unequivocally opposed to the death penalty and they say in support of that that we do not have the right to kill. Some of you are far better students of the Bible than I, but many Theologians say that while the Bible says thou shalt not kill, that is to be interpreted to mean thou shalt not commit murder. I ask you, in your knowledge as citizens, as students of the Bible to discuss this if that is an issue with you.

(TE 2529–30). Halverson states that it is improper for a prosecutor to urge the jury to base its sentencing decision on religion or to suggest that the jury should consider religion.

The Sixth Circuit Court of Appeals rejected a similar argument in *Coe v. Bell.* 161 F.3d 320, 351 (6th Cir.1998). In *Coe,* the prosecutor made even stronger references to religion's role in imposing the death sentence. *Id.* In *Coe,* the prosecutor told the jury "there's certainly foundation for capital punishment in the Bible and in the scriptures themselves." *Id.* The prosecutor made specific reference to scripture by stating "[w]hosoever sheddeth man's blood, by man shall his blood be shed." *Id.* The court held that while the statements were inappropriate, they did not "constitute reversible error." *Id.* Like in *Coe,* the prosecutor in this case told the jury that the Bible *permitted* imposing the death penalty—the prosecutor did not tell the jury that it *required* it. While the prosecutor's statement may have been inappropriate, like in *Coe,* it did not rise to the level of violating Halverson's due process rights. Because this claim has no merit, Halverson's appellate counsel was not objectively unreasonable for not raising it, and appellate counsel's decision not to raise it certainly did not prejudice Halverson. Therefore, cause does not exist for the procedural default of this claim and it is denied.

4. Criticizing Halverson for exercising his constitutional rights

Halverson argues that the prosecutor impermissibly criticized him for exercising his constitutional rights. To support his argument, Halverson points to the prosecutor asking the following questions after he discussed the constitutional rights Halverson exercised at trial:

> ***62** What rights did the victims enjoy? Did they have attorneys? Did the victims have an impartial jury to decide their fate on Loudon Avenue? Did they have a judge to ensure that they had a fair trial? No, I'll tell you something. There sits the judge and jury and the executioner of three people.

(TE 2564–65).

Halverson never raised this argument in state court. However, Halverson has argued ineffective assistance of appellate counsel as cause to excuse the procedural default. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of this claim's merits. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

The prosecutor's questions cannot be taken as criticizing Halverson for exercising his constitutional rights. The prosecutor asked the jury to consider the impact that Halverson's crime had on the victims. In doing so, he referenced the victims' constitutional rights, not Halverson's. The prosecutor did not criticize Halverson or tell the jury that they should punish Halverson for employing his constitutional rights. These statements did not "infect the trial with unfairness." *Donnelly,* 416 U.S. at 643. Because this claim has no merit, Halverson's appellate counsel was not unreasonable for not raising it, and that decision did not prejudice Halverson. Therefore, there is no cause for the procedural default of this claim and it is denied.

5. Victim impact argument

Halverson challenges the prosecutor's statement to the jury regarding the impact Halverson's murder had on the victims' families. He argues that the statement was improper because there was no evidence offered on that issue and therefore the prosecutor was offering his personal opinion. Below is the statement Halverson contests:

> We didn't present the parents to you in this case to talk about their child and because of that you may think that they don't cry. Don't think that for a minute. The parents of these victims can cry. I can show them to you crying. Joey Durrum's mother cries every night. Jackie Greene's mother, there's no way her tear will ever stop. No way. And do you think for a minute the parents of Joe Norman will ever forget this? You think they can wipe that out of their mind about their boy?

(TE 2563).

Even assuming *arguendo* that these comments were improper because the victims' families did not testify, it was not an unreasonable application of Supreme Court law for the Kentucky Supreme Court to hold that the comments did not violate Halverson's due process. The comments were isolated and the evidence against Halverson was strong. *See Bates,* 402 F.3d at 641. Contrary to Halverson's argument, it is unlikely that these comments incited the jury's passion and prejudice. Based on their common sense and own life experiences, the jurors would have already expected that the victims' families were grieving—irrespective of whether the prosecutor had made these comments. *See United States v. Durham,* 211 F.3d 437, 441 (7th Cir.2000) ("Juries are allowed to draw upon their own experience in life as well as their common sense in reaching their verdict...."). Additionally, the prosecutor prefaced his comments by reminding the jury that the parents did not testify: "[w]e didn't present the parents to you in this case to talk about their children." (TE 2563). The prosecutor's comments revealed no information that the jury would not have already considered. Therefore, it is highly unlikely that these comments would have impacted the jury's decision whether to impose life or death. *See Bates,* 401 F.3d at 641. Accordingly, this part of Claim 17 is denied.

6. Halverson showed no remorse

***63** Finally, Halverson argues that the prosecutor impermissibly told the jury that Halverson did not show the slightest bit of remorse and that doing so violated his right against self-incrimination. Halverson points to the following comment:

> You know we've watched these defendants—we've watched these defendants for days on end in this courtroom and we've listened to each of them explain how this callous crime occurred and not one time did we ever see the slightest hint of remorse for what they did. Not one time.

(TE 2540).

The prosecutor's statement was not improper nor did it violate Halverson's right against self-incrimination. Prosecutors have "leeway to argue reasonable inferences from the evidence." *Byrd,* 209 F.3d at 535 (quoting *United States v. Collins,* 78 F.3d 1021, 1040 (6th Cir.1996)). Once a defendant takes the stand, a prosecutor is permitted to comment on his demeanor. *Allen v. Woodford,* 395 F.3d 979, 998 (9th Cir.2004) (holding that a prosecutor may comment on the defendant's demeanor if the defendant chooses to testify); *see Cunningham v. Perini,* 655 F.2d 98, 100 (6th Cir.1981) ("Until a defendant has placed his own demeanor in evidence by taking the stand to testify, his personal appearance at the trial is irrelevant to the question of his guilt or innocence."). Halverson testified during the penalty phase. As a result, the prosecutor was entitled to argue a reasonable inference from Halverson's demeanor and tell the jury that they did not "*see* the slightest hint of remorse." This is not a comment on what Halverson did or did not say, but how he acted on the stand. Because this statement did not violate Halverson's

due process or self-incrimination right, this part of Claim 17 is denied.

Claim 18—Individualized and reliable sentencing determination

Halverson argues that the prosecutor's allegedly improper comments during his sentencing phase deprived him of his Eighth Amendment right to an individualized and reliable sentencing determination. He asserts that the prosecutor's comments impeded the jury's ability to consider mitigating circumstances when determining whether to impose the death penalty. To support his argument, Halverson points to the comments listed in Claim 17. *Supra,* Part IV, Claim 17. Because this claim is procedurally defaulted and Halverson has not demonstrated cause for the default, it is denied.

A. Procedural default

As Halverson concedes, he never raised this argument in state court. (Doc. # 73 at 214). Therefore, it is procedurally defaulted unless he establishes cause. *Martin,* 280 F.3d at 603. To excuse the procedural default, Halverson asserts ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of this claim's merits. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

B. Analysis

***64** The Eighth Amendment requires that a jury considering a death sentence not be precluded from considering mitigating factors, such as the defendant's character and the circumstances of the offense. *DePew v. Anderson,* 311 F.3d 742, 748 (6th Cir.2002) (citing *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976)). A prosecutor's comments can violate this requirement when they "constrain the manner in which the jury was able to give effect to mitigating evidence." *DePew,* 311 F.3d at 748 (citing *Buchanan v. Angelone,* 522 U.S. 269, 276 (1998)).

Halverson has not established that his appellate counsel was unreasonable for deciding not to raise this claim on direct appeal. Appellant counsel is permitted to select from claims to maximize success on appeal, and only when issues not raised "are clearly stronger than the ones presented will the presumption of effective assistance of counsel be overcome." *Smith,* 528 U.S. at 288 (citation omitted). Halverson's appellate counsel raised twenty-eight issues on appeal. (Brief for Appellant, 84–SC–39). In Claim 28, appellate counsel raised the argument that the prosecutor's comments during sentencing were improper, stating that "the repeated misconduct of the prosecutor during his penalty phase denied appellant due process of law and a fair sentencing hearing." *Id* at 139. Appellate counsel cited the same prosecutor comments in that claim that Halverson cites in this claim. Thus, while brought as a due process violation and not an Eighth Amendment violation, Halverson's appellate counsel did put the issue of prosecutorial misconduct during the sentencing phase before the Kentucky Supreme Court. This is the kind of discretion appellate counsel has when "select[ing] claims to maximize success on appeal." *Smith,* 528 U.S. at 288. Arguing that the prosecutor's comments violated the Eighth Amendment is not "clearly stronger" than arguing that those same comments violated due process. Therefore, appellate counsel was not unreasonable.

Appellate counsel's decision not to raise this claim also did not prejudice Halverson. To demonstrate prejudice, Halverson argues that *Depew* is applicable and establishes that there is a reasonable probability that this claim would have been successful if raised on appeal. 311 F.3d 742. In *Depew,* the Sixth Circuit held that a prosecutor's comments violated the defendant's Eighth Amendment rights because they "undercut the defendant's sole theory of mitigation." 311 F.3d at 749–50. The defendant's mitigation theory was that he had been a law-abiding and peaceful person. *Id* . at 748. During trial the prosecutor impermissibly asked a witness whether he was aware of the defendant's involvement in a knife fight, presented a picture of the defendant standing next to a marijuana plant, and told the jury in closing that the defendant did not take the stand so that the prosecutor could not ask him about a subsequent conviction. *Id.* at 748–49. *Depew* is inapplicable because, as discussed above, the prosecutor's comments here were not improper. *Supra,* Part IV, Claim 17, Subpart C(1). The prosecutor never mentioned Halverson by name, spoke generally about how inmates have the potential for violence and the desire

to escape, and discussed deterrence in a manner that was acceptable in 1983. Thus, they fall on the *Irick, Beuke* and *Hicks* line of cases establishing prosecutorial conduct that is constitutionally permissible. *Irick v. Bell,* 565 F.3d 315 (6th Cir.2009); *Beuke v. Houk,* 537 F.3d 618 (6th Cir.2008); *Hicks v. Collins,* 384 F.3d 204 (6th Cir.2004). And unlike in *Depew,* the prosecutor's comments here did not cut against Halverson's "sole theory of mitigation." 311 F.3d at 749–50. Halverson's mitigation mostly centered on his drug use; the prosecutor's comments concerned an inmate's propensity for violence and motive to escape. Halverson has not demonstrated prejudice because he has not shown that there is "a reasonable probability that" if his counsel would have raised this claim "he would have prevailed on his appeal ." *Smith* 528 U.S. at 285–86 (citing *Strickland,* 466 U.S. at 694).

***65** By failing to establish either *Strickland* prong, Halverson has failed to demonstrate that his appellate counsel was ineffective for failing to raise this claim. As a result, he has not established cause for procedural default and Claim 18 is denied.

Claim 19—Future dangerousness

Halverson argues that the prosecutor denied his Eighth Amendment and due process rights when he argued future dangerousness during the sentencing phase without providing notice to Halverson that he would do so. Halverson challenges the same comments outlined in Claim 17. Because this claim is procedurally defaulted and Halverson has not established cause for the default, it is denied.

A. Procedural default

As Halverson concedes, he never raised this argument in state court. (Doc. # 73 at 226). Therefore, it is procedurally defaulted unless he establishes cause. *Martin,* 280 F.3d at 603. To excuse the procedural default, Halverson asserts ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of this claim's merits. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

B. Analysis

Because this claim has no merit, Halverson's counsel was not unreasonable for deciding not to raise it, nor did that decision prejudice Halverson. First, Halverson argues that the prosecution put on evidence of his future dangerousness without providing notice as required by Kentucky law. Under K.R.S. § 532.025, "only such *evidence* in aggravation as the state has made known to the defendant prior to his trial shall be admissible." The prosecutor did not put on *evidence* of future dangerousness. Prior to closing arguments, the trial judge reminded the jury that counsel's oral argument was not testimony. (TE 2503). The prosecutor talked about how convicted murderers are dangerous and how they have an incentive to escape; he also talked about infamous murderers but never directly compared them to Halverson. As Halverson states in his reply "this entire speech applied equally to anyone convicted of murder. No attempt was made to tie it to Halverson's crimes or his drug abuse." (Doc. # 73 at 239). The Court agrees. Because the prosecutor's comments cannot be considered *evidence* of Halverson's future dangerousness, they did not need to be disclosed to Halverson pursuant to K.R.S. § 532.025(1)(a).

Halverson cites *Ake v. Oklahoma, Skipper v. South Carolina* and *Simmons v. South Carolina* to support his argument that the prosecutor impermissibly put on evidence of future dangerousness. 470 U.S. 68 (1984); 476 U.S. 1 (1986); 512 U.S. 154 (1994). None of these cases are applicable here. In *Ake,* the Court held that it violated due process to deny a defendant the funds needed to rebut the state psychiatrist's testimony that the defendant posed a threat of continuing criminal violence. 470 U.S. at 88. In *Skipper,* the Court held that the defendant's Eighth Amendment rights were violated because the trial court denied the defendant the opportunity to put on mitigating evidence that he had displayed good behavior in prison. 476 U.S. at 4. In *Simmons,* the trial court refused the defendant's request that it inform the jury that he was ineligible for parole. 512 U.S. at 160. The Court held that this violated due process because the state had argued the defendant's future dangerousness, but had prevented the jury from learning that the defendant was parole ineligible. *Id.* at 171. The *Ake, Skipper* and *Simmons* line of cases establish that a defendant cannot be denied

the opportunity to put on mitigating evidence during the penalty phase. These cases are inopposite because Halverson points to no evidence or argument that the trial court prohibited him from introducing to the jury.

*66 Because this claim it is not "clearly stronger than those presented" on appeal, Halverson's counsel was not deficient. *Smith,* 528 U.S. at 288. And because this claim has no merit, Halverson has failed to demonstrate prejudice. *Id.* at 285–86 (citing *Strickland,* 466 U.S. at 694). Halverson's failure to demonstrate that his appellate counsel was deficient for not raising this claim results in his failure to establish cause for the claim's procedural default. Accordingly, Claim 19 is denied.

Claims 20, 21 and 22—Statutory aggravating circumstance instruction

Halverson contends that the jury was not properly instructed on the statutory aggravating circumstance under which it imposed Halverson's death penalty. In Claim 20, Halverson argues that the instruction violated the Eighth Amendment's narrowing requirement. In Claim 21, Halverson argues that the instruction violated his due process rights. In Claim 22, Halverson asserts that, based on his interpretation of the statute, there was insufficient evidence to support the statutory aggravating circumstance. Because these claims are procedurally defaulted and Halverson has not demonstrated cause for the default, they are denied.

A. Procedural default

Halverson never raised these arguments in state court. Therefore, they are procedurally defaulted unless he establishes cause. *Martin,* 280 F.3d at 603. To excuse the procedural default, Halverson asserts ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of the merits of these claims. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

B. Analysis

The Supreme Court has summarized the Eighth Amendment's narrowing requirement as follows:

> To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition.

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (internal citations and quotations omitted).

To determine whether a jury instruction deprived a defendant of due process, a court asks "whether the instruction was erroneous and, if so, whether the instruction 'so infected the entire trial that the resulting conviction violates due process.' " *Clarke v. Warren,* 556 F. App'x 396, 409 (6th. Cir.2014) (quoting *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

*67 To recommend the death penalty, a Kentucky jury must find one statutory aggravating circumstance beyond a reasonable doubt. K.R.S. § 532.025(3). The jury found Halverson guilty of K.R.S. § 532.025(2)(a)(6), which allows the jury to recommend death if "[t]he offender's act or acts of killing were intentional and resulted in multiple deaths." (TR 317–18, Instruction # 68).

Halverson contends that the jury instructions were improper because they did not track the statutory language. Instead, the instructions read as follows:

> We the jury find that the aggravating circumstance listed in instruction [No. 54/57] has been proven from the evidence beyond a reasonable doubt; and that Leif Halverson's *acts in connection with the killing of* [Joe Durrum/Jacqueline Greene] were intentional, and also resulted in the death of Joe Norman and/or [Joe Durrum/Jacqueline Greene].

(TE 317, 318). Halverson's argument is that the instructions impermissibly substituted "*acts in connection with the killing of*" for the statutory language that reads "[t]he offender's *acts or acts of killing.*" Halverson suggests that, in giving these instructions, the trial judge changed the meaning of the statutory aggravating circumstance adopted by the Kentucky legislature. Halverson reads the statute as requiring that the jury convict him as the principal, while the instructions permitted the jury to sentence Halverson to death after finding that he was an accomplice. Halverson alleges that the deviation from the statutory language violates the Eighth Amendment's narrowing requirement and due process.

Halverson's argument fails because Kentucky treats principals and accomplices the same. Under Kentucky law, a defendant does not have to deliver the fatal blow to be guilty of killing another. *Marshall v. Commonwealth,* 60 S.W.3d 513, 518 (Ky.2001) (citing Kentucky's accomplice liability statute, K.R.S. § 502.020, in holding that "even if the defendant, himself, did not pull the trigger, he may still be convicted of intentional murder if he was an accomplice to an offense."); *see Tharp v. Commonwealth,* 40 S .W.3d 356, 361 (Ky.2000) ("In the context of criminal homicide, a defendant can be found guilty by complicity of an intentional homicide ..."). Further, the Kentucky Supreme court has stated in *dicta* that an accomplice to murder can be sentenced to death. *Perdue v. Commonwealth,* 916 S.W.2d 148, 166 (Ky.1995) ("This Court has interpreted [Supreme Court precedent] to permit imposition of a death penalty upon *a non-trigger man* if his participation in the murder is such as to render the death penalty appropriate.") (emphasis added); *Stanford v. Commonwealth,* 854 S.W.2d 742, 744 (Ky.1993) ("There is *no automatic exemption of the non-trigger man* from the death penalty. Rather, the circumstances of the non-trigger man's participation in the crime should be considered and, if they are of such gravity as to make the death penalty appropriate, then imposition of the death penalty is not forbidden.") (emphasis added). K.R.S. § 532.025(2)(a)(6)'s plain language does not limit itself to principals. Therefore, when the statute alludes to "the offender's acts or acts of killing," this Court assumes that it follows Kentucky's statutory scheme and refers to both principals and accomplices. *Petitioner F. v. Brown,* 306 S.W.3d 80, 85–86 (Ky.2010) (recognizing that Kentucky courts read statutes in context with other parts of the law).

***68** Based on Kentucky's statutory scheme and case law, the sentencing instructions were permissible. The jury returned a verdict finding that Halverson intentionally killed three people by being an accomplice to Norman's death and either a principal or an accomplice in Durrum and Greene's deaths. Thus, "[Halverson's] ... acts of killing were intentional and resulted in multiple deaths." K.R.S. § 532.025(2)(a)(6). The substitution of "in connection with the killing" in the jury instructions informed the jury that, as long as they found Halverson was an accomplice to an intentional killing that resulted in multiple deaths, they could find the statutory aggravating circumstance. Under Kentucky law that instruction was correct, and therefore did not violate Halverson's Eighth Amendment nor due process rights.

Halverson's argument in Claim 22 is that there was not sufficient evidence for the jury to find the statutory aggravating circumstance because the prosecution did not prove that Halverson killed Durrum and Greene. As discussed in the preceding two paragraphs, all the prosecution needed to prove to establish the statutory aggravating factor was that Halverson was an accomplice to the intentional killings of Durrum and Greene and that those killings resulted in multiple deaths. This Court held in *supra* Part IV, Claim 11, that there was sufficient evidence that Halverson was an accomplice to Durrum and Greene's murders. That evidence included medical and ballistics testimony that Durrum and Greene received fatal wounds from Halverson's .38 caliber handgun, Hutchens's testimony that Halverson was holding a .38 caliber handgun when the shooting stopped, and Tucker's

testimony that Halverson admitted to killing three people. It is undisputed that there was three deaths. Therefore, the evidence was sufficient for the jury to find the statutory aggravating circumstance in both Durrum and Greene's deaths.

Because Halverson's arguments regarding the jury instructions and the sufficiency of the evidence on the statutory aggravating circumstance have no merit, his appellate counsel was not objectively unreasonable for not raising them and that decision certainly did not prejudice Halverson. *See Smith,* 528 U.S. at 285–86. Because Halverson has not demonstrated cause for the procedural default of these claims, they are denied.

Claim 23—Decision not to put on penalty phase mitigating evidence

Halverson argues that he was denied due process when he was forced to make a choice between presenting mitigating evidence and what he claims is his right to prevent the prosecution from discussing his involvement in an unrelated crime. In support, he cites to the trial court's ruling that if he presented evidence that he had no significant history of prior criminal activity, the prosecution would be permitted to discuss his suspected involvement in Charles Murray's murder. (TE 2322–26). Because this claim is procedurally defaulted and Halverson has not established cause for the default, it is denied.

A. Procedural default

***69** Halverson never raised this argument in state court. Therefore, it is procedurally defaulted unless he establishes cause. *Martin,* 280 F.3d at 603. To excuse the procedural default, Halverson asserts ineffective assistance of appellate counsel. Ineffective assistance of counsel "can constitute cause under the cause and prejudice test." *Hinkle,* 271 F.3d at 245 (citing *Lucas,* 179 F.3d at 418). As discussed above, that requires this Court to conduct a *de novo* review of this claim's merits. *Supra,* Part IV, Claim 5, Subpart B. To prove ineffective assistance of appellate counsel, Halverson must demonstrate both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Smith,* 528 U.S. at 285.

B. Analysis

To support his argument, Halverson cites to Supreme Court precedent holding that a sentencing body cannot be prevented from considering the defendant's character as a mitigating factor. *See Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982). Halverson asserts that the trial judge forced him to surrender his constitutional right to not have the unindicted murder used as evidence against him. However, there is no constitutional right to prevent a sentencing body from considering prior criminal activity. *Tuilapa v. California,* 512 U.S. 967, 976–77 (1994) (holding that it is permissible for a jury to consider a defendant's criminal activity when deciding whether to impose the death penalty); *Nichols v. United States,* 511 U.S. 738, 748 (1994) (recognizing that sentencing courts can consider "a defendant's past criminal behavior, even if no conviction resulted from that behavior."); *Williams v. New York,* 37 U.S. 241, 251–52 (1949) (holding that it was permissible for a court that imposed the death penalty to have considered crimes for which the defendant was a suspect but had not been convicted). Contrary to Halverson's argument, the trial court did not force him to give up a constitutional right in order to present mitigating evidence that he had no significant prior criminal history. Rather, as Halverson concedes, "[he] *chose* to not introduce evidence that he had no significant ... prior criminal history." (Doc. # 25 at 323). Halverson made that choice to avoid the constitutionally permissible introduction of prior criminal acts.

Halverson presents no viable claim that his attorney could have raised on appeal. As a result, he has not demonstrated ineffective assistance of appellate counsel and cause for the procedural default of this claim. Therefore, this claim is denied.

Claim 24—Leading the jury to believe it had to impose death

In Claim 24, Halverson argues that the sentencing instructions violated his constitutional rights because they required the jury to rule out the death penalty before considering a prison term. After filing his petition, Halverson withdrew this claim in light of the United States Supreme Court's holding in *Bobby v. Mitts,* 131 S.Ct. 1762, 1765 (2011). (Doc. # 87). In *Mitts,* the Court held that penalty phase instructions do not violate due process

when they require the jury to determine whether the death penalty is warranted before determining a prison sentence. *Id.* at 1765. Because this is the type of instruction used at Halverson's trial, Halverson properly withdrew this claim.

Claim 25—Ineffective appellate counsel relating to sentencing phase issues

***70** Halverson argues that his appellate counsel was ineffective for not raising Claims 18, 19, 20, 21, 22, 23 and 24 in this petition. Halverson withdrew the part of this claim that alleges ineffective assistance of appellate counsel for not raising Claim 24. (Doc. # 87). The Court has already considered whether whether appellate counsel was ineffective for not raising the remaining claims, in order to determine whether caused existed to excuse their procedural default. For each of the claims, the Court found appellate counsel was not ineffective for deciding not to raise them. *Supra,* Part IV, Claims 18, 19, 20, 21, 22, 23. Therefore, this claim is denied.

