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File Name: 20a0265p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEVIE L. ENGLAND, *Petitioner-Appellant*,	)	No. 18-6039
v.	)	
DEEDRA HART, Warden, *Respondent-Appellee*.	)	

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 5:06-cv-00091—Thomas B. Russell, District Judge.

Argued: April 28, 2020

Decided and Filed: August 17, 2020

Before: SILER, MOORE, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Chanson Chang, COVINGTON & BURLING LLP, Washington, D.C., for Appellant. Emily Bedelle Lucas, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Chanson Chang, Jeffrey Lerner, COVINGTON

& BURLING LLP, Washington, D.C., for Appellant. Emily Bedelle Lucas, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

SILER, J., delivered the opinion of the court in which NALBANDIAN, J., joined. MOORE, J. (pp. 22-23), delivered a separate opinion concurring in part.

OPINION

SILER, Circuit Judge. Stevie L. England, a Kentucky prisoner serving a life sentence, appeals from a district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We granted a certificate of appealability ("COA") on three issues raised by England. *See* Fed. R. App. P. 22(b). First, England claims that the trial court erroneously admitted his police confession given that he had invoked his Fifth Amendment right to counsel. Second, he argues that the trial court's improper admission of hearsay statements from the deceased victim was erroneously deemed harmless error. Finally, England argues that the prosecution suppressed evidence in violation of *Brady*. Because the state court did not err in its interpretation or application of federal law, we **AFFIRM** the district court's denial of England's habeas petition.

App. 3

I.

On July 10, 2000, Lisa Halvorson was found deceased in her driveway. It was later determined that she had been dead for approximately three days and that the cause of death was asphyxia. Police immediately began investigating Halvorson's death as a homicide.

Early in the investigation, the focus was on two of Halvorson's romantic partners: Tyrone McCary, her former boyfriend and father of her child, and Pat Halvorson, her former husband. While the investigation was ongoing, Karl Woodfork came forward after hearing of a $10,000 reward for testimony leading to a conviction. He alleged that McCary had paid him and England to murder Halvorson and to make it look like an accident. He claimed that McCary paid them $1,000 each as a down payment, with an understanding that they were to be paid an additional $10,000 each following the completion of the murder. Woodfork agreed to wear a wire, allowing the police to obtain a secretly recorded conversation between him and England. In this conversation, England complained about McCary's not having paid him the owed money and made various threats that he would cause physical harm to McCary if he was not paid.

Police subsequently brought England to the station for questioning and informed him that he had been recorded speaking with Woodfork. After the police accused him of participating in the murder plot, England responded: "Well, I mean you know, I guess

you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about." The interrogation continued, and England ultimately admitted that he was present at the murder scene with McCary, but claimed only to have punched Halvorson in the jaw once to "soften her up," which knocked her to the ground. England stated that he unsuccessfully attempted to talk McCary out of committing further violence. He also claimed that Halvorson was still alive when he and McCary departed the scene.

At trial, the prosecution's theory of the case was that England took part in a plan to make it appear that Halvorson was accidentally run over by her own truck while exiting her garage. "McCary and/or [England]: drove to [Halvorson's] house; knocked her to the ground in or near the garage; beat her severely; accelerated the truck backward out of the garage, causing [Halvorson's] face to be caught in the right bumper and spinning her into the wheel well; got on top of her and broke her windpipe, resulting in death by asphyxia." The jury convicted England of murder and recommended a sentence of life imprisonment without the possibility of parole.

In 2005, the Kentucky Supreme Court affirmed England's conviction and sentence on direct appeal. The following year, England filed a petition for a writ of habeas corpus, alleging twenty-six grounds for relief. In 2017, the magistrate judge recommended dismissal of the petition in its entirety, and in 2018 the district

court adopted the magistrate's findings. On appeal, we granted a COA on three issues.

II.

This habeas petition is governed by 28 U.S.C. § 2254(d) ("AEDPA"). It instructs that federal courts shall not grant a habeas petition filed by a state prisoner with respect to any claim adjudicated on the merits by a state court, absent applicability of either of two specific exceptions. The first exception is when a state court issues a judgment "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The second exception applies when a state court decision "was based on an unreasonable determination of the facts" in light of the record before it. § 2254(d)(2).

AEDPA's requirements reflect a "'presumption that state courts know and follow the law,'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)), and its "highly deferential standard for evaluating state-court rulings . . . demands that state-court decisions be given the benefit of the doubt," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Visciotti*, 537 U.S. at 24). In essence, under § 2254(d), federal habeas review is a safeguard against "extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v.*

Richter, 562 U.S. 86, 102-03 (2011) (*quoting Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

We review the district court's factual findings for clear error, and its legal conclusions de novo. *Railey v. Webb*, 540 F.3d 393, 397 (2008). The state court's factual findings enjoy a presumption of correctness, and will only be disturbed upon clear and convincing evidence to the contrary. *Id.*

III.

A. Fifth Amendment Claim

England's first claim is that his police station confession should have been suppressed because he had invoked his Fifth Amendment right to counsel prior to making the inculpatory statements. The Kentucky Supreme Court found that England's statement was not an unambiguous request for attorney, and that in any case, the admission of the police confession was harmless error in light of the other evidence the Commonwealth presented. Regardless of whether we believe the state court's determination to be correct, it was nevertheless grounded in a reasonable interpretation of clearly established Supreme Court law. As such, the Kentucky Supreme Court's determination must stand under AEDPA's deferential standard of review. *See* 28 U.S.C. § 2254(d); *Cullen*, 563 U.S. at 181.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court delineated certain safeguards that

must be afforded to criminal suspects. These safeguards include the right to consult with an attorney before speaking to law enforcement officials and to have an attorney present during a custodial interrogation. *Id.* at 469-473. These rights must be explained to a suspect before the questioning begins "to insure that the individual knows he is free to exercise the privilege at that point in time." *Id.* at 469. In *Edwards v. Arizona*, the Supreme Court emphasized that "having expressed his desire to deal with the police only through counsel," a suspect must not be "subject to further interrogation by the authorities until counsel has been made available to him." 451 U.S. 477, 484-85 (1981). Of particular relevance here, the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," *Michigan v. Harvey*, 494 U.S. 344, 350 (1990), and to ensure that officers "will not take advantage of the mounting coercive pressures of 'prolonged police custody.'" *Maryland v. Shatzer*, 559 U.S. 98, 105 (2010) (*quoting Arizona v. Roberson*, 486 U.S. 675, 676 (1988)).

In *Smith v. Illinois*, the Court noted that occasionally "an accused's asserted request for counsel may be ambiguous or equivocal." 469 U.S. 91, 95 (1984). And in *Davis v. United States.*, 512 U.S. 452, 457 (1994), the Court addressed the question of how police should interpret such a statement. The suspect in *Davis* stated "[m]aybe I should talk to a lawyer," and the Court found that such a remark was not an unambiguous request for counsel. *Id.* at 462. The Court refused to adopt a rule that would require police to cease

questioning just because "a suspect makes a statement that *might* be a request for an attorney." *Id.* at 461. To do so would eviscerate the "clarity and ease of application" provided by the *Edwards* bright-line rule. *Id.* Recognizing the argument that this rule might lead to harsh results for suspects, the *Davis* Court explained that "the primary protection afforded suspects is the *Miranda* warnings themselves." *Id.* at 460.

The inquiry for reviewing courts is whether the suspect has "articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. The inquiry is objective. *Franklin v. Bradshaw*, 545 F.3d 409, 414 (6th Cir. 2008). The suspect must "make some affirmative 'statement' or 'request' whose ordinary meaning shows his desire to deal with the police through counsel." *United States v. Suarez*, 263 F.3d 468, 483 (6th Cir. 2001) (citations omitted); *see also Edwards*, 451 U.S. at 484 (the request must show the suspect's "desire to deal with the police only through counsel").

With *Miranda* and its progeny in mind, we turn to England's arguments. During the police station interrogation, the police officer told England that he knew he was present when Halvorson was killed and that England was paid money to participate in her murder. The officer stated that they had already informed the prosecutor of these allegations, but that "there's room open for some leeway on it." The officer then advised England "if you want to cooperate with us, now is the

time, but I, I'm not bluffing. I'm not. I'm telling you the truth. We've got you." England then stated: "Well, I mean you know, I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about."

England argues that his response contains two separate declarations: his willingness to cooperate ("I guess you'll just have to go on and lock me up then") coupled with his assertion of his right to counsel ("call my lawyer"). But we cannot simply sever his purported request from the remainder of the sentence in question. Asking us to look at the words "call my lawyer" as a freestanding declaration would distort the facts. Indeed, this clause was preceded by the coordinating conjunction "and," which linked "lock me up then" to "call my lawyer." As such, the words "call my lawyer" did not "follow[] this statement" as England contends—they were part of the very same sentence. This distinction is crucial, as "[h]ad he made . . . [this] simple, unambiguous statement, he would have invoked his right to cut off questioning." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010).[1]

Because we will not view "call my lawyer" in isolation, many of the cases England cites are not quite analogous. *See*, *e.g.*, *Smith*, 469 U.S. at 97 (holding statement "Uh, yeah, I'd like to do that" upon learning of the right to counsel was unambiguous); *Edwards*,

[1] The standards for invoking the Fifth Amendment right to counsel and the right to remain silent are interchangeable because, according to the *Thompkins* Court, there is no principled reason to adopt different standards. 560 U.S. at 381.

