COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
CASE NO. 98-CR-00384

FRED FURNISH — DEFENDANT/MOVANT

v.

OPINION AND ORDER

COMMONWEALTH OF KENTUCKY — PLAINTIFF/RESPONDENT

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This case is before the Court on the Movant's motion to vacate and set aside his conviction and sentence of death pursuant to RCr 11.42. A hearing on said motion was held on May 29 through June 1, 2012. Due to the unavailability of a witness, the hearing was continued on September 20, 2012, at which time the hearing was concluded.

On or about August 16, 2012 the Movant filed a renewed motion for expert funding. On or about August 30, 2012, the Movant filed a motion to amend his RCr 11.42 petition and also a motion for access to the Commonwealth's files and for an order requiring the Commonwealth to disclose all exculpatory evidence.

These motions were briefed by the parties and an Order overruling each of the motions was entered on or about May 20, 2013. On that same date, this Court entered an Order setting a briefing schedule. Following a number of subsequent revisions to the briefing schedule, the case was submitted to this Court for decision on or about January 8, 2015.

The Movant's original motion contained forty four (44) separate claims, many of which were further divided into subparts. The Court previously entered an Order denying claim numbers 5, 6(a), 14, 15, 30, 31, 32 and 33 (Order denying Movant's renewed request for expert funding entered on May 20, 2013). The Movant has chosen not to present evidence or argument as to claim numbers 3, 9, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 35, 36, 37, 42, 43 and 44. Therefore, this Opinion and Order addresses the remaining claims, which are claim numbers 1, 2, 4, 6(b), 7, 8, 18, 25, 38, 40, 39, 34, 29, 28, and 41. The claims are set forth in this sequence because that is the order in which they are addressed by the Movant in his post-hearing memorandum, and the order in which they will be addressed by the Court.

Most of Movant's claims in said motion argue ineffective assistance of counsel. The general framework by which ineffective assistance of counsel claims are evaluated is set forth in *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). The Court set forth a two-part inquiry:

(1) did counsel's representation fall below an objective standard of reasonableness, and

(2) was the Defendant prejudiced by counsel's substandard performance.

In the context of a jury trial, the Defendant must show that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable. *Strickland* at 687. It is within this general framework that the majority of the Movant's claims will be reviewed. Although the Court will address the claims in the order they are presented in the Movant's post-hearing memorandum, the claims will be identified by the numbers given them in the original motion to vacate.

CLAIM NUMBER ONE (1)

The Movant's first claim is that his attorneys (Mary Rafizadeh, Michael Folk and Bill Spicer) in his 1999 trial were so unprepared that he was denied effective assistance of counsel. The Movant asserts throughout his motion to vacate and his post-hearing memorandum that counsels' failure to adequately prepare and/or investigate his case resulted in prejudice to him in a number of different ways. Since this assertion is made in a number of individual claims, the Court will address this claim with reference to the other individual claims made by the Movant.

CLAIM NUMBER TWO (2)

The Movant asserts that his 1999 trial counsel were ineffective when they repeatedly told the jurors that he was guilty of counts two (2), four (4) and five (5) of the indictment. The Movant asserts that he was emphatic that his attorneys not admit his guilt on any of the charges (PH Memo., pg.37). The Movant's attorneys from the 1999 trial had varied recollections as to this issue. Michael Folk testified that he did not have any conversations with the Movant about conceding guilt on any of the charges. Bill Spicer testified that he did not recall having any conversation with the Movant as to this issue. Mary Rafizadeh testified that the Movant did not tell her not to concede guilt in the trial, as asserted by the Movant. Ms. Rafizadeh could not recall a particular conversation between her and the Movant about conceding guilt. When being questioned about the defense theory of the case at the evidentiary hearing, Ms. Rafizadeh stated, "when we went forward with our theory, it was as a trial team and with Mr. Furnish knowing exactly what we were going to do" (VR 9/20/12, 10:22:02). She

further testified that Mr. Furnish sat in the trial day after day and never questioned the presentation of his case. Based on all of the testimony, the Court finds that the Movant was aware of and consented to the concessions of guilt made in his 1999 trial.

The Court further finds that the decision to make these concessions did not fall below an objective standard of reasonableness as contemplated by *Strickland.*[1] Ms. Rafizadeh, who was lead counsel in the case, stated that this theory was arrived at after consideration of all of the evidence and as a team. She further testified that other experienced attorneys were consulted as well (VR 9/20/12, 10:22:38). Based on all of the evidence, the Court finds that counsel in the 1999 trial made an objectively reasonable strategic decision to concede guilt on Counts two (2), Four (4) and Five (5) of the indictment, and that the decision was made with the knowledge and consent of the Movant.

It appears that the defense theory was carefully considered by the defense team and was also supported by the Movant's own statement to his counsel regarding the facts of his case (VR 9/20/12, 10:17:28). The Movant also argues that his previous counsel conceded that he caused physical injury to Mrs. Williamson, the victim in the case, but the Court finds this assertion unsupported by the record.

CLAIM NUMBER FOUR (4)

The Movant also asserts that his counsel were ineffective when they conceded that the Movant used the victim's debit card shortly after her death at an ATM machine in close proximity to her home. He argues that this concession is related to his

[1] The Movant urges the Court to find that prejudice should be presumed under United States v. Cronic, 466 U.S. 648 (1984). This Court finds Cronic inapplicable to this claim.

counsels' failure to adequately prepare for his trial. The substantive basis of this claim is that the Movant could not be clearly identified from the photos because they only showed a portion of the Movant's face. What the Movant fails to recognize and/or acknowledge as to this claim and a number of other claims, is that these individual claims cannot be viewed in complete isolation, but have to be viewed with reference to all of the evidence, and with reference to the defense theory of the case.

Again, the defense theory of the case was that the Movant and another person went into the victim's home with the intention of taking property and/or money from her and that the Movant's accomplice killed the victim. This theory was arrived at by his trial team after consultation amongst themselves and with outside counsel. Although it is now asserted by the Movant that this concession regarding the ATM photos was due to a lack of preparation, there is no evidence to support this claim. There was other evidence introduced in the trial that placed the Movant in the area, not just the ATM photos.[2] If the jury were to believe any of this evidence, then it is likely they would believe the Movant was being untruthful if he contested additional evidence which also placed him in the area. The overall presentation of the case needed to be consistent. This Court has previously found that the defense theory of the case was objectively reasonable and the concession regarding the ATM photos was consistent with this theory, and did not fall below an objective standard of reasonableness.