Claim 26—Ineffective trial counsel for failing to present mitigating evidence

Halverson argues that his trial counsel was constitutionally ineffective for failing to present mitigating evidence during the sentencing phase. He asserts that his trial counsel's investigation into the mitigation defense was ineffective because his counsel did not gather medical and mental health records, mental health or neurological evaluations, or interview his sister. He asserts that if his counsel would have conducted a more effective investigation, his counsel would have been able to present to the jury how drug abuse and exposure to industrial solvents caused him to suffer brain damage and how it impacted his behavior. Halverson suggests that if the jury would have heard this evidence it would have influenced their sentence. Because Halverson has not demonstrated that his counsel's mitigation defense prejudiced him, Claim 26 is denied.

A. State court decision

Halverson presented this claim to the Kentucky Supreme Court in his CR 11.42 motion. (Brief for Appellant, 2004-SC-27 at 35–28). The court's analysis is listed above. *Supra,* Part IV, Claim 17, Subpart (C)(1). Halverson argues that AEDPA deference does not apply to this claim because the trial court addressed trial counsel's guilt phase mitigation defense, but not his sentencing phase defense. After Halverson filed his petition, the United States Supreme Court rejected this type of argument, holding that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Johnson,* 133 S.Ct. at 1096. This presumption is a "strong one," which can be overcome only in "unusual circumstances." *Id.* Overcoming the presumption requires the petitioner to show that the state court "inadvertently overlooked" the federal claim. *See id.* 1097. Halverson has not made that showing. Because the Kentucky Supreme Court rejected Halverson's claim, this Court must presume that it was adjudicated on the merits. *Harrington,* 131 S.Ct. at 784–85. Therefore, AEDPA deference applies.

B. Applicable law

The Sixth Amendment guarantees criminal defendants the right to counsel. *Strickland,* 466 U.S. 668 (1984). For that reason, the Supreme Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.' " *Id.* at 686 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970)). To prevail on an ineffective assistance of counsel claim, a defendant must set forth facts to satisfy a two-part test: (1) counsel's performance was objectively unreasonable, and (2) the unreasonable performance prejudiced the defendant. *Strickland,* 466 U.S. at 687.

***71** Under the first part of the *Strickland* test, the defendant must demonstrate that "counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (quoting *Strickland,* 466 U.S. at 687). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington,* 131 S.Ct. at 787. When determining whether counsel's mitigation defense was reasonable, "a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Jells v. Mitchell,* 538 F.3d 478, 492 (6th Cir.2008) (citing *Wiggins,* 539 U.S. at 527). *Strickland* guides a court's analysis whether an attorney's investigation was reasonable:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690–91.

Under the second part of the *Strickland* test, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An individual has been prejudiced when his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart,* 506 U.S. at 369 (quoting *Strickland,* 466 U.S. at 687). When the claim is that counsel was ineffective for failing to present mitigating evidence during the sentencing phase, "[p]rejudice is established where, taken as a whole, the available mitigating evidence 'might well have influenced the [sentencer's] appraisal of [the petitioner's] moral culpability.' " *Jells,* 538 F.3d at 498 (quoting *Williams v. Taylor,* 529 U.S. 362, 398 (2000)). "There is no prejudice if the newly available evidence is merely cumulative or is not substantially different from the evidence presented during the penalty phase." *Phillips v. Bradshaw,* 607 F.3d 199, 216 (6th Cir.2010).

On federal habeas review, establishing ineffective assistance of counsel is "all the more difficult." *Harrington,* 131 S.Ct. at 787. In *Harrington,* the Supreme Court recently emphasized the highly deferential standard for analyzing an ineffective-assistance claim on habeas review:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's action were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

***72** *Id.* (internal quotation marks omitted). Under this deferential standard, this Court can grant habeas relief based on trial counsel's mitigation defense only if Halverson "can demonstrate a reasonable probability that, but for the alleged error of omitting certain mitigating evidence, he would not have been sentenced to death ... [and that] the state court's conclusion was contrary to or an unreasonable application of federal law." *Phillips,* 607 F.3d at 216 (citing *Strickland,* 466 U.S. at 694).

C. Analysis

The Court will address the prejudice prong because "it is easier to resolve, and there can be no finding of ineffective assistance of counsel without prejudice." *Phillips,* 607 F.3d at 216. Determining whether Halverson was prejudiced by his counsel's mitigation defense requires " 'reweigh[ing] the evidence in aggravation against the totality of the mitigating evidence' adduced at trial and in [the] post-conviction proceeding[ ]." *Id.* (quoting *Wiggins,* 539 U.S. at 534–36). Because the same jury sat in both the guilt and penalty phase, the Court will consider all the

evidence introduced at trial. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky.1998).

1. Evidence presented in mitigation

In evaluating whether Halverson was prejudiced by his counsel's mitigation defense "it is best to begin with the evidence ... actually presented in mitigation." *Lorraine v. Coyle*, 291 F.3d 416, 428 (6th Cir.2002). Seven witnesses testified at trial about Halverson's drug abuse problems leading up to the murders: (1) his father, (2) his mother, (3) Luce, (4) Tucker, (5) Hutchens, (6) Willoughy, and (7) Halverson himself. Halverson's father provided the jury with general background about his son's drug problems. (TE 2394–10). He told the jury that Halverson had sought therapy for his drug issue, and described for the jury how Halverson had been taken to the emergency room due to a cocaine overdose. He testified further about how Halverson's drug problems continued in the months leading up to the murders. Halverson mother also provided testimony about her son's drug problems and how it changed his personality. (TE 2416–21). She confirmed that Halverson had attended therapy for his drug problems and testified that she would see evidence of drug use when she visited her son's house. Tucker testified that Halverson was a "pretty heavy user of drugs," and Hutchens testified that she was doing drugs with Halverson nearly every day. (TE 1707, 1728). As discussed previously, Willoughby testified in great detail about Halverson's drug use, describing the specific drugs that they used on the day before and the day of the murders. (TE 1922–45, 1960). During his penalty phase testimony, Halverson confirmed his history of drug use, including his attempted therapy and near overdose. He also admitted that his drug use accelerated prior to the murders, and that on day of the murders he smoked marijuana and drank alcohol. (TE 2428–51).

*73 Halverson and his parents gave the jury relevant details about Halverson's life story and how he had changed in the months leading up to the murders. (TE at 2388–2410, 2413–23). Halverson's father told the jury that Halverson had married a fifteen year-old girl, then pregnant at the time with Halverson's child. While that child passed away a couple of days after birth, Halverson's father explained that Halverson had two other children from that marriage. He told the jury that the marriage later ended in divorce and that Halverson was awarded custody of the children. He talked about Halverson's work history and how Halverson lost his job due to his drug problems. Halverson's mother testified about his divorce. She described Halverson as a good father, but stated that the drug abuse caused her to worry about the childrens' safety. She said in the months prior to the murders Halverson "seemed very depressed," and was not himself. Halverson testified that he had done the best he could to raise his children, but that the difficulty of doing so on his own led him to turn to drugs. (TE 2428).

Dr. Atcher, a psychiatrist, testified during the penalty phase about the effects of drugs. (TE 2364–75). He prefaced his testimony by explaining to the jury that he had taken "an extensive pharmacology course in medical school," and had "very specific training in drugs of abuse." Dr. Atcher described the effects of many of the drugs testimony established Halverson had taken. He explained that quaaludes and downers can cause an individual to lose his social judgment and to get involved in illegal acts. He testified that alcohol doubles or triples the effect of these drugs. He explained that cocaine can cause paranoia, which results in a person being suspicious and not able to trust others. He described how LSD causes hallucinations. Dr. Atcher also testified about withdrawal, noting that it can cause a person to be paranoid and potentially dangerous.

2. Additional evidence that could have been presented in mitigation

Halverson argues that his counsel should have introduced Halverson's medical records and put on expert testimony because that evidence would have impacted the jury's sentence. According to Halverson, experts could have testified that he suffered brain damage from his drug use and was predisposed to drug abuse. He supports that argument with two reports from Drs. Nelson and Eric Drogin. He also states that an expert could have testified to brain damage suffered as a result of exposure to toxins at work. He again cites to Dr. Nelson's report in support, as well as an affidavit from a former co-worker, Clark Hessel.

After detailing Halverson's history of drug abuse, Dr. Nelson opined that Halverson was born with a genetic disposition to chemical dependency, suffered neurological damage from his drug use, and was intoxicated at the time of the murders. (TR 1273–74). In an affidavit, Dr. Nelson also stated that he would have been able to provide this testimony at the trial. (TR 1270–71). Similarly, Dr. Drogin's report states that there was evidence of

Halverson's alleged neuropsychological impairment. (TR 1267). Dr. Drogin's report states that the screening instruments he used were available in 1983.

*74 With respect to Halverson's alleged exposure to toxic chemicals at work, Dr. Nelson's report stated that Halverson was exposed to a mixture of industrial solvents and that these solvents impair judgment and mental functioning "[w]hen in the body." (TR at 1274). Clark Hessel, a former co-worker, stated in a 2002 affidavit that he and Halverson "were exposed to duct liner adhesive" that "would make me feel lightheaded and my tongue feel as if it were swollen." He stated that he and Halverson talked about the adhesive, but that they "did not think it was a big deal." (TR at 1388–90).

The Kentucky Supreme Court specifically addressed both Dr. Nelson and Dr. Drogin's reports in its adjudication of Halverson's CR 11.42 motion. In discussing Dr. Nelson's report, the court stated:

> Dr. Nelson, a professor of clinical pharmacology, interviewed Appellant but his findings were, likewise, of limited utility. After recounting Appellant's history of long-term drug abuse as well as those drugs which Appellant ingested on the day of the murder, Dr. Nelson concluded that Appellant's judgment at the time of the shooting would have been impaired. He cited Appellant's inability to recall the events the morning of the murders to support the conclusion that the drugs had serious effects on his mental processes. Nevertheless, as the Commonwealth points out, Appellant was able to recall the events of the actual murders in great detail.

Halvorsen, 258 S.W.3d at 8. With respect to Dr. Drogin's report and his testimony at Halverson's CR 11.42 hearing, the court reached the following conclusion:

> Dr. Drogin had never met Appellant and gave general testimony regarding potential avenues that should be explored to support mitigation for a defendant with a history of drug abuse.
>
> Although Dr. Drogin rendered a broad finding that there was "evidence of neuropsychological impairment, including memory deficits and other indicia of organic dysfunction" that most likely resulted from Appellant's chronic substance abuse, the finding was of limited utility as Dr. Drogin's resulting conclusion was only that more evaluation and testing were warranted. Further, Dr. Drogin described the phenomenon of "Emotional Contagion," but concluded only that administering the emotional contagion scale could shed additional insight into Appellant's susceptibility to the phenomenon. Dr. Drogin's last observation was simply that there were conflicting opinions as to whether Appellant had anti-social personality disorder.
> *Id.*

3. Prejudice

Were this Court evaluating Halverson's ineffective assistance claim in the first instance, it may be faced with a closer call. But on habeas review, close calls must go in favor of the state court's decision, unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). After reviewing the aggravating evidence and comparing it against the totality of the mitigating evidence presented at trial, as well as the additional mitigating evidence cited above, this Court concludes that the Kentucky Supreme Court was reasonable in determining that the additional evidence would not have changed the jury's sentence. See *Phillips,* 607 F .3d at 216 (citing *Strickland,* 466 U.S. at 694) ("[W]e may only reverse if [the prisoner] can demonstrate a reasonable probability that, but for the alleged error of omitting certain mitigating evidence, he would not have been sentenced to death.").

*75 The jury found Halverson guilty of K.R.S. § 532.025(2)(a)(6), an aggravating statutory circumstance that requires the jury to find that "[t]he offender's act or acts of killing were intentional and resulted in multiple deaths." (TR 317–18, Instruction # 68). The abhorrent nature of this crime is described in great detail by the Kentucky Supreme Court and cited earlier in this opinion. *Supra,* Part 1, Subpart A (citing *Halverson,* 730 S.W.3d

at 922–93). To sum it up briefly, Halverson and his confederate shot and killed three individuals, at least two of whom were unarmed, tied them up with rope connected to rocks, and threw them over a bridge.

With respect to the evidence actually presented at trial, Halverson's parents painted a sufficient picture of his relevant life history at the penalty phase, including background on the following: how he lost his first child, how he went through a divorce, how drugs impacted his work life, and how drugs caused him to be depressed and affected his ability to raise his daughters. There was an abundance of evidence on Halverson's drug use, including testimony on Halverson's attempts to seek therapy, his emergency room visit due to a cocaine overdose, and his drug habits. Several witnesses also testified that Halverson's drug use increased in the time leading up the murders, and that Halverson had consumed marijuana and alcohol on the day of the murders. Finally, Dr. Atcher described the mental and psychological effects of quaaludes, downers, cocaine and LSD. Specifically, Dr. Atcher told the jury that these drugs can cause loss of social judgment, the involvement in illegal acts, paranoia and hallucinations.

While the additional evidence may have been available for presentation in 1983, it is either cumulative or not substantially stronger than that presented. *Hill v. Mitchell,* 400 F.3d 308, 319 (6th Cir.2005) ("[T]o 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."). Drs. Nelson and Drogin's affidavits did state that Halverson likely suffered neurological damage from drugs; however, Dr. Atcher testified extensively about the impact that drugs have on one's mental health. Dr. Nelson's affidavit opined that Halverson was under the influence at the time of the shootings; yet, the jury heard testimony from Halverson, Willoughby, Luce and Hutchens regarding Halverson's drug use and possible intoxication on the day of the murders. With respect to the toxins Halverson was exposed to at work and the impact they had on his mental capacity, the Kentucky Supreme Court observed that "Dr. Nelson stated that these solvents are known to impair judgment and mental functioning *when in the body.* However, he did not elaborate on whether they may have been in Appellant's system during the murders which was more than two weeks after Appellant had been fired from the ... job." *Halvorsen,* 258 S.W.3d at 8 (emphasis added). As far as any medical or mental health records that trial counsel should have presented, Halverson identifies no specific information contained in those records that could have influenced the jury's decision. *See Moreland v. Bradhsaw,* 699 F .3d 908, 935 (6th Cir.2012) (holding that a habeas petitioner did not establish prejudice due to his counsel's failure to obtain medical and educational records because the petitioner left "the court to speculate about what might be included in his records and how those records would have had any bearing on the outcome at sentencing."). The Court concludes that the totality of this additional mitigating evidence is largely "cumulative or ... not substantially different from the evidence presented during the penalty phase." *Phillips,* 607 F.3d at 216.

***76** Based on the foregoing, the Kentucky Supreme Court's conclusion that Halverson's trial counsel's mitigation defense did not prejudice him is not "contrary to or an unreasonable application of federal law." *Id.* at 216 (citing *Strickland,* 466 U.S. at 694). Therefore, Halverson has not demonstrated ineffective assistance of counsel and Claim 26 is denied.

Claims 27 and 28—Proportionality review

In Claims 27, Halverson argues that the Kentucky Supreme Court's proportionality review of his death sentence violated the Eighth Amendment for two reasons: (1) it only reviewed cases in which the death penalty had been imposed; and (2) it did not make an individualized determination of whether the death penalty is proportionate. In Claim 28, Halverson contends that Kentucky's decision to limit its proportionality review to cases where the death penalty was imposed also violates due process.

A. State court decision

Halverson presented both these claims on direct appeal. (Brief for Appellant, 84–SC–39 at 201–05). The court rejected Halverson's claims by holding "[w]e have reviewed the other assertions of error and are of the opinion none of them merits comment." *Halverson,* 730 S.W.2d at 928. The Kentucky Supreme Court conducted its mandatory proportionality review of Halverson's death sentence and held as follows:

We have conducted our review of the death sentence in accordance with the provisions of KRS 532.075. We are of the opinion from the record that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the evidence supports the finding of an aggravating circumstance. KRS 532.025(2)(a).

We have considered whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases and have in this regard considered the crimes committed here and all of the evidence surrounding Halvorsen and Willoughby and their backgrounds.

The data for our use in this regard have been compiled in accordance with KRS 532.075(6)(a), (b), and (c). We have considered all of the cases in which the death penalty was imposed after January 1, 1970, as follows: *Scott v. Commonwealth,* Ky., 495 S.W .2d 800 (1972); *Leigh v. Commonwealth,* Ky., 481 S.W.2d 75 (1972); *Lenston and Scott v. Commonwealth,* Ky., 497 S.W.2d 561 (1973); *Call v. Commonwealth,* Ky., 482 S.W.2d 770 (1972); *Caldwell v. Commonwealth,* Ky., 503 S.W.2d 485 (1972); *Tinsley and Tinsley v. Commonwealth,* Ky., 495 S.W.2d 776 (1973); *Galbreath v. Commonwealth,* Ky., 492 S.W.2d 882 (1973); *Caine and McIntosh v. Commonwealth,* Ky., 491 S.W.2d 824 (1973); *Hudson v. Commonwealth,* Ky., 597 S.W.2d 610 (1980); *Meadows v. Commonwealth,* Ky., 550 S.W.2d 511 (1977); *Self v. Commonwealth,* Ky., 550 S.W.2d 509 (1977); *Boyd v. Commonwealth,* Ky., 550 S.W.2d 507 (1980); *Gall v. Commonwealth,* Ky., 607 S.W.2d 97 (1980); *McQueen v. Commonwealth,* Ky., 669 S.W.2d 519 (1984); *White v. Commonwealth,* Ky., 671 S.W.2d 241 (1984); *Harper v. Commonwealth,* Ky., 694 S.W.2d 665 (1985); *Skaggs v. Commonwealth,* Ky., 694 S.W.2d 672 (1985); *Kordenbrock v. Commonwealth,* Ky., 700 S.W.2d 384 (1985); *Bevins v. Commonwealth,* Ky., 712 S.W.2d 932 (1986); *Matthews v. Commonwealth,* Ky., 709 S.W.2d 414 (1986); and *Marlowe v. Commonwealth,* Ky., 709 S.W.2d 424 (1986).

***77** The cases preceding *Gall* have had the death penalty set aside for the reason the statute was invalid under *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In making a comparative study of these cases and the circumstances in this case, we are of the opinion the sentence of death here is not excessive or disproportionate to the penalty imposed in the enumerated cases.

Id. Based on *Harrington,* this Court presumes that the Kentucky Supreme Court's rejection of Halverson's claims resulted in an adjudication on the merits and therefore will apply AEDPA deference. 131 S.Ct. at 785.

B. Analysis

Halverson argues in Claim 27 that the Kentucky Supreme Court's proportionality review violated the Eighth Amendment because the court considered cases in which the death penalty was imposed, but did not consider cases in which the death penalty was not imposed. He also asserts that the court did not make an individualized determination of whether the death penalty is appropriate. Halverson's claim fails because the Eighth Amendment requires proportionality review "between the punishment and the crime"; the Eighth Amendment does not require proportionality review between the punishment handed down in one case "and that exacted in other cases ." *Bowling v. Parker,* 344 F.3d 487, 521 (6th Cir.2003) (citing *Pulley v. Harris,* 465 U.S. 37, 50 (1984)). The Kentucky Supreme Court conducted a proportionality review between Halverson's death sentence and his crime, concluding the following:

> We have considered whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases *and have* in this regard considered the crimes committed here and all of the evidence surrounding Halvorsen and Willoughby and their backgrounds."

Halverson, 730 S.W.2d at 928. Thus, the court met the Eighth Amendment's proportionality requirement and made an individualized determination of whether the death penalty was appropriate for Halverson.

Kentucky's death penalty statute is modeled after that enacted in Georgia, which the United States Supreme Court has consistently upheld as constitutional. *McQueen v. Scroggy,* 99 F.3d 1302, 1333 (6th Cir.1996) (citing

McCleskey v. Kemp, 481 U.S. 279 (1987); *Zant v. Stephens,* 462 U.S. 862 (1983); *Gregg v. Georgis,* 428 U.S. 153 (1976)). Further, the Sixth Circuit has upheld as constitutional the type of proportionality review that the Kentucky Supreme Court conducted in Halverson's case. *McQueen,* 99 F.3d at 1334; *see Getsy v. Mitchell,* 495 F.3d 295 (6th Cir.2007) ("Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison; therefore limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed falls within this wide latitude.") (internal quotation marks omitted). Based on the above cited binding precedent, the Kentucky Supreme Court's proportionality review meets constitutional muster. Therefore, Claim 27 is denied.

***78** The Sixth Circuit has also rejected Halverson's argument in Claim 28. In *Bowling v. Parker,* the petitioner argued that "the Kentucky proportionality requirement creates a due-process interest that the Kentucky Supreme Court violated by not finding his sentence disproportionate." 344 F.3d at 521. The petitioner suggested Kentucky's review violated due process because it "compared [his] sentence to other crimes where the death penalty was imposed, but should have compared [his] sentence to similar crimes where the death penalty was not imposed." *Id.* at 522. In rejecting the petitioner's claim, the court held that "there is no violation of due process as long as Kentucky follows its procedures." *Id.* Because the *Bowling* decision is binding precedent on this Court, Claim 28 is denied.

Claim 29—Kentucky does not disclose its proportionality review data

In Claim 29, Halverson argues that the Kentucky Supreme Court violated his due process rights because it did not disclose the data it relied upon in affirming his death sentence. Halverson raised this claim on direct appeal, (Brief for Appellant, 84–SC–39 at 192–93), and the Kentucky Supreme Court rejected it by holding "we have reviewed the other assertions of error and are of the opinion none of them merits comment," *Halverson,* 730 S.W.2d at 923. Based on *Harrington,* this Court presumes that the Kentucky Supreme Court's rejection of Halverson's claims resulted in an adjudication on the merits and therefore will apply AEDPA deference. 131 S.Ct. at 785.

Halverson's claim fails for two reasons. First, as noted in above in *Supra,* Part IV, Claim 28, Subpart B, the Constitution does not require proportionality review between the sentence imposed in one case and that imposed in another. *Bowling,* 344 F.3d at 521 (citing *Pulley,* 465 U.S. at 50). Second, the Kentucky Supreme Court does not have a nonpublic data base; therefore there is nothing for the court to disclose. *See Perdue v. Commonwealth,* 916 S.W.2d 148, 168 (Ky.1995) (stating that the Kentucky Supreme Court only uses published opinions in conducting its proportionality review). In *Slaughter v. Parker,* 187 F.Supp .2d 755, 819–820 (W.D.Ky.2001), former Judge Jennifer Coffman provided a thorough adjudication of this argument, holding the following:

> In sum, the time has come to put this issue to rest. The Supreme Court of Kentucky does not maintain a non-public data base. Its proportionality review, under KRS 532.075, is conducted by a review of the records of the published death penalty decisions it identifies in each of its published death penalty opinions. Discovery requests that seek to obtain such non-existence records are a waste of a petitioner's resources and those of the federal courts. The futility of such request is underscored by the repeated holdings of numerous federal courts that habeas petitioners have no federal due process rights that would entitle them to any specific procedure when a proportionality review is performed by a state court pursuant to state statute. Slaughter's arguments to the contrary border upon being specious.

***79** This Court agrees. Accordingly, Claim 29 is denied.

Claim 30—Cumulative ineffectiveness

The Court has analyzed each of Halverson's ineffective assistance of counsel claims separately, but that does not end the Court's anaylsis. "[T]he clear mandate of *Strickland* and several other Supreme Court cases is that the effect of all counsel's errors is to be considered in toto, against the backdrop of the totality of the evidence in the case." *Mackey v. Russell,* 148 F. App'x 355, 368–69 (6th Cir.2005).

As Halverson concedes, the evidence presented against him at trial was overwhelming; and there is no doubt that the details of the crime were horrific. Halverson and Willoughby shot and killed three people, only one of whom was possibly armed. Medical and ballistics testimony established that Halverson fired fatal .38 caliber bullets into two of the victims. Halverson helped Willoughby bind all three victims with rope connected to heavy rocks, and then they attempted to toss all three victims over a bridge. When police arrived they found one victim in the river and the other two on the side of the road. Halverson confirmed these details and his participation in the crime during his penalty phase testimony.

Because this Court found no errors at Halverson's trial, there are no errors to accumulate and consider. And even if there was error, Halverson's cumulative error claim falters when weighed against the totality of the evidence. Therefore Claim 30 is denied.