451 U.S. at 479–80 (holding statement "I want an attorney before making a deal" triggered *Miranda* rights); *Moore v. Berghuis*, 700 F.3d 882, 887 (6th Cir. 2012) ("Moore invoked his constitutional right to counsel by requesting that the police officer call his attorney's phone number."). The closest comparison that England cites is *Kyger v. Carlton*, 146 F.3d 374, 379 (6th Cir. 1998), in which we found that the defendant invoked his right to counsel by remarking: "I'd just as soon have an attorney [']cause, you know—ya'll say there's been a shooting involved and that's a serious charge." But this phrase is not indicative of sarcasm the way that "I guess you'll just have to go on and lock me up then" is. Although it is "good police practice for the interviewing officers to clarify whether or not [the suspect] actually wants an attorney," the police are not obligated to clarify or ask follow-up questions to determine whether the suspect in fact wanted an attorney. *Davis*, 512 U.S. at 461. Here, the detectives reminded England that he had the right to "lawyer up," but England nevertheless responded that he would talk and tell what he knew. A reasonable police officer would not take England's statement literally—that he was actually requesting to be locked up. And if a questioning officer is reasonably unsure as to whether the suspect wants a lawyer, to require that questioning immediately stop would impermissibly "transform the *Miranda* safeguards" into "irrational obstacles to legitimate police investigative activity." *Michigan v. Mosley*, 423 U.S. 96, 102 (1975).

Davis's requirement of a clear, unequivocal request has proved to be fatal to claims like England's in our circuit: "I think I should talk to a lawyer, what do you think?" was not unequivocal, *United States v. Delaney*, 443 F. App'x 122, 130 (6th Cir. 2011); nor was the statement "[i]t would be nice to have an attorney," *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994). "I really should have a lawyer, huh?" was also ambiguous. *United States v. Mays*, 683 F. App'x 427, 433 (6th Cir. 2017). England attempts to differentiate his statement by noting that his exact words were "call *my* lawyer"—suggesting that he was specifically requesting *his* attorney. True, this court has held that specificity "corroborate[s] the unequivocal nature of that request." *Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004) ("nam[ing] the specific individual with whom he wanted to speak[,] . . . corroborate[d] the unequivocal nature of that request"), *abrogated on other grounds by Guilmette v. Howes*, 624 F.3d 286 (6th Cir. 2010). But England's mere use of the word "my," when the officers had no indication that he was represented by counsel, is far different than giving a specific attorney's name, *Abela*, 380 F.3d at 926; phone number, *see*, *e.g.*, *Moore*, 700 F.3d at 887; or business card, *Yenawine v. Motley*, 402 F. App'x 997, 998 (6th Cir. 2010) (per curiam). And again, England's argument is hampered by the fact that it was not a standalone statement.

England also claims that the Warden's argument impermissibly uses his post-request statements to challenge the clarity of his purported request. *Smith* instructs that once a suspect clearly invokes his right

to counsel, police may not continue to question him and use his answers to cast retrospective doubt on the purported request for counsel. *Smith*, 469 U.S. at 97. That is, we cannot retroactively glean ambiguity in a suspect's statement based on "postrequest responses to further interrogation." *Id.* at 100; *see also Tolliver v. Sheets*, 594 F.3d 900, 922 (6th Cir. 2010) ("[W]e may consider what came before the request, but may not look to [the defendant's] *subsequent* statements to determine whether the initial request was ambiguous.").

But here, at least some of England's post-request statements were not in response to further interrogation. In the same breath as his purported request—and before officers asked him any further questions—England stated "I'll just be honest with you. Like I said, me and Tyrone are friends. I've never seen that woman in my life." Such a statement would indicate to a reasonable officer that England was willing to continue talking to the officers. The situation was far different in *Smith*, where the state challenged the clarity of the suspect's request based solely on his "responses to continued police questioning." 469 U.S. at 97 (emphasis added).

Next, England argues that the state court contradicted the Supreme Court's mandate in *Davis* that a request for counsel need only be "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney," 512 U.S. at 459, by stating that his request "[did] not rise to the level of impressing upon the interrogator that the suspect has requested an attorney

before continuing the questioning." A state-court adjudication is "contrary to" federal law if it reaches a conclusion of law opposite to that reached by the Supreme Court, or if the state court decides a case with materially indistinguishable facts differently than the Supreme Court. *Goodell v. Williams*, 643 F.3d 490, 495 (6th Cir. 2011) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "Clearly established Federal law" refers to Supreme Court holdings at the time of the state court's decision. *Williams*, 529 U.S. at 412.

England's argument is that the court's use of the phrase "impress upon" impermissibly transformed the Supreme Court's objective standard into a subjective one. In the order granting England's COA, we looked to the dictionary's definition of the word "impress": "to produce or imprint an especially vivid impression of." *England v. Hart*, No. 18-6039, at 5 (6th Cir. Feb. 26, 2019) (order) (quoting *Impress*, Merriam-Webster Unabridged Dictionary, http://unabridged.merriam-webster.com/unabridged/impress (last visited Feb. 21, 2019)). But the Warden points us to the definition of the complete phrase "impress upon," which means "to make someone understand or be familiar with the importance or value of something." Respondent's Br. at 19 (quoting *Impress On/Upon*, Cambridge Dictionary, http://dictionary.cambridge.org/us/dictionary/english/impress-sth-on-upon-sb (last visited December 28, 2019).

In any event, the state court's poor phrasing was not "diametrically different," "opposite in character or nature," or "mutually opposed" from the *Davis*

standard, as required to find that the state court misinterpreted federal law. *Williams*, 529 U.S. at 405-06. But the instant case is far different than a court's stating the wrong burden of proof in an ineffective assistance of counsel claim. *Id.* Here, "impress upon" is not so radically different from the court's pronouncement in *Davis* that a suspect must articulate a desire to have counsel "sufficiently clearly" as contemplated by the contrary-to prong.

Nor did the district court err in its interpretation of relevant Supreme Court precedent. England argues that by comparing England's statement to a negotiation tactic, the district court impermissibly speculates about England's subjective mental state. *Davis* instructs that whether a suspect invokes his right to counsel is an "objective inquiry." 512 U.S. at 458-59. Here, the district court compared England's statement to that in *Perreault v. Smith*, 874 F.3d 516, 519-20 (6th Cir. 2017), in which the defendant responded to a police officer's accusation that his story was inconsistent by stating "[w]ell, then let's call the lawyer then 'cause I gave what I could." In that case, we expressed approval of the state court's classification of the suspect's statement as a negotiation, likening it to "[t]hat's all I got; take it or leave it." *Id.* at 520. To be sure, we are prohibited from utilizing circuit precedent "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). But the district court's use of *Perreault* is immaterial, as the state court's

decision is supported by sufficient federal law without looking to *Perreault*.

The "unreasonable application" prong of 28 U.S.C. § 2254(d)(1) applies when the state court identified the correct legal principle but applied it to the facts of the petitioner's case in an objectively unreasonable way. *Goodell*, 643 F.3d at 495. The Supreme Court has stated that to constitute an unreasonable application, "the state court's ruling . . . [must be] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Our role is therefore to "determine what arguments or theories supported or . . . could have supported, the state court's decision." *Id.* at 102. We then turn to the question of whether "fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 102. We note that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410. Accordingly, we may not grant a habeas petition based solely on our own "independent judgment that the [state court] applied clearly established federal law erroneously or incorrectly"; "that application must also be unreasonable." *Id.* at 411.

We undertake this "objective[] unreasonable[ness]" inquiry, *id.* at 409, in view of the specificity of the governing rule: "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations," *Yarborough v. Alvarado*, 541 U.S. 652,

664 (2004). Conversely, "[i]f a legal rule is specific, the range may be narrow" and "[a]pplications of the rule may be plainly correct or incorrect." *Id.* Here, the relevant Supreme Court precedent comes from *Davis*, which we have previously held represented a "general rule." *McKinney v. Hoffner*, 830 F.3d 363, 373. Accordingly, the state court is given some latitude in its application of *Davis* to the facts of this case.

England argues that the state court materially changed the meaning of his statement by finding that "[i]n essence, England merely said that I guess you will have to call my lawyer and I don't know if I need my lawyer because I don't want to get into trouble." He directs us to *Smith v. Illinois*, in which the petitioner remarked "[u]h, yeah. I'd like to do that," upon learning that he had a right to consult with an attorney. 469 U.S. at 93. The Supreme Court found such a statement to be unambiguous. But *Smith* is easily distinguishable from the facts before us. First, England sidesteps the fact that his statement was not prefaced solely by the words "I guess." As discussed previously, it cannot be viewed separate and apart from the remainder of his statement. Second, in *Smith* the Court noted, "with the possible exception of the word 'uh'," there was nothing to reasonably suggest equivocation in the petitioner's statement. *Smith*, 469 U.S. at 97. The same cannot be said for England, whose purported request was buried within a larger statement.

England's reliance on *United States v. Scott*, 693 F.3d 715 (6th Cir. 2012), is similarly unpersuasive. In *Scott*, we held that the defendant had unambiguously

invoked his right to counsel by writing "no" in response to the following written question: "Having these rights in mind, do you wish to talk to us now?" *Id.* at 717. We noted, "[i]f there is any ambiguity about Scott's right to counsel, it is in the form itself, and not in his invocation of the right." *Id.* at 720. The same cannot be said for England, as his alleged request was not directly in response to a statement advising him of his *Miranda* rights, nor was it equivalent to the unequivocal "no" used by the defendant in *Scott*.

