No. 18-8434
CAPITAL CASE

IN THE SUPREME COURT
OF THE UNITED STATES

LEIF HALVORSEN **PETITIONER**

v.

DEEDRA HART, Warden **RESPONDENT**
Kentucky State Penitentiary

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

Respectfully submitted,

ANDY BESHEAR
Attorney General of Kentucky

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

FACTS AND OPINIONS BELOW

The offense conduct perpetrated by Halvorsen has been summarized by various post-conviction/appellate courts on multiple occasions. *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 922-923 (Ky. 1986); *Halvorsen v. Commonwealth*, 2006 WL 3751392 (Ky. 2006); *Halvorsen v. Commonwealth*, 258 S.W.3d 1 (Ky. 2007); *Halvorsen v. Simpson*, 2014 WL 5419373 (E.D.Ky. 2014); *Halvorsen v. White*, 746 Fed.Appx. 489, 2018 WL 3993716 (6th Cir. 2018).

In short, on January 13, 1983, with criminal intentions, Halvorsen and his co-defendant, Mitchell Willoughby, entered a home occupied by Joe Norman and murdered three (3) people. Willoughby and Halvorsen had visited the Norman house previously that day.[1] That morning the

[1] In one of Willoughby's pre-trial statements, he claimed that he and Norman argued upon his first visit to Norman's house that day. At that point, Willoughby stated that he went and got Halvorsen and arranged to have his girlfriend, Susan Hutchens, buy the ammunition for the guns because there might be some trouble when they went back to Norman's home. During his trial testimony, Willoughby claimed he and Halvorsen stopped by Norman's house the first time after the ammunition was purchased (because they were going target shooting), and came back the second time after they had arranged to do so with Norman in order to do (and trade) drugs.

pair asked Willoughby's girlfriend, Susan Hutchens, to go and purchase ammunition for the guns that each man carried. They followed Hutchens and retrieved their ammunition in the gun store parking lot.

A short time later, Hutchens went to Joe Norman's home to visit with Norman's girlfriend, Jacqueline Greene. When she arrived, she found Willoughby and Halvorsen outside the house talking to Norman. Greene motioned Hutchens to come in, and once inside she was introduced to an acquaintance of Greene's - Joey Durrum. Willoughby and Halvorsen eventually also came inside with Norman. As Hutchens' was conversing with Greene – Willoughby, Halvorsen, and Norman were standing in a circle talking. All of a sudden, gunfire erupted. By the time the shooting stopped, Norman and Durrum were on the floor. Greene was still showing signs of life and Hutchens watched as Willoughby shot Greene twice more. All three (3) were dead – having been shot multiple times each. Hutchens stated that she had covered her face when the shooting started, and when she finally looked up she saw Willoughby and Halvorsen both wielding their guns. Ballistics and medical evidence showed that Durrum and Greene were both hit with fatal shots fired by

each gun. Norman had three (3) wounds – two of which could be attributed to Willoughby and a third that was unidentifiable.

Willoughby ordered Hutchens to clean up the shell casings – although two (2) were missed. Meanwhile, Halvorsen and Willoughby removed each body and separately wrapped them in sheets, tied a heavy rock to each victim, and loaded them into Halvorsen's van. Later that evening, Willoughby and Halvorsen drove to a place where they attempted to dump the bodies in the Kentucky River (only Greene's body was found on the riverbed - Durrum and Norman were left on the Brooklyn Bridge at the Jessamine-Mercer County line). A myriad of physical evidence, including Halvorsen's van, linked Willoughby and Halvosen to the crime and led to their capture.

After his arrest, Willoughby gave multiple statements – claiming that he had killed all three (3) victims – firing with a gun in each hand (he claimed Halvorsen was unarmed). Hutchens, who was charged but not tried with Willoughby and Halvorsen, also confessed and became a witness for the prosecution. During the guilt-phase of the trial, Willoughby testified on his own behalf and although he admitted killing

Norman, he alleged it was self-defense (claiming that he and Norman were in a heated argument when Norman threatened him with a bayonet). As for Durrum and Greene, Willoughby stated he could not remember anything after shooting Norman (except the convenient fact that he thought Durrum had a bar or other weapon of some type in his hand). Willoughby's behavior and lack of memory were linked primarily to excessive drug and alcohol abuse prior to going to Norman's home.