V. CERTIFICATE OF APPEALABILITY

Under the AEDPA, an appeal from a denial of a writ of habeas corpus may not be taken unless a circuit justice or judge issues a certificate of appealability. See 28 U.S.C. § 2253. Recently, in *Castro v. United States,* 310 F.3d 900 (6th Cir.2002), the Sixth Circuit held that a district court need not wait until a petitioner moves for a Certificate of Appealability (hereinafter "COA") before issuing a COA for claims raised in the petition. Because a district judge who has recently denied a writ of habeas corpus will have "an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she denies the initial petition," it follows that a proper time to determine whether to grant a COA is at the conclusion of the opinion granting or denying the writ. *Id.* at 901 (internal quotation marks and citations omitted).[4] Thus, in concluding this Opinion, it is now appropriate to determine whether to grant or deny a COA as to any of the claims Petitioner presented in his petition pursuant to 28 U.S.C. § 2253.

A COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or 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. *Slack v. McDaniel,* 529 U.S. 473, 483–484 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.*

***80** Applying this standard to the claims raised herein, and for the reasons set forth within the body of this Memorandum Opinion and Order, the Court concludes that because jurists of reason could debate the issues raised in Claims 1, 2, and 26, the Court will issue a COA on those claims. The Court will not issue a COA for any of the other claims raised.

VI. CONCLUSION

For the reasons discussed above, and the Court concluding that Petitioner has presented no grounds upon which federal habeas relief is warranted, it is accordingly, **ORDERED AS FOLLOWS:**

(1) The petition of Leif Halverson for writ of habeas corpus (Doc. # 25) is **denied;**

(2) Halverson's Motion to Declare 28 U.S.C § 2254(d)(1) Unconstitutional (Doc. # 27) is **denied;**

(3) The instant action is **dismissed with prejudice** and stricken from the docket of this court;

(3) This is a final and appealable order. With regard to any appeal, a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R.App. P. 22(b) will be **issued for Claims 1, 2, and 26,** and **denied for all other Claims raised.**

(4) Judgment will be entered contemporaneously with this Memorandum Opinion and Order in favor of the Respondent.

All Citations

Not Reported in F.Supp.3d, 2014 WL 5419373

Footnotes

1 Halvorsen's initial counsel withdrew because they were employed by the Kentucky Department of Public Advocacy, and at the time of Halvorsen's appeal, his trial counsel was a state senator with influence over the DPA's funding. The DPA contracted two private attorneys to take over Halvorsen's case.

2 The Court has preserved the language of Halverson's claims as he presents them in his petition.

3 Halverson was a suspect in Charles Murray's murder. Murray, an acquaintance of Halverson's, was killed the night before Durrum, Greene and Norman. Willoughby eventually plead guilty to first-degree manslaughter for Murray's death.

4 Because *Castro* was decided subsequent to the Sixth Circuit's decision in *Murphy v. Ohio*, 263 F.2d 466 (6th Cir.2001) wherein a different panel of the Sixth Circuit suggested that it was improper for the district court to deny a certificate of appealability before the petitioner had even applied for one, the Court believes that *Castro* is controlling and will proceed to determine which claims in Halvorsen's petition, if any, warrant a COA.

End of Document

730 S.W.2d 921
Supreme Court of Kentucky.

Leif HALVORSEN, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.
Mitchell L. WILLOUGHBY, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

Nos. 84-SC-39-MR, 84-SC-61-MR
|
Dec. 18, 1986.
|
As Modified on Denial of Rehearing July 2, 1987.

Synopsis

Defendants were convicted in the Fayette Circuit Court, Armand Angelucci, J., of three counts of murder, and they appealed. The Supreme Court, Stephenson, J., held that: (1) prosecutor's closing argument that jury could "recommend" death penalty did not minimize jury's sense of responsibility in sentencing; (2) "combination" murder instruction was proper; (3) defendant was not denied effective assistance of counsel by joint representation by legal aid office of himself and a coindictee; and (4) death sentences were not excessive or disproportionate to penalty imposed in other cases.

Affirmed.

Leibson, J., concurred and filed opinion.

Vance, J., dissented and filed opinion.

Attorneys and Law Firms

***921** Donna Boyce, Kathleen Kallaher, Asst. Public Advocates, Frankfort, for appellant Halvorsen.

Larry H. Marshall, Edward C. Monahan, Asst. Public Advocates, Frankfort, for appellant Willoughby.

***922** David L. Armstrong, Atty. Gen., David A. Smith, Rickie L. Pearson, Asst. Attys. Gen., Frankfort, for appellee.

Opinion

STEPHENSON, Justice.

Mitchell L. Willoughby and Leif Halvorsen were convicted of three counts of murder. They were sentenced to death on each of two counts and life imprisonment on the third count. Halvorsen was additionally convicted of carrying a concealed deadly weapon for which he was sentenced to twelve months' imprisonment and fined $500. We affirm.

The bodies of Joe Norman and Joey Durrum were found on the side of the Brooklyn Bridge on the Jessamine-Mercer County line. The body of Jacqueline Greene was found in the Kentucky River below the bridge. Each of the victims had been shot to death. David Warner, who lived on the Jessamine County side of the Brooklyn Bridge, became suspicious when he noticed a light blue Ford van and a dark pickup truck lurking at various points around the bridge. At one point, the pickup truck parked on the bridge, a person got out of the passenger side, and Warner heard a big splash. Forty-five minutes later, Warner heard a noise that sounded like a car hitting a guardrail or a sign. He looked out to see the blue van and the pickup truck speeding off across the bridge toward Lexington. Warner called the police.

When the police arrived, they found two of the victims on the side of the bridge, each bound with a blue-and-yellow rope that was attached to a heavy rock. The third victim was found in the river below the bridge, wrapped in a sheet that was also bound with a blue-and-yellow rope and attached to a heavy rock. A traffic sign near the bridge had been knocked over by a vehicle. It had paint smears on it and broken glass lying at its base.

Officer William Foekele testified that around 1:30 p.m., on January 13, he was on Loudon Avenue in Lexington, looking for a car involved in another investigation, when he noticed a blue Ford van stopped at 215 Loudon Avenue. He wrote down the van's license number. On the following day, police learned that two of the victims had lived in the house at 215 Loudon Avenue. A truck belonging to the third victim was found parked at the house. When police entered, they found blood at various places in the house.

Upon learning that a blue Ford van was seen in the area where the bodies were discovered, Officer Foekele suspected that it was the same vehicle which he had seen near the house at 215 Loudon the day before. A registration check revealed that the van was registered to Halvorsen. Foekele then went to Halvorsen's home but saw no vehicles in the driveway. A neighbor indicated that two men and a woman had just left in a blue pickup truck and would probably return shortly. Police staked out all routes to the house, located and cornered the truck, and demanded that its occupants exit. The driver, Mitchell, jumped out immediately. Halvorsen, after hesitating, slid out of the passenger side. The officers found a .38–caliber revolver where he had been sitting. As the officers approached the truck, the woman, Susan Hutchens, threw her hands up and said, "The gun's in my purse." A 9–millimeter pistol was found sticking out of her purse.

A ballistics expert positively identified several of the projectiles recovered from the victims' bodies as having come from the revolver and semi-automatic pistol found in the truck. Two 9–millimeter shell casings were additionally recovered at 215 Loudon. Fingerprints from both Willoughby and Hutchens were found on the 9–millimeter pistol. Hutchens' fingerprints were found on the refrigerator at 215 Loudon as well.

Also recovered from 215 Loudon, by the police, was a plastic blue-and-yellow rope identical to that found tied around the victims' bodies. Paint samples taken from Halvorsen's van matched the paint smears found on the highway sign near the bridge. A comparison between pieces of glass taken from a broken headlight on Halvorsen's van and pieces of broken headlight recovered from the base of the highway sign proved them to have come from the same headlight. Lastly, blood samples from Halvorsen's ***923** van were positively identified as having come from one of the victims.

At trial, Hutchens testified that in December 1982, she and Willoughby moved into the house at 215 Loudon, and Willoughby was employed by the victim, Joe Norman, to help him remodel the house. Willoughby and Hutchens moved out a month later when Norman refused to pay Willoughby for the work he had done.

Hutchens testified that on January 13 Willoughby and Halvorsen asked her to buy ammunition for their pistols. Later that day, she decided to go visit the victim, Jacqueline Greene, who lived at 215 Loudon with Joe Norman. When she arrived, Willoughby, Halvorsen, and Norman were standing in the driveway talking. Hutchens went into the house where Greene introduced her to the victim, Joey Durrum. Willoughby, Halvorsen, and Norman then came inside when "all of a sudden" the shooting began.

Hutchens put her hands over her face, covering her eyes. She heard numerous shots. When the shooting was over, she opened her eyes to see Willoughby and Halvorsen each wielding a pistol. Norman and Durrum had fallen to the floor. Hutchens then saw Willoughby shoot Greene twice more, since she was still alive. Willoughby and Halvorsen then screamed at Hutchens to begin picking up the shell casings while they dragged the bodies of the victims through the hallway to the back door where they were placed in the van. Later, Halvorsen left in the van, and Willoughby left in the truck to get rid of the bodies.

Willoughby testified at trial in his own behalf that on January 13 he and Halvorsen went to 215 Loudon to smoke marijuana with Joe Norman. He and Norman began arguing about a cold check that Norman had given to him, when Norman poked him in the chest and threatened him with a bayonet. Willoughby then reached for his gun and began shooting. He remembered shooting Norman two or three times but did not remember shooting the other victims.

In his statements, Willoughby took all of the blame for the shootings. Halvorsen did not testify during the guilt phase. The jury found both Willoughby and Halvorsen guilty of the three murder charges, and Halvorsen guilty of carrying a concealed weapon. The penalty phase then proceeded, after which the jury returned verdicts sentencing Halvorsen and Willoughby to life imprisonment for the murder of Norman and to death for the murders of Greene and Durrum.

Some of the asserted errors are claimed by both Willoughby and Halvorsen. Each has some individual assertions of error.

Halvorsen asserts that the prosecutor, in the voir dire, emphasized that the jurors' verdict was *merely* a recommendation. Willoughby couched his assertion of error on the point that the prosecutor emphasized that the jury's verdict is *only* a recommendation, all of this to many

of the jurors and specifically to eight of the jurors chosen to try the case. The first difficulty with this proposition is that our review of the voir dire does not reveal a single instance of the prosecutor's stating *only recommend* or *merely* a recommendation. Further, this is not argued by either of the appellants. The claimed error is put in terms of counting the times recommend was used during an extensive voir dire. We do not find it useful to engage in a game of counting.

The test is whether the prosecutor so minimizes the role of the jury in imposing the death sentence as to lessen the feeling of responsibility on the part of the jury in reaching such a verdict.

All of the jurors were asked: "Have you ever expressed a feeling that you could not ever give the death penalty?" and "Do you have any religious or moral or conscientious scruples against the imposition of the death penalty?"

As to the eight jurors, the following portrays a portion of the voir dire:

Ann Gish was asked:

Q. Okay. At this point, do you feel that if given an instruction by the Court you would be able to consider the death ***924** penalty as a possible alternative as a sentence?

A. I could consider it, yes.

On cross-examination, Ms. Gish was asked:

Q. You are telling the Court that you could give the death penalty?

A. I think so.

Nell Ferrell was asked on direct examination:

Q. ... you recommend the sentence to a judge if you determine whatever the sentence is, okay you make that recommendation; do you feel that you could consider the death penalty as an option ...?

A. Yes.

Mack Hurt was asked:

Q. Do you feel that you could consider giving the death penalty if you're selected as a juror?

A. I believe I could.

Mable Smith was asked:

Q. Could you impose the death penalty, consider imposing it or recommending it as a penalty if the facts justify it?

A. If the facts justify it—yes.

Louise Maxey was asked:

Q. If you are a juror in a case, in this case, and you believe from the evidence that the defendants are guilty ... and you feel that the murder is such that would justify a death penalty under the kinds of cases that you believe, okay? Could you recommend that yourself?

A. I think I could in that case, yes, sir.

Shirley Munro was asked:

Q. ... Judge Angelucci submits instructions to you which has the law in it and says the penalty is twenty years to life imprisonment or the death penalty, could you consider giving the death penalty depending on what the fact situations were?

A. Yes.

Margaret Barton was asked:

Q. Could you consider recommending the death penalty in this case if the facts warrant it?

A. If the facts warrant it, I could.

On cross-examination, she was asked:

Q. You stated that you could as a juror vote for the death penalty if the facts warrant it?

A. Yes.

Francis White was asked:

Q. ... could you impose that penalty, if you feel the facts justify it?

A. If I sit through the trial, knew they were like with—beyond a doubt guilty, yes.

In *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the prosecutor was found to have minimized the jury's sense of the importance of its role by stressing that its decision was not final since it was automatically reviewable and that, in any event, Caldwell would not be strung up in front of the courthouse within moments of the jury's verdict. Similarly, in *Ice v. Commonwealth,* Ky., 667 S.W.2d 671 (1984), this court ruled improper the prosecutor's statements that the "burden" would rest upon the judge to make the final "decision" as to whether Todd Ice should die, and that in any event, the jurors "are not killing Todd." In *Ward v. Commonwealth,* Ky., 695 S.W.2d 404 (1985), once again, the prosecutor stressed to the jury that after a variety of appeals, the execution might very well not take place.

No such minimizing of the jury's sense of responsibility occurred in this case in the voir dire or the closing argument. In their assertions of error in the closing argument by the prosecutor, they argue that the use of the word "recommend" diminished the sense of responsibility of the jurors as to the death penalty and also that the prosecutor unfairly argued that the death penalty should be given as a much-needed deterrent; and emphasized that the death penalty should be imposed instead of a life sentence.

A reading of the closing argument convinces us that the responsibility of the jurors in recommending the death penalty was not diminished. We are of the opinion there was no reversible error in the closing argument of the prosecutor at the penalty phase of the proceeding.

***925** We note that no objections were made to any of the questions on voir dire for the very good reason there was nothing to object to. This drum beat of complaint about the use of "recommend," which is in the statute and necessarily the instructions, seems to arise in every case. We suggest that the trial court or prosecutor, or both, emphasize to the jurors that the use of the term "recommendation" in a death penalty case does not, in any fashion, diminish or lessen the responsibility of the jury in imposing the death penalty.

Both Halvorsen and Willoughby complain about "combination" murder instructions which allowed the jury to find each of them guilty as either a principal *or* an accomplice and then an instruction that stipulated that if the jury was unable to determine in which capacity each defendant had actually participated, the jury could find guilt under this instruction. They particularly complain that the "combination" instruction does not list the elements of principal or accomplice liability. This complaint is without merit since the "combination" instruction specifically refers to, and incorporates by reference, two prior instructions which consecutively listed the elements of principal and accomplice liability. Instructions are proper if, when read together and considered as a whole, they submit the law in a form capable of being understood by the jury. *Thomas v. Commonwealth,* Ky., 412 S.W.2d 578 (1967).

Likewise without merit is the contention that the instruction rendered the jury's verdict non-unanimous since it did not require the jury to indicate which crime it was finding Halvorsen or Willoughby guilty of. A verdict cannot be attacked as being non-unanimous where both theories are supported by sufficient evidence. *Wells v. Commonwealth,* Ky., 561 S.W.2d 85 (1978). The nature of the evidence of Willoughby and Halvorsen's participation in the killing of the victims, in our opinion, amply supports either instruction. The death penalty was imposed for the murders of Greene and Durrum. These victims were shot eight and five times, respectively; three wounds on each were characterized as lethal. Two pistols of different caliber were involved. Greene had two wounds from a .38 Special and two wounds from a 9–millimeter characterized as fatal. Durrum had a fatal wound from a .38 Special and one from a 9–millimeter. Another fatal wound could not be identified as to the caliber of the gun. Thus it was impossible to determine that either appellant was only a principal or only an accomplice. The instruction conformed to the evidence.

Both Halvorsen and Willoughby complain about the trial court's failure to instruct the jury on wanton murder for the deaths of two of the victims. This argument is without merit, since there was no evidence supporting such an instruction. *Gray v. Commonwealth,* Ky., 695 S.W.2d 860 (1985). These two victims alone were shot a total of thirteen times by both Willoughby and Halvorsen. In view of the number, location, and lethal magnitude of the gunshots, it would have been unreasonable to give a wanton murder instruction.

Both Halvorsen and Willoughby complain that repeated misconduct by the prosecutor during the penalty phase closing argument deprived them of a fair trial. Our

examination of the closing argument has convinced us that this complaint is without merit. Brief portions of the argument were irrelevant, but on the whole, the argument was fair comment on the evidence.

Considering the overwhelming nature of the evidence against Halvorsen and Willoughby, including their own admissions, we quote from *Timmons v. Commonwealth*, Ky., 555 S.W.2d 234, 241 (1977), which concluded:

> We do not think that the prosecutor's argument exceeded the bounds of propriety, nor do we think that it could have added much fuel to the fire anyway.

The same comment applies here.

Halvorsen complains that the prosecutor's questioning of his codefendant, Willoughby, made "oblique references" to his failure to testify and therefore constituted unfair comment on same. Willoughby was asked a number of questions about matters he had asked Halvorsen or about other ***926** witnesses' statements incriminating Halvorsen. Willoughby simply denied asking questions or could not remember. We do not consider these matters comment on failure to testify, particularly since at this stage of the trial Halvorsen had not elected to decline to take the witness stand.

Halvorsen next complains that the introduction of evidence of other crimes and bad acts prejudiced him to the extent of denying him a fair trial. The "other crimes" and "bad acts" evidence complained of were (1) the testimony of Susan Hutchens that Halvorsen, after the shooting, stamped on a kitten that his daughters had found; (2) the testimony of Glenda Tucker that Halvorsen said he would kill his mother if she saw the van; and (3) Hutchens' testimony that on the day following the shooting, Halvorsen attempted to sell drugs and buy guns.

Halvorsen concedes that the testimony about his attempt to buy guns was relevant to prove that he wanted to trade off the .38–caliber pistol that was used to murder the victims but complains that the inclusion of the other details of the sale was unnecessary. The details surrounding the effort by Halvorsen to get rid of one of the murder weapons were necessarily part of a single, inseparable, and concededly relevant transaction. Likewise, the testimony that Halvorsen took drugs and stamped on a kitten immediately after the killing was admissible, since it was incidental to relevant testimony in regard to Halvorsen's activities between the time of the killings and the time he and Willoughby left to get rid of the victims' bodies and other evidence of the crimes. Tucker's testimony about Halvorsen's statement that he would kill his mother arose out of, and was incidental to, relevant testimony regarding Halvorsen's admission to Tucker that he and Willoughby had killed three people. This assertion of error has no merit.

Next, Halvorsen complains that the court gave misleading instructions on Halvorsen's defenses of extreme emotional disturbance and intoxication. There was absolutely no evidence supportive of Halvorsen's complaint that the trial court should have *sua sponte* given the jury instructions on extreme emotional disturbance other than the bare assertion that seeing one of the victims threaten his friend, Willoughby, gives rise to a reasonable inference that he became extremely disturbed.

Halvorsen also complains that while the court properly included his defense of intoxication in those instructions under which he was entitled to such a defense, he was denied the benefit of the defense by the failure of the court to specifically refer the jury to the offenses which it could convict him of if it found him to have been intoxicated.

The instructions under which the intoxication defense was available were clearly set out by language spelling out the elements of the defense. It is a reasonable inference that the instructions which excluded such specific language also excluded the defense. As such, the jury was free to convict Halvorsen under these instructions had it been so inclined to accept his intoxication defense, and no additional instructions were necessary to impress the jury that these offenses were alternatively available had it accepted Halvorsen's intoxication claim. There is no merit to these assertions of error.

We also reject Halvorsen's complaint that the court was required to *sua sponte* instruct the jury on nonstatutory mitigating factors, such as "his stable upbringing in an obviously healthy, caring home."

Likewise without merit is the complaint that the court was required to instruct the jury on Halvorsen's accomplice participation as a mitigating factor. KRS 532.025(2)(b)(5) allows accomplice participation to be considered as a mitigating factor where such participation is "relatively minor." Emptying a revolver into the bodies of two helpless victims, in our opinion, is not "relatively minor" participation.

Willoughby argues that he was denied effective assistance of counsel due to the joint representation provided by the Legal Aid office to himself and co-indictee Hutchens; that an actual conflict of interest ***927** existed which affected his lawyer's performance; and that his waiver of multiple representation in district court was not an intelligent waiver.

Willoughby, Halvorsen, and Hutchens were arraigned in district court where each entered a plea of not guilty. Sullivan, a Legal Aid attorney, represented each. Shortly thereafter, Willoughby, represented by Jarrell of Legal Aid, executed a waiver of dual or multiple representation, acknowledging that he was aware that a lawyer from the Legal Aid office also represented his co-indictees, Hutchens and Halvorsen. Later, Halvorsen employed private counsel. Sullivan still represented Hutchens.

In the trial court, all three defendants entered pleas of not guilty under the representation of separate counsel. Counsel for Willoughby and Hutchens were both employees of Legal Aid. Three months after their arraignment, Hutchens pled guilty to lesser charges and testified for the prosecution at trial.

The issue of joint representation and conflict of interest was not called to the attention of the trial court. When the trial took place, Willoughby was represented by Jarrell, the Legal Aid lawyer appearing in district court, and Halvorsen by employed counsel. The fact that Hutchens' counsel, also of Legal Aid, appeared at the time of entering pleas of not guilty is so innocuous that it deserves no further comment.

We have examined the record and do not discern any confict of interest during the trial. The argument that Halvorsen, who did not testify at the guilt phase, testified at the penalty phase that he shot two of the victims for the reason he was afraid of Willoughby does not rise to the level of conflict of interest. The argument that Willoughby's counsel did not effectively cross-examine Halvorsen or Hutchens for the reason Hutchens' counsel was from the same Legal Aid office is simply not borne out by the record. The trial court did not abuse discretion by denying separate trials and had no reason to inquire into dual representation or potential conflict. Cf. *White v. Commonwealth,* Ky., 671 S.W.2d 241 (1983); *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

In any event, Willoughby fails to demonstrate any unfair prejudice from these issues.

Willoughby next argues that pretrial taped and oral confessions made by him were improperly admitted. Willoughby had moved to suppress the statements on the ground that they were involuntary due to his drug and alcohol intoxication.

The traditional rule is that a confession otherwise voluntary is not to be excluded by reason of self-induced intoxication unless "the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements." *Britt v. Commonwealth,* Ky., 512 S.W.2d 496, 499 (1974). Having reviewed the briefs and excerpts from the record, we cannot say that Willoughby had reached such a degree of mania as to require the exclusion of his statements. The trial court's ruling that the confession was voluntary cannot be disturbed on appeal unless clearly erroneous. *Sampson v. Commonwealth,* Ky., 609 S.W.2d 355 (1980). The court's ruling is supported by substantial evidence, and its factual findings are conclusive. RCr 9.78.

Willoughby next complains that the trial court erred in failing to instruct the jury on all mitigating factors. This argument is without merit. Willoughby first argues that it was error for the court to not instruct on the mitigating circumstance of his lack of a significant history of prior criminal conduct. The court's refusal to give such an instruction is not surprising considering the fact that Willoughby had a criminal repertoire which included convictions of first-degree robbery, first-degree burglary, and theft by unlawful taking. Willoughby claims that the court erred by not *sua sponte* instructing the jury on some twenty-odd factors as mitigating circumstances, such as his not being a mean person, his trouble coping as a young child, and his having been shot in the face accidentally as a young man. The trial court did not preclude the jury

from considering ***928** these factors, since the jury was instructed as follows:

> In addition to the foregoing (statutory mitigating factors) you may consider any other circumstances which you consider mitigating even though they are not listed above.

The jury was encouraged to consider any evidence it pleased in mitigation, and nothing was precluded from its consideration to that effect. We are of the opinion no error occurred here. See *White v. Commonwealth,* Ky., 671 S.W.2d 241 (1983).

We have reviewed the other assertions of error and are of the opinion none of them merits comment.

This gruesome slaughter of human beings is portrayed by the testimony of an eyewitness who stated that Greene's wounds caused her to cry, moan, and convulse until Willoughby ended her suffering with two additional shots, the last to the back of the head.

We have conducted our review of the death sentence in accordance with the provisions of KRS 532.075. We are of the opinion from the record that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the evidence supports the finding of an aggravating circumstance. KRS 532.025(2)(a).

We have considered whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases and have in this regard considered the crimes committed here and all of the evidence surrounding Halvorsen and Willoughby and their backgrounds.