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[2] There was evidence that the Movant had been in the victim's house on a prior occasion and committed theft. There was also property recovered which linked the Movant to the theft of property on the date in question. Likewise, there was evidence that he had committed a similar theft on a prior occasion with a different victim. Furthermore, witnesses had picked him out of a photo lineup as being in the neighborhood on the day in question.

CLAIM NUMBER SIX (6)(b)

The Movant next argues that his previous counsel were ineffective because they did not undermine the identifications made by Sally Foran, Kelly Lonergan, Tenderly Uebel and Chief Anderson. This claim is presented at pages 51-64 of the Movant's post-hearing memorandum, and alleges ineffective assistance related to counsels' failure to challenge the identifications through direct and cross-examination during the trial. Claim six (6)(a) was previously denied by this Court as part of an Order overruling the Movant's renewed motion for expert funding, which Order was entered on or about May 20, 2013.

Claim six (6)(a) asserted that previous counsel were ineffective because they failed to challenge the above-mentioned identifications through the use of an eyewitness identification expert. In the previous Order denying that claim, this Court found that failing to challenge the identifications through the use of expert testimony was not ineffective assistance of counsel, but a matter of trial strategy.

Again, the defense theory of the case was that the Movant was involved in burglarizing the victim's home with an unnamed accomplice, which accomplice committed the murder. It would be unnecessary and potentially inconsistent with the theory of the case to challenge the identifications. The chosen theory concedes that the Movant was in the area. Therefore, for the same reason that claim six (6)(a) was denied, this claim is also denied. The defense theory was objectively reasonable and the above-mentioned identifications were consistent with that theory.

CLAIM NUMBER SEVEN (7)

The Movant next asserts that his previous counsel were ineffective for failing to interview Kellie Lonergan and Tenderly Uebel prior to calling them as witnesses in the case (PH Memo., pgs. 64-68). The Movant points to numerous witnesses and citations to the record in support of his claims that these witnesses were not interviewed by his defense team prior to his trial. These same witnesses, when testifying at the 11.42 hearing, stated that they did not remember whether they talked to someone from the defense team prior to trial (VR 6/1/12, 9:52 and 10:49:50). Reviewing the testimony of all the witnesses, it is unclear to the Court whether Uebel and Lonergan were interviewed by the defense team prior to the Movant's trial. The burden of proof is on the Movant to "establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings". *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky., 1968). The Court finds that the Movant has failed to meet his burden of proof as to this claim.

Moreover, even if it were conceded that Uebel and Lonergan were not interviewed by the defense team, there is no indication that the defense strategy would have been altered in any way, and even more importantly, there is no indication that the defense team would not still have been somewhat surprised by the testimony of the witnesses at trial.

Furthermore, the Movant asserts that he was prejudiced by this failure because without the identifications by these witnesses, the trial strategy could have and should have been different (PH Memo., pg. 67). The Court has previously found that the defense strategy in the Movant's trial was objectively reasonable based on all the

evidence. Even if the Movant had met his burden of proof as to this claim, which the Court finds that he has not, he has not established that he suffered prejudice to the extent that the outcome of the trial would likely have been different.

CLAIM NUMBER EIGHT (8)

The Movant's next claim of error is that his counsel were ineffective when they failed to properly develop his accomplice theory at trial. Movant first asserts that previous counsel were deficient in closing arguments because they did not explain to the jury why the various descriptions given by the witnesses supported the theory that the Movant did not act alone. As pointed out by the Commonwealth, counsel for the Movant spent over four (4) minutes in closing argument discussing the various descriptions given by the neighborhood witnesses in the case (CW Response, page 9). Even the Movant concedes in his post-hearing memorandum that it was "obvious that one man cannot wear both blue jeans and beige, khaki, or brown pants at the same time" (PH Memo., page 71). To assert that the various descriptions were not addressed by counsel is not supported by the record in the case. In addition to directly addressing the various descriptions, counsel addressed the fact that a footprint had been found, but not matched to the Movant; that no hairs or fibers recovered from the scene had been matched to the Movant; that the Movant had no scratches on him which he would have had if he had killed the victim, and that none of the victim's blood was found on his clothing. The fact that the descriptions were not addressed to the extent and in the manner that the Movant now asserts they should have been, even if found to be in error, would not constitute an error of the significance required to support relief pursuant to RCr 11.42.

The Movant also asserts that counsel should have questioned police officers involved in the case about the possibility that the Movant did not act alone. The Court believes this issue is addressed very well in the Commonwealth's Response at pages nine (9) and ten (10). It does seem that previous counsel was stuck between a rock and a hard place regarding their accomplice theory. Mary Rafizadeh testified that the Movant had told them that there was an accomplice, but did not reveal his/her identity (CW Response, page 9). Michael Folk testified that the accomplice was referred to as the "mystery man" out of fear that if they named a particular person, that person may come forth with an alibi (CW Response, page 10). These same concerns would be applicable in regard to questioning the police officers in the case. The Movant has not provided any evidence regarding where the questioning would have or may have led. According to the testimony taken at the hearing in this case, the defense team was walking a fine line in attempting to present the "mystery man" defense while being cautious that the mystery man was not identified. Given the concerns of the defense team, the actions and/or inactions outlined in claim number eight (8) were objectively reasonable.

CLAIM NUMBER EIGHTEEN (18)

The Movant next asserts that his previous counsel were deficient when they failed to move to suppress his statements made to the police, which statements were obtained in violation of his Fifth Amendment privilege against self-incrimination (PH Memo., pages 82-90). The Movant now states at page 83 of his post-hearing memorandum:

"Based on the testimony at the evidentiary hearing it is clear

> that counsel did not make a strategic decision not to file a motion to suppress statements that were unquestionably obtained in violation of Fred's Fifth Amendment right against compelled self-incrimination. Rather, counsel failed to recognize the harmful nature of Fred's statements."

Michael Folk testified during the evidentiary hearing that it was a group consensus that the Movant's statements did not hurt them (VR 5/29/12, 3:05:57). "When we were together as a group examining things, coming up with trial strategy, things like that, it was decided that the statement did not present a problem, an issue for us that we needed to go after " (VR 5/29/12, 3:43:20). Mr. Folk further testified that the Movant never admitted anything, but reviewing in hindsight there were some problems. (VR 5/29/12, 3:44:15).