Halvorsen testified during the sentencing phase of the trial. He admitted his guilt, however, the majority of his self-serving testimony minimized his participation and placed the blame on his fear of Willoughby and/or his extensive abuse of drugs (both prescription and recreational). Notably, after Hutchens was unable to get rid of Willoughby's gun for him (she told a lie to a male friend that she had murdered someone so that he would help her), Halvorsen then threatened to kill Hutchens' friend because he now knew about the murders. Hutchens responded that Halvorsen's mother had stopped by the night before, and Halvorsen threatened to kill his mother as well (and throw her from a bridge).

A fourth victim, Halvorsen's housemate, James Murray, had been murdered the night before (January 12, 1983). Police found Murray's corpse in a shallow grave on Furnace Mountain in nearby Estill County. At the request of both Halvorsen and Willoughby, there was no mention of the Murray murder to the jury. Murray's murder was prosecuted separately.[2]

Halvorsen's convictions and sentences were affirmed on direct appeal, *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 922-923 (Ky. 1986) – and he was also unsuccessful during his post-conviction, collateral attack proceedings. See *Halvorsen v. Commonwealth*, 2006 WL 3751392 (Ky. 2006); *Halvorsen v. Commonwealth*, 258 S.W.3d 1 (Ky. 2007). On October 22, 2014, the United States District Court for the Eastern District of Kentucky denied Halvorsen's petition for relief via habeas corpus. *Halvorsen v. Simpson*, 2014 WL 5419373 (E.D.Ky. 2014).

---

[2] Halvorsen and Willoughby were indicted for the murder of James Murray in Estill County. Eventually, after the trial for the murders of Greene, Durrum, and Norman, Willoughby entered a conditional guilty plea to the amended charge of first-degree manslaughter and was sentenced to twenty (20) years imprisonment (to run concurrent with the charges for which he had been convicted in Fayette County). Willoughby's plea was affirmed on appeal. See *Willoughby v. Commonwealth*, 89-SC-84 (rendered April 26, 1990).

Halvorsen's habeas denial was **unanimously affirmed** on appeal. *Halvorsen v. White*, 746 Fed.Appx. 489, 2018 WL 3993716 (6th Cir. 2018). The present petition for a writ of certiorari followed.

REASONS TO DENY HALVORSEN'S PETITION

I. The unanimous panel of the Sixth Circuit Court of Appeals correctly affirmed the finding that the Kentucky Supreme Court reasonably applied federal law when it concluded that no prosecutorial misconduct occurred during Halvorsen's penalty phase closing argument.

Four (4) aspects of the prosecutor's closing argument were reviewed for misconduct: (1) future dangerousness; (2) imposition of the death penalty deters other crime; (3) reference to other notorious murderers; and (4) allegedly criticizing Halvorsen for exercising his constitutional rights.

The relevant precedent from this Court is *Darden v. Wainwright*, 477 U.S. 168 (1986), which requires the prosecutor's misconduct to violate the defendant's due process rights - such that it "is not enough that the prosecutors' remarks were undesirable or even universally condemned"; instead those comments must "so infect[ ] the trial with

unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *Parker v. Matthews*, 567 U.S. 37 (2012). A federal court on habeas corpus must distinguish ordinary trial error of a prosecutor from that sort of egregious misconduct which amounts to a constitutional denial of due process. *Smith v. Phillips*, 455 U.S. 209 (1982). "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Id. at 219. *Darden* grants state courts significant leeway to evaluate prosecutorial misconduct claims on a case-by-case basis. *Halvorson v. White*, 746 Fed.Appx. 489, 497 (6th Cir. 2018)(citing *Parker*, 567 U.S. at 48).

In *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 925 (Ky. 1986), the Kentucky Supreme Court found the prosecutor's penalty-phase closing argument to be proper - noting that the complained of comments were "brief". And while it was noted that certain parts of the argument were "irrelevant", on the whole it was found to be a "fair comment on the evidence. Id. As noted by the Sixth Circuit when addressing this issue, the overwhelming evidence against Halvorsen (as he admitted his guilt

during penalty-phase testimony) was significant and neutralized any complaint with regard to the prosecutor's statements.