The data for our use in this regard have been compiled in accordance with KRS 532.075(6)(a), (b), and (c). We have considered all of the cases in which the death penalty was imposed after January 1, 1970, as follows: *Scott v. Commonwealth,* Ky., 495 S.W.2d 800 (1972); *Leigh v. Commonwealth,* Ky., 481 S.W.2d 75 (1972); *Lenston and Scott v. Commonwealth,* Ky., 497 S.W.2d 561 (1973); *Call v. Commonwealth,* Ky., 482 S.W.2d 770 (1972); *Caldwell v. Commonwealth,* Ky., 503 S.W.2d 485 (1972); *Tinsley and Tinsley v. Commonwealth,* Ky., 495 S.W.2d 776 (1973); *Galbreath v. Commonwealth,* Ky., 492 S.W.2d 882 (1973); *Caine and McIntosh v. Commonwealth,* Ky., 491 S.W.2d 824 (1973); *Hudson v. Commonwealth,* Ky., 597 S.W.2d 610 (1980); *Meadows v. Commonwealth,* Ky., 550 S.W.2d 511 (1977); *Self v. Commonwealth,* Ky., 550 S.W.2d 509 (1977); *Boyd v. Commonwealth,* Ky., 550 S.W.2d 507 (1980); *Gall v. Commonwealth,* Ky., 607 S.W.2d 97 (1980); *McQueen v. Commonwealth,* Ky., 669 S.W.2d 519 (1984); *White v. Commonwealth,* Ky., 671 S.W.2d 241 (1984); *Harper v. Commonwealth,* Ky., 694 S.W.2d 665 (1985); *Skaggs v. Commonwealth,* Ky., 694 S.W.2d 672 (1985); *Kordenbrock v. Commonwealth,* Ky., 700 S.W.2d 384 (1985); *Bevins v. Commonwealth,* Ky., 712 S.W.2d 932 (1986); *Matthews v. Commonwealth,* Ky., 709 S.W.2d 414 (1986); and *Marlowe v. Commonwealth,* Ky., 709 S.W.2d 424 (1986).

The cases preceding *Gall* have had the death penalty set aside for the reason the statute was invalid under *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In making a comparative study of these cases and the circumstances in this case, we are of the opinion the sentence of death here is not excessive or disproportionate to the penalty imposed in the enumerated cases.

The judgment is affirmed.

STEPHENS, C.J., and GANT, LEIBSON, WHITE and WINTERSHEIMER, JJ., concur.

VANCE, J., dissents and files a separate dissenting opinion.

Leibson, Justice, concurring

I concur with this opinion except for that portion of the opinion stating Supreme Court proportionality review pursuant to KRS 532.075 is limited to prior cases wherein the death penalty was both imposed and affirmed. It is my opinion that the review of "similar" cases, as called for by the statute, requires us to consider all cases where the death penalty was imposed, regardless of whether the sentence was affirmed or reversed on appeal.

***929** VANCE, Justice, dissenting.

In a death penalty case, a juror should not be encouraged to take lightly his responsibility in fixing death as a punishment. Our statute provides that the jury can only recommend the death penalty but that the actual sentencing is the responsibility of the Judge. Jurors should not be led to believe, however, that they should keep the option of the imposition of the death penalty open by recommending it because the Judge can reduce the sentence if he feels it is not warranted.

I believe the Commonwealth's attorney, both in questions on voir dire and in final argument, gave the jurors reason to believe the responsibility would not rest upon them, but upon the trial judge, if appellant were executed.

In the voir dire examination of Francis White, the following question was asked:

> Q. Okay. In Kentucky the jury does not set the penalty in a death penalty case. They recommend the penalty to the judge, Okay? I think maybe earlier you—you probably, if you remember, were told in jury orientation that in a criminal case the jury sets the penalty, like on a theft case, and that's true. But in a death penalty case, the jury recommends to the Judge, so in effect if you're the juror in this case you would be recommending a sentence to Judge Angelucci; you understand?
>
> A. Yes, I think.

In the concluding argument, the Commonwealth's attorney stated:

> In these instructions it's very clear that your recommendation, your verdict, is a recommendation to Judge Angelucci in this case. You don't set the sentence in this case; you recommend it.

References such as these by the Commonwealth's attorney, it seems to me, are likely to cause a juror to recommend a death penalty, knowing the Judge might later reduce it, even though the same juror would not have imposed the death penalty had the matter been left entirely up to him.

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United States District Court, E.D. Kentucky,
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Leif HALVORSEN, Petitioner
v.
Philip W. PARKER, Warden, Respondent.

Civil Action No. 08–484–DLB.
|
Nov. 19, 2012.

Attorneys and Law Firms

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Matthew R. Krygiel, Office of Attorney General, Frankfort, KY, for Respondent.

MEMORANDUM ORDER

DAVID L. BUNNING, District Judge.

*1 Petitioner Leif Halvorsen has filed a motion requesting leave to amend his petition for a writ of habeas corpus to assert eleven new claims that his trial counsel was constitutionally ineffective. (Doc. # 137) In an effort to excuse procedural default of these new claims pursuant to *Martinez v. Ryan,* 132 S.Ct. 1309 (2012), Halvorsen contends for the first time that his counsel during his state post-conviction proceedings was constitutionally ineffective for failing to assert that his trial counsel was ineffective for failing to raise several claims of substantive unconstitutionality in his criminal proceedings. (Doc. # 137 at 7–9)

Respondent Parker counters that *Martinez* cannot excuse procedural default because Kentucky courts do not categorically refuse to entertain claims of ineffective assistance of trial counsel on direct appeal, rendering procedural default inexcusable and hence amendment of the petition futile. (Doc. # 148 at 3) Parker continues that new claims of ineffective assistance would also be time barred, as they do not arise from the same operative facts as the substantive claims already asserted in the petition, and therefore would not "relate back" to the original filing to avoid a time bar. Finally, Parker contends that permitting amendment years after the petition was filed and after completion of briefing regarding both the merits of the claims and discovery requests would be impermissibly prejudicial, barring amendment. (Doc. # 148 at 4–5) The Court will consider these arguments in turn.

In *Martinez,* the Supreme Court held that where the first opportunity for a petitioner to claim that his trial counsel was ineffective is not on direct appeal but during state collateral review proceedings, and counsel at such proceedings fails to assert the ineffective assistance claims resulting in their default, this failure can constitute cause to excuse the procedural default if the petitioner can establish that collateral review counsel provided ineffective assistance by choosing not to pursue the claims. *Martinez,* 132 S.Ct. at 1315, 1317.

Halvorsen now seeks to take advantage of this newly-articulated principle to add eleven new claims to his petition that his trial counsel was ineffective. Each claim asserts, in essence, that his trial counsel was ineffective because he did not object to rulings made by the trial court, arguments made by the prosecution, or to the jury instructions. (Doc. # 137 at 2–3) Each of these claims simply recasts a claim made in his petition which challenged the actions of the court or the prosecution as substantively improper. (Doc. # 25 at 6–7, 10–12)

Neither party disputes that Halvorsen did not assert these new ineffective assistance claims during his RCr 11.42 proceedings. The threshold question under *Martinez* then, is whether under Kentucky law those collateral review proceedings were the first opportunity for him to do so, or whether the claims could and should have been asserted on direct appeal. On this question, the Kentucky Supreme Court has stated:

> *2 Generally, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error

> which have been presented to trial courts.... This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872–73 (Ky.1998). Importantly, this rule was already well-established when Halvorsen actually filed his direct appeal fifteen years before in 1983. *Hennemeyer v. Commonwealth,* 580 S.W.2d 211, 216 (Ky.1979); *Wilson v. Commonwealth,* 601 S.W.2d 280, 284 (Ky.1980).

There do appear to be a few instances where, notwithstanding this rule, appellate courts in Kentucky have considered and decided ineffective assistance claims where the trial court did not clearly decide the issue below, and without the benefit of any evidence beyond that contained in the record on appeal. *Cf. Wilson v. Commonwealth,* 836 S.W.2d 872, 877–80 (Ky.1992); *Prater v. Commonwealth,* 2007 WL 625081, at *6–8 & n. 41 (Ky.App.2007) (noting that *Humphrey* requires a trial record or evidentiary hearing to permit direct appellate consideration of ineffectiveness claim, but reaching claim on the merits notwithstanding that circuit court denied motion for new trial without hearing or explanation). Indeed, Halvorsen's co-defendant Mitchell Willoughby claimed on direct appeal that his trial counsel was ineffective, a claim the Kentucky Supreme Court reached on the merits in their combined appeal. There, Willoughby argued:

> that he was denied effective assistance of counsel due to the joint representation provided by the Legal Aid office to himself and co-indictee Hutchens; that an actual conflict of interest existed which affected his lawyer's performance; and that his waiver of multiple representation in district court was not an intelligent waiver.

Halvorsen v. Commonwealth, 730 S.W.2d 921, 926–27 (Ky.1986). Notwithstanding its express acknowledgment that "[t]he issue of joint representation and conflict of interest was not called to the attention of the trial court[,]" *id.,* the Supreme Court conducted its own de novo review of the record and rejected the claim, finding that it could "not discern any conflict of interest during the trial":

> The argument that Halvorsen, who did not testify at the guilt phase, testified at the penalty phase that he shot two of the victims for the reason he was afraid of Willoughby does not rise to the level of conflict of interest. The argument that Willoughby's counsel did not effectively cross-examine Halvorsen or Hutchens for the reason Hutchens' counsel was from the same Legal Aid office is simply not borne out by the record.

***3** *Halvorsen,* 730 S.W.2d at 927. Nonetheless, these cases appear to be the rare exception to the generally-followed rule in Kentucky that ineffective assistance claims must be reserved for presentment during collateral review proceedings.

It therefore seems reasonably clear that, were Halvorsen filing his federal habeas petition today, *Martinez* would permit him to at least make the argument that he should be allowed to raise unexhausted ineffective assistance claims because of his post-conviction counsel's allegedly unreasonable decision not to. The remaining question is whether he should be permitted to make that argument for the first time now, three years after he originally filed his petition and long after the limitations period of 28 U.S.C. § 2244(d)(1) has passed. The short answer to that question is no.

To determine whether to permit an amendment to a habeas corpus petition, the Court utilizes Federal Rule of Civil Procedure 15, the same rule applicable to ordinary

civil proceedings. 28 U.S.C. § 2242; *Mayle v. Felix,* 545 U.S. 644, 654–55 (2005). Because the limitations period for Halvorsen to assert habeas claims has long since passed, any proposed amendment at this juncture would be denied as futile unless he can establish that his new claims "relate back" to the filing date of the original petition under Rule 15©. Under that rule, "(1) [a]n amendment to a pleading relates back to the date of the original pleading when ... (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading ..." Fed.R.Civ.P. 15(c)(1)(B). This provision is given a noticeably stricter construction in the habeas context in light of "Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them]." *Mayle,* 545 U.S. at 657. Under this standard, the proposed new claims will "relate back" only when they arise from the same facts and events as the claims set forth in the original petition. *Pinchon v. Myers,* 615 F.3d 631, 642–43 (6th Cir.2010).

The Court will assume, without deciding, that Halvorsen's proposed ineffective assistance claims are sufficiently related factually to the events which gave rise to his substantive claims of error by the trial court and impropriety by the prosecution to warrant relation back, although the case law with respect to whether this is actually so is far from uniform in this regard. *Compare Colton v. Hall,* 386 F. App'x 606, 607 (9th Cir.2010) (district court properly denied amendment to add new claim challenging trial court's imposition of consecutive sentences because it "involve[d] different alleged errors by different actors" than initial claim that trial counsel was ineffective for failing to object to trial court's imposition of two sentences) with *Martinez v. McGrath,* 391 F. App'x 596, 598 (9th Cir.2010) (proposed claim that trial counsel was ineffective for failing to investigate juror misconduct shared "common core of operative facts" with pre-existing claim of juror misconduct).

***4** A conclusion that an otherwise time-barred claim may be saved through application of the "relation back" doctrine establishes only that the proposed amendment is not patently futile; it does not establish that it is appropriate. To decide that question, a court should consider several factors, including:

> Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision. Delay by itself is not sufficient reason to deny a motion to amend. Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.

Coe v. Bell, 161 F.3d 320, 341 (6th Cir.1998) (citations omitted). Courts have been justifiably unwilling to permit amendment to assert new claims that were readily apparent and available when the petition was initially filed. *Cf. Smith v. Gansheimer,* 2010 WL 6618866, at *13 (N.D.Ohio 2010). In this case, Halvorsen unreasonably delayed without justification in asserting claims that he could and should have asserted when he first filed his petition, and permitting them at this late juncture would be highly prejudicial.

Halvorsen gave notice that he intended to file a habeas petition in this Court on November 24, 2008. (Doc. # 2) Nine months and four hundred pages later, Halvorsen filed his petition asserting thirty different claims for relief, including numerous allegations that his trial counsel had been ineffective, on August 18, 2009. (Doc. # 25) The Court ordered the petition served on October 26, 2009. A year later respondent Simpson filed a comprehensive response on August 27, 2010 (Doc. # 58); Halvorsen filed in excess of three hundred pages of reply on March 14, 2011. (Doc. # 73) Before and after that date, the parties filed or responded to dozens of motions on all manner of topics, including exhaustive briefing regarding discovery and expansion of the record through various devices to expound upon the substantive claims asserted in the original petition.

To explain the three year delay before attempting to assert these new claims, Halvorsen contends that he could not possibly have asserted them until the Supreme

Court decided *Martinez.* (Doc. # 137 at 7) Before then, he explains, his ineffective assistance claims were procedurally defaulted because his RCr 11.42 counsel had failed to make them in 1998. It was only 14 years later when *Martinez* was decided that he concluded that his post conviction counsel was ineffective, thus paving the way for their assertion in federal habeas proceedings. Accordingly to Halvorsen, at any time before then it would have been "frivolous" for him to assert such claims. *Id.*

The fallacy of this argument is, of course, self-proving. As Halvorsen himself goes to great pains to explain, Kentucky and Arizona law are alike with respect to requiring an ineffective assistance claim to be presented in state collateral attack proceedings. (Doc. # 152–1 at 2, 6) Because his state post-conviction counsel had failed to do so, Martinez, like Halvorsen, had defaulted the claim. Unlike Halvorsen, however, when Martinez filed his federal habeas petition in April 2008, he asserted his ineffective assistance claims, and argued that their default was excused by the ineffectiveness of his post-conviction counsel, an argument ostensibly at odds with well-established law under *Coleman v. Thompson,* 501 U.S. 722, 753–54 (1991). *Martinez,* 132 U.S. at 1314–15.

***5** Martinez, who just won his case before the United States Supreme Court, would doubtless take exception to the characterization of this argument as "frivolous." The only barrier faced by Martinez or Halvorsen alike to asserting their ineffective assistance claims was the need to argue for an exception to the *Coleman* rule, an argument Martinez made but Halvorsen did not. The Supreme Court's ultimate decision four years later in *Martinez* was not a condition precedent to making a viable argument for such an exception, but only to ensuring its success. Halvorsen chose to forego this argument three years ago, and he may therefore not make it now, long after the parties have thoroughly briefed their substantive claims on the merits as well as related questions regarding the necessity and propriety of permitting discovery and expanding the record with respect to them.

Because nothing prevented Halvorsen from asserting these ineffective assistance claims when he filed his original petition three years ago, and because permitting amendment to include them now would be unfairly prejudicial to the defendants and needlessly delay these proceedings, the amendment will be denied. *Smith v. Angelone,* 111 F.3d 1126, 1134 (4th Cir.1997) (motion to amend habeas petition may be denied when it has been unduly delayed and when allowing the motion would prejudice the nonmovant); *Moore v. Horel,* 2011 WL 644137, at *3 (E.D.Cal.2011) (leave to amend should be denied "when a party seeks to amend late in the litigation process with claims which were or should have been apparent early."); *Littlejohn v. Artuz,* 271 F.3d 360, 363 (2d Cir.2001) ("district courts nonetheless retain the discretion to deny that leave [to amend] in order to thwart tactics that are dilatory, unfairly prejudicial or otherwise abusive."); *Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir.1995) (denial proper "where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally.")

Accordingly, **IT IS ORDERED** that:

1. Halvorsen's motion to exceed page limitation (Doc. # 152) is **GRANTED.**

2. Halvorsen's motion to amend petition (Doc. # 137) is **DENIED.**

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FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

VOLUME XVIII

INDICTMENT :
NO.83-CR-152

MITCHELL WILLOUGHBY
AND LEIF HALVORSEN

DEFENDANT

I N D E X

VOLUME XVIII

* * * * * * * *

THE COURT: Does any member of the jury need to take a break for just a few minutes or so, before we get started? I'm not going to take a big long fancy break, but if any members of the jury need to go back to the juryroom, feel free to do so right now.

Any counsel need to take a short break, you lawyers.

All right, you may proceed.

* *

CLOSING ARGUMENT ON BEHALF OF
THE COMMONWEALTH BY MR. ROBERTS:

May it please the Court, Senator Moloney, Mr. Jarrell, Ladies and Gentlemen of the Jury:

When this trial began on July the 5th, I asked you a lot of different questions, specifically in one area. I asked you if you could vote to recommend the death penalty to Judge Angelucci if you believed the facts of the case warranted it. Of course, you didn't know what the facts were at that time. Each of you said that yes, you would, but each of you also said that you would require proof beyond all doubt.

I talked with you about the type of murder case that you felt, having never sat on a murder trial before or having never really considered it, but at that point in July, that you felt would be appropriate to have a penalty of death

recommended for the person who committed the murder, and some of you indicated the killing of an innocent person or senseless killing or killing of a family, or if your child or family member were murdered, or a murder in cold blood.

All of you said that you would have to absolutely be convinced of the defendant's guilt before you could recommend such a penalty.

I asked you at the beginning of the trial also if you would follow Judge Angelucci's instructions on the law in the case and uphold that law, whatever it be, as it developed in the trial, and all of you said that you would do that. And we talked about it, if you remember, somethings about the law that you didn't know at the time when we were picking the jury. And I think probably that each of you have learned some things in this month that you didn't know in July about the law in Kentucky.

For instance, just as an example, the law of intoxication may be stated in a way that--under the law that you might not have thought of before, but it's a very practical law which we all understand very very thoroughly and you applied it in this case. You upheld it.

The law about extreme emotional disturbance, otherwise known in street jargon, I guess, as sudden heat and passion, is based on common sense, and you've dealt with that law in our instructions in the case and you upheld it.

All of the law in this case is basic principles, just basic solid principles founded on common sense. All of it. The law dealing with the death penalty in Kentucky applies to only certain kinds of murder and in this particular case, one type that is prescribed by law, is where there are multiple murders that the death penalty then is appropriate or can be appropriate under the law that the legislature has written. The intentional killing of two or more people is what that means, a multiple killing or multiple murder.

This penalty was deemed to be appropriate by our state legislature and these are men and women who in fact put a lot, a great amount, of effort and caution into the creation of the law. But where--in thinking about this, where does the legilsature obtain its authority, its right, to enact such a law, and indeed where do you, as jurors, obtain the power to recommend to Judge Angelucci that the death penalty is a proper form of punishment? You know? Probably none of you have ever before had to make the real life decision of whether a particular criminal should receive the death penalty. And most people would be far more comfortable to let somebody else do it than to have that responsibility.

I've heard the argument by people expressed that they are unequivocally opposed to the death penalty and they say in support of that that we do not have the right to kill. Some of you are far better students of the Bible than I, but

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many Theologians say that while the Bible says thou shalt not kill, that is to be interpreted to mean thou shalt not commit murder. I ask you, in your knowledge as citizens, as students of the Bible to discuss this if that is an issue with you.

Not all killing is murder. And in talking to the people who would say you cannot kill, we don't have the right to kill, I--I sometimes will ask a question of the individual, well, what if you come home at night--or to a student who debate these issues sometimes in high school--what if you come home and you walk in your house and suddenly you're grabbed from behind by an intruder in your house and a knife is held at your throat and he's going to kill you and you know he's going to kill you. You believe that. Do you have a right to take that person's knife, if there's a pair of scissors there and you can plunge it into his chest? Or if you're in your house and if a gun is present and you shoot the burglar, the person that is in your house that you feel is going to take your life? Well, of course, the answer is; that's self defense. Self defense (Writes on Board words "self-defense")

Not an act of murder, but an act of killing that is justified in our society and practically accepted by everyone that that is possible and permittable. Certainly under the law it is.

Well, to the person who makes the statement that you

don't have the right to kill under any circumstances, I--I sometimes will ask the question, well what if you come home from school, if you're a kid at Henry Clay and debate on the death penalty issue, and you see when walking in your house your mother or sister being confronted by an attacker, and he has the knife at her throat. Do you shout at the guy and say now don't hurt mama? If you have the capability of killing that man to stop him from killing your mother or your--or your sister or anybody else, your friend, your loved one? Do you have the right to take that person's life and stop them from killing that person? Of course--and the answer that comes back, of course you do, if it's your mother or your sister or your father or your friend. And that's called defense of another. And that's a form of killing that is not murder, that is permitted. (Writes on board "Defense of Another")

Suddenly it occurs to most people who begin to thinking about this proposition that we citizens make laws in our communities, in our states, that protect us from wrongs or from individuals who commit those wrongs on us. Well, you know it would be--it would be ridiculous to think that we should be unprotected as an individual citizen from a person who would murder us or an innocent member of our family. And of course that's not what the law is and that's not what society says the law should be.

You know, in this--in this day and time we have the

greatest nation in the world, without any question. Sometimes we often bask in the freedoms that are afforded us by our constitution, with very little thought about how they actually --actually affect us. I'm talking about things you accept probably without very much thought, like the right that you have to go to work, the right that you can go and pray any place you want to, the right that you can live any place you want to, own your own home; rights that we've got, that we sometimes accept without much thinking.

You know, there are people in the world who would love to put barbwire around our country and there are a fractional few Americans in our country who would allow that to happen without any resistance, but there are only a few, because if we are under attack as a nation, then we defend ourselves. We have done that in different wars and we will continue to do that and we're proud to do it, if the need arises, even though it means taking the lives of thousands of people, hundreds of thousands of people possibly. We authorize our government to support a military defense for our country. That's killing. That's not murder. That's defense of a country and we accept that. (Writes on board "Defense of country")

You know, there are people in this world, in our country, in our state, in our city, who don't care anything about the value of human life. There are some people who could

take a life of an innocent person just as easily as--or with as much thought as it takes to flick off a light switch in a room. Sometimes people don't recognize that, but there are such people. And our state legislators have recognized this fact and have--as well as the citicens of this state who support the legislators and have enacted a law for those few individuals who do not respect the value of human life and who would commit a senseless,heinous murder, demonstrate it by doing that.

The argument is often raised instead of the death penalty for such an individual, we should give them a life sentence and keep these people off the street. And it's easy for some folks, you know, to argue that, as if to say as soon as the killer is out of sight, as soon as he is out of Fayette County, then everything will be all right.

What they don't realize is that the Kentucky State Penitentiary in Eddyville is a city within a few acres, and you're not taking the person out of this world with a life sentence.

What should we expect of an individual who has committed a ghastly act of murder and is sentenced to life? What do you expect? Do you think that he's suddenly rehabilitated upon entry into the penitentiary? He's transformed? You think that happens? Do you think that he miraculously loses his rage or his calousness and he grasps the concept

somewhere in this time period that the human life is the most precious thing on earth?

I wonder if the anti-death penalty people have ever really considered--ever really considered the welfare of hundreds and thousands of people who are subjected to the risk of convicted murderers. Is the inmate population safe? The young man convicted of burglary or larceny, theft, who goes to the penitentiary, is he safe? What prevents a convicted murderer with a life sentence from getting a shiv and holding it to the kid's neck, the young burglar's neck, and demanding escape? What prevents that?

Well, that's easy to say--the answer, segregation from prison population. Well that's fine, but what about the prison officials, people like George Coons, people who have to handle the murderer with the multiple life sentence? That's a reality. That's in this world. Every second every person who is in this capacity of watching, of being in control, has to have a razor sharp sense of awareness in a penitentiary, because their laxness can be the opportunity, the chance, for the convicted murderer to effect his escape. That's reality.

And his bargaining power, the throat of an innocent person whose job it is just to maintain the person. Well, our response to that person in the penitentiary, don't kill him now, Frank, because if you do we're going to give you a life sentence. Is that a deterrent to a person who's been convicted

of murder, with a life sentence, multiple murders? Well, I suggest to you that the death penalty is a needed, much needed deterrent for the inmate population of our penal institutions.

Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is. In the last few years, we saw Martin Luther King, the greatest black leader who ever lived, gunned down; the person caught, arrested, tried, convicted, sentenced and placed in the extremely tight security of the Tennessee maximum prison in Brushy Mountain, and he escaped, and thank God he broke his ankle when he jumped down and he was gone for three days but they finally caught him.