As stated previously, the burden of proof is on the Movant to "establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings." *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky., 1968). That burden is especially important regarding this particular claim. It is alleged that the Movant was questioned on four separate occasions over a period of approximately 10 to 12 hours. The Movant has only alleged that he invoked his right to remain silent during the fourth and final interview (PH Memo., pg. 93), yet the Movant asserts that former counsel should have moved to suppress statements that were made prior to his invocation of that right. As a basis for suppressing earlier statements, the Movant argues that he was subject to a custodial interrogation, and had not been read his Miranda rights.

> The fact that Fred had to invoke his right to remain silent nine times before Detectives Denham and Embry would honor his request is not only seriously troubling, it strongly suggests that any earlier invocation of his

> right to remain silent or his right to an attorney, in any of the previous three interrogation sessions, was not honored by the police.

(PH Memo., pg. 93). The Movant has not presented any evidence that he invoked his right to remain silent in any of the previous three interviews.

Furthermore, while the Movant argues that he was not read his Miranda rights, he has not presented any evidence in support of that claim. Counsel for the Movant states:

> It is unclear whether Fred was ever informed of his Miranda rights. According to Detective Denham's supplementary report dated June 27, 1998, Fred was first informed of his Miranda rights before the fourth and final interrogation with Detectives Denham and Embry.

(PH Memo., pg. 92). Detective Denham's report does not state that the Movant was "first" informed, but only that he was arrested and advised of his Miranda rights (Movant's exhibit 22, pg. 4). The Movant has not directed the Court to any other evidence that he was not read his Miranda rights in any of the three previous interviews.

In fact, Michael Folk was questioned at the hearing in this matter regarding the Movant's statements and the circumstances surrounding them. The following exchange took place between Mr. Folk (hereinafter MF) and counsel for the Movant (hereinafter MC) during the hearing.

MC If I could direct you to page 2 of the document (referring to Movant's exhibit number 23).

MF All right, I'm there.

MC I'm focusing now on question 5.

MF Yes

MC Now I'm looking at, uh, 1, 2, 3, the 4th sentence. It reads, "Now you know-you've been down this road before, you know that you don't have to talk to us. You

know the rights that you've got. I mean you've been down this road before, you know all the stuff about lawyers and getting lawyers, and talking to us and not talking to us, and you've been down here before." Do you see where that is?

MF Yes, I see that.

MC Are those Miranda Warnings?

MF I'm sorry?

MC Are those the Miranda Warnings?

MF They're not Miranda warnings, absolutely not. At least in my view they're not sufficient Miranda Warnings. I don't know if those were, if that is the area where Denham says he gave the, where Fred was given Miranda. I don't know. But these are certainly not Miranda warnings in my view.

MC If I told you that there is nothing even remotely resembling Miranda warnings in the remainder of this document, would you have any reason to doubt.

MF I would believe you. You've obviously looked through it closer than I have.

MC When a police officer claims to have given Miranda warnings, and the transcript of the interrogation reveals that in fact Miranda warnings were not given, does that raise red flags for you?

MF Almost certainly it does, uh, the only thing I can say in defense is that, uh, it's not clear in my memory that Denham gave the warnings. I, I don't remember. I think Denham's statements were that Miranda had been given. But I don't really know who gave it (emphasis added).

MC Is that a question that you would want to explore pretrial?

MF It's a question that I should have investigated closer and found out the exact answer.

(VR 5/29/12, 3:15:33 to 3:17:55). Based on all of the foregoing, the Movant has failed to meet his burden of proof as to this claim. There is no evidence before the Court that the Movant was not read his Miranda rights earlier in the day and no evidence that he invoked any of those same rights prior to the fourth interview. Previous counsels' failure to file a motion to suppress the Movant's statements as to the first three

interviews does not fall below an objective standard of reasonableness and does not constitute ineffective assistance of counsel.

The Specific statements Movant claims were obtained are pointed out in the Movant's post-hearing memorandum:

1) That the Movant admitted to taking jewelry from Ms. Williamson's home;

2) That Movant told police he worked at Kiwi Carpets;

3) Inconsistencies about where the Movant said he was when Ms. Williamson was murdered;

4) Police thought the Movant was not truthful, and

5) Police officers testified about the Movant's emotional state during the interrogation.

With the possible exception of number five (5), all of these specific things pointed out by the Movant appear to have occurred in one of the first three interviews. As to police officers testifying about Movant's emotional state during the interviews, it is unreasonable to suggest that previous counsel could have predicted such would occur.

Finally, the statements now pointed out by the Movant were consistent with the defense theory of the case. The fact that the Movant admitted to taking jewelry from the victim's home on a prior occasion is obviously harmful if Count five (5) of the indictment is viewed in isolation. Considered within the context of the entire case, and with reference to the defense theory of the case, the Court finds that the Movant did not suffer prejudice as a result of the statement. The police had evidence that the Movant had been in the victim's house on May 19, 1998, while employed by Kiwi Carpets. The police had recovered jewelry that had been taken from the victim on May 19, 1998, and

on June 24, 1998. This jewelry was linked back to the Movant. The Movant has failed to show that he suffered any prejudice due to previous counsels' failure to file a motion to suppress this statement. The statement was consistent with the defense theory of the case and there was substantial circumstantial evidence regarding count five (5) of the indictment.

In conclusion, the Movant has failed to establish that he was not read his Miranda rights in any of the first three (3) interviews. He has not asserted that he invoked any of those rights in the first three (3) interviews. The only true admission by the Movant was that he took jewelry from the victim's residence on a prior occasion, and the police had other evidence that this had occurred. The statements made by the Movant were consistent with the defense theory of the case, and the Movant simply did not suffer prejudice to the extent that the outcome of the trial would likely have been different even if the Movant's statement had been suppressed.

CLAIM NUMBER TWENTY FIVE (25)A

The Movant's next claim is that he was denied due process, an impartial jury, and a reliable sentencing determination when juror Margie Beatrice consulted with her priest regarding her ability to impose a death sentence and discussed this conversation with other jurors. The Court must first make a determination as to whether any misconduct occurred, and then, if so, whether or not the misconduct was harmless error.

Both the Movant and the Respondent agree that juror Margie Beatrice had a conversation with her priest regarding the position of the Catholic Church on the death penalty. The Movant argues that this is a clear violation of the trial court's admonition

that the jury members not discuss the case with anyone and decide the case based only on the evidence presented in Court. The Commonwealth argues that her discussion with her priest did not involve specific details of the Movant's case, and therefore did not violate the Court's admonition.