Nevertheless, England argues that the use of the phrase "I guess" constituted firmer language than the petitioner's "[m]aybe" in *Davis*. Our precedent, and that of other circuits, suggests the opposite conclusion. *See*, *e.g.*, *United States v. Havlik*, 710 F.3d 818, 822 (8th Cir. 2013) ("I guess you better get me a lawyer then" was not an unambiguous request for counsel); *United States v. Nolan*, 443 F. App'x 259, 260 (9th Cir. 2011) (defendant's mid-interview statement that "I guess I have to, you know, get a lawyer or something because we're not coming to an understanding here" was not an unequivocal request for counsel); *Luna v. Lamarque*, 400 F. App'x 169, 172-73 (9th Cir. 2010) (defendant's statements "I should probably get a lawyer, I guess" and "In other words, I'll just wait 'til I get booked and wait 'til I'm charged or whatever, you know whatever or get a lawyer" did not constitute an unambiguous request for counsel).

Whether we ultimately believe there to be a constitutional difference between the statement made in *Davis* and the statement here is irrelevant. Under

AEDPA, our inquiry focuses not on whether the officers *could* have interpreted England's statement as an unambiguous request for an attorney, but whether it was objectively unreasonable for the Kentucky Supreme Court to conclude otherwise. We cannot say that it was. Indeed, the very fact that many courts have considered this issue and reached differing conclusions—in other words, "fairminded jurists [] disagree[d]," *Yarborough*, 541 U.S. at 664—supports our conclusion that the state court did not unreasonably apply federal law.

Even if we had found that the admission at trial of England's police station confession violated his right to counsel and that the state court unreasonably applied or failed to follow clearly established federal law by admitting it, England would still need to demonstrate that the error was prejudicial to warrant granting his petition. *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015). On habeas review, an error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). To meet this standard there must be more than the "reasonable possibility" that the error contributed to the jury's verdict. *Mitzel v. Tate*, 267 F.3d 524, 534 (6th Cir. 2001) (*quoting Brecht*, 507 U.S. at 637). If we harbor "grave doubt" about whether the state court's error had a "substantial and injurious effect or influence in determining the jury's verdict" then the error is not harmless, and the petition must be granted. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)) (internal quotation marks omitted).

England argues that his confession to police was inextricably woven throughout the Commonwealth's case, tainting the jury's view of other evidence.[2] To be sure, a confession is prejudicial—"the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (alteration in original) (quoting *Bruton v. United States*, 391 U.S. 123, 139-140) (White, J., dissenting)). But even if the police station confession were suppressed, the Commonwealth had the taped conversation between England and Woodfork—which was entirely independent of the police station confession—to build its case around.[3]

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[2] England did not confess to murdering Halvorson. Rather, he admitted that he struck her and knocked her to the ground. England maintains that McCary actually killed Halvorson. Nevertheless, the actions England admitted to were sufficient to be found guilty of the crime of conviction—complicity to murder. *See* Kentucky Revised Statutes (KRS) 502.020(1)(b) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]").

[3] The parties dispute whether the tape of the police interview was played to the jury. The Warden states that it was not played, while England claims that the "entirety of the interrogation, which lasted nearly two hours" was played to the jury at trial, citing the Virtual Record of the trial. "[T]he Commonwealth presented two audio tapes to the jury: in one England confessed to the crime at the police station, and in the other England made inculpatory statements to Woodfork." The record indicates England is correct.

In the Woodfork recording, England makes numerous inculpatory statements. He told Woodfork that he waited in Halvorson's garage, and when he saw her, he "came out like a running forward and pop[,]" he hit her, knocking her out. England stated that he "should have just shot the bitch." He continued to complain about McCary's failure to pay him the promised money, "[y]ou wanted her dead; you're going to pay. . . . I want the . . . money." He compared McCary's actions in the case to his own. "He knows I'm bad. He didn't do anything. He ran the truck around in a circle. . . . I did all the work and didn't get shit. . . . He should know who he's fucking with. He see what I done. He think I won't do that to him?"

To be certain, England is not required to show that but for the error he would have been acquitted. *Kyger*, 146 F.3d at 382. But unlike *Moore*—a case England cites in which the stricken confession left only circumstantial eyewitness evidence—the prosecution had England's inculpatory statements to Woodfork. 700 F.3d at 889. Given this, we cannot conclude that the police station confession—even if we had found it to be erroneously admitted—had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (citation omitted).

B. Confrontation Clause Violation

The trial court allowed the Commonwealth to introduce Halvorson's affidavit in support of an emergency protective order ("EPO") against McCary—filed

just a month prior to her death—in which she stated that McCary had threatened to kill her or have someone else kill her. The Kentucky Supreme Court found that this affidavit was erroneously admitted in violation of the Confrontation Clause, and neither party disputes this finding before this court. Rather, England disputes the state court's finding that the improper admission constituted harmless error.

The "starting point" for a § 2254 case is to identify the clearly established federal law that governs the habeas petitioner's claims. *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013). In *Crawford v. Washington*, the Supreme Court announced that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. 36, 68 (2004). In *Davis v. Washington*, the Court clarified that statements "are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," rather than to enable the assistance of law enforcement to respond to an ongoing emergency. 547 U.S. 813, 822 (2006) (footnote omitted).

The Kentucky Supreme Court made it "abundantly clear that statements made for the purpose of obtaining a restraining order are not admissible at trial." Although the state court failed to cite *Crawford* in its analysis, the district court found that it nevertheless properly reviewed England's claim. Indeed, the state court decision need not refer to relevant Supreme

Court cases or even demonstrate an awareness of them. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Rather, it is sufficient that the result and reasoning are consistent with Supreme Court precedent. *Id.* That was the case here: the Kentucky Supreme Court's decision encompassed the Supreme Court's prohibition against admission of a testimonial statement by a nontestifying witness to the deceased Halvorson's testimonial affidavit in support of an EPO.

To grant England's petition, we would need to find that the affidavit's admission was prejudicial to England's case. Confrontation Clause violations are subject to harmless-error analysis. *McCarley v. Kelly*, 801 F.3d 652, 665 (6th Cir. 2015). Depending on the procedural stage of a criminal defendant's conviction challenge, different harmless error tests apply. *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019). On direct appeal in state court, the defendant-friendly harmless error formulation announced in *Chapman v. California*, 386 U.S. 18, 24 (1967), applies—error is harmless only if the court can "declare a belief that [the error] was harmless beyond a reasonable doubt."

However, "the test is different" on collateral review. *Ayala*, 135 S. Ct. at 2197. Determining whether to grant a habeas petition based on a Confrontation Clause challenge requires us to ask whether the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at

623.[4] Building on this standard, in *McAninch*, the Supreme Court instructed federal courts "to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' " 513 U.S. at 436. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 438 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Grave doubt means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435.

The Kentucky Supreme Court asked only whether there was a "reasonable possibility that absent error the verdict would have been different." It proceeded to apply this standard when analyzing the facts. "If ever failed to satisfy the 'verdict would be different' standard required for reversal, it is here." there were evidence that . . . failed to satisfy the 'verdict would be different' standard required for reversal, it is here." But for the purposes of habeas review, we assess the prejudicial impact of constitutional trial errors under

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[4] Although *Crawford* and *Brecht* spell out different standards for harmless error analysis in habeas petitions under AEDPA, this court has held that "in this Circuit[,] . . . *Brecht* is always the test, and there is no reason to ask both whether the state court 'unreasonably' applied *Chapman* under AEDPA and, further, whether the constitutional error had a 'substantial and injurious' effect on the jury's verdict." *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009).

the "substantial and injurious effect" standard set forth in *Brecht*, examining the error by applying the factors announced in *Delaware v. Van Arsdall* to the facts in the case. 475 U.S. 673 (1986). These include: (1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted, and . . . (5) the overall strength of the prosecution's case. *Id.* at 684. The district court properly considered these factors in finding that the state court's harmless error analysis was reasonable.

The Importance of the Witness's Testimony in the Prosecution's Case. England argues that the hearsay statements contained in the affidavit were used to prove McCary's intent to commit murder (a necessary element of the complicity to commit murder charge for which England was convicted). According to England, because the prosecution's theory of the case was that McCary hired England to commit the murder, the affidavit's reference to a third party who could kill Halvorson ("if he didn't do it, he knew someone that could") provided the necessary context for England's involvement. The Warden downplays the potentially damaging role of the affidavit, arguing that it was only discussed for two minutes of four days of testimony. But this ignores the fact that a highly inflammatory statement could be deeply influential on the jury's verdict no matter how briefly it is mentioned.

Nevertheless, we find persuasive the Warden's characterization of the prosecution's use of the affidavit—as merely background information to explain why McCary became the prime suspect in the investigation. Indeed, the affidavit's passing reference to a hypothetical third party did not directly implicate England. More importantly, the affidavit was not absolutely necessary to the prosecution, as it could still put forward England's statements to Woodfork to provide the necessary context for England's involvement.