Future Dangerousness

With respect to future dangerousness, the Sixth Circuit panel agreed with the district court's reasoning that no precedent from this Court suggested that the comments of the prosecutor violate *Darden*. Indeed, this Court "has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons v. South Carolina*, 512 U.S. 154, 162, 1994)(citing *Jurek v. Texas*, 428 U.S. 262, 275 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose")); *Wainwright v. Goode*, 464 U.S. 78, 86 (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, 1003, n. 17 (1983) (explaining that it

is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society"). Federal courts will generally defer to a state's determination as to what a jury should and should not be told about sentencing. *See California v. Ramos*, 463 U.S. 992 (1983). Finally, and critically, it was noted by the Sixth Circuit that the Halvorsen conveniently ignored the context of the 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'." *Halvorsen*, at 498.

Deterrence

As noted below, Halvorsen failed to support this claim with any precedent from this Court – a fatal blow to any habeas claim. *Halvorsen*, at 499. In fact, it was noted that citation to a number of circuit court decisions, particularly cases that employed the very same multi-prong test that this Court rejected in *Parker,* could not form the basis for habeas relief. Id. On the contrary, citing to *Irick v. Bell*, 565 F.3d 315, 325 (6th Cir. 2009)(collecting cases as well from "sister circuits" supporting

deterrence as an acceptable argument), it was noted that a very similar argument had been deemed to be proper. Id. *Irick* noted that as of 1988 this Court had never held that appeals to general deterrence are impermissible in sentencing arguments". Id. See also *Brooks v. Kemp*, 762 F.3d 1383, 1409, 1412 (11th Cir. 1985)(deterrent effect of death penalty is a valid sentencing consideration in a death penalty case); *Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008); *Hicks v. Collins*, 384 F.3d 204 (6th Cir. 2004). From that basis, the Sixth Circuit concluded that "[i]f 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." Id.

Reference to Notorious Murderers

The Sixth Circuit found no issue with this portion of the prosecutor's argument for two (2) reasons: (1) Halvorsen supported his position with case law from other circuits – not this Court; and (2) the prosecutor was not comparing Halvorsen to other notorious murderers –

it was part of a more general argument with respect to future dangerousness/deterrence. *Halvorsen*, at 500-501. When analyzing this claim, the Sixth Circuit noted that the comments in his case did not reach the high standard of the comments made in *Darden* itself – much less the extra height added to the standard via the AEDPA. Id. The Sixth Circuit agreed that the comments were not comparing Halvorsen to those murderers, and while not preferred, the isolated references did not disturb the overall fairness of the trial – and as such do not provide grounds for habeas relief. Id. at 501.[3]

Constitutional Rights

Halvorsen's final claim was that the prosecutor pointed out that Halvorsen did not provide the victims with the constitutional rights he

[3] As noted below by the Warden, the comments likely cut against the Commonwealth as it highlighted to the jury that several of those notorious killers did not get the death penalty – despite the fact that the Commonwealth was arguing in favor of a death sentence for Halvorsen. Also, in assessing overall fairness, it was noted that counsel for Mitchell Willoughby, Halvorsen's co-defendant, had referred to famous serial killers in his argument as comparison to show that the crimes in this case were less aggravated than the crimes in those cases (specifically mentioned Juan Corono, John Wayne Gacy, and Charles Manson).

received at trial. This claim was procedurally defaulted, as it was not raised in state court.

The courts below examined Halvorsen's cause/prejudice argument (alleging ineffective assistance of appellate counsel) and, looking to the merits, noted that the rhetorical questions by the prosecutor were not a comment on Halvorsen exercising his constitutional rights - rather it was a comment on the impact that Halvorsen's crimes had on the victims. Citing the appropriate standard (*Strickland v. Washington*, 466 U.S. 668 (1984)), ineffective assistance of appellate counsel was not found to excuse the default. Citing to Kentucky case law, it was highlighted that prosecutors are given reasonable leeway during closing argument to persuade jurors the matter should not be taken lightly, including that they may say that 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 or sufficient to affect the outcome of the trial or the penalty. *Halvorsen*, at 500-501 (citing *Murphy v. Commonwealth*, 509 S.W.3d 34,

52 (Ky. 2017) and *Alley v. Commonwealth*, 160 S.W.3d 736, 742 (Ky. 2005).