Although it is clear that Margie Beatrice had a conversation with her priest, it is not clear exactly when that conversation occurred. The substance of the conversation seems relatively straightforward. Ms. Beatrice was having reservations about whether she could impose the death penalty and asked her priest about the position of the Catholic Church on the death penalty. Her priest told her that the Catholic Church was typically against the death penalty, but that there were exceptions (VR 5/31/12, 9:20-9:22). The Court finds that this conversation did violate the admonition of the Court that the jurors not discuss the case with anyone. Although "specific" facts of the Movant's case were not discussed, it is clear to the Court that the discussion was related to Ms. Beatrice's participation in the Movant's resentencing trial. Therefore, the Court finds that this discussion violated the Court's admonition that the jurors not discuss the case with anyone.

The next question to be addressed is whether the Movant suffered or may have suffered prejudice as a result of the violation. The Court finds that the violation of the Court's admonition by Margie Beatrice was harmless under the facts of this case. First of all, and as pointed out by the Commonwealth, the jurors at the resentencing trial had already gone through a jury selection procedure in which they affirmed that they could look at the facts of the case and consider the entire range of possible penalties. Secondly, Ms. Beatrice is not alleged to have discussed any specific facts of the

Movant's case. Had she conveyed specific facts to her priest, and been given an opinion based on those facts, that would be quite different than what actually occurred in this case. Furthermore, the information that she did get from her priest seemed to be that the death penalty is generally not approved of by the Catholic Church. The Movant characterizes this conversation as the priest giving Ms. Beatrice permission to sentence the Movant to death, but the Court disagrees.

As previously stated, Ms. Beatrice had already affirmed that she could consider the entire range of penalties available in the Movant's case. If she was concerned with the Catholic Church's position on the death penalty, the statement made by her priest would have made it more difficult, rather than less difficult for her to vote in favor of the death penalty. The Court finds that although there was a violation of the Court's admonition, it did not result in prejudice to the Movant and was therefore harmless.

The Movant also asserts that she shared her conversation with other members of the jury. Again, it is unclear exactly when that may have occurred, but the substance of the information shared with other jurors was very general. Timothy Spenlau testified that one of the jurors mentioned a discussion she had with her father who used to be a priest, and that he told her the death penalty was something she had to look at and decide on her own (VR 5/31/12, 9:25-9:26). Another witness, Ilker Onen, testified that another of the jurors, Judith Coleman, told him that Ms. Beatrice told her she had a discussion with her priest due to reservations on whether she could impose the death penalty. However, Ms. Coleman did not recall this conversation.

There are no specific allegations that any juror was influenced by these statements. As is the case with Ms. Beatrice, it seems that the effects of the general

statements that were made, if they had any effect at all, would have made it more difficult, as opposed to less difficult for the other jurors to vote in favor of the death penalty. For the same reasons that the Court found Ms. Beatrice's participation in the Movant's resentencing harmless, it also finds that none of the other jurors were influenced to the prejudice of the Movant.

CLAIM NUMBER TWENTY FIVE (25)C

The Movant next asserts that he was deprived of his rights to due process, an impartial jury and a reliable sentencing hearing when juror Craig Bluemlein served on his resentencing jury despite having a prior relationship with the Movant and Kiwi Carpet Cleaners. Juror Bluemlein testified at the hearing on May 31, 2012 as follows:

1) when asked if he ever used Kiwi Carpets before, he answered, "I think I have, yea" (VR 10:02:14);

2) when asked who came to his house from Kiwi Carpets, Mr. Bluemlein answered "He looks familiar, that's why I think he was in my house" (VR 10:02:55);

3) he further stated that he recalled that this revelation occurred during the resentencing proceedings (VR 10:06:25).

Based on these statements, the Movant now argues that Mr. Bluemlein "deliberately concealed" this information during the resentencing trial. (PH Memo., pg. 106). The Movant also references *McCoy v. Goldston*, 652 F. 2d 654 (66th Cir. 1981), for the proposition that bias is presumed due to this deliberate concealment. There is no evidence that Mr. Bluemlein deliberately concealed or provided incomplete or inaccurate information during the voir dire process, so bias will not be presumed.

The Movant also asserts that Mr. Bluemlein would have been excused for cause had this information been known and therefore he is entitled to a new sentencing

proceeding. A juror should be excused for cause if there is a probability that the juror will be biased in favor of one party over the other. *Whittle v. Commonwealth*, 352 S.W. 3d 898 (Ky. 2011). There is no evidence of record to suggest that Mr. Bluemlein favored the Commonwealth over the Movant. There is simply no evidence to support the statement that he would have been excused for cause. There is much discussion about Kiwi Carpet Cleaners, but Kiwi was not a party in this case. The Court could more readily see bias toward Kiwi, but that bias would not necessarily extend to the Movant, who has failed to meet his burden of proof as to this claim.

CLAIM NUMBER TWENTY FIVE (25)D

The Movant's next claim of error is that he was deprived of his rights to an impartial jury and a reliable sentencing hearing when juror Timothy Spenlau withheld material information during voir dire. Specifically, the Movant claims that Mr. Spenlau was asked if anyone close to him was involved in the legal profession or law enforcement and he did not respond in the affirmative. Mr. Spenlau's father served as a bailiff in the courtroom on at least one occasion during the Movant's resentencing (VR 5/31/12, 9:27:35). The Movant asserts that Mr. Spenlau's father was a member of law enforcement and Mr. Spenlau should have revealed this relationship when asked if he was close to anyone in law enforcement. He further asserts that Mr. Spenlau deliberately concealed this information and/or did not provide accurate information and therefore he is entitled to a new sentencing hearing.

After review of all of the evidence presented and argued in regard to this particular claim, the Court finds that Mr. Spenlau did not deliberately conceal any information during voir dire in the 2004 resentencing. Likewise, the Court is unclear

whether Mr. Spenlau's father was in law enforcement, thereby requiring an affirmative answer to the question at issue. The fact that Mr. Spenlau's father was a courtroom bailiff does not necessarily render him a member of law enforcement. The burden of proof is on the Movant. That burden could have been easily satisfied by calling Mr. Spenlau's father as a witness or someone qualified to testify as to his status at the time of the Movant's resentencing in 2004. The Court found Mr. Spenlau's testimony on May 31; 2012 to be credible. After viewing his entire testimony, the Court does not believe that Mr. Spenlau intentionally failed to disclose information during the voir dire, but simply did not believe an affirmative response was warranted.