Cumulative Evidence. Next, England argues that the affidavit was corroborative, rather than cumulative, of the aspects of the Woodfork statements that the prosecution relied on. "[E]vidence that is merely cumulative of that already presented does not . . . establish prejudice." *Getsy v. Mitchell*, 495 F.3d 295, 313 (6th Cir. 2007) (en banc) (*quoting Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006)). Determining what constitutes cumulative evidence can be difficult, as "[o]ur cases . . . do not tell us clearly when evidence becomes sufficiently different to no longer be 'cumulative' or at what level of generality one must compare the evidence." *Vasquez v. Bradshaw*, 345 F. App'x 104, 120 (6th Cir. 2009). Our most frequent formulation of the standard is that "new evidence" is not cumulative if it "differs both in strength and subject matter from the evidence actually presented at [trial]." *Goodwin v. Johnson*, 632 F.3d 301, 327 (6th Cir. 2011).

The affidavit's inference—that England was the person McCary hired to kill Halvorson—was presented in graphic detail through the Woodfork confession. "He

wanted me to do it. Kill her." "He had, he did approach me about paying me." "He offered me a thousand then he told me, first, and then he told me ten thousand, what he said." England also stated that McCary had given him $1,000.00 in a white envelope containing hundred-dollar bills, which was consistent with Woodfork's trial testimony that McCary had handed both him and England white envelopes containing $1000.00 each. And England alluded to the fact that McCary had failed to pay him the full amount: "You wanted her dead; you're going to pay. . . . I want the fucking money."

Corroborating or Conflicting Evidence. To show corroboration of the substance of the affidavit (that McCary threatened to kill Halvorson), the Warden points to the testimony of Cori Poindexter—the last person to see Halvorson alive—who claimed to have overheard a conversation in which McCary threatened to "end it" with Halvorson and stated that if he could not have her, no one would. However, England posits that these statements have an innocuous meaning: simply that McCary intended to break up with her or otherwise terminate their relationship. But even without the affidavit, the Woodfork testimony provides sufficient corroboration, as England himself implied that McCary had recruited him to kill Halvorson. Given this additional support, this *Van Arsdall* factor weighs in the Warden's favor.

Extent of Cross-Examination Otherwise Permitted. England provides no counter to the Warden's assertion that he could have cross-examined Detective Walker

about the affidavit. That he chose not to do so—instead focusing his defense on other elements of the case—does not mean he was deprived of the opportunity.

Strength of Prosecution's Case. The final, and most critical factor in harmless error analysis is the overall strength of the prosecution's case. *Perkins v. Herbert*, 596 F.3d 161, 177 (2d Cir. 2010). In *McCarley*, we likened the erroneously admitted testimony at issue "to a keystone holding the arch of the State's case together" which, when removed, caused the State's case to "collapse[ ] into disjointed pieces." 801 F.3d at 667. We reasoned that the untainted evidence "paint[ed] a clear picture of the crime, but only when considered in light of [the hearsay testimony]." *Id.* That is not the case here. The Warden argues the affidavit was "extraneous and, frankly, unnecessary in light of all the evidence." Indeed, "[t]hough it is impossible to speculate how the trial may have played out under different circumstances," *Jensen v. Romanowski*, 590 F.3d 373, 381 (6th Cir. 2009), the prosecution's case was supported by competent evidence: the police confession, the Woodfork confessions, and the corroborating circumstances found at the crime scene. As such, the affidavit was far from the "linchpin of the government's case, connecting [the defendant] to the fruits of the crime in a way no other evidence, testimonial or physical, could." *Reiner v. Woods*, 955 F.3d 549, 551 (6th Cir. 2020).

Accordingly, we cannot say that we harbor grave doubt as to the effect or influence the affidavit might have had on the jury's verdict. The state court's harmless error determination must stand.

C. *Brady* Claims

England's final claim is that the trial court erred by denying England's motion for a new trial despite his showing that the Commonwealth withheld exculpatory forensic evidence. Specifically, this evidence refers to (1) Caucasian head hair found in Halvorson's underwear; (2) Caucasian head hair found in Halvorson's hands; and (3) semen found in Halvorson's vagina, which was determined to belong to her then-boyfriend Shannon Jenkins. Both England and McCary are African-American. England contends that had he been permitted to present this evidence, there was a reasonable probability that he would not have been convicted. Accordingly, he argues the Kentucky Supreme Court unreasonably applied federal law in concluding otherwise. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 405.

Under *Brady v. Maryland*, "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Supreme Court has stated that "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The defendant has the burden of proving a

Brady violation. *See id.* at 291, 296; *see also Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000).

Because significant time elapsed from when England claims he left Halvorson's house and the discovery of her body, he argues that the presence of foreign Caucasian hairs would have supported an argument that another person struck the final blow against Halvorson. Halvorson had a Caucasian boyfriend, Jenkins, at the time of her death and also had a Caucasian ex-husband, Pat Halvorson, who was originally investigated as a suspect in her murder prior to the emergence of Woodfork. Additionally, Pat Halvorson had a life insurance policy on Lisa at the time of her death, and he had made a statement to police indicating that he and Lisa had separated on bad terms. Accordingly, England theorizes that the evidence at issue would have bolstered an argument that a disgruntled romantic partner committed Halvorson's murder.

Confusion arises from the Kentucky Supreme Court's failure to definitively explain if—or how—the prosecution suppressed evidence. Its vague reasoning includes the following curious statement:

> [England] contends that he was not informed that the sperm found in Lisa's vagina was from her boyfriend, Shannon Jenkins, that there was a Caucasian head hair found in Lisa's panties, and that there were Caucasian head hairs in her hands. However, England was aware of the crucial parts of this information prior to trial. For instance, he was aware that the hair in Lisa's hand was

> probably from a cat. As to the sperm found, England argued that the sperm taken from Lisa did not match either England or McCary. Also, England was aware that Jenkins stated that he recently had sexual intercourse with Lisa.

England appears to argue that because he was aware of "crucial parts" of the information, there were other parts that he was erroneously not made aware of. But a review of the record belies this claim.

As to the hair found in Halvorson's hand, a trace evidence analyst told the jury that the hair had Caucasian characteristics, and England's trial counsel cross-examined this analyst, and emphasized this finding in his closing argument. The jury was also informed that the hair in Halvorson's underwear was from a Caucasian person.[5]

As to the sperm evidence, England contends that the prosecution's failure to affirmatively identify Jenkins as the sperm contributor was an evidentiary suppression. However, the jury was informed that the sperm DNA was not a match to either England or McCary. Indeed, *Brady* does not require a prosecutor

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[5] Another wrinkle to add to the dispute: the Warden argues that the state court erroneously held that England knew prior to trial that the hair in Halvorson's hand was from a cat. Unfortunately, the Supreme Court of Kentucky made the inaccurate observation that England knew it was cat hair prior to trial. The Warden is unable to find where it has been corrected throughout England's appeals. The Warden has relied upon the video record. Confusingly, England apparently argues that he was aware prior to trial that the hair was from a cat.

to "deliver his entire file to defense counsel," but only to disclose those items which are material to the defendant's guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 675 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy."). But when "evidence is obviously of such substantial value to the defense . . . elementary fairness requires it to be disclosed even without a specific request." *United States v. Agurs*, 427 U.S. 97, 110 (1976). England contends that knowing that the sperm DNA was a match to Jenkins would have allowed him to better focus his defense on a theory that Jenkins was the killer. And to be sure, it is one thing to present an argument, but something entirely different to be provided the evidence to support that argument.

Yet even if we found that evidence was suppressed, England fails to establish that it prejudiced his defense. Prejudice (and materiality) is established by showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Cone v. Bell*, 556 U.S. 449, 469 (2009). A reasonable probability is shown "when the . . . suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (1995) (*quoting Bagley*, 473 U.S. at 678). To make this showing, England need only clear the "lower than the more-probable-than-not standard." *LaMar v. Houk*, 798 F.3d 405, 416 (6th Cir. 2015). But "[t]he likelihood of a different result must be substantial, not just conceivable."

Harrington, 562 U.S. at 112 (internal quotation marks and citation omitted). In determining whether a reasonable probability exists, we consider the undisclosed evidence collectively. *See Kyles*, 514 U.S. at 435 (explaining that a *Brady* violation is shown through "favorable evidence [that] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

England argues that the presence of Caucasian head hair in Halvorson's hand and underwear would have supported his theory that another individual—perhaps one of the Caucasian suspects—was responsible for her death. At the very least, he argues, it would have allowed the jury to infer that a Caucasian individual was in close contact with Halvorson shortly before her death. While this is "conceivable," it does not present a substantial likelihood of a different result. *Harrington*, 562 U.S. at 112 (internal quotation marks and citation omitted).

Disclosing the source of the sperm found in the victim's vagina would have shown that Jenkins had recently had sexual intercourse with Halvorson. But England provides no support for the contention that a woman's most recent sex partner should automatically be considered a suspect for her murder—especially when no evidence of sexual assault was found. Moreover, the prejudice inquiry "does not extend to assessments of the impact that the suppression may have had on [Defendants'] subsequent trial strategy." *United States v. Fields*, 763 F.3d 443, 461 (6th Cir. 2014) (quoting *Smith v. Metrish*, 436 F. App'x 554, 564

(6th Cir. 2011)); *see also Joseph v. Coyle*, 469 F.3d 441, 473 n.23 (6th Cir. 2006) ("Rather, we have expressly recognized the Supreme Court's explicit rejection of the argument that 'the [materiality] standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial.'") (alterations in original) (quoting *Agurs*, 427 U.S. at 112 n.20).