Think about the death penalty as a deterrent. You know, some--we live in a town that has the home fleet plan, policemen take their cars home, and the thought there is that it deters crime. How do you know? You can't say that 53 burglaries were prevented because a policeman has his car on Appamattox Road every day, but we know that it does have an affect. We know it does because we have talked to the burglars. And so we justify that as a pay incentive to let the policeman take his car home. You could give him the money instead of taking his car home, but they know it has an affect.

Well what about the death penalty as a deterrent?

Does it actually stand as a threat to the criminal who is out there right now, thinking about an armed robbery of a liquor store, or the burglary of somebody's home? Do they kill the eye witness? Do they think about that and thus escape capture because nobody can identify them?

Obviously nothing that occurs in a judgment or verdict will totally affect every citizen, every potential murderer or criminal. The death penalty conviction will not stop future murders in this community. It will not, totally. Won't stop them all. But it most certainly is a valuable and effective deterrent to individuals --to certain individuals who really believe the death penalty will be enforced by Commonwealth Attorney's offices and juries, the citizens in the community. If they really believe that, then it can be a deterrent.

If the belief is that you'll never get the death penalty, then the value of the life, of the potential innocent victim eye witness, goes way down. The question of deterrence is easily resolved. As to the future threat of the convicted murderer to society, Gary Gilmore will never kill another college student, ever. Can the Illinois authorities guarantee that for Richard Speck? Can California authorities guarantee tha about Charles Manson?

Kentucky citizens, ladies and gentlemen of the jury, have a right to be protected from any person who kills innocent

people for no reason. They have a right to be guaranteed-- guaranteed that a convicted murderer under our law will never kill again. That's not murder. That's protection of society. (Writes on board "Protection of Society")

I want to talk to you about the instructions. Each of you have them and they're certainly not difficult to understand. There are several things that I want to talk about, just briefly. New words are probably presented to you in the instructions that are running through your mind now and they deal with aggravating circumstances, mitigating circumstances, and I want to discuss that with you as the instructions do, what they mean. And it talks about, in the instructions about sort of a compiliation of circumstances. If you believe so many circumstances are proved or you don't believe a number is proved, then you shall do certain things. And it's pretty self-explanatory.

In these instructions it's very clear that your recommendation, your verdict, is a recommendation to Judge Angelucci in this case. You don't set the sentence in this case; you recommend it.

Let's talk about aggravating circumstances. The Commonwealth must prove to you an aggravating circumstance in order for the death penalty to be recommended by you. The first page of this instruction says, you may consider the evidence presented to you during the first phase of the trial.

There's a sentence right in the middle of that instruction 48. And I submit to you that beyond all doubt we have proved to you the aggravating circumstance in each of these cases, in each of the counts, that there are multiple murders. That's the fact that we must prove, and we've done that. It doesn't have to be proved in the second phase of the trial, otherwise we'd be here two months proving it all over again to you. We proved it beyond all doubt. There has been multiple murders on each--in each of these situations. And that's the aggravating circumstance which you will consider in every one of these penalty phases with regard to each count.

We have proved to you also that the brutal acts of these two defendants were intentional. That's an addition for you to consider, and that's important, because we proved to you that Joe Norman owed Mitchell Willoughby money, and that they argued about that. We proved to you that Willoughby and Halvorsen had Susan Hutchens go to Barrick's and buy shells, two boxes of shells. But not just two boxes of shells, bought two boxes of hollowpoints. Why would a person want to buy the most expensive kind of bullet, a bullet that mushrooms upon impact and splinters in a body? Why would a person want to do that? To shoot tin cans or a jug in a pond? No. They had a different plan; they had a different intent when they did that. They had to have the bullets for what they were going to do.

And you know, it's interesting that they didn't want [redacted] on the sheet in Barrick's that says who buys--who [redacted] bullets. Mitchell explained that because of his record. Well; okay, so he had a record. He's not worrying about all the dope dealing he's doing particularly, but he said, I'm not going to go in and sign up for the bullets because maybe that would get me in trouble. And so he gets Susan to do it. Why? Why not Leif? Leif doesn't have a criminal record. Why can't he go in and buy the bullets? There's only one reason for that. Not that he was too intoxicated and didn't know what was going on, sitting over in the cab of the truck. He didn't want his name on the line for buying the bullets. Why? Because they were intended for something and it wasn't shooting tin cans. Who in the world would care about that? There has to be another reason and that's intent; that's conscious intent.

And so they had a person go buy the bullets that would not have any idea about what's going to happen in the next two or three hours. And then they go to the house on Loudon Avenue with guns loaded. Intent is spelled out there, because they planned to shoot Joe Norman.

Well, then they're confronted with a witness that they really didn't know was going to be there, involved, whose only crime was that she was at the wrong place at the wrong time.

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Detective Stephens--Detective Stephens asked Willoughby. (Plays tape) "Stephens: Why did you kill the girl? Any certain reason?" Willoughby, "Witness". (Stopped tape) Why did you kill the girl? Any certain reason? Witness. But for the grace of God, there weren't any other witnesses, because Angie Greene could have been there, or Russell Durrum could have been there, or the friends of Jackie or Joey. They could have been there. And how many victims would there have been? Do you think there would have been any spared?

You know we've watched these defendants--we've watched these defendants for days on end in this courtroom and we've listened to each of them explain how this callous crime occurred, and not one time did we ever see the slightest hint of remorse for what they did. Not one time.

Mitigating circumstances. If you'll turn to the--let's say instruction 52, the first instruction dealing with mitigating circumstances. Most of the instructions on mitigating circumstances are the same with regard to Halvorsen and Willoughby, with a couple of exceptions. Basically there's the mitigating circumstance of intoxication which you can consider. There's the one of youth. There's the one of duress. There is--for Leif Halvorsen the mitigating circumstance, under number 52, of being an accomplice because Joe Norman was killed by Willoughby, and the issue is if Leif was an accomplice, then that could be considered a mitigating

circumstance.

I want to talk to you about these. There's no point in going through the instructions and reading them all, because you're going to do that in the jury room, and they're very self-explanatory. I want to talk to you about some of them. Mr. Moloney will--and Mr. Jarrell will probably tell you that these mitigating circumstances are unrebutted. The Commonwealth didn't come on and prove anything in the second phase of this trial to rebut these. And I submit to you that throughout this case, as the first instruction tells you, you can consider all of the evidence presented to you in this trial; it's not just in the second phase, and certainly there's a good reason there. But from all the evidence, from listening to the defendants, the issue of credibility, you don't have to believe everything they say when they say that they are point five or four plus intoxication, and you obviously didn't believe that with regard to the guilt phase of this trial.

Several factors that you can consider in deciding, if the death penalty is not the appropriate penalty for you to recommend, are these particular items. If you believe that there is an aggravating circumstance, the multiple deaths which we have proved to you, then you can recommend the death penalty. You can do that if you find that there is one mitigating circumstance for each defendant or ten; you can still recommend the death penalty, if you feel that weighing

them, they don't overcome the significance of the aggravating circumstance, the multiple deaths.

On the other hand, if you find the aggravating circumstance, multiple deaths, you can still receommend a period of years, 20 years up to life or the life sentence. You can still do that. Whatever you do in your verdict, if you find an aggravating circumstance, there is an appropriate place in there to write that you did, in the verdict. If you find that there was an aggravating circumstance of multiple deaths, which I see no way that you could find otherwise, but you decide that the death penalty is not appropriate, and you recommend another sentence, go ahead and write in that you found the aggravating circumstance. That doesn't mean that you have to recommend the death penalty; you can still recommend life or 20 years.

Let's consider if there are any circumstances in this case, any mitigating circumstances in this case which justify --which justify you returning a sentence of life. Let's take emotional disturbance. Mitchell Willoughby's instructions, way back here in the back, let's take, uh, Count 1 of Mitchell Willoughby would be Instruction Number 61. Count 1, Count 2 and Count 3 of Mitchell Willoughby all read the same with regard to the emotional disturbance. Extreme emotional disturbance, if you remember from the prior part of this trial, that he was in an argument, that under the circumstances as he

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perceived them to be, he had the cause to kill Joe Norman.

Well, let's think about that, from the standpoint of a mitigating circumstance, because it applies to Joe Norman; it applies to Jacqueline Greene and it applies to Joey Durrum. Does he have sufficient mitigating circumstance of emotional--extreme emotional disturbance for you to return a verdict of life? He has an argument over a debt with a guy, and he shoots him and shoots him and shoots him, but he doesn't stop there. He then walks over and shoots Joey Durrum and Jacqueline Greene in the head. Is that extreme emotional disturbance for which there is a reasonable explanation or excuse? No. Without any question, no.

Well let's talk about age. Age in every one of these --I think it's number (c) or whatever--for every one of these three different counts for Mitchell Willoughby and for Leif Halvorsen. You're to consider the youth of the defendant at the time of the crime. And the court doesn't tell you that it has to be a certain age or whatever; that's your determination. If you--if you believe that the youth of these two guys or either one of them is of such mitigating nature that you feel a life sentence is appropriate, then you have the ability to do that. Let's look at that.

These are not fifteen or fourteen year old kids, a sixteen year old kid who commits a murder. These aren't inexperienced juveniles who suddenly get involved with drugs

that they don't know anything about and can't handle one night and they just blow. These aren't naive youngsters who suddenly get led down the path by some criminal mind somewhere and makes them--or leads them into doing some heinous crime. Not at all.

Leif Halvorsen is a 28 year old man who has personally done every drug imaginable and he has sold practically every drug imaginable. Mitchell Willoughby is a man who at the age of 24 has been convicted of the felony offenses of theft, of burglary and of armed robbery. And he spent time in the penitentiary. And now these two men, on January 13th, committed cold blooded murder without provocation.

Age as a mitigating factor? No. Not in this case.

Let's look at another one. Intoxication is throughout these instructions. They were intoxicated. There's no question about that, none at all, and we've never said that wasn't true. In fact the first question--one of the first questions we presented in this case is through Detective Stephens to prove to you that when Mitchell Willoughby got out of the car he was intoxicated. Okay. That's not a defense to the crime, as you certainly have found. But is it a mitigating factor? Is it something --if you'll just look at any of these mitigating factors, if you're on number 61, they all read the same--is it a mitigating factor that at the time he committed the offense his capacity to appreciate the criminality of his

conduct or to conform his conduct to requirements of the law was impaired because of intoxication. Impaired.

The defendants have related to you long and detailed histories of their drug use. Never once did I hear them say that they were forced to use drugs. I never heard that in all the testimony. Not when he was thirteen, not last year, not the Sunday before all this happened when they were using Meperidine and Tussionex and anything else they said they used. Not one time did I ever hear force, coercion to use the drugs by somebody. Everything they did with drugs was voluntary and done on their own free will.

Let's look at their so-called impairment and see if they are impaired. They had no difficulty getting on that stand and telling you what drugs they used and on what day they used them. Neither had any problem with that. In fact. Halvorsen took us day by day through the week of these --of these murders, starting on Saturday night before hand, when he said he didn't get any sleep, he was up all night, into early Sunday morning when he woke up and he said, I was sick and I needed some narcotics in my body and so he remembers that Susan took him to Begley's and he got a script filled under somebody else's name. Well that didn't end his memory. It wasn't impaired, because he went on to tell you that that day he drank a half a bottle of Tussionex and he smoked a lot of pot and Mitchell had a fifth of alcohol that day.

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And he goes on, he had lots of other facts. I'm just citing a few for your recall. He goes to Monday. The murders were on Thursday, coming up, but he's back on Monday and this is July and he's telling you this;he remembers this. He says Susan got the kids ready for school that morning and he saw Tommy Roark, who ever he is, he names him, and they use Meperidine. Willoughby says that he picked up Christy from school and that he smoked pot. And that night he stayed at Willoughby's. He remembers this.

Tuesday, he goes on, he still had some of the Meperidine left, so he's using that, and he took his cousin Laura's car. Where? To Cincinnati. Why? To buy some Cocaine. And he remembers that he wrecked the car and he got back, not somewhere in the morning, I don't remember what--he remembered he got back at four o'clock in the morning and he gave Laura some of the Coke and she used it.

Well that didn't end his impairment of memory because on Wednesday he remembers that--very clear as a bell that Danny Wells fronted him seven grams of Coke, very pure Cocaine he said, and Laura tested it; he remembers that, his cousin. And he remembers Susan left that night in Mitchell's truck and he remembers that they went back to Eden Court and he put his children to bed, I think he said two o'clock in the morning. And then he started shooting a lot of Coke. And he stayed up all night with Mitchell. And he remembers that cousin Laura

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was still there, and he remembers that he didn't take his child to school the next day because he felt bad, and that's of course going to be Thursday.

And he went looking for Susan and he told you the different places he went looking. This is the man who is impaired as a result of intoxication so that he doesn't appreciate the criminality of his conduct or can't conform his conduct to the requirements of the law?

You know if you recall Mitchell Willoughby's testimony he remembers all the drugs that he and Halvorsen used before the murders--before the murders and after the murders; he remembers them all. He detailed that for you. He told you about using Tussionex and Meperidine and Quaaludes and LSD and Cocaine and he wasn't talking to you like that doctor was talking to you in--out of a textbook. He was telling you when he used it, because he wanted that defense.

He was clear about buying the two bottles of Tequila. This person who's impaired by intoxication? He recalled the liquor store he bought it and he recalled that Leif was using the same amount of drugs he was and that they drank the Tequila out at the pond where they're shooting at some kind of a can or milk jug or something. He told you how to get there.

He related to you the conversation that he had with Joe Norman and I think he even remembered the fact that Joe Norman was capping a rock wall in his yard that day. That's

Thursday.

So what do we learn about any impairment? Certainly not the inability of these defendants to remember anything before the act. But what about the impairment during the acts of murder? Was there an impairment, a mitigating factor that would cause them to receive a life sentence from you? Did they lack the capacity to appreciate the criminality of their conduct because of the alcohol and drugs?

Well, they didn't miss one shot. Didn't miss. And Halvorsen says that Willoughby is laughing at him 'cause he can't shoot out at the pond.. Remember that? He didn't miss any shots. There's no bullet holes sprayed all over the wall. There's none. There's no bullet holes in the floor with flooring chewed up where they just riddled the floor trying to shoot these people. They hit 'em every time. Does that indicate to you the impairment so that you don't appreciate the criminality of your act?

They shot these victims in the front, in the chest, in the back and in the head, killing wounds from both guns. Well, did they indicate that they were impaired, as their lawyers will argue, when they gathered up the shells? Does that show impairment of appreciating the criminality of your act or does that show that you better get the shells so you don't get caught and you get the fingerprint so that the police won't get 'em.

What about taking the bar from the window with Joey Durrum's fingerprints on it, and I suppose Willoughby's fingerprints on it, and taking it and putting it in the trunk of the car--or the back of the car? Why would you do that. And why would a person who doesn't understand the criminality of his acts or is unable to conform his conduct to the law because of intoxication, why would he take a big wallboard and put it out by the door so that you can carry the bodies to the van without being seen by the neighbors? Does that sound like impairment? Or indeed why even use a van? Why don't you just take the first vehicle you see and throw the bodies in an open bed truck, if you're impaired, if you're just totally out of it and don't appreciate the criminality of what you're doing?

Well, they remembered the bottle of Tequila a few hours later and they came back and they busted the door in on Loudon Avenue to get the bottle of Tequila. Why? Not to get another drink. To get their fingerprints so they wouldn't be caught. Were they so intoxicated that they didn't appreciate the criminality of their acts when they waited until dark to dispose of the bodies? You heard his voice say that in response to the question to Stephens as we went through the cross examination.

What about taking them to an isolated bridge on Kentucky River? Why not the Clays Ferry Bridge? Why isolated? Why a river? Why take ropes from the back yard of Loudon

Avenue? Why do that? And why tie rocks on the bodies? Are you so impaired that you just don't know what you're doing? Or are you so impaired that you know exactly what you're doing? You want to weight that body down so it won't come up in the river.

Why did they wear gloves? And why did they take victims' identification if they're under this intoxication which should justify a life sentence in this case? Why do they take the identification of the victims and drive fifty, sixty, seventy miles, or wherever it is up to Powell County, and throw it off a bridge over the Red River in a weighted bag? Why did they do that?

Do we want to say to this community that with a verdict of a life sentence that it's less serious because they were on drugs? I don't think so. Do we want to establish a standard with a verdict that taking the lives of three human beings is less serious because a person consumes drugs and alcohol, but could still remember everything they did? Do we want that standard?

Another mitigating factor for you to consider that's in these instructions, duress. Let me see if I can find that. That's Leif Halvorsen. That will be number 52, Instruction 52, and it will apply, at (c), that Leif Halvorsen acted under duress or under domination of Mitchell Willoughby even though the duress or the domination of Mitchell Willoughby over Leif

Halvorsen was not sufficient to constitute a defense to the crime. Neif Halvorsen tells you on that stand that he is so scared for his life and so scared for his children's lives, and that he made that mental thought process on Loudon Avenue--I asked him that--that he shot two times into the body of Joey and four times into the body of Jackie. Both had killing wounds from his .38. We proved that to you by the doctor from Louisville.

Well did he shoot into the floor, this man under duress who feels like he's got to do something to justify this to Willoughby? Does he just shoot into the floor? Not to kill, but just to act like he's doing it? No. This drunken guy who couldn't hit a jug, didn't miss six times. Not one time did he miss. He fired killing wounds.

You know it's interesting if he's so scared of Willoughby, the man that has the gun, that's waving it, what he's going to do with all six of his bullets gone. How is he going to defend himself against Willoughby? Well, what happens when he gets away, when it's over? Does he--does he get away from him the first chance he gets? Does he go to the police? Does he reload and shoot Willoughby? No. He stayed with Willoughby, his partner in murder, for the next twenty-eight hours, until the arrest.

When the police catch 'em, did he come out of that truck like he was afraid of Mitchell Willoughby. Huh-uh (no).

He cowered down over that loaded .38 and they had to drag him out of the car. Is that the man under duress as he stated? Is that a mitigating factor in this case that you think justifies a life sentence for this man? Hardly.

Does the man under duress, Leif Halvorsen, tell the girl that he's going to marry that he's just killed three people and that she'd better remember what it means to be a snitch? Is that a man under duress? Is that the conduct of a man who's in fear?

There's an instruction on mitigating circumstances with regard to Halvorsen in Joe Norman's death on that same page 52, at (d), which deals with being an accessory or an accomplice. That says, this is Instruction 52, that the offense was actually committed by some person other than Leif Halvorsen and that the defendant, Leif Halvorsen, was but an accomplice whose participation in it was relatively minor. Well we know he didn't fire the shots into Norman that killed him. We know that, because all of his bullets are in the other two victims. And you've found in your verdict, appropriately, but does he deserve a mitigating factor in this manner which would allow him to receive a life sentence?

The example where that would be true would be in a situation possibly where two people go to a liquor store to rob it. One is driving the car. The other one goes in to rob and get the money. The guy in the car has no idea that he's

going to kill the clerk, and he kills the clerk. Well, he's aiding and abetting the crime of armed robbery by driving the car. He's helping him. And that would be a mitigating factor to give him a life sentence and the shooter the death penalty. But not in this case, because Leif Halvorsen is standing there with the gun, with two victims and he's aiding and abetting Willoughby by being present and shooting the victims. He's not entitled to that sympathy as a mitigating factor.

Let's look at Instruction 61, please. At (d) we have a mitigating circumstance relating to Mitchell Willoughby talking about killing Joe Norman. You, if you find--or you can find that the offense was committed under circumstances which the defendant, Willoughby, believed to provide a moral justification or extenuation for his conduct, even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct were insufficient to constitute a defense to the crime. We're talking about self-defense. We're talking about the sword, this alleged sword that is coming at him that we learn about in the trial. That's what we're talking about.

Do you think that that is a mitigating factor which should authorize a sentence of life? Well think about it. How many times did he shoot him? Was he in self-defense by this sword? He didn't--of course didn't tell the police about the sword; never mentioned it. Halvorsen never mentioned it in

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his testimony about any sword. And this big--coming at him, with--in self-defense. And you obviously didn't believe it when you considered it originally. Is it a mitigating factor that would justify a life sentence in this case? I don't think so.

I'd like to talk to you a minute about duties. Sometimes in our community, citizens are caught up in a brutal murder, who suddenly without any--without any real desire become witnesses in the case and sometimes those people disappear. They don't want to be caught, found, brought to court to testify particularly if it's a situation where there's somebody they know that is involved, from the murderer's standpoint. Sometimes when those people are confronted with their duty then they bite the bullet and they do their duty even though it's extremely painful for them.

I don't know what you think about Glenda Tucker. It's not relevant really what you think about her life style or anything else about her, but I can tell you this, it's uncontradicted that she likes Leif Halvorsen, and he told her he was going to marry her, and there hadn't been any break up to cause her to lie, and she told you as a citizen that she was over there and she saw blood all over Leif's clothes when he came in. She told you that he and Willoughby burst in. She told you that both defendants had guns and the man who said he was going to marry her told her that he'd killed three

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people, and he said that if his mother came over and discovered the van that he would kill her, too. And I'll tell you something: it takes guts as a citizen to come in and say that. That's a duty that a lot of people would never face.

But other people have duties in this case. The police; you've got a multiple police influx in this case from the state police, from people in Richmond, local City police departments down around the river to the Lexington police department, particularly in the area of scientific investigation and the collection of evidence, and the crime lab in Frankfort, police--state policemen who did tremendous amounts of analyzing evidence and presentation of it to you. Their duties in a case, any case, but particularly in this case, a death penalty case, is to collect everything so that you'll know, if you're on a jury, you'll know exactly all the facts. Because when we started this case I told you that I accepted the burden of proving it to you beyond all doubt. How can I do that if I don't have the evidence; if the police don't go out and do it and spend the hours collecting and taking statements and corroborating evidence that Susan Hutchens tells us, proving that she's telling the truth, by going to the witness or who ever it is and finding whatever she says he said or did. I know it takes a lot of work, and you don't have to do that, if you're a cop. You can work nine hours and go home. You can shuck it off. But you didn't see it in this case.

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You saw other things in this case. You saw very deep concern by policemen for the defendants' rights in this case, very deep concern, the admonishment of rights, calling Willoughby's parents for him, things like that, human things. They had a duty in this case and they did it, ever single one of 'em.

The defense attorneys in this case, Senator Moloney and Mr. Jarrell, have a duty. A lot of times citizens think the defense lawyer's duty is to pull some rabbit out of the hat and get the guy off, and that's not right. They had one duty in this case and that's to make sure this is a fair trial for their clients, and they did it. They did it well and they are to be commended.

The Commonwealth has a duty in the case. This is not an easy case to present. I'm sure you can well imagine by this time--you probably never thought of it before--but this is a tough case, particularly when you're going to ask for the death penalty and you know you are, then it's got to be painfully prepared, because this is not a case to be decided by beyond a reasonable doubt, but beyond all doubt. And I told you that--in the voir dire examination and the selection of the jury and each of you individually--that we accepted that burden, back on July the 5th. Each of you said that you would require such a standard of proof, and we've fulfilled that burden to you. We proved the guilt of both of these defendants

beyond all doubt.

It's a--it's a proud feeling that we have to be able to be entrusted with the responsibility to have a burden like this. And particularly I'm proud of being able to have an office of assistants who can grasp a case of this magnitude, because you learned from somewhere in the testimony that these two were at the scene, at the arrest, working with the police and they've worked until this very day.

Well the responsibility of deciding to ask for the death penalty first rests upon the Commonwealth Attorney, that's where it starts. And it's probably the toughest decision that can be made in our office. But we did it.

Now the Judge in this case, Judge Angelucci, has duties. He has probably tread on your patience sometimes. He's been the scapegoat. He's got to accept all that as being the reason for all the delays and so forth, and we don't miss your grimaces sometimes. His duty is to make sure this is a fair trial and to tell you what the law is in the case, instruction on the law, properly, and he's done that.

Well, let's get to you, because you've got a duty. The first duty you've got is to pay close attention to the case. And I asked you at the beginning of this would you do that and I watched you close because people I thought couldn't do it, I got rid of 'em. If they didn't have an attention span, if they looked bored, then they're gone, because I knew

this case was going to be tedious and I asked you to pay close attention to Susan Hutchens. And Mr. Moloney asked you to pay close attention to Susan Hutchens, because her credibility and testimony in this case was crucial. And you did it. And I told you you could take notes, and you did that, some of you, very copious notes. I saw some of you wrote all the time. So that tells me that you were doing a duty.