Even if the Court found that Mr. Spenlau had not responded accurately to the question at issue, the Movant would still not be entitled to the relief requested. The Movant must satisfy the following three (3) criteria to prevail on a claim of this nature:

1) the juror must have been asked a material question;

2) the juror must have answered the question dishonestly;

3) a truthful answer to the question would have subjected the juror to be stricken for cause.

Even if Mr. Spenlau had disclosed that his father was a bailiff in the courtroom, there is no reason to believe he would have been stricken for cause. No evidence was presented at the 11.42 hearing indicating that Mr. Spenlau's father's position as a bailiff had any effect on his impartiality as a juror. Likewise, the relationship itself would certainly not rise to the level of automatically subjecting him to a challenge for cause.

CLAIM NUMBER TWENTY FIVE (25)B

The Movant next asserts that he was deprived of his rights to an impartial jury and a reliable sentencing hearing when jurors Craig Bluemlein and Timothy Spenlau gave false answers during voir dire. Beginning with Craig Bluemlein, the Movant points out a number of answers that were given by Mr. Bluemline during the voir dire at the Movant's resentencing (PH Memo., pgs.110-112). The Movant then points to a number of statements that were made in a post-trial interview at Mr. Bluemlein's home (Interview conducted by current counsel, Meggan E. Smith and another woman, approximately around 2010, VR 5/31/12, 10:13:35). The Movant further references a number of statements made by Mr. Bluemlein while testifying on May 31, 2012:

1) that Mr. Bluemlein was a huge proponent of the death penalty, partly because he believes it costs too much money to keep people in prison;

2) that Mr. Bluemlein viewed the resentencing as a Furnish Family reunion that we had to pay for;

3) that Mr. Bluemlein believed that mitigating evidence was too little, too late in the Movant's case;

4) that even if the Pope himself testified on the Movant's behalf, it would not have made any difference in his verdict;

5) that nothing would have changed his mind about sentencing the Movant to death; and

6) that he could not have imposed a sentence of less than death for an aggravated, intentional murder.

After referencing the statements Mr. Bluemlein made during voir dire and the statements made post-trail, the Movant asserts that it is clear that Bluemlein gave false answers during voir dire.

As to statement number one (1), Mr. Bluemlein was questioned at the hearing on May 31, 2012 and provided the following answers:

Meggan Smith:	Do you remember what you told us about, uh, your views on the death penalty?
Bluemlein:	I think I remember what I said.
Meggan Smith:	Can you tell us what you said?
Bluemlein:	I agree with it.... When people murder, especially twice.
Meggan Smith:	OK, do you recall telling us that you were a huge proponent of the death penalty?
Bluemlein:	Oh yea, I remember, sure.
Meggan Smith:	Was that an accurate statement at the time?
Bluemlein:	Absolutely.
Meggan Smith:	Was that an accurate statement at the time you were a juror?
Bluemlein:	I had an open mind when I was a juror. I still believe in the death penalty. Let's start over. Ask that question again.
Meggan Smith:	Is the statement that you are a huge proponent of the death penalty, would that have been true when you were a juror?
Bluemlein:	That's a hard one to answer, cause I don't, I guess, yes.
Meggan Smith:	Ok. Do you recall telling me and Ms. Drake, that, oh not this Ms. Drake (referring to co-counsel), a different Ms. Drake, just for the record purposes, I apologize, the woman that came with me to your home, that part of the reason you were a huge proponent of the death penalty is because you thought it cost too much money to keep people in prison?
Bluemlein:	Absolutely.
Meggan Smith:	Is that true today?

Bluemlein: Yes.

Meggan Smith: Was that true at the time you were a juror?

Bluemlein: Yes.

(VR 5/31/12, 10:13:45-10:15:25)

Mr. Bluemlein was also questioned by the Commonwealth Attorney, Rob Sanders, at the hearing and provided the following answers:

Rob Sanders: Is it accurate to say that your experience sitting as a juror on Mr. Furnish's resentencing has affected your feelings about the justice system?

Bluemlein: Yes.

Rob Sanders: Would it be accurate to say that your sitting on Mr. Furnish's resentencing has affected your feeling about the death penalty?

Bluemlein: Yes.

Rob Sanders: Would it be accurate to say that all of the opinions and statements that are contained within the affidavit that defense counsel asked you to sign are affected, or influenced by your experience sitting on Mr. Furnish's resentencing as a juror?

Bluemlein: Yes.

Rob Sanders: Do you recall being asked during voir dire for Mr. Furnish's resentencing about the punishment ranges? The punishment ranges,

Bluemlein: Yes, Yes.

Rob Sanders: The board with the different possibilities of what he could be sentenced to. Do you recall that?

Bluemlein: Yes.

Rob Sanders: Did you answer in the affirmative or yes when they asked you if you could consider all of those possible punishments?

Bluemlein: Yes.

Rob Sanders: And that was before you heard any evidence or testimony or knew much of anything about the case, correct?

Bluemlein: Yes.

Rob Sanders: At the time you gave that answer, was that answer true?

Bluemlein: Yes.

(VR 5/31/12, 10:28:10 – 10:29:31)

When viewing the statements made in voir dire, post-trial, and at the hearing, the Court finds that Mr. Bluemlein did not provide false evidence during voir dire regarding his views on the death penalty. A person could certainly be a proponent of the death penalty under the appropriate circumstances, but still have an open mind as to all possible punishments in an individual case. Mr. Bluemlein's views were obviously affected by the testimony and other evidence heard during the Movant's resentencing.

Statements two (2) through five (5) fall into a similar category. A review of the testimony given at the 11.42 hearing leads the Court to the conclusion that Mr. Bluemlein did not hold these views during voir dire, but developed them during the presentation of the case. There is no indication, when comparing statements made in voir dire with statements two (2) through five (5), that any false information was given in the voir dire process. Mr. Bluemlein indicated this to be true (VC 5/31/12, 10:31:55).

Regarding statement number six (6), the Court reviewed Mr. Bluemlein's testimony given on 5/31/12 between 10:46:15 to 10:56:12 and finds that he was unclear as to the legal definition of an aggravated, intentional murder when he answered that question. A review of the full ten (10) minutes of testimony leads the court to the

conclusion that at the time of the Movant's resentencing, Mr. Bluemlein could consider the full range of penalties, and indicated that he could consider all of the facts presented prior to making a decision as to the appropriate punishment.

The Movant also asserts that Timothy Spenlau provided false information during the Movant's 2004 resentencing. He specifically references the following excerpts:

Judge: If at the end of this case, you're seated as one for the 12 jurors required to decide on a penalty, can you consider all those penalties?