Nevertheless, England directs us to *Mills v. Barnard*, in which we found that—at least at the motion-to-dismiss stage—a petitioner's claim that suppressed DNA evidence in a sexual assault case would have shown conclusively that it was contributed by another individual satisfied the elements of a *Brady* violation. 869 F.3d 473, 485-86 (6th Cir. 2017). But that case involved a sexual assault in which the defendant was found guilty based solely on the victim's testimony coupled with DNA evidence from her underwear; as such, it is easily distinguishable from the instant case. Here, the medical examiner testified that she found no indication a sexual assault had occurred. And, England's trial counsel did not challenge the medical examiner's conclusion on cross examination. Thus, the identity of the DNA evidence was far from crucial to the Commonwealth's case.

In sum, even if all the evidence were as England wishes, it does not persuade us that there is a reasonable probability the result of the trial would have been different. *Strickler*, 527 U.S. at 281. We therefore cannot conclude that the state court unreasonably

applied federal law in rejecting England's *Brady* claims.

AFFIRMED.

CONCURRING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part. We need not address the potential Fifth Amendment problem in admitting Stevie England's police-interrogation confession, because England made an independent, recorded confession to Karl Woodfork about his involvement in Lisa Halvorson's murder. The critical question is what England said on those recordings. Were his statements as inculpatory as his police-interrogation confession? Based on England's counsel's concession at oral argument that England is heard admitting to violence against Halvorson in the Woodfork recordings, the answer is yes, and the potentially erroneous admission of England's police-interrogation confession was therefore not prejudicial.

Counsel's concession clarifies what is otherwise a confusing trial record. We were unable to review the actual content of the Woodfork recordings, because the recordings are unintelligible in the trial record. The only relevant item we could review was a trial-record video of the prosecutor, during his closing argument, purporting to relay direct quotes from England

in these recordings, involving admissions of violent acts against Halvorson. On the one hand, if true, these statements are highly inculpatory. On the other hand, neither the state court, the magistrate judge, nor the district court found that the jury heard England confess to involvement in Lisa's murder in the Woodfork recordings. In fact, the three courts all describe the Woodfork recordings as containing less directly inculpatory content, namely England stating that McCary owes him money and considering ways to get McCary to pay. *See England v. Kentucky*, No. 2003-SC-0328-MR, 2005 WL 1185204, at *5 (Ky. May 19, 2005) ("In those conversations, which were played for the jury, England said McCary had not paid money owed to him and considered ways to coerce McCary to pay him the money."); *England v. Simpson*, No. 506CV00091GNSLLK, 2017 WL 10238035, at *2 (W.D. Ky. Mar. 6, 2017) ("Woodfork agreed to be wired for sound, and authorities obtained secretly-recorded conversations with Petitioner in which Petitioner complained about McCary's not having paid him some owed money (the inference being that it was the $10,000 owed for having assisted McCary commit the murder)."); *id.* at *7 n.11 ("Petitioner told Woodfork that McCary had not paid money owed to him and considered ways to get McCary to pay."); *England v. White*, No. 5:06-CV-091-TBR-LLK, 2018 WL 4353692, at *2 (W.D. Ky. Sept. 11, 2018) ("Before the trial, Woodfork agreed to be wired for sound, and the police secretly recorded conversations between Woodfork and England, in which England complained about McCary owing him money.").

We sought clarity on this issue at oral argument, asking counsel for England whether he disputed that his client could be heard, in the Woodfork recordings, admitting to hitting Halvorson and knocking her out, and stating that he should have just shot her. Oral Arg. Audio at 11:25-11:35. Counsel replied, "We don't dispute that those statements were made on the tape with the informant [Karl Woodfork]." *Id.* at 11:48-11:53. Therefore, even excluding the police-interrogation confession, the jury heard England confess, in explicit detail, to his involvement in Lisa Halvorson's murder. Indeed, these statements mirror the most incriminating portion of his police-interrogation confession, in which he stated that he struck Halvorson in the jaw. In light of this separate confession, the admission of England's police-interrogation confession cannot be deemed prejudicial. For this reason, as to the majority's analysis of England's Fifth Amendment claim, I concur only in its conclusion regarding the lack of prejudice to England. I further concur in the remainder of the majority's opinion on the Confrontation Clause and *Brady* claims.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-6039

STEVIE L. ENGLAND,

Petitioner - Appellant,

v.

DEEDRA HART, Warden,

Respondent - Appellee.

Before: SILER, MOORE, and NALBANDIAN, Circuit Judges.

JUDGMENT

(Filed Aug. 17, 2020)

On Appeal from the United States District Court for the Western District of Kentucky at Paducah.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Stevie L. England's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 18-6039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVIE L. ENGLAND, Petitioner-Appellant, v. DEEDRA HART, Warden, Respondent-Appellee.	))))))	ORDER (Filed Feb. 26, 2019)

Stevie L. England, a pro se Kentucky prisoner, appeals a district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has applied for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis on appeal and for the appointment of counsel. *See* Fed. R. App. P. 24(a)(5).

A grand jury indicted England on a charge of capital murder in the death of Lisa Halvorson, and the trial court thereafter granted the Commonwealth's motion to add a charge of complicity to commit murder. In 2002, England was convicted at a jury trial of complicity and was sentenced to life in prison without parole. The Kentucky Supreme Court affirmed England's conviction on direct appeal. *England v. Commonwealth*, Nos. 2003-SC-0328-MR, 2004-SC-0506-TG, 2005 WL 1185204 (Ky. May 19, 2005) (unpublished opinion).

In 2006, England filed his § 2254 petition, reasserting the claims that counsel raised on direct appeal: (1) England's statement to police should not have been

admitted because police continued to question him after he invoked his right to counsel and (2) because police coerced his statement; (3) the Commonwealth improperly pursued the death penalty after police had told England that it would not be pursued if he confessed; (4) Halvorson's affidavit in support of an Emergency Protective Order against his co-defendant (Tyrone McCary) should not have been admitted; (5) the trial court erred by granting the Commonwealth's motion to sever the trials of England and McCary; (6) the trial court erred by denying England's motion to appoint a criminologist; (7) Cori Poindexter, a friend of Halvorson, was improperly allowed to testify about statements that she heard Halvorson make during her telephone conversation with McCary; (8) the jury panel did not include a fair representation of African-Americans; (9) prospective jurors who were opposed to the death penalty should not have been dismissed; (10) the trial court wrongfully allowed the Commonwealth during its closing argument to display enlarged transcripts of portions of audio tapes between England and a confidential informant, Karl Woodfork; (11) England was prejudiced when the Commonwealth misstated part of the jury instruction for murder; (12) the Commonwealth did not file timely notice of aggravating circumstances that triggered the death penalty; (13) the aggravating circumstances were not included in the indictment; (14) the tapes between England and Woodfork should not have been admitted because they were obtained without a warrant; (15) the trial court erred by denying England's motion for a new trial despite his showing that the Commonwealth withheld exculpatory

evidence; and (16) the trial court erred by refusing to order DNA testing on the exculpatory evidence. The district court granted England's contemporaneously filed motion to hold the habeas proceedings in abeyance while he pursued post-conviction remedies in state court.

England returned to state court and filed a motion to vacate that contained ten claims of ineffective assistance of trial counsel. *See* Ky. R. Crim. P. 11.42. The trial court denied the motion in a summary order. The Kentucky Court of Appeals affirmed the trial court's decision as to nine claims, but vacated and remanded the action for an evidentiary hearing with respect to a claim that trial counsel had failed to present mitigating evidence during the sentencing phase. *England v. Commonwealth*, No. 2007-CA-000935-MR, 2008 WL 4182027 (Ky. Ct. App. Sept. 12, 2008) (unpublished opinion). Ultimately, by agreement of the parties, the trial court entered an amended judgment that reduced England's sentence to life in prison. The district court subsequently lifted the stay.

England next filed a supplemental § 2254 petition, asserting that trial counsel rendered ineffective assistance by failing to: (17) object to a fatal variance and constructive amendment to the indictment; (18) object to the complicity instruction on the ground that the Commonwealth did not present evidence that McCary had been convicted of murder; (19) present mitigating evidence at his sentencing hearing; (20) object to a prosecutor's comment during closing argument; (21) object to Poindexter's testimony about Halvorson's

statements; (22) object to the systematic exclusion of African-Americans from the grand jury; (23) present a defense version of the transcripts of the taped conversations with Woodfork; (24) file a pre-trial motion contesting the indictment's failure to list aggravating circumstances; (25) move for a change of venue due to pretrial publicity; and (26) move to suppress the taped conversations as prohibited by 18 U.S.C. § 2511. England immediately withdrew Claim 19 and thereafter withdrew Claims 5, 7, 8, 10, 12, 13, 14, and 24.

A magistrate judge recommended denying all of England's claims. England filed objections only as to those claims that he had not previously withdrawn. Upon de novo review, the district court overruled England's objections and denied the § 2254 petition. The court concluded that most claims lacked merit, that Claim 11 was procedurally defaulted, and that Claim 21 lacked merit even if it survived a possible procedural default. The court declined to issue a COA.

In his COA application, England reasserts Claims 1, 4, 6, 11, 15, 17, 18, 21, 22, and 25.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the appeal concerns a

district court's procedural ruling, a COA should issue when the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In Claim 1, England contended that his statement to police should not have been admitted because police continued to question him after he invoked his right to counsel. During the interrogation, England stated, "I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about. I'll be honest with you. Like I said, me and Tyrone are friends. I've never seen that woman." *England*, 2005 WL 1185204, at *2. England later said, "I don't want to get in no trouble. I mean my lawyer. I don't know." *Id.*

"In determining whether a suspect has invoked his right to counsel, we apply an objective standard, asking whether a reasonable police officer would have understood the suspect to be asking for an attorney. The request must be unequivocal." *Perreault v. Smith*, 874 F.3d 516, 51920 (6th Cir. 2017) *cert. denied*, 138 S. Ct. 1299 (2018), (citing *Davis v. United States*, 512 U.S. 452, 458-59 (1994)).