Well your first duty was to decide guilt or innocence and you did that You fulfilled one part of your duty. And now your duty is to determine the appropriate penalty for the crimes these defendants have committed. Understand that by your verdict you are going to set a standard as to when the death penalty should be recommended to a Judge.

During the course of this trial the defense attorneys asked questions of people like Angie Greene and Russell Durrum about the victims of these murders. Did Joe Norman hit an employee in the lip? Was he rude to some employees? Was he tough? Did Jackie Greene take a Valium? Did Joey Durrum have a stolen ring? Did Joe Norman maybe have some stolen property that he's ripping off from Ray Penrod, the building supplies down in the basement of the house where Ray Penrod lives? They asked those questions. Why did they ask them? They asked them. Defense lawyers of this caliber don't throw questions out at random. I've been in this business too long to know that and they are good defense lawyers.

They didn't ask these questions because of guilt or innocence. They have nothing to do with the guilt or innocence. Nothing. The questions were asked because of penalty. Do any of these allegations, if true, even if true, do they decrease the value of each of these victims' lives?

By your verdict, do you want to set--or do you want to establish a standard whereby value of a person's life is rendered meaningless because they took a Valium? Or because they had a stolen ring, if it was? Or because he was not kind to an employee? Do you want that standard set?

The evidence has shown you that these victims were not rich; they were not powerful; they weren't influential members of the society--of this community. Do you want to set a standard with your verdict that the death penalty is appropriate only if the victims are rich and powerful or influential? I submit to you that the lives of all our citizens in this community are equal, every one of them.

The evidence presented to you that three--was that three victims were murdered. And the law in Kentucky requires that only two victims be murdered for a death penalty to be recommended. You'll see in any of the instructions and/or the other victim. Count--Instruction 51 regarding Leif Halvorsen on the killing of Joe Norman, the aggravating circumstance which we've proved to you under (a) that the defendant's acts in connection with the killing of Joe Norman were in-

tentional and also resulted in the death of Joe Durrum and/or Jacqueline Greene. Not all three. Two. That's the law in Kentucky for multiple murders.

Well do you want to establish a standard in this community that you can murder three people in cold blood and have no legitimate fear of the death penalty? Do we want that standard in Lexington? A life sentence in this case tells these defendants and all potential defendants that you're safe if you limit your victims to three. Well where do you draw the line in Fayette County? Is it at five,four, five, six victims before the death penalty is appropriate.

The standard has been carefully set by our state senators and repesentatives that the murder of two people is sufficient to establish death as a proper penalty. And I submit to you that cold blooded murder of three people merits the death penalty as the only proper penalty in this case.

The evidence has established that the only reason Jackie Greene --the only reason she was murdered was because she was a witness. And her only crime--her only crime was that she saw these two defendants murder two men. Do we want to set a standard in this community where a murderer risks no greater penalty for killing an innocent witness than he risks by killing his first and second victims? Do we want that standard?

I submit to you there is no case where the death penalty

is more appropriate than that in which a person cold bloodedly [redacted] eye witness. There is no case.

[redacted] anticipate that in this case, in the final arguments, that the defense attorneys will attempt to make you feel like you are murderers if you return a recommendation of death. Mr. Moloney talked about in his opening statement killing, the state kills and that sort of thing, and I --I just want to tell you, don't let them do that to you. Do you think for a minute that the policemen who investigated this case and made the arrests and took the statements of these two defendants [redacted] murderers? Certainly not.

Do you think that because Mike Malone and Connie Sellars and I made the decision to seek the death penalty in this case, based on the evidence of the case, that we are murderers? Certainly not.

Is Judge Angelucci a murderer should he decide to follow your recommendation that the death penalty is the proper penalty in this case? Certainly not.

And neither are you. Neither are you, for feeling that the death penalty is the only appropriate penalty in this case. You're not a murderer and don't let anybody suggest it to you.

I urge you to remember that there are two parties to this action, the defendants and the people of the Commonwealth whom I represent. The people of this Commonwealth deserve your

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consideration about this issue as much as the defendants do. [illegible] justice. And they deserve protection. So it [illegible] not so much perhaps of do we have the right as citizens on this jury to recommend the penalty of death, but put it this way, do we as jurors and representatives of our law and our community, in view of this crime and the nature of the acts of these defendants, and in view of your responsibilities to society, do you have the right not to recommend the death penalty under the facts of this case? Do you have the right to run the risk of not recommending this penalty?

How far will these defendants go to kill? They murdered a witness. They thought that there was a car in the driveway on Eden Court when they came in at four o'clock in the morning and they must have thought it was somebody dangerous like the cops, because they burst in the door with guns.

They told Glenda about being a snitch. What do you think that means? Is that casual, high school talk? And then they were going to shoot it out with the police. Mitchell Willoughby's statement that I proved to you, they were going to shoot it out until two cop cars suddenly showed and they realized they couldn't.

Do we have the right to run the risk of not recommending the death penalty to Judge Angelucci? Without question in this case the attorneys for the defendants are going to ask for mercy. And that's understandable. And they're going to

seek to invoke your sympathy. No where will you hear Joe [redacted] like Moloney talk about justice. You won't hear [redacted] while they talk (writes on board the word "Justice") think about that word, justice, and what it means in this case.

Invoking sympathy? We saw that yesterday when Mr. Jarrell asked Mrs. Willoughby how she would feel if her son was electrocuted. What a question. Would could that possibly invoke? What could it be presented for other than to invoke your sympathy for Mrs. Willoughby? You should have sympathy for her and you should have sympathy for Mrs. Halvorsen. But don't think for a minute, don't lose sight of it for a minute, that these two ladies are the only parents who's grieving for a child.

We didn't present the parents to you in this case to talk about their child and because of that you may think that they don't cry. Don't think that for a minute. The parents of these victims can cry. I can show them to you crying. Joey Durrum's mother cries every night. Jackie Greene's mother, there's no way her tears will ever stop. No way. And do you think for a minute the parents of Joe Norman will ever forget this? You think they can wipe that out of their mind about their boy?

As far as mercy is concerned, it's kind of ironic. For three weeks you observed first hand the criminal justice system in this Commonwealth. Some of you didn't know anything

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about the criminal justice system, some of you did. But you have observed--if you're not a student of the constitution of the United States--you've observed safeguards, every safeguard accorded to these defendants by the constitution. You've seen their rights protected, protections of a person charged with a crime, their right to be represented by an attorney; an attorney hires a lawyer; an attorney who doesn't have the money to hire a lawyer, who you know, legal aid, Joe Jarrell does a fantastic job of representation.

You've seen their right to cross examine and confront witnesses who testified against them. That's the constitution. And you--you've seen their right exercised to be able to pick a jury of their peers. If they don't want certain men, strike em; if they don't want certain women, strike 'em. We have strikes and they have the right and it's--it's upheld and it was done in this case. They have a right to have a judge preside over this trial and insure that it's conducted fairly. Some countries you don't have that. You're just guilty and you go to jail. And you're presumed innocent. You're not innocent but you're presumed innocent on July 5th when you start this trial, and you're presumed innocent until it's proven against you. A right that is very rare in this world

Well these murderers enjoyed these rights. They enjoyed every one of them during this trial. What rights did their victims enjoy? Did they have attorneys? Did their

victims have an impartial jury to decide their fate on Loudon [redacted]? Did they have a judge to insure that they had a fair [redacted]? No, I'll tell you something. There sits the judge and the jury and the executioner of three people.

These defendants will ask for mercy through their lawyers and when they do, ask how much mercy they gave their victims. (Shows slide) How much mercy did they give to Joe Norman? How much mercy did they give to Joey? Jackie Greene was screaming for mercy, the testimony was, and what was their response? A bullet in her head and a concrete block around her waist. That's cold blooded murder without provocation.

Thank you.

* *

THE COURT: All right, we'll take a recess before we get into the next statements. Let's remove the defendants, please. (Defendants removed from courtroom)

All right, during this recess you're admonished, members of the jury, not to discuss this case among yourselves; don't let anybody else talk to you about it; don't form or express any opinions about it until it's finally submitted to you.

Let's give the jury an opportunity now, if you will gentlemen, let them go on back to that jury room first. All right, you can go ahead. Follow the bailiff.

All right, members of the courtroom, we'll take a

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to the murders first and then address the robberies later.

At the close of the evidence Mitchell Willoughby in addition moves for a directed verdict of acquittal on the robberies on the grounds that you cannot rob a dead person. There's been no intent shown. Senator Moloney has extensive research and when he makes his motion on that I'll join in. That's all.

THE COURT: Okay.

MR. MOLONEY: With respect to the defendant Halvorsen, I would first move to--for the Court to direct a verdict of acquittal with respect to Counts one, two and three in that the testimony at this point does not demonstrate that Leif Halvorsen fired a weapon. The testimony at this point regarding firing a weapon comes from Miss Hutchens. She states--and I recognize the evidence has to be taken in the best light from the Commonwealth's view point. She states that she saw Halvorsen with a gun, thirty-eight, prior to when the shooting started. She says in one of her statements, so I don't know--really I can't remember whether she said it from the stand or not; I was unclear--whether she saw him with a gun afterward. I know she says she saw Willoughby--

MR. MALONE: She did.

MR. MOLONEY: --But, she did state in response to my direct question, did you see Leif Halvorsen shoot anyone,

no. That evidence in and of itself, taken together with the statements of Mitchell Willoughby which have been introduced through Detective Stephens, are, I believe--or is insufficient to let this go to the Jury and let the Jury speculate on the guilt.

Now in support of that motion I would cite to the Court the case of Carmen v. Commonwealth, 490 S.W.2d 744; the case of Nolan v. Commonwealth, 332 S.W.2d 283; the case of Moore v. Commonwealth, 488 S.W.2d 703; the case of Hodges v. Commonwealth, 473 S.W.2d 811; and the-- That's it.

These cases stand for the point that the Court at this juncture of the trial, and again at the close of all of the evidence, must be able to conclude that reasonable minds may fairly find guilt beyond a reasonable doubt, and if the court cannot conclude that, then the Court must grant the motion for a directed verdict. Now, if the Commonwealth wants to respond to each of these as we go, or they want to wait until I'm finished, which--however we want to handle it.

THE COURT: Wait until you're through with all of them or take one at a time?

MR. MALONE: This is the motion of the murders.

MR. MOLONEY: This is on the murders.

THE COURT: Right.

MR. MOLONEY: This is on all three murders. Now I've got another motion with respect to Count one, after

THE COURT: Okay, Mike.

MR. MOLONEY: All right. With respect to the defendant Leif Halvorsen, on behalf of Mr. Halvorsen I am going to object to the giving of any instructions relating to Mr. Halvorsen's being an accomplice at all for the reason that Criminal Rule 6.10(3) requires that the official or customary citation of any applicable statute be set forth in the indictment and further provides that if it is not set forth in the indictment, it can be grounds for dismissal or reversal if the omission worked to the prejudice of the defendant.

This particular indictment with respect to the three counts of capital murdercites as the applicable statute KRS 507.020 and makes no reference whatsoever to the accomlice statute KRS 502.020, under which the instructions relating to Leif Halvorsen being an accomplice, specifically instruction number 3, 4, 5, 6, 8 and part of 9, 11, 13, 15, page of 16, 18, and 20, all of which relates to accomplice liability.

The leading case on this point appears to be Ward v. Commonwealth, 444 S.W.2d 896, which establishes the standard to be complied with and does require the numbering of--the naming of the--the reference to the appropriate statute.

The incidences about which this trial is being

held occurred on January 13. Within roughly a week of that time statements were had from two of the defendants indicating what had occurred. The indictment was not returned until March the 7th. The Commonwealth had the option during that approximate two month period of time to develop its theory fully and could have indicated in the indictment reliance upon KRS 502.020.

I would further add that the suggested instructions contained within Palmore's Kentucky Instructions to Jury, Volume I, indicate that the appropriate type of wording for an aiding and abetting or accomplice liability instruction should contain specific language concerning the acts which the accomplice performed in being an accomplice, and that the language in these instructions, in the ones above numbered, which simply state that Mr. Halvorsen was "holding himself in readiness to assist" is inadequate.

I would further specifically emphasize this objection to instruction number 3, 4, 5 and 6 which relate to the Joe Norman death for the reason that there is no evidence whatsoever in the record that indicates that Leif Halvorsen did any act at all which in any manner assisted or indicated his willingness to assist in the death of Joe Norman.

That's it.

MR. JARRELL: Further, Your Honor, as to the

United States District Court
For the Eastern District of Kentucky
Central Division at Lexington

Electronically filed

Leif Halvorsen Petitioner v. Philip W. Parker, Warden, Kentucky State Penitentiary, Eddyville Kentucky Respondent.	Civil Action No. 5:08-cv-484 **Capital case**

Halvorsen's motion for leave to amend petition for a writ of habeas corpus in light of March 20, 2012 decision in *Martinez v. Ryan*, 2012 WL 912950 (U.S.)

In light of the United States Supreme Court's decision four days ago in *Martinez v. Ryan*,[1] Halvorsen seeks leave to amend his habeas petition to add the following claims that relate to the same factual circumstances as claims already presented to this Court, but just add ineffective assistance of trial counsel as basis for relief and that rely on ineffective assistance of post-conviction counsel in an initial-review collateral proceeding to excuse the default. Halvorsen raised 30 claims for relief in his habeas petition (including any claims withdrawn prior to *Martinez*). For clarity, the amended claims will begin with the number 31.

[1] 2012 WL 912950 (U.S.).

XXXI) Halvorsen was denied the right to effective assistance of counsel when trial counsel failed to argue that Halvoresen was denied his federal due process right to be informed of the nature of the charges against him, and thus was denied the ability to formulate a defense, when the trial court modified the charges against him by instructing the jury that it could convict him of intentional murder without finding that Leif actually shot anyone, even though he was indicted only as the actual shooter;

XXXII) Trial counsel's failure -- to realize that an indictment charging a defendant as a principal automatically includes accomplice liability-- was deficient performance that prejudiced Halvorsen when trial counsel failed to present a defense to accomplice liability because he mistakenly believed that the jury could convict Halvorsen only if it found Halvorsen actually killed the victim;

XXIII) Halvorsen was denied his right to effective assistance of counsel when trial counsel failed to argue that Kentucky's murder statute was unconstitutionally vague as applied to Halvorsen, in violation of the Fourteenth Amendment due process clause, because it failed to define extreme emotional disturbance;

XXXIV) Trial counsel's failure to object to the accomplice instruction given to the jury, on the basis that it allowed the jury to convict without finding the elements of accomplice liability had been proven, deprived Halvorsen of the right to effective assistance of counsel;

XXXV) Halvorsen was denied the right to effective assistance of counsel when trial counsel failed to argue insufficiency of the evidence to show that Halvorsen acted as an accomplice;

XXXVI) Halvorsen was denied the right to effective assistance of counsel when trial counsel failed to object to prosecution sentencing phase closing argument statements relying on Bible references, sending a message to the community, and penalizing Halvorsen for utilizing his constitutional rights;

XXXVII) Trial counsel's failure to object to the prosecutor's sentencing phase closing argument on the basis that it deprived Halvorsen of the right to an individualized and reliable sentencing determination, as guaranteed by the Eighth Amendment to the United States Constitution;

XXXVIII) Trial counsel's failure to object to the prosecutor's future dangerousness argument, on the basis that Halvorsen was not provided notice that future dangerousness would be an argument used to obtain a death sentence nor the given the opportunity to rebut the future dangerousness argument, deprived Halvorsen of the right to effective assistance of counsel;

XXXIX) Trial counsel's failure to argue that the jury did not find an aggravating circumstance, and thus could not sentence Halvorsen to death, deprived Halvorsen of the right to effective assistance of counsel;

XL) Trial counsel's failure to object to the erroneous jury instruction on the sole statutory aggravating circumstance deprived Halvorsen of the right to effective assistance of counsel; and,

XLI) Halvorsen was denied the right to effective assistance of counsel when trial counsel failed to argue that his Fourteenth Amendment due process rights were being violated when he was forced to make the Hobson's choice of foregoing his constitutional right to present mitigating evidence of the lack of significant history or prior criminal activity in order to preserve the constitutional right to not have unrelated charges used against him;

With the exception of claim 32 above (which Halvorsen will discuss in more detail *infra*), Halvorsen raised each of these claims as straight-up substantive denials of constitutional rights that were exhausted and not procedurally defaulted. He maintains that each of these claims are before this Court on their underlying merits, and he maintains that all portions of the improper prosecution sentencing phase closing argument claim were presented in state court and are thus properly before this Court without needing to reach the issue of default and possible excusal of the default. Halvorsen also asserted ineffective assistance of direct appeal counsel to excuse any default of the underlying claims. The Warden has argued that each of the underlying claims listed above now in the context of an ineffective assistance of trial counsel claim are procedurally defaulted in all or in part. Halvorsen disagrees. Nonetheless, he recognizes that

this Court may disagree and that this Court has already expressed disagreement with regard to some of them.

Before proceeding further to discuss the impact of *Martinez*, claim 32 above warrants further discussion. As noted in Claim V in Halvorsen's habeas petition, the indictment contained only the language of a principal theory of liability. Trial counsel operated under the belief that Halvorsen had been charged only as a principal and that, as a result, the jury could convict Halvorsen of murder only if it believed beyond a reasonable doubt that Halvorsen, not his codefendant, actually killed one or more of the victims. Trial counsel did not seek a pretrial ruling to make sure that the trial court also believed that Halvorsen could be convicted only if the jury believed he was the "actual" killer. Instead, he went to trial still operating under the belief that Halvorsen could be convicted only under an accomplice theory of liability. Trial counsel's entire defense focused on the premise that the prosecution could not prove beyond a reasonable doubt that Halvorsen, not his codefendant, killed the victims; trial counsel did not present any defense that Halvorsen was not present when the murders occurred or that Halvorsen should be convicted of a lesser offense. Instead, he went with an all or nothing defense that Halvorsen should be acquitted because the prosecution could not prove he was the "actual" killer. The problem, however, was that, under the instruction the trial judge gave, the prosecution did not need to prove this, but could convict Halvorsen of murder if it believed Halvorsen was an accomplice or even if it could not decide whether Halvorsen or his codefendant was the actual killer. In other words, trial counsel presented absolutely no defense to an accomplice theory of liability. He did, though, object to the instruction allowing the jury to convict Halvorsen if it found he was only an accomplice, but did not raise the proper objection (as discussed in Claim V in Halvorsen's habeas petition and in Claim XXXI above). Halvorsen maintains that allowing

Halvorsen to be convicted as an accomplice violated his federal due process rights because Halvorsen was not given proper notice that he would face murder charges under an accomplice theory of liability and because the instruction given to the jury essentially constituted a constructive amendment of the indictment. Halvorsen also maintains that trial counsel was ineffective for failing to make these arguments, and direct appeal counsel were ineffective for failing to raise these arguments on appeal. Trial counsel, however, was ineffective for two additional reasons that Halvorsen never raised in state court but can now raise in light of *Martinez*.

First, trial counsel should have sought a pretrial ruling to ensure that Halvorsen would not be subject to conviction under an accomplice theory of liability and could then devised a defense theory that would apply to the theory of liability that the judge allowed the prosecution to pursue at trial. Second, to the extent Kentucky law at that time made clear that a principal theory of liability contained in an indictment automatically included an accomplice theory of liability when there was a codefendant in the case, trial counsel should have been aware of this and thus should have prepared a defense that would have accounted for this. In his Answer, the Warden argued that "Kentucky courts have long held that where two or more persons are jointly indicted as principals, any one of them may be convicted of complicity, or aiding and abetting, even though the indictment does not charge aiding and abetting." [Record Entry No. 58 at 57-58]. If this Court agrees with the Warden, then trial counsel should have undoubtedly been aware of this applicable law. Trial counsel's unfamiliarity with long-standing law is clearly deficient performance. It was equally deficient to proceed with a defense that was entirely irrelevant since the jury could have agreed 100% with the entire defense theory and argument at trial and still convict Halvorsen of the motion serious offense and then impose the death penalty, just as the

jury did. Halvorsen was prejudiced by trial counsel's lack of knowledge of the law in this regard and the defense that actually presented not only because of the absurdity of the defense in light of the then existing law – if this Court agrees with the Warden on the state of the law at that time – but also because, as discussed in Claim XIV in Halvorsen's habeas petition, there were viable defenses available.

That trial counsel presented a defense that was useless in light of the instruction given to the jury should have been obvious to state post-conviction counsel since any reasonable person would know that a defense that the prosecution did not actually prove that Halvorsen was the triggerman means nothing if the jury was allowed to convict of the most severe offense even if the jury did not believe Halvorsen was a triggerman. It should also have been equally clear to post-conviction counsel that he should have filed a pretrial motion to be sure that accomplice liability would not be a theory of guilt that would be submitted to the jury and to then devise a defense based on the trial court's ruling. It should have also been evident to any reasonable state post-conviction counsel that Kentucky law could perhaps be construed to mean that principal language in the indictment includes an accomplice theory of liability when there are codefendants. And, objectively reasonable state post-conviction counsel should have easily been able to detect the prejudice to Halvorsen since, as they realized, there were viable defenses that could have been presented at trial, but the one trial counsel presented was not viable in light of the instruction given at trial. Reasonable post-conviction counsel would have therefore raised trial counsel's ineffectiveness for failing to seek a pretrial ruling on whether accomplice liability would be submitted to the jury and for failing to be aware of law that suggested the trial judge might allow the jury to convict under an accomplice liability theory of guilt and to then formulate a defense based on this. State post-conviction counsel at the trial court level were

therefore ineffective in failing to raise this claim, thereby excusing the default from the failing to raise the claim in state court and thus now, within the past few days, creating the opportunity for Halvorsen to raise the claim for the first time in federal habeas proceedings, as will be explained in more detail below.

Because each claim listed above was not raised in state court as an ineffective assistance of counsel claim or, according to the Warden, not raised in state court at all or in part (see, e.g. Warden's Answer with regard to portions of Claim XVII – a position to which Halvorsen strenuously disagrees), Halvorsen could not assert trial counsel ineffectiveness with regard to these claims when he filed his habeas petition. At that time, trial counsel's ineffectiveness in the above-listed regards would have been procedurally defaulted because state post-conviction counsel never asserted it and ineffective assistance of post-conviction counsel could not serve as cause to excuse a procedural default. It would have therefore been frivolous for Halvorsen to have raised the above-listed claims under the conduit of ineffective assistance of trial counsel. That all changed four days ago when the United States Supreme Court decided *Martinez v. Ryan*.[2]

In *Martinez*, the Court held for the first time that "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default."[3] An initial-review collateral proceeding is the proceeding where a party can first reasonably assert a type of claim, *i.e.*, the state post-conviction proceeding at the trial court when alleging ineffective assistance of counsel, not on the appeal from the trial court's denial of post-conviction relief.[4] State post-

[2] 2012 WL 912950 (U.S.).
[3] *Id.* at *8; *accord id.* at *5, *8.
[4] *Id.* at *6 (referring to an initial state proceeding as "the first designated proceeding for a prisoner to raise a claim"). The Court further noted that "[i]nefffective-assistance claims often depend on evidence outside the trial record" and thus "[d]irect appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim." *Id.* at *8.

conviction proceedings (called RCr 11.42 motions in Kentucky) are the first opportunity to raise an ineffective assistance of counsel claim, as Kentucky case law explains.

In Kentucky, "some issues must be brought to the attention of the appellate courts in the direct appeal, while others must be presented first to the trial court by way of a collateral attack."[5] "[C]laims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made."[6] "As a general rule, a claim of ineffective assistance of counsel *will not* be reviewed on direct appeal from the trial court's judgment."[7] Collateral attacks to a conviction or sentence are raised under Kentucky Rule Criminal Procedure, Rule 11.42. "It is only then that a decision regarding whether any ineffective assistance of counsel reaches the level of reversible error may be determined."[8] As this language from the Kentucky Supreme Court makes clear, ineffective assistance of post-conviction claims are to be reserved for post-conviction proceedings, just as they are in Arizona – the state in which *Martinez* arose. Ineffective assistance of initial post-conviction counsel can thus constitute cause to excuse a default and can now allow a federal court to reach the underlying merits of an ineffective assistance of trial counsel claim that was never presented to the state trial court.