Indeed, in the instant case the evidence against Halvorsen was particularly strong and gruesome. Halvorsen was a participant in the gruesome murder of three (3) young people, he assisted with removing and attempting to dispose of their bodies, and he was involved indirectly in the fencing of some of the property taken from the victims. Given the facts of the offenses in this case, Halvorsen could have suffered no prejudice from the prosecutor's closing argument in support of his effort to excuse his default. In fact, it is for that reason that it is likely the comments failed to draw an objection from either defense attorney.

In sum, the Sixth Circuit's decision took particular care to assess this case relative to a recent rebuke by this Court in *Parker v. Matthews*, *supra.*, and in so doing correctly affirmed the district court.

II.

The Lower Courts Correctly Decided the Issues Related to Halvorsen's Attempt to Amend His Petition.

On August 18, 2009, Halvorsen filed an exhaustive 396-page *Petition for Writ of Habeas Corpus*. The Warden filed his answer and Halvorsen countered with a 310-page Reply/Traverse on March 14, 2011. After *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) was decided, Halvorsen field a motion to amend his petition (RE 137) seeking to add eleven (11) new procedurally defaulted ineffective assistance of counsel (IAC) claims.[4] The district court denied Halvorsen's motion (*Memorandum Order*, RE 161, pg. ID# 3127-3135), no amendment occurred, and the claim was not addressed in the district court's *Memorandum Opinion and*

[4] 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 (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).

Order, RE 168 (*Halverson v. Simpson*, 2014 WL 5419373, (E.D.Ky., Oct. 22, 2014) disposing of Halvorsen's case.

After the denial of his habeas petition - and a granting of a certificate of appealability (COA) from the district court for five (5) claims, Halvorsen applied to the Sixth Circuit to add more claims to his COA. The Sixth Circuit granted his COA application in part – adding two (2) procedurally defaulted habeas claims (Nos. 5 and 12) related to accomplice liability. However, they also granted a COA on issue No. 32 (a claim of ineffective assistance of counsel related to Halvorsen's defense) – that was essentially an alternative argument to the issues from No. 5 and 12. Issue No. 32 was part of the motion to amend the habeas petition that had been denied by the district court.[5]

---

[5] In the COA application, Halvorsen sought for Issue No. 32 to be granted and the claim remanded for development of the issue. However, on multiple occasions the Sixth Circuit declined Halvorsen's requests for a remand of the case for *Martinez*-related issues. See Orders dated March 15, 2015 and May 30, 2017. Therefore, Halvorsen essentially received a COA regarding whether the district court was correct when it failed to allow Halvorsen to amend his all-encompassing habeas petition (attempting to use *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) as the catalyst). Among a series of eleven (11) new, procedurally defaulted IAC claims, Halvorsen asserted that defense counsel was ineffective regarding accomplice liability (and his post-conviction counsel was ineffective for failing to raise it during Halvorsen's RCr 11.42

The Warden asserted below that the district court correctly disposed of this claim when it declined permission for Halvorsen to amend his petition. In his motion to amend in the district court, Halvorsen contended that he needed to amend his habeas petition with new IAC claims because until *Martinez v. Ryan* [566 U.S. 1 (2012)] he was unable to do so - noting that the claims were procedurally defaulted and would have been "frivilous" if made prior to his motion. *Motion to Amend*, RE 137. Halvorsen's own habeas petition proved otherwise. Halvorsen's exhaustive 396-page petition was littered with brand new and/or claims that had been morphed from other state court claims (making them

---

proceeding). This alternate argument would assume that the previous issues (Nos. 5 and 12) were decided against Halvorsen (defense counsel was on notice of accomplice liability from the indictment). The district court did not allow the amendment – particularly in light of the fact that Halvorsen had raised a substantial number of new claims in his voluminous petition that either had never been previously raised or were expanded into new areas off of marginally similar claims made in state court. Thus, the district court noted that, unlike the defendant in *Martinez*, Halvorsen did not raise these new IAC issues from the outset (waiting two and one-half years to seek an amendment of his petition) when he had clearly shown a willingness to do so at the time his petition was filed.