The Kentucky Supreme Court cited the Supreme Court's conclusion in *Davis* "that the words 'maybe I should talk to a lawyer' are insufficient to invoke the right to counsel because the statement is equivocal."

England, 2005 WL 1185204, at *2. The Kentucky Supreme Court also cited precedent stating that "the mere hint that a defendant has an attorney in another matter does not constitute a request for counsel in the present issue." *Id.* (citing *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989)). It concluded that England's "statements do not rise to the level of impressing upon the interrogator that the suspect has requested an attorney before continuing the questioning." *Id.*

Jurists of reason could find this analysis to be an unreasonable application of Supreme Court precedent. First, England's statement, "I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about," is firmer than the statement "maybe I should talk to a lawyer," which the Supreme Court deemed an equivocal invocation in *Davis.* 512 U.S. at 462. Second, the content of England's statement was not "the mere hint that [he had] an attorney in another matter." *England*, 2005 WL 1185204, at *2. Third, the Supreme Court's standard for what it takes to invoke the right to counsel does not require "*impressing upon the interrogator* that the suspect has requested an attorney." *Id.* (emphasis added). To impress means "to produce or imprint an especially vivid impression of something. Merriam-Webster Unabridged Dictionary, http://unabridged.merriamwebster.com/unabridged/impress (last visited Feb. 21, 2019). The Supreme Court's invocation precedent requires only that a reasonable police officer would have understood the suspect to be asking for an

attorney, not that a reasonable police officer receive an especially vivid impression of that request.

The district court found England's statement "extremely similar" to the petitioner's statement in *Perreault*, which the Sixth Circuit found could be reasonably interpreted to be "a negotiation tactic, not an unequivocal request for counsel." Case No. 06-91, R. 97 (Mem. Op. at 6) (Page ID #844). Based on this comparison with *Perreault*, the district court concluded that the Kentucky Supreme Court had faithfully applied Supreme Court precedent. *Id.* Yet in the context of habeas review "'[c]learly established Federal law' refers to Supreme Court holdings at the time of the state court's decision." *McCarley v. Kelly*, 801 F.3d 652, 661 (6th Cir. 2015) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "We may not employ circuit precedent 'to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced.'" *Id.* (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013)). The district court arguably over-relied on the Sixth Circuit's "sharpen[ing]" of general Supreme Court invocation jurisprudence in *Perreault* in determining that England's statement could reasonably be interpreted as a negotiation tactic, and that such statements are not unequivocal invocations of the right to counsel. The court therefore grants England's motion for a COA on this claim.

In Claim 4, England asserted that Halvorson's affidavit in support of an Emergency Protective Order against McCary should not have been admitted at

trial. Halvorson stated in the affidavit that McCary "threatened to kill me and said if he didn't do it, he knew someone that could. He said I was as good as gone." Jurists of reason could disagree with the district court's analysis of this issue and denial of England's claim.

The Confrontation Clause generally prohibits the admission of a testimonial statement such as this by a non-testifying witness. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). When the Confrontation Clause is violated, as the Kentucky Supreme Court agreed it was in this case, the Supreme Court has prescribed the *Brecht* harmless error standard to evaluate whether relief is warranted, requiring the reviewing court to ask whether the violation had a "substantial and injurious effect or influence in determining the jury's verdict." *McCarley*, 801 F.3d at 665-66 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). In conducting its harmless error analysis of this Confrontation Clause violation, the Kentucky Supreme Court merely asked whether there was a "reasonable possibility that absent error the verdict would have been different." *England*, 2005 WL 1185204, at *5 (quoting *Crane v. Commonwealth*, 726 S.W.2d 302, 307 (Ky. 1987)). Jurists of reason could find that the Kentucky Supreme Court applied an incorrect harmless-error standard. In analyzing this issue, the Kentucky Supreme Court observed:

> The prosecution had a taped confession with England admitting participation in this crime.

> This evidence is corroborated by both the circumstances of the murder and the crime scene, and is enough to deem the admission of the affidavit against England's co-conspirator harmless. But there is more. The prosecution also introduced competent evidence of a taped conversation between England and Karl Woodfork. In March 2000, Woodfork contacted the police and informed it that he had information regarding Lisa's murder. After telling the police that McCary had sought to hire him and England to murder Lisa, Woodfork agreed to record conversations with England. In those conversations, which were played for the jury, England said McCary had not paid money owed to him and considered ways to coerce McCary to pay him the money.

England, 2005 WL 1185204, at *5. Several of these pieces of evidence highlighted by the Kentucky Supreme Court as supporting England's guilt are themselves problematic. For example, a significant period of time passed between the attack on Halvorson and the discovery of her body, potentially undermining the strength of any crime scene evidence. Woodfork's credibility was forcefully impeached at trial, and the recordings he made of his conversations with England did not include a discussion of the murder itself. England confessed to striking Halvorson and witnessing McCary injure her further but maintained that she was alive at the time they left her. Cori Poindexter's testimony did provide proof of McCary's motive or intent somewhat similar to that contained in Halvorson's challenged affidavit, which would support a finding of

harmless error. However, jurists of reason could find that, given the weaknesses of some of the other evidence discussed above, the inclusion of Halvorson's affidavit stating her experiences and fear of McCary in her own words had a "substantial and injurious effect or influence in determining the jury's verdict" and therefore constituted reversible error. *McCarley*, 801 F.3d at 665-66 (quoting *Brecht*, 507 U.S. at 637).

In Claim 6, England argued that the trial court erred by denying his motion to appoint a criminologist in violation of his right to a fair trial and due process. England has failed to make a substantial showing of a constitutional violation because the Supreme Court has not recognized a federal constitutional due-process right to a state-paid expert witness other than for a psychiatrist's assistance in support of an insanity defense. *See Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985). Moreover, the trial court refused to allow the appointment only of a particular criminologist due to the expert's high fees. *England*, 2005 WL 1185204 at *6. The court invited counsel to submit names of other experts, but counsel instead requested, and received, leave to purchase a forensic pathology treatise at the Commonwealth's expense. *Id.*

In Claim 11, England asserted that he was prejudiced when the Commonwealth misstated part of the jury instruction for murder during closing argument. To wit, the jury was instructed by the court to find England guilty if it determined that England had killed Halvorson by "striking her, running over her with a

truck, *and* causing her death by strangulation." *England*, 2005 WL 1185204, at *8 (emphasis added). However, in closing argument, the Commonwealth replaced the "and" with an "or." In his COA application, England further argues that counsel rendered ineffective assistance by failing to object to the Commonwealth's misstatement.

Jurists of reason would agree that the first part of the claim is procedurally defaulted because counsel failed to make a contemporaneous objection to the Commonwealth's comment. The Kentucky Supreme Court applied the contemporaneous-objection rule on direct appeal to foreclose review of the claim, the rule was an adequate and independent ground for doing so, and England did not demonstrate cause for not complying with the rule or prejudice therefrom. *See Henderson v. Palmer*, 730 F.3d 554, 559 (6th Cir. 2013); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996); *England*, 2005 WL 1185204, at *8-9. England did not previously argue that counsel rendered ineffective assistance by failing to object, and this court will not consider this part of the claim because no exceptional circumstances exist that merit its consideration for the first time on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

In Claim 15, England argued that the trial court erred by denying his motion for a new trial despite his showing that the Commonwealth withheld exculpatory evidence, i.e., evidence that sperm from Halvorson's boyfriend (Shannon Jenkins) was in her vagina, Caucasian head hair was in her panties, and

Caucasian head hair was in her hands. England and McCary are African-Americans.

The magistrate judge concluded, and the district court adopted the conclusion, that "[e]ven if such evidence existed and would have linked other individuals to Lisa's murder, the evidence falls short of being exculpatory as it does not change the fact that competent evidence supported Petitioner's conviction of complicity to commit murder." Case No. 06-91, R. 94 (Findings, Conclusions, and Recommendation at 22) (Page ID #778). This analysis misses the mark. Evidence may still be exculpatory without fully exculpating a defendant. The question that matters in habeas review is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *LaMar v. Houk*, 798 F.3d 405, 415 (6th Cir. 2015) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)).

The court finds some aspects of the Supreme Court of Kentucky's analysis of the *Brady* claim puzzling. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Kentucky Supreme Court stated that England

> contends that he was not informed that the sperm found in Lisa's vagina was from her boyfriend, Shannon Jenkins, that there was a Caucasian head hair found in Lisa's panties, and that there were Caucasian head hairs in her hands. However, England was aware of the crucial parts of this information prior to trial. For instance, he was aware that the hair in Lisa's hand was probably from a cat. As to

> the sperm found, England argued that the sperm taken from Lisa did not match either England or McCary. Also, England was aware that Jenkins stated that he recently had sexual intercourse with Lisa.