Notably, in so ruling in *Martinez*, the Court also noted that it was not recognizing a federal constitutional right to effective assistance of initial post-conviction counsel but was merely providing a basis by which the claim could be reviewed in the first instance by the federal habeas courts. There is thus no federal constitutional claim by which Halvorsen or any other inmate in the country could currently return to state court to litigate. Instead, *Martinez*, created

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[5] *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009).
[6] *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998).
[7] *Id.* (emphasis added).
[8] *Martin v. Commonwealth*, 207 S.W.3d 1, 6 (Ky. 2006) (Wintersheimer, J., concurring).

the unusual situation by which an ineffective assistance of trial counsel claim not presented in state court can be raised in the first instance in federal court and reviewed on the merits if the habeas petition can establish that state post-conviction counsel were ineffective in failing to assert to raise trial counsel's ineffectiveness with regard to the claim. Halvorsen now seeks to do so - a mere four days after the United States Supreme Court first recognized the procedural right to do so.

With regard to the claims laid out above, with the exception of Claim XXXII, the substantive claims for relief have been presented in Halvorsen's habeas petition and addressed further in the Warden's Answer and Halvorsen's reply/traverse. In each of those pleadings, direct appeal counsels' ineffectiveness for failing to raise the claims on direct appeal has also been addressed. The same legal analysis applies to determining whether initial post-conviction counsel was ineffective for failing to raise the claims as substantive claims Simply put, if the claim was meritorious enough that direct appeal counsel should have raised it (i.e. trying to litigate them without having to assert trial counsel ineffectiveness), the claim was also meritorious enough that post-conviction counsel should have raised it. Indeed, the argument that post-conviction counsel should have raised an ineffective assistance of counsel claim regarding it is even stronger since they could have presented evidence concerning the claim that was not in the record and would have not had to litigate the claim under the auspices of an unpreserved trial error. The prejudice component overlaps the merits of the underlying claim in that if the substantive claim is so strong that the petitioner should have prevailed on the underlying claim, then Halvorsen was prejudiced by the failure to present the claim. And, with regard to Claim XXXII, the basis for the claim – which parallels substantially the Warden's argument in

opposition to Claim V – is laid out above, and is also a claim that could not have been raised prior to *Martinez*.

At this point, however, this Court need not decide whether state post-conviction counsel was ineffective. That determination will come at a later day. All that this Court need now decide is whether Halvorsen should be allowed to amend his habeas petition to assert the ineffective assistance of trial counsel claims listed above and to assert ineffective assistance of post-conviction counsel to excuse the default of them.

Halvorsen files this motion merely four days after *Martinez* was decided and first provided the opportunity to raise the claims listed in this motion. Halvorsen's motion to amend is therefore timely. Halvorsen does not seek to present an entirely new claim with new facts. He merely seeks to present an additional basis on which relief can be granted for an underlying constitutional violation that took place. He does not believe that this new basis is necessary for Halvorsen to prevail on his claims. But, because the Warden has asserted that the underlying claims at issue are procedurally defaulted and because this Court may agree, Halvorsen seeks to present this just recognized basis to also reach the merits of the underlying claims. The Warden suffers no harm from Halvorsen now being allowed to do present these claims, as they do not differ in substantial regards from the claims already presented, the Warden should be able to respond in a prompt fashion, Halvorsen will not object to the amount of time the Warden believes he needs to respond, and Halvorsen could not have raised these claims earlier without them being deemed frivolous because there would have been no means to get beyond the procedural default then stemming from state post-conviction counsel's failure to raise the claims in state court. *Martinez* provides the "cause" to get beyond the default. Any potential harm to the Warden from now amending the petition is substantially outweighed by the just-recognized

right to present these claims in federal court and Halvorsen's extreme diligence in seeking to present these claims. This Court should therefore grant this motion to amend.

Respectfully submitted,

/s/ David M. Barron

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Counsel for Leif Halvorsen

March 24, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Court by using the CM/ECF system, on this 24th day of March, 2012.

/s/ David M. Barron

Counsel for Petitioner Leif Halvorsen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

CASE NO. 5:08-484-KSF

LEIF HALVORSEN **PETITIONER**

versus

PHILIP W. PARKER, WARDEN **RESPONDENT**

* * * * * * * *

RESPONSE TO PETITIONER'S
MOTION FOR LEAVE TO AMEND HABEAS PETITION

Comes now the Respondent, Philip W. Parker, Warden, by and through counsel, and hereby responds to *Halvorsen's Motion for Leave to Amend Petition for a Writ of Habeas Corpus in light of March 20, 2012 decision in Martinez v. Ryan, 2012 WL 912950 (U.S.)* (DN 137) as follows:

RELEVANT HISTORY

On August 18, 2009, the Petitioner, Lief Halvorsen, filed a Petition for Writ of Habeas Corpus. (DN 25). On October 26, 2009, this Court entered an Order serving the Warden with the petition and requiring an Answer. (DN 46). The Answer was filed on August 27, 2010. (DN 58). The Petitioner filed a Traverse on March 14, 2011. (DN 73). On May 13, 2011, Respondent voluntarily withdrew Claim Nos. 24 and portions of 25 from his Petition. (DN 87).

Halvorsen filed a series of motions on June 15, 2011 - seeking record expansion (DN 98), discovery (DN 99) and an evidentiary hearing (DN 100). A short time later, he also filed a motion for expert funding (DN 101). After responses by the Warden - and replies from Halvorsen -

this Court entered orders disposing of each motion.[1]

Nearly simultaneous or a short time thereafter, Halvorsen filed another series of motions seeking reconsideration of motions that were decided adversely to his position (DN 130, 134, 135, 136, and 143)- in most instances relying on a recent holding from the United States Supreme Court as support (Martinez v. Ryan, 132 S.Ct. 1309 (2012)). Among the motions, Halvorsen has filed a motion to amend his petition (DN 137) to include ten (10) new (and admittedly procedurally defaulted) claims. Essentially, Halvorsen has taken a number of his non-IAC (Ineffective Assistance of Counsel) claims and now asserted a "new" IAC claim by claiming trial counsel was ineffective for failing to raise the issue - and using *Martinez* as an avenue for cause to excuse the default by claiming that post-conviction counsel committed IAC by failing to raise it.

For the reasons noted herein, Halvorsen's motion should be denied.

RESPONSE

Amendment of a habeas corpus petition is subject to the rules of procedure applicable to civil cases - i.e. Federal Rule of Civil Procedure 15. 28 U.S.C. 2242; Mayle v. Felix, 545 U.S. 644 (2005). Rule 15 provides that an attempt at amendment - which occurs after a responsive pleading has been filed - may only be done by leave of court or consent of the opposing party. Kellici v. Conzales, 472 F.3d 416 (6th Cir. 2006). Leave is not automatically granted. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). Reasons for denial of leave to amend include

[1] See DN 128 (order granting in part and denying in part for record expansion); DN 129 (order denying discovery motion); DN 132 (order denying expert funding); DN 141 (order denying evidentiary hearing motion); DN 145 (order denying motion to reconsider denial of expert funding); and DN 146 (order denying motion to reconsider evidentiary hearing denial).

(but not limited to) delay, prejudice, and futility. Foman v. Davis, 371 U.S. 178, 182 (1962); Bonin v. Calderon, 59 F.3d 815, 845-846 (9th Cir. 1995). In the instant case, because the Warden's responsive pleading was filed August 27, 2010 (DN 58), leave of court is required to add new claims.

It is the Warden's position that it would be futile to add these new claims. Because Martinez v. Ryan, 132 S.Ct. 1309 (2012) is inapplicable to Kentucky cases, no basis exists to excuse the default, such that it should not serve as a basis to amend Halvorsen's petition. Generally, in Kentucky, claims of ineffective assistance of counsel (IAC) are brought in a collateral proceeding pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Humphrey v. Commonwealth, 962 S.W.2d 870, 872-3 (Ky. 1998). However, an IAC claim is not precluded from review on direct appeal, provided there is a trial record or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue. Hopewell v. Commonwealth, 641 S.W.2d 744 (Ky. 1982); Wilson v. Commonwealth, 601 S.W.2d 280, 284 (Ky. 1980). Therefore, in many instances, at the discretion of defendants, IAC claims have been taken up for consideration on direct appeal of a criminal conviction.

The opinion of the Court in *Martinez v. Ryan* repeatedly assures that it "qualifies [*Coleman v. Thompson*[2]] by recognizing a ***narrow*** exception...." (Slip op. at 6, emphasis added.). *E.g., see also* Slip op. pg. 10 - "limited qualification of *Coleman*"; "limited nature of the qualification to *Coleman*"]). In particular, the exception is limited to "initial review proceedings" - defined by the Court as "collateral proceedings which provide the **first occasion** to raise a claim of ineffective assistance at trial." Slip. Op. at 5 (emphasis added). The "first occasion" terminology is not expressly defined, however, the remainder of the opinion indicates that it is the first occasion as

[2] 501 U.S. 722 (1991).

a matter of rules, not the first occasion as a matter of practical reality. For, when discussing its reasoning, the Court noted:

> Thus, there are sound reasons for deferring consideration of ineffective assistance-of-trial-counsel claims until the collateral review stage, but this decision is not without consequences for the State's ability to assert a procedural default in later proceedings. **By *deliberately choosing* to move trial ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.** It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.
>
> ******
>
> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. *See* 501 U. S., at 754; Carrier, 477 U. S., at 488. **It does not extend to attorney errors in any proceeding beyond the first occasion the State *allows* a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.**
>
> In addition, **the limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel and Arizona's decision to bar defendants from raising ineffective assistance claims on direct appeal**. Our holding here addresses only the constitutional claims presented in this case, where the State ***barred*** the defendant from raising the claims on direct appeal.
>
> Slip Op. pg. 10 (emphasis added).

Contrary to Halvorsen's assertions, in Kentucky, no rule exists to prevent bringing IAC claims on direct appeal. Any defendant may do so by filing a motion for a new trial, having an evidentiary hearing on the issue, or otherwise bringing the issue before the trial court such that an opportunity

to address the issue and establish a trial record is accomplished. Therefore, unlike Arizona, Kentucky has not "barred" or "deliberately chosen" to restrict all IAC claims from direct appeals. From that basis, *Martinez v. Ryan* is inapplicable to Kentucky convictions being challenged on federal habeas and should not serve as a basis to add these new claims to Halvorsen's petition.

Further, in Mayle v. Felix, 545 U.S. 644 (2005), the United States Supreme Court held that untimely requests to amend the petition with new claims are time-barred unless those claims "relate back" to the date the initial petition was filed within the meaning of F.R.C.P. 15. Because the habeas corpus rules are more demanding than the notice pleading requirements of typical civil cases, Rule 15's requirement that claims only relate back when they arise out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" should **not** be broadly read. See Mayle, at 662-663 (emphasis added).

Relation back should not apply in this case. Halvorsen's new claims are being brought approximately two and one-half (2½) years after his petition was filed (well after the statute of limitations). Halvorsen has asserted that all the new claims are extensions of other claims from his petition that were brought as claims for "straight-up substantive denials of constitutional rights" - essentially arguing in favor of application of the relation back doctrine. Motion (DN 137), pg. 3. However, Kentucky law treats IAC claims and underlying substantive denials of constitutional rights as two entirely separate and distinct claims. *See* Leonard v. Commonwealth, 279 S.W.3d 151, 157-158 (Ky.2009). Indeed, the differing facts and legal theories that envelop IAC claims - which provided the very reason that the Kentucky Supreme Court found in *Leonard* that an IAC claim was different than underlying claims of non-IAC constitutional infirmity - give sufficient reason to find that relation back should not be allowed in this instance.

And, if this Court does get to the point of assessing prejudice and delay, it should be noted that Halvorsen's 396-page petition is replete with new and/or morphed claims that were never fairly presented to the state courts (See DN 58 - Answer - pgs. 19-23), such that he would have no plausible reason for failing to insert these new claims in the original petition. Because these new IAC claims were not fairly presented to the state court - and are based on underlying claims that were also not fairly presented - Halvorsen's new IAC claims involve two layers of procedural default - and two levels of IAC to excuse them (alleging IAC on the part of his post-conviction attorneys for not raising his new IAC claim and IAC against his appellate counsel for failing to raise the new underlying claim).

WHEREFORE, based on the foregoing, the Respondent respectfully requests this Court to deny Halvorsen's motion.

Respectfully submitted,

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NOTICE

Please take notice that the foregoing Response has been filed via electronic filing (ECF) at the Office of the Clerk of the United States District Court for the Eastern District of Kentucky, on the 14th day of May, 2012, to be considered at the convenience of the Court.

CERTIFICATE OF SERVICE

I certify that on May 14, 2012, I filed the foregoing using the electronic case-filing system (ECF) of this Court.

I further certify that I served the Petitioner by using the ECF procedure to: Hon. David M. Barron, Assistant Public Advocates, Department of Public Advocacy, 100 Fair Oaks Lane - Suite 301, Frankfort, Kentucky 40601 (david.barron@ky.gov) and Hon. James Drummond, Jim Drummond Law Firm, PLC, 220½ East Main Street - Suite 2, Norman, Oklahoma 73069 (jim@jimdurmmondlaw.com) - Counsel for Petitioner.

/s/ Matthew R. Krygiel
Assistant Attorney General

United States District Court
for the Eastern District of Kentucky
Central Division at Lexington

Electronically filed

LEIF HALVORSEN Petitioner v. PHILIP W. PARKER, Warden, Kentucky State Penitentiary, Eddyville Kentucky Respondent.	Civil Action No. 5:08-cv-484 **Capital case**

Halvorsen's reply to the Warden's response to his motion for leave to amend his habeas petition

In the wake of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), Halvorsen promptly sought to amend his habeas petition to raise eleven ineffective assistance of trial counsel claims that became cognizable only because of *Martinez*. Each claim relies on the same core, operative facts as claims raised in Halvorsen's habeas petition. Each claim was also not raised in state court and is not a direct appeal counsel ineffectiveness claim, which means they are not claims that would automatically be cognizable for the first in federal habeas proceedings since Kentucky law did not permit ineffective assistance of direct appeal counsel claims during the time Halvorsen was pending in state court. Because each of the eleven claims were procedurally defaulted with no basis then existing for which the procedural default could have been excused, it would have been frivolous for Halvorsen to have raised those claims in his habeas petition.

That changed when the United States Supreme Court held in *Martinez* that ineffective assistance of counsel in an initial-review collateral proceeding can serve as cause to excuse a procedural default. Despite Halvorsen's promptness in seeking to amend and despite the commonality between the core facts of the eleven claims and claims timely raised in Halvorsen's habeas petition, the Warden opposes Halvorsen's motion. He makes four arguments: 1) *Martinez* does not apply to Kentucky cases; 2) Halvorsen's amended claims do not relate back to claims in his habeas petition and are thus barred by the statute of limitations; 3) Halvorsen could have asserted the amended claims in his habeas petition; and, 4) to reach the merits of the ineffective assistance of trial counsel claims presented in the motion for leave to amend, this Court would have to find that both initial-review collateral proceeding counsel and direct appeal counsel were ineffective. The Warden is wrong in all regards.

I. *Martinez* applies to Kentucky cases.

The Warden argues that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), is inapplicable in Kentucky because ineffective assistance of trial counsel claims were "taken up for consideration" "in many instances" in other cases and because no Kentucky rule prevents bringing an ineffective assistance of counsel claim on direct appeal. *Response to Petitioner's motion for leave to amend habeas petition* at 3-5. The Warden cites only three cases during a more than thirty year period of time and none during the past twelve years where ineffective assistance of counsel claims have been "taken up for consideration" on direct appeal. And, like the Arizona law that was at issue in *Martinez*, Kentucky law "reserves" ineffective assistance of trial counsel claims that are based on non-record evidence for collateral review proceedings. Each claim in Halvorsen's motion to amend his habeas petition is an ineffective assistance of trial counsel claim. As such, trial counsel's reason(s) for the challenged action or inaction are essential to

determine if trial counsel performed deficiently. Trial counsel's reasons (or lack thereof) are not contained in the trial record, and those reasons could not have been presented in a motion for a new trial because it is unethical for trial counsel to assert his own ineffectiveness in a motion for a new trial or otherwise. Thus, both as a general legal principle and more narrowly under the circumstances of Halvorsen's case, Kentucky law required him to "reserve" his ineffective assistance of trial counsel claims for collateral review. *Martinez* is therefore fully applicable.

The United States Supreme Court's principal concern in *Martinez* was to ensure a habeas petitioner receive at least one opportunity for a court to address his ineffective assistance of trial counsel claim. "A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 132 S.Ct. at 1317. As the Court noted, "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. . . . And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 1316. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Id.* at 1317. Thus, "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures, [] a prisoner likely needs an effective attorney." *Id.* Again, the Court's concern was not on when the defendant could first present an ineffective assistance of trial counsel claim but instead as to the importance of effective counsel in presenting the claim. Because of the concern over the significant right at issue, the Court created a new equitable remedy to ensure that habeas petitioners received at least one opportunity to present this type of crucial claim with an effective attorney.

Articulating its holding in simple and direct terms, the Court said it was now recognizing a narrow exception to the rule of *Coleman v. Thompson*, 501 U.S. 722 (1991): "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial." *Martinez*, 132 S.Ct. at 1315. Nowhere in this articulation of the holding does the court specify that it applies only where state law categorically prohibits raising any ineffective assistance of trial counsel claim on direct appeal. However, the Court did define "initial-review collateral proceedings" as the "*first occasion* to raise a claim of ineffective assistance at trial." *Id.* at 1315 (emphasis added). The Court later stated that the rule it was establishing in *Martinez* "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." *Id.* at 1320. Therefore, the key to whether *Martinez* applies at all in Kentucky is not whether some type of ineffective assistance of trial counsel claim could in some case theoretically be raised on direct appeal, but is instead whether a post-conviction proceeding is the "first occasion" under Kentucky law to raise the ineffective assistance of trial counsel claim.

Factually, it would be a rare occasion where an ineffective assistance of trial counsel claim was fully developed on the record during trial or in the few days allotted to file a motion for a new trial. Almost always, trial counsel also handles the motion for a new trial and thus could not argue ineffective assistance of counsel. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998) ("It is unethical for counsel to assert his or her own ineffectiveness."). In those situations, the record is therefore not developed for an ineffective assistance of trial counsel claim until post-conviction proceedings. Where there is no record developed as to the action that should or should not have been taken or as to the reason for the action being taken or not, there is no developed record to review on appeal and thus, under Kentucky law, the ineffective assistance

of trial counsel claim cannot be raised until post-conviction proceedings. That proceeding is therefore the "first occasion" to raise the claim. Kentucky law fully supports this conclusion.

Under Kentucky law, "some issues must be brought to the attention of the appellate courts in the direct appeal, while others must be presented first to the trial court by way of collateral attack." *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009). In Kentucky, "[a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment." *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998). Referring to the procedure for raising a collateral attack under Ky. R. Crim. P. 11.42, the Kentucky Supreme Court has also stated that "[i]t is only then that a decision regarding whether any ineffective assistance of counsel reaches the level of reversible error may be determined." *Martin v. Commonwealth*, 207 S.W.3d 1, 6 (Ky. 2006) (Wintersheimer, J., concurring).

The case law the Warden cites in opposition fully supports Halvorsen' argument. Once again, the *Humphrey* cases the Warden cites, which Halvorsen also cites above in support of his argument, states that "[a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered." *Leonard*, 279 S.W.3d at 159 n.3 (Ky. 2009); *Humphrey*, 962 S.W.2d at 872.[1] Put another way, "the issue of ineffective assistance of counsel must be raised at the trial level by means of a post-trial motion for it to be considered on appeal," and a collateral attack known as an RCr 11.42 motion is a post-trial motion. *Wilson v. Commonwealth*, 601 S.W.2d 280, 284 (Ky. 1980). The cases the Warden cites makes clear that an ineffective assistance of trial counsel claim will be reviewed on direct appeal *only if* there is a trial record of the claim made during the motion for new trial stage of

[1] "Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim." *Martinez*, 132 S.Ct. at 1318.

proceedings – which is filed within days of conviction and which is handled by the trial attorney – and the trial court actually rules on the issue. *Id.*; *Rodriquez v. Commonwealth*, 87 S.W.3d 8, 11-12 (Ky. 2002) (noting that "nothing precludes raising an [ineffective assistance of trial counsel] issue either in a motion for a new trial or [] in a motion to set aside a plea of guilty so long as there is sufficient evidence in the trial record or adduced at a post-trial evidentiary hearing to make a proper determination"); *Humphrey*, 962 S.W.2d at 872-873 (noting that an ineffective assistance of counsel claim may be reviewed on direct appeal only if "there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue"). Where that is not the case, Kentucky law prohibits the claim from being raised until post-conviction proceedings, just as is the case under the Arizona law that was at issue in *Martinez*. Simply put, as the Kentucky Supreme Court noted in *Leonard*, the collateral attack stage (RCr 11.42) is the stage "when claims of ineffective assistance of counsel are before the court." *Leonard*, 279 S.W.3d at 157. The claim is not to be raised earlier, except possibly under the rarest of circumstances that do not exist here. Under this state of the law, *Martinez* applies. Indeed, the United States Supreme Court cited the same procedural rule regarding raising ineffective assistance of counsel claims as one that is similar to the Arizona rule at issue in *Martinez* and thus is one to which *Martinez* applies.

Noting that ineffective assistance of counsel claims "often depend on evidence outside the trial record," the Court, in *Martinez*, stated it does not intend "to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding." *Martinez*, 132 S.Ct. at 1318. The Court then cited *Massaro v. United States*, 538 U.S. 500 (2003), as an example of a procedure/rule regarding raising ineffective assistance of trial counsel claims similar to the Arizona statute that was at issue in *Martinez*. *Martinez*, 132 S.Ct. at 1318.

Massaro dealt with whether record-based ineffective assistance of trial counsel claims had to be raised on direct appeal. The Court "d[id] not hold that ineffective assistance of counsel claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Massaro*, 538 U.S. at 508. In *Martinez*, the Court expressed its belief that the procedure discussed in *Massaro* falls within the scope of an initial-review collateral proceeding ("first occasion" to raise a claim). *Martinez*, 132 S.Ct. at 1318. The procedural rule the Court created in *Massaro* mirrors the procedure applied in Kentucky, under which an ineffective assistance of counsel claim that relies on non-record evidence must be reserved for collateral proceedings but one that is fully apparent and developed within the trial record may be raised on direct appeal. The Court's reference to *Massaro* should therefore be construed to mean that collateral proceedings remain the "first occasion" to raise a non-record-based ineffective assistance of counsel claim (i.e., any ineffective assistance of counsel claim that relies on evidence from outside the trial record) in jurisdictions that permit under certain specific circumstances ineffective assistance of counsel claims to be raised on direct appeal, and thus *Martinez* applies in those jurisdictions.

Indeed, the only federal court of appeals that appears to have addressed the issue has reached the exact same conclusion. Louisiana has the same rule regarding raising ineffective assistance of counsel claims as Kentucky. Under Louisiana law, "[a] claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised

by assignment of error on appeal, it may be addressed in the interest of judicial economy." *State v. Lockhart*, 629 So.2d 1195, 1207 (La. App. 1993). Addressing the application of *Martinez* to Louisiana cases, the United States Court of Appeals for the Fifth Circuit recently interpreted this rule to mean that ineffective assistance of counsel claims must generally be reserved for collateral proceedings, and that *Martinez* therefore applies. *Lindsey v. Cain*, 2012 WL 1366040, *1 (5th Cir., April 19, 2012). The Fifth Circuit therefore remanded the defaulted ineffective assistance of trial counsel claim to the district court for further proceedings in light of *Martinez*. *Id.* at *2.[2] The holding in *Lindsey* also supports the conclusion that *Martinez* applies under Kentucky's procedural rules for raising ineffective assistance of trial counsel claims.