barely recognizable in relation to the original claim). As pointed out in the Warden's Answer (RE 58), of the thirty (30) issues raised by Halvorsen in his petition, approximately nineteen (19) were brand new and/or morphed in whole or in part. This included multiple new and/or morphed claims of counsel ineffectiveness. It was due to those new claims already presented in his original petition that Halvorsen's contention in his motion to amend fell on deaf ears. The lack of availability via *Martinez v. Ryan* had not prevented him from raising other new claims in his petition. And as noted by the district court, the difference between Martinez and Halvorsen was that Martinez asserted the allegedly "frivolous" claims from the outset - something Halvorsen had not done with his amendment issues (despite doing it with other new claims in his petition). From that basis, it was concluded that amendment of the petition would be unfairly prejudicial to the Warden and needlessly delay the proceedings. *Memorandum Order*, RE 161, pg. ID# 3127-3135.

When denying Halvorsen's attempt to amend his petition, the district court noted that "[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 v. Thompson,* 501 U.S.722 (1991)] rule, an argument Martinez made but Halvorsen did not". See *Halvorsen v. White*, 746 Fed.Appx. 489, 496 (6th Cir. 2018)(citing the district court Order without direct citation). The Sixth Circuit agreed with the district court's determination – holding that "Halvorsen bore responsibility for preserving any arguments he wished to pursue" therefore, "[w]e 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". *Halvorsen v. White*, 746 Fed.Appx. 489, 496 (6th Cir. 2018). The Sixth Circuit also noted Halvorsen's citation to one of their cases allowing a defaulted IAC claim to be brought due to post-conviction IAC as an excuse, but distinguished it because, just like Martinez, the initial petition brought the claim. Id. (discussing *Woolbright v. Crews*, 791 F.3d. 628 (6th Cir. 2015).

Halvoren's petition to this Court raised a number of issues that were purported to support the need for this Court to rectify this issue in light of the Sixth Circuit's holding. To the contrary, each reason is a natural

consequence any time that the law is changed and new precedent created. In numerous areas of criminal law defendants routinely argue for new exceptions to and/or expansions of existing law. If not done, cases like *Martinez v. Ryan* would never come into existence. Halvorsen showed in his petition a willingness to push the boundaries and raise claims regardless of the fact they had not been raised in prior proceedings. The claims in his motion to amend were no different – except that they were brought forth two and a half years after the petition had already filed and long after the statute of limitations had run.

As an underpinning of his argument, Halvorsen has asserted that the claims from his amendment actually relate back to his petition. The Warden disagrees. In *Mayle v. Felix*, 545 U.S. 644 (2005), this 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).

Halvorsen asserted that all the new claims in his amendment were 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. 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 addition, the Warden also asserted below that futility should drive the lack of need to address the issue – as Halvorsen is incapable of showing that his underlying IAC claim was a substantial one. Halvorsen's entire argument was based on the false premise that defense

counsel (Hon. Michael Moloney) did not know/understand the law and thought Halvorsen was only on trial as a principal – formulating Halvorsen's "only" defense based on that fact and ignoring accomplice liability. That is not true. On the contrary, while Mr. Moloney made a legal argument attempting to shield Halvorsen from accomplice liability – it did not indicate a misunderstanding of the law. Bench conferences did not support Halvorsen's position. Evidence showed that Willoughby had made statements to the police claiming that the murders were not planned, that he actually had the .38 caliber pistol during the shooting (the gun attributed to Halvorsen), and later that he could not say if Halvorsen brought a gun with him into the house when the shooting happened. That evidence was buttressed by Moloney noting that Susan Hutchens never saw Halvorsen shoot a gun (only noting that she said he had a pistol after she uncovered her eyes and the shooting stopped), she was never tested for gunshot residue, she was the one that purchased the bullets for the guns, she indicated she used to carry a .38 caliber pistol, and she showed during her testimony that she was very familiar with guns in general. All of this evidence was used to cast doubt on the

Commonwealth's evidence of Halvorsen's involvement in the crimes, as well as, to suggest to the jury that Hutchens had greater involvement then she let on during her testimony. Moloney even referred to her at one point in his guilt-phase closing argument as Susan Willoughby (a name she called herself at times [including letters to Willoughby at the jail] even though she was not married to Mitchell Willoughby), and made reference to the possibility that Willoughby was continuing to cover for her. Moloney's closing argument focused a great deal on Hutchens, in particular the fact that she was similarly charged as Willoughby and Halvorsen yet she received a very good deal from the Commonwealth in return for her cooperation. Mr. Moloney also noted that Hutchens' testimony was very self-serving – minimizing her role yet ignoring that immediately after the shootings she decided to go through the belongings of the victims and took various items and that she also engaged in considerable efforts to help conceal the crimes.