Spenlau: Yeah.

Judge: Do you have any notions or thoughts about what penalty should be applied in murder cases, what should be the penalty?

Spenlau: No.

Judge: Do you have any, any particular problem with imposing one of those penalties?

Spenlau: No.

Judge: You have an open mind about this?

Spenlau: Yeah, yeah.

(VR 3/16/04, 11:55:10-11:55:50.)

Case: I wonder whether, to you, knowing that we have a case where there are those extra factors involved that call for the higher penalties than in other cases, does that make you think that the lower end sounds way too low to you at this point and you couldn't consider the whole range?

Spenlau: No. I mean, all I know is it's a murder, that's the only thing, I mean.

Case: Ok, and if you're told, if you learn through the evidence that there's this extra factor that makes it one of the more serious ones, you can still all the way down to the lower range based on what you hear?

Spenlau: Yeah.

(VR 3/16/04, 11:59:19-12:00:00.)

The Movant then references an affidavit signed by Mr. Spenlau on June 22, 2010, specifically referencing paragraph number five (5):

> Whether I would automatically vote to impose a death sentence for an intentional murder would depend solely on the facts of the crime. I would automatically vote to impose a death sentence for a premeditated murder. Once I knew a case involved a premeditated murder, I would not need or want any further information before deciding to impose a death sentence, I felt the same way at the time I served on Mr. Furnish's sentencing jury.

Based on the above information, the Movant concludes that Mr. Spenlau gave false information during the 2004 resentencing voir dire.

The affidavit does not specify the point in time during the resentencing that Mr. Spenlau developed this view on the death penalty. It does not specify whether he felt this way during voir dire or after evidence and testimony was presented in the resentencing hearing, therefore the Court cannot conclude that Mr. Spenlau provided false information during the voir dire portion of the proceeding. After viewing Mr. Spenlau's testimony from May 31, 2012 in its entirety, the Court does not find that Mr. Spenlau provided false information as asserted by the Movant.

CLAIM NUMBER TWENTY (25)F

The Movant next asserts that the cumulative impact of the misconduct of the jury mandates reversal of his sentence. Having found only one instance of misconduct (25A), there is no cumulative effect. Therefore, this claim is denied.

CLAIM NUMBER THIRTY EIGHT (38)

The Movant next asserts that he was denied the right to an unbiased capital sentencing jury that would consider and give effect to mitigating evidence when jurors Bluemlein and Spenlau served on the resentencing jury. This claim has been

adequately covered by the Court regarding claim number twenty five (25) and its subsections. The Movant is again asserting that jurors Bluemlein and Spenlau provided false information during the resentencing voir dire and their true views became known in a post-trial interview and at the evidentiary hearing held in this case. The Court has previously found that the jurors did not provide false information during the voir dire proceeding. The answers provided by them in voir dire indicated that they could and would consider mitigating evidence in the Movant's case. Therefore, claim number thirty eight (38) is denied.

CLAIM NUMBER FORTY (40)

The Movant next asserts that his resentencing counsel were ineffective when they failed to conduct an adequate voir dire of the resentencing jury panel. This claim has five (5) subparts and is presented by Movant at pages 123-142 of his post-hearing memorandum. The five (5) subparts are as follows:

A) Failure to ask jurors about their ability to consider the type of mitigation that would be presented;

B) Failure to remove jurors who overemphasized the facts of the crime;

C) Failure to remove jurors who could not consider mitigating factors that were relevant in Movant's case;

D) Failure to clarify ambiguous statements by jurors about their viewpoints of the death penalty or their ability to consider a lesser penalty; and

E) Failure to clarify ambiguous statements by jurors or follow up on information.

From the Court's perspective, all five of the subparts can be resolved on the same basis, so they will be considered as a group.

First of all, the Movant does not assert that any specific juror should have been excused for cause.[3] As to all of the allegations in this claim, the Movant is required to show prejudice, to demonstrate that there were errors of such magnitude that there is a reasonable probability that they affected the outcome of the proceeding. This Court is overruling claim forty (40) in its entirety because the Movant has failed to satisfy the second prong of *Strickland.*

For instance, the Movant asserts that because of counsels' deficient performance, it is impossible for counsel or the Court to determine whether jurors Bluemlein and Beacraft were truly qualified to serve on the Movant's resentencing jury (PH Memo., page 140). The Court finds the argument presented herein very similar to the argument presented in *Baze v. Commonwealth* 23 S.W. 3d 619 (Ky., 2000) (overruled on other grounds).

In *Baze,* the Appellant filed an 11.42 motion alleging that his attorney was ineffective because he failed to exercise the Appellant's ninth peremptory strike. He further argued that, "As a result, a correctional officer the defense had intended to strike was allowed to serve on the jury, and a juror who might have been disinclined to impose the death penalty was removed by the trial court as if he was the ninth juror struck." *Baze* at 623.

The Court responded as follows:

> The entirely speculative and self-serving assertion that, but for counsel's negligence, Appellant would have used the ninth challenge to strike the correctional officer, thereby altering the

[3] A number of claims were made in the Movant's direct appeal of his resentencing that jurors should have been removed for cause. The lower Court rulings were all upheld in the appeal.

> outcome of the trial is convenient revisionism. We simply cannot say that trial counsel was deficient, and Appellant was prejudiced as a result of the failure to exercise the ninth challenge, because it is virtually impossible to know what a differently impaneled jury would have done. For this Court to hold otherwise would essentially create a practice in which error could be built into any trial record simply through counsel's decision not to exercise all peremptory challenges, resulting in this type of argument being raised in every post-trial proceeding. It is not the function of this Court to usurp or second guess counsel's trial strategy.

Baze at 624. Both in *Baze* and in the present case, the Movant failed to address what a different jury would have done. Again, the Movant does not argue that a specific juror should have been excused for cause. Since the Movant has failed to satisfy the second prong of *Strickland*, claim number forty (40) is overruled.