England, 2005 WL 1185204, at *10. It seems unresponsive to England's claim that he was not made aware of the presence of Caucasian head hairs on Lisa Halvorson's hands to say that "he was aware that the hair in Lisa's hand was probably from a cat." *Id.* It is also unresponsive to say that England "argued that the sperm taken from Lisa did not match either England or McCary" when his claim is that he "was not informed that sperm found in Lisa's vagina was from her boyfriend, Shannon Jenkins." *Id.* It is one thing to make an argument, and something entirely different to be provided the evidence to support that argument.

Furthermore, these pieces of evidence could have been used to challenge the government's account of Lisa Halvorson's death or to bolster an alternative theory. England asserted that he left Lisa Halvorson still alive, and significant time passed between when he claims to have left her and the discovery of her body. The presence of foreign Caucasian hairs, particularly those in the victim's hands, might have supported an argument that another person had struck the final blow against Lisa Halvorson after England left. Halvorson had a Caucasian boyfriend at the time of her death and also had a Caucasian ex-husband, Pat Halvorson, who was originally investigated as a suspect in her murder prior to the emergence of Woodfork, the

informant who responded to a reward offer by alleging England and McCary's involvement. Case No. 06-91, R. 94 (Findings, Conclusions, and Recommendation at 2 n.2 & 3, 3) (Page ID #758, 759). Pat Halvorson still had a life insurance policy on Lisa at the time of her death. *Id.* at 2 n.3 (Page ID #758). The court finds that this claim deserves encouragement to proceed further because jurists of reason could conclude that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *LaMar*, 798 F.3d at 415 (quoting *Kyles*, 514 U.S. at 433). The court grants England's motion for a COA on this claim.

In Claim 17, England asserted that trial counsel rendered ineffective assistance by failing to object to a fatal variance and constructive amendment to the indictment. England complained about the addition of the complicity charge and about jury instructions that expanded the description of Halvorson's murder. Whereas the original indictment charged England with murdering Halvorson by running over her and strangling her, the jury instructions also referred to England or McCary striking her. In Claim 18, England contended that trial counsel rendered ineffective assistance by failing to object to the complicity instruction on the ground that the Commonwealth did not present evidence that McCary had been convicted of murder.

These claims do not deserve encouragement to proceed further. To establish a claim of ineffective assistance of trial counsel, "the defendant must show

that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

England has failed to make a substantial showing that counsel rendered deficient performance by failing to object to the change in language between the indictment and the jury instructions. A right to "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment." *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). However, due process does require that a state defendant "be informed of the nature of the accusations against him." *Lucas v. O'Dea*, 179 F.3d 412, 417 (6th Cir. 1999). Here, the minor alteration in the wording of the jury instructions (the addition of the allegation that the victim was struck by her assailants) did not expose England to a new charge and deprive him of an "opportunity to plan a defense." *Id.* Thus, England has not made a substantial showing that the alteration deprived him of due process and that counsel rendered deficient performance by failing to object.

Likewise, England has failed to make a substantial showing that counsel rendered deficient performance by failing to object to the additional charge of complicity and to the complicity instruction on the ground that the Commonwealth did not present

evidence that McCary had been convicted of murder. Under Kentucky law, the amendment of the indictment to add an allegation of complicity did not expose England to a new charge of "an additional or different offense," and the Kentucky Supreme Court has held that the addition of an allegation of complicity is not a due-process problem when a defendant has known from the beginning that "the Commonwealth intended to present testimony alleging that [he] was, at the very least, an accomplice in [the crime]." *Commonwealth v. McKenzie*, 214 S.W.3d 306, 307-08 (Ky. 2007); *see also Halvorsen v. White*, No. 15-5147, 2018 WL 3993716, at *3-4 (6th Cir. Aug. 20, 2018). Furthermore, Kentucky law did not require that McCary be convicted of murder before England could be convicted of complicity. *See* Ky. Rev. Stat. § 502.030(1); *Tharp v. Commonwealth*, 40 S.W.3d 356, 366 (Ky. 2000); *England*, 2008 WL 4182027, at *2. Thus, counsel did not render deficient performance by failing to raise these objections. *See Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011).

In Claim 21, England asserted that trial counsel rendered ineffective assistance by failing to object to Poindexter's testimony about Halvorson's statements during her telephone conversation with McCary. Among other things, Halvorson told Poindexter that "McCary had said if he could not have her, nobody would." *England*, 2005 WL 1185204, at *6. England argued that he was denied the right to confront McCary at trial in violation of the Sixth Amendment. Relying on *Crawford v. Washington*, 541 U.S. 36, 61 (2004), the district court

concluded instead that no violation of the Confrontation Clause occurred because McCary's statement was not testimonial. Consequently, counsel did not render deficient performance by failing to object to Poindexter's testimony.

Jurists of reason would agree with the district court's resolution of the claim. "[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial," i.e., the statement was "not made with the primary purpose of creating evidence" for criminal prosecution. *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). McCary's statements to Halvorson clearly were not made with this purpose. Thus, counsel did not render deficient performance by failing to raise a frivolous objection. *See Sutton*, 645 F.3d at 755.

In Claim 22, England argued that trial counsel rendered ineffective assistance by failing to object to the systematic exclusion of African-Americans from the grand jury. The Kentucky Court of Appeals rejected this claim because England had not presented any facts to support his claim that African-Americans were systematically excluded. *England*, 2008 WL 4182027, at *7. Thus, England has failed to make a substantial showing that trial counsel rendered deficient performance by not making an objection on this basis. *See Strickland*, 466 U.S. at 687.

In Claim 25, England asserted that trial counsel rendered ineffective assistance by failing to move for a change of venue due to pre-trial publicity. England

included a list of newspaper articles published before and during the trial. England, however, has demonstrated neither presumptive prejudice by showing that "an inflammatory, circus-like atmosphere pervade[d] both the courthouse and the surrounding community" nor actual prejudice by showing a failure to "carefully question[] prospective jurors during *voir dire* concerning their knowledge of the case from news reports and whether they could judge the case based solely on the evidence that would be presented in court" or that any seated juror "indicated an inability to set aside any prior knowledge about the case or to judge the case fairly and impartially." *Campbell v. Bradshaw*, 674 F.3d 578, 593, 594 (6th Cir. 2012) (quoting *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007) in first set of quotation marks). Thus, England has not made a substantial showing that he suffered any prejudice from trial counsel's failure to move for a change in venue. *See Strickland*, 466 U.S. at 687.

Finally, England does not reassert Claims 2, 3, 9, 16, 20, 23, and 26, and has thus abandoned them. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002). In any event, England has failed to make a substantial showing of the denial of a constitutional right as to these claims due to the absence of argument.

Accordingly, the court **GRANTS** England's COA application on claims 1, 4, and 15 as detailed in this order, and **DENIES** the COA application on the remaining claims. The court **GRANTS** England's motions to

proceed in forma pauperis and his motion to appoint counsel.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:06-CV-00091-GNS-LLK

STEVIE LYN ENGLAND **PETITIONER**

v.

THOMAS L. SIMPSON, Warden **RESPONDENT**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

(Filed Mar. 6, 2017)

This matter is before the Court on Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Claims 1 through 16) and amended petition raising ten additional claims (Claims 17 through 26). Dockets 1 and 47.[1] The Court referred the matter to the undersigned Magistrate Judge for report and recommendation (Docket 49), and it is ripe for determination.

Because all of Petitioner's claims are meritless in light of this Court's standard of review, which is deferential to the state court's prior determination of those

[1] Respondent responded in opposition to the petition, and Petitioner replied. Dockets 62 and 81. Following Court-ordered expansion of the state-court record to include audio-video recordings of his trial, Petitioner supplemented his petition and amended petition, and Respondent responded in opposition. Dockets 83, 91, and 93.

claims, the RECOMMENDATION will be to DENY the petition and amended petition.

Background facts and procedural history

Petitioner and his co-defendant, Tyrone McCary, were indicted on charges of capital murder and tried separately. McCary pled guilty to complicity to murder the victim, Lisa Halvorson (hereinafter "Lisa"), and was sentenced, pursuant to the terms of a plea agreement, to life imprisonment without parole for 25 years.

A Graves Circuit Court jury convicted Petitioner of complicity to commit murder and sentenced him to life without parole after finding the aggravating circumstance of having committed the crime for profit. On direct appeal, Petitioner raised the same claims that correspond to Claims 1 through 16. Docket 1. The Kentucky Supreme Court affirmed. England v. Commonwealth, 2005 WL 1185204 (Ky.).

McCary was Lisa's ex-boyfriend, and, at the time of her murder, she was seeing Shannon Jenkins.[2]

At Petitioner's trial, the Commonwealth introduced evidence that, shortly before her death, Lisa had obtained an emergency protective order (EPO) against McCary. Her affidavit in support of EPO indicated that McCary threatened to kill her or have someone kill her for him.

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[2] Petitioner and McCary are African-American, and Lisa and Jenkins are Caucasian.

The last person to see Lisa alive was her female friend, Cori Poindexter. Poindexter was present with Lisa when McCary called her on the phone and overhead Lisa's side of the conversation. Poindexter testified that Lisa told her that, during the conversation, McCary told her that, if he could not have her, nobody would.

The Commonwealth's theory of the case was that Petitioner was present and assisted McCary commit the murder. McCary and/or Petitioner devised a plan to make it appear that Lisa was accidentally run over by her own truck while exiting her garage. McCary and/or Petitioner: drove to Lisa's house; knocked her to the ground in or near the garage; beat her severely; accelerated the truck backward out of the garage, causing Lisa's face to be caught in the right bumper and spinning her into the wheel well; got on top of her and broke her windpipe, resulting in death by asphyxia.[3] Audio-video of trial, Day 1 (January 8, 2003), 3:13:00.