Also, lack of evidence to prove Halvorsen was a shooter was not the "only" defense raised by Moloney. A principal part of Halvorsen's defense was intoxication. Halvorsen and Willoughby's counsel were working

together to the extent possible. Due to that arrangement, Moloney was able to piggy-back off of the testimony of Willoughby and his doctor and highlight Halvorsen's level of intoxication in the guilt-phase without Halvorsen having to testify – yet still put forth the insufficiency of the Commonwealth's evidence as to Halvorsen. The intoxication evidence – which was ample - was corroborated by Susan Hutchens and a friend of Halvorsen's that visited his home close in time to the shootings (Jeff Luce).

It is also noteworthy that this issue overlapped into Halvorsen's IAC claims raised at Claim No. 14 in his petition – that Moloney (1) failed to conduct an adequate investigation; and (2) put forth an objectively unreasonable defense.[6] See *Memorandum Opinion and Order*, RE 168, pg. ID# 3252-3261. Both of these claims were denied – with specific holdings regarding the inadequacy of proof during post-conviction

[6] Halvorsen also alleged IAC in that Moloney failed to educate himself before deciding not to retain experts (for evaluation of diminished capacity or insanity); he undermined his own defense by eliciting that Halvorsen shot the victims; and he failed to follow through with his chosen defense. All of these claims were denied by the district court because they were procedurally defaulted and Halvorsen made no attempt to show cause/prejudice to overcome the default. *Memorandum Opinion and Order*, RE 168, pg. ID# 3261.

proceedings related to other proposed defenses (duress [not a defense to intentional murder but utilized in mitigation by Moloney], insanity, diminished capacity, or extreme emotional disturbance). The district court found the Kentucky Supreme Court's determinations were reasonable and able to withstand AEDPA review. Referring to the facts – the district court noted the lack of eyewitness testimony, Hutchens (who had credibility issues herself) did not see Halvorsen shoot anyone, in pretrial statements Willoughby had taken the blame for all 3 murders, Willoughby stated he was unaware if Halvorsen brought his gun into the residence, and Willoughby noted the murders were not planned, therefore, it was reasonable for Moloney to note those deficiencies in the Commonwealth's case during the guilt phase. *Memorandum Opinion and Order*, RE 168, pg. ID#3260-3261. No COA was issued with respect to these issues despite multiple attempts by Halvorsen to do so. Given the findings related to these IAC claims (See *Memorandum Opinion*, RE 168, Page ID #3253-3261), and the further belief that no reasonable jurists would disagree under the COA standard, it is difficult to ascertain how Mr. Moloney and post-conviction counsel were somehow incompetent

regarding this issue.

Lastly, it would be impossible for Halvorsen to show prejudice. Mr. Moloney had an unsympathetic defendant who was involved in a horrific crime that left three (3) people dead. The circumstantial evidence of Halvorsen's guilt was overwhelming – and he was an obvious participant in the attempted disposal of the bodies and related cover-up. Mr. Moloney could only do so much and worked diligently to cast doubt on the Commonwealth's case and attemptted to keep Halvorsen off of Death Row. Simply because the result was not favorable to Halvorsen does not support that his defense counsel was ineffective. Nothing raised by Halvorsen would have altered the result and his petition did not need to be amended.

CONCLUSION

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

Respectfully submitted,

ANDY BESHEAR
Attorney General of Kentucky

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

Counsel for Respondent

FILING/PROOF OF SERVICE

The foregoing Brief in opposition was filed electronically this day (May 15, 2019) and also was mailed to the Clerk of this Court.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 15th day of May, 2019, a copy of this Brief was mailed via United States Postal Service, postage prepaid, to Hon. David M. Barron, Assistant Public Advocate, 5 Mill Creek Park – Section 101, Frankfort, Kentucky 40601 and Hon. Kathryn B. Parish, Carlyle Parish LLC, 3407 Jefferson #128, St. Louis, Missouri 63118 - Counsel for Petitioner.

/s/Matthew R. Krygiel

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