CLAIM NUMBER THIRTY NINE (39)

The Movant next asserts that his counsel were ineffective when they failed to move to strike juror Schreiner or to remove him with a peremptory challenge. The Movant references an excerpt from the group portion of voir dire where juror Schreiner was being questioned by defense counsel. That line of questioning and the answers thereto are confusing at best, but nothing said by juror Schreiner rose to the level that a challenge for cause would have been appropriate. The original question was quite lengthy, but in essence, juror Schreiner (a police officer) was asked if he could see how his special knowledge as a police officer, if brought out by him during jury deliberations, might be a problem because it wasn't being brought out in open court. The prosecutor objected to the question because he stated that it was confusing when the jury is also directed to bring their life experiences with them. A bench conference was conducted, and although all of the Judge's response to the objection is not audible, the Judge is

heard referencing "facts and data". At that point the bench conference ends and the voir dire continues. The question is rephrased to indicate that defense counsel is not talking about life experiences, but facts or data of some professional or expert nature. Again, the question is very unclear. The answer of juror Schreiner is essentially that he would be hard pressed not to give his opinion on an issue that was confusing to the jury and that he could help clarify. At that point defense counsel asked an open question, moving on to other topics and jurors.

Again, there is nothing that was stated by juror Schreiner that gave rise to a challenge for cause. Defense counsel may simply have realized that the questions had become confusing and just decided to move on to another topic. The Court does not agree with the Movant's characterization of the issue which is, "As it stood", juror Schreiner had clearly told defense counsel that he would be hard pressed not to bring facts or data of some professional or expert nature into the jury deliberation that hadn't been involved in the trial into jury deliberation (PH Memo., page 144). This statement amounts to picking and choosing words of both defense counsel and juror Schreiner and does not acknowledge the confusing nature of the exchange. Likewise, the Movant's reliance on *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001) is misplaced. In *Hughes,* a juror stated in response to questions by the Court that she had a nephew who was a police officer and had close relationships with several detectives. The Court asked if anything in that relationship would prevent the juror from being fair and she stated unequivocally, "I don't think I could be fair". The Judge then said, "You don't think you could be fair"? The juror said "No". *Hughes*, at 456. Neither the Court nor counsel ever followed up with the juror about those responses. The

situation in *Hughes* bears no resemblance to that presented in this case. There was no rehabilitation to be done with juror Schreiner. Prejudice is not presumed as asserted by the Movant and the Movant has offered no showing of actual prejudice. Therefore, claim number thirty-nine (39) is denied.

CLAIM NUMBER THIRTY FOUR (34)

The Movant next asserts that the Commonwealth's improper arguments during his resentencing violated his due process rights. The alleged factual misstatements are set out at pages 155-157 of the Movant's post-hearing memorandum. He asserts that he is entitled to relief pursuant to *Hollon v. Commonwealth*, 334 S.W.3d 432 (Ky. 2010), asserting that his appellate counsel were ineffective for failing to raise this issue in his direct appeal.

Ineffective assistance of appellate counsel claims are reviewed under the same standard as ineffective assistance claims at the trial level. The Movant must establish that he/she is entitled to relief under the *Strickland v. Washington* standard. The Court in *Hollon* goes on to state:

> To succeed on such a claim, the defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy.
>
> As the Supreme Court noted in *Smith*, "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome.'"

Hollon at 436 (citations omitted). It is worth noting that the Movant's appellate counsel did not testify at his 11.42 hearing, while both his original trial counsel and his resentencing counsel did. This is emphasized because the Court does not have the

benefit of appellate counsel's testimony as to why they raised the issues they did on the direct appeal, and why they did not raise the subject issue.

The resentencing hearing in this case was somewhat unusual in that the Judge read an agreed upon narrative statement of facts to resentencing jury. The Movant now asserts that the prosecutor's statements either misstated the facts or went beyond the agreed upon narrative, or fair inferences therefrom. A number of the statements pointed out are related to the prosecutor stating that the Movant had beaten the victim (Jean Williamson) in the course of committing the crime. The narrative statement indicated that an autopsy revealed the cause of death to be strangulation. It further indicated that there were bruises on the victim's body. Furthermore, a number of photographs were shown during the resentencing which showed bruising on the victim's body. The Movant argues that these statements were contradicted by evidence presented at the Movants' original trial (PH Memo., pages 160-161). The fact that there was evidence to the contrary presented at the original trial does not preclude the Commonwealth from arguing their position or theory of the case. The above arguments of the Commonwealth were based on the evidence or reasonable inferences therefrom.

The Movant also asserts that the Commonwealth misled the jury by stating that there were no fingerprints found in the victim's home. The narrative states that there were no "identifiable fingerprints" found in the victim's home. The Commonwealth continued by stating that the Defendant wore gloves, indicating that he had planned the crime ahead of time. Again, the argument as a whole is based on the evidence or reasonable inferences therefrom.

The Movant also asserts that the Commonwealth misled the jury by stating that the Movant was deliberate and cold-blooded enough to pick through the jewelry at the victim's home and take the "good stuff". The factual narrative indicates that the Movant stole jewelry from the victim and was convicted of theft. The specific statement made by the Commonwealth is not beyond the factual narrative or reasonable inferences therefrom. The Movant states there was no evidence to support the assertion that only costume jewelry was left behind (PH Memo., page 162), but the Commonwealth did not state that only costume jewelry was left behind. Again, the Court finds no merit to this claim.

There are two statements pointed out by the Movant that this Court does find to be improper. When addressing the prior Bertsch murder, the Commonwealth stated, "The evidence will show that I, the prosecutor, me, Luke Morgan, was involved in that. And I had my reasons for that." The Commonwealth later stated, "Members of the jury, there are reasons that this defendant received a recommended sentence of life in prison without parole for twenty-five (25) years in Ms. Bertsch's murder, for what he did to Ms. Bertsch. And those reasons have nothing to do with this case." These statements were based on the prosecutor's personal knowledge, but they were not based on evidence taken at the resentencing hearing.

The Prosecutor at the resentencing hearing was in a somewhat awkward position due to the Movant's argument that life without the possibility of parole was an appropriate sentence in the Bertsch case and should therefore be an appropriate punishment in the present case. Since the same prosecutor (Luke Morgan) handled both of these cases, he was in a unique position to respond to that argument. Although

the Court finds the above referenced statements to have been improper, the Court further finds that they were very general, isolated, and would not likely have misled the jury or resulted in prejudice to the Movant. United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994).

CLAIM NUMBER TWENTY NINE (29)

The Movant next asserts that resentencing counsel were ineffective when they made harmful arguments to the resentencing jury. The first argument made by the Movant is that counsel told the jury that it would be justified to impose a death sentence, and this statement amounts to ineffective assistance of counsel. This statement was made by George Sornberger in his closing argument in the Movant's resentencing trial. The Court does not find that this statement, standing alone, amounts to ineffective assistance of counsel. It is not inconsistent to acknowledge that while a sentence of death may be justifiable, it is still not appropriate. Counsel never conceded that death was an appropriate sentence, and in fact, argued that it was not.