At most, as the Warden has indirectly conceded by noting that ineffective assistance of trial counsel claims are permitted on direct appeal "provided there is a trial record or an evidentiary hearing is held on a motion for a new trial and the trial court rules on the issue," *Response* at 3, Kentucky law has carved out a narrow exception to the rule that ineffective assistance of trial counsel claims must be reserved until post-conviction proceedings. This exception applies only in the rare situation where: 1) trial counsel did not serve as motion for new trial counsel; 2) the record on the issue was developed before the trial court; and, 3) the trial court actually ruled on the issue. If any of these things did not take place, Kentucky law prohibits the claim from being addressed before collateral review proceedings. In these regards, this rule is no different than the one in Louisiana or the one discussed in *Massaro* that the Firth Circuit and the United States Supreme Court respectively have recognized fall within the scope

[2] Lindsey's claims were that the "trial court erred when it determined that his claims regarding the sufficiency of the evidence, the prosecutor's improper remarks during closing arguments, counsel's failure to appeal the denial of the motion to suppress, counsel's failure to object to the prosecutor's improper remarks during closing arguments, and the constitutionality of the habitual offender adjudication were all procedurally barred. He also argue[d] that the district court erred by determining that his remaining ineffective assistance of counsel claims and his claim regarding the State's withholding of exculpatory evidence were without merit." *Id.* at *1.

of *Martinez*. Under this rule, ineffective assistance of trial counsel claims must be reserved for collateral review in all but the rarest circumstance, where the three requirements laid out above have been satisfied. The "general rule" remains that a "claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment." *Humphrey*, 962 S.W.2d at 872.

The "general rule" applies with regard to each of the claims in Halvorsen's motion to amend his habeas petition since none of the three requirements laid out above were satisfied. There was no record developed before the trial court with regard to those claims and there could not have been until after Halvorsen's trial attorney ceased representing him. Halvorsen's trial attorney filed a motion for a new trial, which, of course, could not ethically or legally assert his own ineffectiveness. By the time Halvorsen received new counsel, the time for filing a motion for a new trial had elapsed. Therefore, he could not have amended his motion for a new trial nor filed another one raising trial counsel's ineffectiveness. Collateral proceedings were Halvorsen's "first occasion" to raise those claims, just as it is under the Louisiana law the Fifth Circuit has addressed and just as it is under the law that was at issue in *Massaro*. Under this law and in light of the holding and spirit of *Martinez*, this Court should rule that *Martinez* fully applies to Kentucky cases, or at least applies to the claims at issue in Halvorsen's motion for leave to amend his habeas petition.

Under *Martinez*, ineffective assistance of initial-review collateral proceeding counsel for failing to raise the claims identified in Halvorsen's motion to amend his habeas petition serves as cause to excuse the procedural default from the failure to raise the claims in state court. And, because *Martinez* did not recognize a federal constitutional right, there is no avenue now (or before) for Halvorsen to present those claims in state court. The claims are therefore exhausted,

yet defaulted. However, under *Martinez*, the default shall be excused and the claims are therefore properly before this Court, as long as they are not barred by the statute of limitations. They are not.

II. The claims Halvorsen seeks to add to his habeas petition relate back to claims originally raised in his habeas petition and are therefore not barred by the applicable statute of limitations.

The Warden asserts that none of the claims Halvorsen seeks to add to his habeas petition relate back to the claims Halvorsen originally raised in his habeas petition since the "new" claims rely on a different legal theory, namely ineffective assistance of counsel involving the same underlying facts as claims already before this Court. *Response* at 5. Under the Warden's argument, seemingly no claim could ever relate back to claims in a habeas petition. Whether a claim relates back turns on whether the claim involves a common nucleus of facts, not whether the legal theory is the same. The Warden therefore misunderstands the applicable law. As will be explained below, correctly applying the law, this Court should rule that the claims relate back.

In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that whether an amended habeas claim relates back, under Fed.R.Civ.P. 15(c)(2), to claims originally presented in a habeas petition, "depends on the existence of a common core of operative facts uniting the original and newly asserted claims." *Id.* at 659. A claim does not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650. On the other hand, "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Id.* at 664. In this regard, as long as the facts supporting the new claim are the same in *either* time *or* type, the claim relates back to claims in the original petition and are thus timely, as long as the original petition was filed within the one-year statute of limitations, as Halvorsen's petition was.

Smith v. Schriro, 2007 WL 779695, *3 (D. Ariz.). Under *Felix*, it is the core operative facts that determine whether a claim relates back, not merely whether the legal theory is different. Put another way, a claim relates if the amended claim and the original claim "flow from the same time in the proceeding and are based on the related theories," *Chism v. Adams*, 2006 WL 3762109, *5 (E.D. Cal.), even if the claims involved different actors. *Gonzalez v. Baca*, 2007 WL 1174698, *7-8 (N.D. Cal.). "It is not necessary for the amended ground to present the same legal theory as the original ground, so long as it is based on the same core of operative facts uniting the original and newly asserted claims, i.e., whether the amendment added a new legal theory tied to the same operate fact as those initially alleged." *Benitez v. McDaniel*, 2011 WL 5598315, *12 (D. Nev.). As an example of a claim that relates back under *Felix*, the Court cited an amended claim challenging a court's refusal to allow a defendant to show statements had been recanted where the original petition challenged the trial court's admission of a later-recanted statement. *Felix*, 545 U.S. at 664 n.7. In the Court's example, the legal claims (theories) were different but the facts supporting the claims were the same. Relying on *Felix* and the example the Court provided in *Felix*, there are no shortage of cases holding that an amended claim relates back to an original claim despite the claims relying on different legal theories, including cases holding that an ineffective assistance of counsel claim, like the ones Halvorsen seeks to add to his petition, relates back to a non-ineffective assistance of counsel claim.

In *United Levao v. Lewis*, 2011 WL 7043828, *5-6 (S.D. Cal.), the federal district court held that a petitioner's claim that his Fourth Amendment rights were violated when the police recorded a conversation with his mother and his ineffective assistance of counsel claim alleging trial counsel failed to prepare for a hearing on the motion to suppress the same statement were similar enough that relation back applies. In *Gonzalez*, the federal district court held that an

ineffective assistance of counsel claim for permitting an improper jury instruction relates back to the original claim of trial court error regarding that instruction and that an ineffective assistance of counsel claim for failing to object to a competency examination related back to the original claim that admission of evidence concerning the competency examination violated constitutional rights. *Gonzalez*, 2012 WL 1175698 at *7-8. In *Chism*, the federal district court held that an ineffective assistance of counsel claim for assuring the defendant that he could appeal despite entering a no contest plea relates back to a claim that the trial court misled the defendant into believing he retained the right to appeal after pleading guilty since the "claims flow from the same time in the proceedings and are based on related theories." *Chism*, 2006 WL 3762109 at 5. Courts have also held that an ineffective assistance of counsel claim for failing to challenge sentencing factors related back to an argument that the sentencing factors were unconstitutional. *United States v. Mock*, 2006 WL 1168851, *1 (E.D. Wash.). In *Pratt v. Upstate v. Corr. Facility*, 413 F.Supp.2d 228, 237 (W.D. N.Y. 2006), a federal district court held that an appellate ineffective assistance of counsel claim for failing to raise trial counsel's conflict of interest related back to a claim that trial counsel was ineffective because he had a conflict of interest. In *Serrano v. Burge*, 2005 WL 2063765 (S.D. N.Y.), *adopted by*, 2005 WL 2170362 (S.D. N.Y.), a federal district court held that an ineffective assistance of appellate counsel claim for failing to raise a prosecutorial misconduct claim related back to a timely claim of prosecutorial misconduct. In *Brown v. Donat*, 2011 WL 221327, *4 (D. Nev.), the federal district court held that an ineffective assistance of counsel claim for failing to object to prior felonies upon which a habitual criminal adjudication was based and for failing to argue the non-violent nature of them relates back to a claim that the trial court improperly based the habitual criminal adjudication upon prior felonies. In *Benitez*, the district court held that an ineffective assistance of counsel

claim for failing to object to improper prosecution argument relates back to a prosecution misconduct claim involving improper prosecution argument. *Benitez*, 2011 WL 5598315 at *12. And, in *Fradiue v. Pliler*, 2011 WL 70560, *14 (E.D. Cal.), the federal district court ruled that an ineffective assistance of counsel claim for failing to develop facts during the suppression that would have demonstrated that the defendant had been "in custody" for purposes of *Miranda* warnings related back to a claim that the *Miranda* rights were violated when the court admitted the defendant's statement. In so ruling, the court stated that "[t]he core facts common to both claims involve whether petitioner made the statement. Whether or not trial counsel was ineffective in his prosecution of the motion to suppress hinges directly on the facts underlying whether petitioner was, in fact, in custody at the time the statement was uttered. While the actors are different in that the *Miranda* error addresses alleged error by the trial court and the ineffective assistance of counsel claim focuses on the actions of the defense attorney, both claims are intertwined with the facts surrounding the investigating employee's approach to petitioner, the exchange between the employee and petitioner, and the circumstances surrounding the statement. . . . The claims flow from the same time in the proceedings and are based on related theories." *Id.* All of these cases have one thing in common: A federal court held that an ineffective assistance of counsel claim relates back to a substantive, non-ineffective assistance of counsel claim involving the same core, operative facts. That is the exact same situation before this Court with regard to Halvorsen's amended claims.

Amended Claims XXXVI and XXXVII argue trial counsel ineffectiveness for failing to object to improper comments the prosecutor made during his sentencing phase closing argument. In claims XVII and XVIII in his original Petition, Halvorsen argues that the same prosecution comments violated his federal due process and Eighth Amendment rights. The core operative

facts for amended claims XXXVI and XXXVII and claims XVII and XVIII are the improper comments the prosecutor made during closing argument. As the comments complained of in the original claims and the amended claims are the same, the facts are the same in time and type. Amended claims XXXVI and XXXVII therefore relate back to original claims XVII and XVIII. Indeed, there is no material difference between these claims and the nature of the claims at issue in *Serrano*. There, the federal district court also held that an ineffective assistance of counsel claim for failing to raise a prosecutorial misconduct claim related back to a timely claim of prosecutorial misconduct. This Court should therefore find that Claims XXXVI and XXXVII relate back.

Amended Claims XXXI and XXXII relate back to original Claim V. Original claim V argues that Halvorsen was denied his federal due process rights to be informed of the nature of the charges against jim and was thus denied the ability to formulate a defense when the trial court modified the charges against him by instructing the jury that it could convict him of intentional murder without finding that Halvorsen actually shot anyone, even though he was indicted as the actual shooter. Amended claim XXXI argues that Halvorsen was denied the right to effective assistance of counsel when trial counsel failed to make this argument in opposition to the trial court modifying the charges. The core operative fact here is the trial court modifying the charges. Halvorsen now merely presents an additional legal theory. A habeas petitioner can do so and still have his amended claim relate back to the original claim. As the many cases cited above make clear, when a habeas petitioner asserts an ineffective assistance of counsel for failing to make an argument for failing to do something else with relation to a substantive constitutional violation already pled in the original habeas petition, the ineffective assistance of counsel claim

will relate back. That is all Halvorsen has done here. Claim XXXI therefore relates back to Claim V.

The same is true with regard to Claim XXXII, which merely presents another ineffective assistance of counsel theory with regard to the indictment charging Halvorsen as a principal, not an accomplice. The core operative facts are once again the indictment and the trial court's modification during trial to the language of the indictment. Those are the core facts contained in Claim V, and thus amended claim XXXII relates back to Claim V.

Amended Claim XXXIII (inadvertently numbered XXIII in the motion for leave to amend) asserts that trial counsel was ineffective for failing to argue that Kentucky's murder statute was unconstitutionally vague as applied to Halvorsen because it did not define extreme emotional disturbance. Original Claim VIII argues that Kentucky's murder statute was unconstitutionally vague as applied to Halvorsen because it failed to define extreme emotional disturbance. The core operative fact here is whether the statute is unconstitutionally vague. The same fact applies to both claims, with just a different theory for relief. Amended Claim XXXIII therefore relates back to Claim VIII.

Amended Claim XXXIV argues that trial counsel was ineffective for failing to object to the accomplice instruction given to the jury, on the basis that it allowed the jury to convict without finding the elements of accomplice liability had been proven. Original Claim X argues that Halvorsen's due process rights were violated when the trial court gave an accomplice instruction that allowed the jury to convict without finding the elements of accomplice liability had been proven. The core operative fact linking these two claims is the accomplice liability instruction given to the jury. Amended Claim XXXIV therefore relates back to Claim X.

Amended Claim XXXV argues that Halvorsen was deprived the right to effective assistance of counsel when trial counsel failed to argue insufficiency of the evidence to show that Halvorsen acted as an accomplice. Original Claim XI argues that Halvorsen's due process rights were violated when Halvorsen was convicted despite insufficient evidence that Halvorsen acted as an accomplice. The core operative fact here is the evidence being insufficient to convict as an accomplice. Amended Claim XXXV therefore relates back to Claim XI.

Amended Claim XXXVIII argues that trial counsel's failure to object to the prosecutor's future dangerousness argument on the basis that Halvorsen was not provided notice that future dangerousness would be an argument used to obtain a death sentence nor given the opportunity to rebut the future dangerousness argument. Claim XIX asserts that Halvorsen was denied his Eighth Amendment and federal due process rights to notice of information used to obtain a death sentence and the opportunity to rebut that evidence when the prosecutor argued future dangerousness as a basis to impose death, despite providing no notice that he would do so and despite not presenting any evidence of future dangerousness. Both of these claims rely on the following same core facts: 1) the prosecutor argued future dangerousness during his sentencing phase closing argument; 2) the prosecutor failed to provide notice that he would argue future dangerousness; and, 3) Halvorsen was not given an opportunity to rebut the evidence of future dangerousness. Because both claims rely on the same core operative facts, Amended Claim XXXVIII relates back to Claim XIX.

Amended Claim XXXIX argues trial counsel ineffectiveness for failing to argue that the jury did not find an aggravating circumstance and thus Halvorsen could not be sentenced to death. Original Claim XX argues that Halvorsen's Eighth Amendment rights were violated because the jury was allowed to sentence him to death without finding the existence of an

aggravating circumstance enumerated under Kentucky law. Both claims rely on the following same facts: 1) the jury's guilt phase verdict in which they did not find that Halvorsen actually killed the two victims for which death sentences were ultimately imposed; and, 2) the statutory aggravating circumstance instruction given to the jury at the sentencing phase. Halvorsen's argument is essentially that the guilt phase verdict prevented a finding of the sole statutory aggravating circumstance presented to the jury and thus prohibited the jury from imposing a death sentence. This argument and the supporting facts are essentially the same between the two claims and thus Amended Claim XXXIX relates back to Claim XX.

Amended Claim XL asserts ineffective assistance of counsel for failing to object to the erroneous jury instruction on the sole aggravating circumstance. Claim XXI argues that Halvorsen was denied his federal due process rights when the trial court erroneously instructed the jury on the sole statutory aggravating circumstance. Both claims are about the same instruction and both claims assert the same error regarding the instruction. The content of the instruction and the instruction actually being given to the jury are the core operative facts uniting these two claims. Amended Claim XL therefore relates back to Claim XXI.

Finally, Amended Claim XLI asserts ineffective assistance of counsel with regard to the Hobson's choice trial counsel was forced into, while original claim XXIII argues the Hobson's choice violated Halvorsen's due process rights. Both claims are about the same predicament trial counsel was forced into - having to choice between foregoing Halvorsen's constitutional right to present mitigating evidence of the lack of significant history of prior criminal activity in order to preserve the constitutional right to not have unrelated charges used against them. The trial court's ruling that unrelated charges could be introduced if Halvorsen presented evidence of the

lack of a significant history of prior criminal activity is the core operative fact underlying both claims. Amended Claim XLI therefore relates back to Claim XXIII.

As the above comparison of the amended claims to the original claims to which they relate should demonstrate, Halvorsen's amended claims merely allege an ineffective assistance of counsel theory of relief with regard to the same underlying constitutional violation already pled in the original claims. As discussed at the outset of this section of this reply, numerous courts have held that an ineffective assistance of counsel claim relates back to a substantive claim involving the same factual basis for a constitutional violation. It is no different here. This Court should join the legal ruling of those many courts by holding that Halvorsen's amended claims relate back to the claims in Halvorsen's habeas petition that he has identified herein.

If this Court holds that the claims relate back, there is no statute of limitations issue. In other words, the claims are timely and this Court would not then need to reach the issue of equitable tolling. However, if this Court rules otherwise, equitable tolling would also have to be addressed. A habeas petitioner is entitled to equitable tolling if he can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005). Halvorsen has been pursuing his rights diligently, filing numerous pleadings before this Court. Once *Martinez* was decided, Halvorsen promptly sought to amend his habeas petition to add new claims that became available because of the holding in *Martinez*. Indeed, Halvorsen filed his motion to amend only four days after *Martinez* was decided. Undoubtedly, that is timely. Prior to then, there was no way for Halvorsen to overcome the procedural default of the claims Halvorsen now seeks to add. That was, of course, an impediment that prevented Halvorsen from filing non-frivolous claims. *Martinez* changed that, and *Martinez* is an extraordinary ruling that

changes the legal landscape. For the first time, it allows post-conviction counsel ineffectiveness to serve as cause to excuse a procedural default. And, it is an "equitable" remedy, in the Court's own words. As an equitable remedy, it should be applied equitably to ensure that a habeas petitioner gets at least one opportunity to present ineffective assistance of counsel claims with an effective attorney. With regard to the claims Halvorsen now seeks to add, this is his one and only opportunity. An extraordinary circumstance (the default) therefore stood in the way of raising the claim and an even more extraordinary circumstance (the *Martinez* decision) now allows the claims to be raised in a manner that provides a non-frivolous basis for which this Court can reach the merits of the claims. Consistent with the principle underlying *Martinez* and the holding in *Martinez*, this Court should recognize that equitable principles should allow these claims to proceed and that equitable tolling would be applicable. Once again, though, this Court should not need to reach the matter of equitable tolling because the claims all relate back to original claims in Halvorsen's habeas petition and thus are timely.

III. Halvorsen's amended claims were not viable when his original petition was filed.

The Warden argues that Halvorsen has "no plausible reason" for failing to raise his amended claims within his habeas petition since his habeas petition "is replete with new and/or morphed claims that were never fully presented to the state courts." *Response* at 6. Halvorsen disputes that many of those claims were "morphed" or "new," as explained in the reply/traverse. Nonetheless, the Warden overlooks a significant point. As explained in detail throughout Halvorsen's habeas petition and his reply traverse, and as the Warden conceded in a response to a separate motion, there is the right to effective assistance of counsel on direct appeal but Kentucky courts refused to provide a vehicle to raise that type of claim while Halvorsen's case was pending in state court and thus binding Sixth Circuit law allows raising an ineffective

assistance of direct appeal counsel for the first time in federal habeas proceedings. [Record Entry No. 82 at 3 (citing *Boykin v. Webb*, 541 F.3d 638 (6th Cir. 2008), in acknowledging that the Sixth Circuit allows ineffective assistance of direct appeal counsel claims to be raised for the first time in Kentucky federal habeas cases since Kentucky state law did not provide a vehicle for raising the claim)]. Therefore, under *Boykin*, Halvorsen had an extremely viable argument at the time he filed his habeas petition that his ineffective assistance of direct appeal counsel claims could be raised for the first time in federal habeas proceedings. Likewise, any substantive claim for which ineffective assistance of direct appeal counsel would serve as cause to excuse a default could be raised for the first time in a habeas petition filed when Halvorsen's Petition was filed since the basis by which a court could reach the merits of the claim could not be argued and litigated in state court, despite the federal constitutional right to effective assistance of counsel on direct appeal. At least, Halvorsen could make an argument in this regard that comes nowhere close to bordering on being frivolous. The same could not then be said with regard to any claim for which ineffective assistance of initial-review collateral proceeding counsel would need to serve as cause to excuse a procedural default.

When Halvorsen filed his habeas, the law was that ineffective assistance of counsel in a proceeding where there was no constitutional right to counsel could not serve as cause to excuse a procedural default. Each claim Halvorsen seeks to add are ineffective assistance of trial counsel claims that were never raised in state court and are therefore subject to procedural default. Unlike with claims where ineffective assistance of direct appeal counsel could serve as cause to excuse the default, Halvorsen had nothing that could excuse the default at the time the Petition was filed. All he could have argued was that post-conviction counsel was ineffective. That was a non-starter. No law supported that argument, and the applicable law was to the

contrary. This Court would have then ruled against Halvorsen. And, it would have at least bordered on the frivolous to argue that post-conviction counsel ineffectiveness excused a default when contrary authority then existed that would have bound this Court to reject the argument. Halvorsen therefore cannot be faulted for failing to include in his original Petition the claims he now seeks to add, and the fact that he could under governing law raise claims for which ineffective assistance of direct appeal counsel could serve as cause to excuse a default has no bearing on whether Halvorsen could have legitimately presented at the time he filed his Petition non-frivolous arguments concerning the claims he now seeks to add to his Petition. Therefore, the claims Halvorsen raised in his Petition have absolutely nothing to do with whether Halvorsen should be allowed to amend his Petition, except with regard to whether the new claims relate back to claims presented in the original petition, as explained in the immediately preceding section.

IV. Halvorsen's amended claims do not involve two layers of default.

The Warden asserts that "[b]ecause these new IAC claims were not fairly presented to the state court – and are based on underlying claims that were also not fairly presented – Halvorsen's new IAC claims involve two layers of procedural default – and two levels of IAC to excuse them (alleging IAC on the part of his post-conviction attorneys for not raising his new IAC claim and IAC against his appellate counsel for failing to raise the new underlying claim)." *Response* at 6. The Warden does not say anything further about this confusing proposition. Yet, the Warden is wrong.

Halvorsen does not need to establish direct appeal counsel was ineffective for failing to raise the underlying claims in order to be able to prevail on the amended claims that are all ineffective assistance of trial counsel claims, not ineffective assistance of direct appeal counsel

claims. A party could prevail on an ineffective assistance of trial counsel claim without having to separately also prevail on the underlying substantive claim of a constitution violation for which ineffective assistance of counsel is not applicable. Separate from relation back, which focuses on core operative facts as opposed to legal theories, an ineffective assistance of trial counsel claim stands alone from an independent claim of a constitutional violation. For example, for any ineffective assistance of trial counsel claim Halvorsen raised in state court, he does not also need to establish direct appeal counsel ineffectiveness to prevail. Simply put, if he establishes that trial counsel was ineffective, he prevails on the trial counsel ineffectiveness claim. It is no different here.

Indeed, Halvorsen has never had a means to present a claim in state court that initial-review collateral proceeding counsel were ineffective or that such ineffectiveness excuses a default of a claim. Kentucky does not recognize the right to effective assistance of counsel in a post-conviction proceeding, and the United States Supreme Court did not recognize a constitutional right in *Martinez*. It merely provided an equitable remedy by which a habeas petitioner could raise a claim not raised or adjudicated in state court and have that claim addressed in the first instance in federal habeas proceedings if he establishes that initial-review collateral proceeding counsel performed ineffectively. Consistent with *Martinez*, that is all Halvorsen seeks to do here. Once initial-review collateral proceeding counsel failed to present the claims Halvorsen seeks to add, there was nowhere in state court for Halvorsen to go to present the claims and nowhere to go to do so in federal court until *Martinez* was decided. *Martinez* now provides that opportunity. Halvorsen therefore seeks to have ineffective assistance of counsel claims that were not presented in state court and that, in light of *Martinez* do not have to be presented in state court, added to his Petition and adjudicated by this Court. If Halvorsen

can establish initial-review collateral proceeding counsel performed ineffectively by failing to raise those claims, this Court can reach the merits of those claims. And, then, if Halvorsen establishes trial counsel ineffectiveness with regard to those claims, the writ of habeas corpus would have to be granted. Halvorsen need not do anything more. Thus, there is no "two layers" of ineffectiveness that Halvorsen must overcome.

Conclusion

As laid out herein and in Halvorsen's motion for leave to amend his habeas petition, *Martinez* applies generally to Kentucky cases and in particular under the circumstances of Halvorsen's case. Whether an amended claim relates back to an original claim in the habeas petition turns on whether the claims share core operative facts, not whether they assert a different legal theory. As laid out herein, each amended claim shares a core operative fact with an original claim. The claims therefore relate back and are timely. Halvorsen also could not have legitimately raised within the original Petition the claims he now seeks to add because they would have then been clearly procedurally defaulted with no basis on which the default could be excused. *Martinez* changed that and now provides a basis for which the default can be excused. Consistent with *Martinez*, this Court should reject the Warden's arguments and allow Halvorsen to amend his Petition with the claims contained in his motion for leave to amend.

Respectfully submitted,

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May 20, 2012

Certificate of service

I hereby certify that a copy of the foregoing document was electronically filed with the Court by using the CM/ECF system, on this 20th day of May, 2012.

/s/ David M. Barron

Counsel for Halvorsen