The Movant also asserts that comparing him to the prodigal son during the resentencing amounted to ineffective assistance of counsel because there were too many differences between the Movant and the prodigal son. He further asserts that this opened the door for the prosecutor to emphasize the differences between the Movant and the prodigal son. Finally, the Movant speculates that this error on the part of resentencing counsel angered the jury. Margaret Case testified that the decision to compare the Movant to the prodigal son was made after careful consideration (VR 5-30-12, 10:37) and that there is typically a downside to any chosen theory (VR 5-30-12, 9:54). The basic theory was that sometimes one must "hit rock bottom" before positive

life changes are possible, and that the Movant was now making positive changes in life. The Movant argues that this theory opened the door for the prosecution to emphasize all the ways in which the Movant was not like the prodigal son. While this may be true, the underlying theme was reasonable. The choice of theme did not "open the door" to otherwise impermissible evidence. Movant's counsel at resentencing were faced with a difficult set of facts. As acknowledged by current counsel, the Movant had been convicted of murdering two women while burglarizing their homes and had a significant criminal history. These facts would have been before the jury regardless of the theme chosen by counsel. The Court finds that this choice of theme did not fall below an objective standard of reasonableness, taking into consideration all of the facts and circumstances of this case.

Lastly, the Movant argues that George Sornberger's closing argument amounted to ineffective assistance of counsel. Mr. Sornberger made an argument in closing that he once had someone's life in his hands, and he chose not to take that person's life, and he was glad that he did not. He was attempting to compare his situation to that of the jury in the resentencing, and to impress upon them that they could look back and be glad if they did not take the life of the Movant (VR 5-30-12, 1:20:30). The Movant then asserts that counsel's personal story backfired, and only served to crystalize for the jurors how frightening it is to believe one's home is being burglarized. The Court finds the decision to tell the personal story was a strategic decision and that it did emphasize the importance of the jury's decision in the case.

In addition to the Court finding that the actions of resentencing counsel did not fall below on objective standard of reasonableness, even if they had, the Movant has

failed to establish that he suffered any prejudice. There is no evidence before the Court that the alleged missteps of resentencing counsel had a negative effect on any members of the resentencing jury, only the Movant's speculation. Therefore, claim twenty nine (29) fails under both prongs of *Strickland.*

CLAIM NUMBER TWENTY-EIGHT (28)

The Movant claims that his resentencing counsel were ineffective when they argued that the jury should impose a sentence less than death because the Movant received a sentence of less than death in the Bertsch case. The basis of this claim is that this was an unreasonable argument and opened the door for the prosecution to present otherwise inadmissible aggravating evidence. The "otherwise inadmissible evidence" referred to by the Movant is not evidence, but arguments made by the prosecution at the resentencing trial.

The Court has previously addressed two of the statements made by the prosecution in claim number thirty-four, and found the statements to be improper. However, the Court also found that the Movant suffered no prejudice as a result. The Court finds the remainder of the Movant's arguments in this claim to be without merit. The prosecution certainly had the right to argue that the Movant had committed another murder. The Movant's assertion that his resentencing counsel opened the door for the prosecution to make this argument is without merit.

Furthermore, the Court does not find the Movant's resentencing counsel were ineffective in choosing to make this argument to the jury. The prosecution was aware of both murders when the offer was made in the Bertsch case, so the same outcome would be appropriate in the Williamson case. This is not a clearly unreasonable choice

by resentencing counsel and did not open the door to otherwise inadmissible aggravating evidence. As to the statements made by the prosecutor which the Court found to be improper, they were minor misstatements, and in light of all the other evidence and arguments at the resentencing trial, the Movant suffered no prejudice.

CLAIM NUMBER FORTY ONE (41)

The Movant next asserts that he was denied effective assistance of counsel and a reliable capital sentencing determination when counsel waived a finding of aggravating circumstances at the resentencing trial. The argument made by the Movant in this section is somewhat confusing to the Court. The Movant frames this issue as stated above, but then states in footnote 43 on page 181 that "Fred does not concede that his counsel stipulated to aggravating factors by virtue of their agreement to the narrative statement."

Margaret Case testified at the hearing in this case and the following exchange took place with counsel for the Movant.

> Movant's Counsel – Was the jury instructed to find aggravating circumstances at Mr. Furnish's sentencing trial?
>
> Margaret Case – No.
>
> Movant's Counsel – Why not?
>
> Margaret Case – We didn't want them to. That was another aspect of the pretrial litigation that we prevailed. We didn't want them to have to find an aggravator. It had already been found by a previous jury, and we believed that making them find an aggravator would just be more likely to lead to a death sentence. Oh, we've written this aggravator down, no it's gotta be death.

(VR 5/30/12, 10:14:18 to 10:14:55). This passage makes clear that this decision was made as a matter of trial strategy.

The remainder of the arguments advanced by the Movant were answered on Direct Appeal by the Kentucky Supreme Court wherein it was found that the defense had stipulated to the aggravating circumstances by virtue of agreeing to the narrative statement, which included the fact that the original jury convicted the Movant of Robbery and Burglary. *Furnish v. Commonwealth,* 267 S.W.3d 656, 660 (Ky. 2007). The Movant's remaining arguments in this claim seem to disagree with that finding of the Kentucky Supreme Court, rather than being argued as an ineffective assistance of counsel claim. The decision to waive a finding of aggravating circumstances was a matter of trial strategy, was reasonable, and did not prejudice the Movant.

Based on all of the foregoing, the Court hereby Orders as follows:

1) The Movant has chosen to present no evidence or argument as to claim numbers 3, 9, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27, 28, 35, 36, 37, 42, 43 or 44, which claims are denied;
2) Claim numbers 1, 2, 4, 6(b), 7, 8, 18, 25, 38, 40, 39, 34, 29, 28 and 41 are also denied;
3) The Movant's previous conviction and sentence of death are Affirmed.

This is a final and appealable Order, there being no just cause for delay.

So Ordered this 2nd day of June, 2017.

JAY DELANEY, SPECIAL JUDGE
KENTON CIRCUIT COURT

Clerk's Certificate

I, John Middleton, Kenton County Circuit Clerk, hereby certify that a true and correct copy of the foregoing Opinion and Order has been sent first class mail to:

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This 2 day of June, 2017.

John C. Middleton Clerk

D.C.