McCary and Petitioner were implicated in the crime by Karl Woodfork. Woodfork testified that, prior to the murder, McCary discussed with him (Woodfork) and Petitioner various scenarios for murdering Lisa

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[3] The body may or may not have been moved (after she died) to a certain portion of Lisa's driveway, where the body was discovered. Caucasian head hairs were found in Lisa's hands, one Caucasian hair in her panties, and sperm in her vagina, which was determined not to be of African-American origin.

Jenkins admitted to relatively-recent sexual intercourse with Lisa. Lisa's Caucasian ex-husband, Pat Halvorson, who still had a life insurance policy on Lisa, was initially a suspect.

and making it appear like an accident. McCary paid Petitioner and Woodfork a down payment of $1,000 (each), with an understanding was they would receive an additional $10,000 (each) upon completion of the murder. Day 4 (January 14, 2003), 11:07:00.

During the murder investigation, Woodfork, who had been charged in an unrelated matter, heard of a $10,000 reward for testimony leading to conviction. Woodfork agreed to be wired for sound, and authorities obtained secretly-recorded conversations with Petitioner in which Petitioner complained about McCary's not having paid him some owed money (the inference being that it was the $10,000 owed for having assisted McCary commit the murder).

After obtaining the Woodfork-Petitioner conversations, police investigators brought Petitioner to the station for questioning and informed him of the secretly-recorded conversations. Petitioner admitted that he was present at the murder scene with McCary but claimed that he only punched the Lisa the jaw once to "soften her up," knocking her to the ground. McCary allegedly committed the other atrocities while Petitioner was trying to dissuade him. According to Petitioner, Lisa was still alive when he and McCary departed the scene.

After the Kentucky Supreme Court affirmed Petitioner's conviction on direct appeal, he filed a motion to vacate pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 (hereinafter "11.42 motion"), raising ten claims of ineffective assistance of trial

counsel, which correspond to Claims 17 through 26 (Docket 47). The trial court denied the 11.42 motion, and Petitioner appealed. The Kentucky Court of Appeals affirmed the trial court's rejection of all claims except that it remanded for an evidentiary hearing on Claim 19. The appellate ordered the trial court to determine whether trial counsel's decision not to present mitigating evidence at sentencing (in a capital case) was supported by reasonable investigation. England v. Commonwealth, 2008 WL 4182027 (Ky.App.).

On remand, Petitioner agreed to a sentence of life imprisonment. The Graves Circuit Court Agreed Order Amendment Judgment states, in pertinent part, that:

> The parties have agreed that the judgment entered on April 15, 2003 should be amended to reflect a sentence of life. As a result of this agreement, the evidentiary hearing ordered by the Court of Appeals is moot.
>
> Court being fully advised, HEREBY ORDERS that the judgment entered on April 15, 2003 is AMENDED to reflect that Steven England is guilty of complicity to murder and is hereby sentenced to a life sentence. (Docket 47-1, p. 25).

Petitioner filed the present habeas corpus petition and amended petition, which raise a total of 26 claims. Dockets 1 and 47. Respondent responded in opposition and submitted portions of the state-court record (18 CD/DVDs) in support of its position. Dockets 62 and 63.

The Court entered an Order requiring Respondent to expand the state-court record to include Petitioner's trial. Docket 83. Respondent submitted 7 audio-video recordings of Petitioner's 7-day trial. Docket 88.

The post-expansion briefs of Petitioner and Respondent are at Dockets 91 and 93. Petitioner's 26 claims, presented in his petition and amended petition, are ripe for ruling.[4]

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[4] This case has experienced some significant procedural delays.

The petition was filed in June 2006. Docket 1. In March 2007, the Court held the petition in abeyance pending exhaustion of state-court remedies with respect to Petitioner's 11.42 motion raising 10 claims of ineffective assistance of trial counsel. Docket 15. In September 2008, the Kentucky Court of Appeals remanded for an evidentiary hearing on Claim 19.

From September 2008 until May 2015, a series of defense attorneys advised Petitioner to accept various offers of a new sentence in lieu of evidentiary hearing, which Petitioner rejected. Docket 91-1, pp. 46-48. Finally, in May 2015, "realizing that [I] was never going to have [my] evidentiary hearing and just wanting to get [my] case before this [federal habeas] Court, [I] agreed to a life sentence which was entered on May 26, 2015." Id. at p. 48.

In June 2015, Petitioner filed his notice of exhaustion of state-court remedies and amended petition raising 10 claims of ineffective assistance of trial counsel. Docket 47.

In October 2015, the Court lifted the stay and this matter proceeded. Docket 48.

During most of 2016, after exhaustion of state-court remedies, additional procedural delays occurred in this Court due to controversies surrounding Petitioner's right to so-called "possessisonal access" to the state-court record (CDs and DVDs) in the privacy of his cell as opposed to the prison law library and his

Standard of review of claims presented in a Section 2254 petition

The standard of review of claims presented in a Section 2254 petition is generally defined by statute.

First, all claims must allege a violation of the United States Constitution and not merely an error of state law. See 28 U.S.C. § 2254(a) (Habeas courts entertain habeas petitions in behalf of persons in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

Second, the constitutional violation must be clearly-established in light of United States Supreme Court case-law and not merely interpretations of the Constitution by lower courts (as there may be differences of opinion from circuit to circuit). Section 2254(d)(1) provides:

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

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right to access to additional portions of the state-court record. Those matters are now resolved.

Third, the Court will generally defer to the state court's determination of facts. Section 2254(d)(2) provides that the writ shall not be granted unless the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light facts of the evidence presented in the State court proceeding."

Fourth, even if a constitutional violation is established in light of Supreme Court precedent, the error is deemed harmless (and the writ shall not be granted) unless it had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

Claim 1

Petitioner's first claim is that the Fifth Amendment right to counsel required suppression of his inculpatory police-station statement. The police allegedly erroneously continued to question Petitioner after he invoked his right to counsel.

After being advised that he had the right to counsel, Detective John Saylor informed Petitioner that he was being questioned because of his role in the murder. Detective Saylor told Petitioner that he knew that Petitioner was present during the murder and that he was paid money to do it. After denying any involvement, Petitioner responded: "I guess you'll just have to go on and lock me up then and call my lawyer, 'cause I don't, I don't know what you're talking about. I'll be honest with you. Like I said, me and Tyrone are

friends. I've never seen that woman. . . . I don't want to get in no trouble. I mean my lawyer. I don't know." 2005 WL 1185204, at *2.

Davis v. United States, 512 U.S. 452, 459 (1994) held that the words "maybe I should talk to a lawyer" are equivocal and do not invoke the Fifth Amendment right to counsel. Even when (as here) the suspect refers specifically to "my lawyer" as opposed to "a lawyer," the Eleventh Circuit held that a defendant's assertion that he has an attorney in another matter does not constitute a request for counsel in the present issue. Delap v. Dugger, 890 F.2d 285 (11th Cir.1989).

The Kentucky Supreme Court's adjudication of Petitioner's first claim was not contrary to United States Supreme Court precedent as required for this Court to grant relief:

> In essence, England merely said that I guess you will have to call my lawyer and I don't know if I need my lawyer because I don't want to get into trouble. We hold that these statements do not rise to the level of impressing upon the interrogator that the suspect has requested an attorney before continuing the questioning. The statements were properly admitted at trial. (2005 WL 1185204, at *2).

Claim 2

Petitioner's second claim is that Due Process was violated when police interrogators coerced his incriminating statement.

The interrogators allegedly falsely promised Petitioner that, if he cooperated, the death penalty would be taken off the table and he might see his kids and sick father again. Sergeant Steve Hendley's presence as an interrogator (along with Detective Saylor) allegedly rose to the level of a coercive false-friend police technique because Petitioner and Hendley played ball together in high school.

To determine whether a confession is the result of coercion, one must look at the totality of the circumstances to assess whether police obtained evidence by overbearing the suspect's will through making credible threats. Arizona v. Fulminante, 499 U.S. 279, 286-288 (1991). Kentucky considers the same three factors the Sixth Circuit considers in evaluating the voluntariness of a confession: 1) Whether the police activity was objectively coercive; 2) Whether the coercion overbore the will of the defendant; and 3) Whether the defendant showed that the coercive police activity was the crucial motivating factor behind his confession. See England v. Commonwealth, 2005 WL 1185204 citing Henson v. Commonwealth, 20 S.W.3d 466 (Ky.2000) citing McCall v. Dutton, 863 F.2d 454 (6th Cir.1988).

The Kentucky Supreme Court determined that, in light of these three factors, Petitioner's incriminating statement was voluntary, and that determination was not contrary to United States Supreme Court precedent as required for this Court to grant relief:

> . . . The comments about the death penalty did not tell England anything he did not already

> know. . . . In fact, England said that he knew Lisa's murder could be punished by the death penalty when the police informed him of this fact.
>
> . . . [T]here was no evidence in the record that [England and Hendley] had continued a friendly relationship after high school. This is not the type of relationship one would consider as inherently coercive. It is, rather, more akin to a [permissible] good cop, bad cop routine. (2005 WL 1185204, at *3).

Claim 3

Petitioner's third claim is that Due Process was violated when the Commonwealth sought the death penalty notwithstanding what he understood as an offer from the Commonwealth, communicated through Sergeant Hendley, that, if he confessed to a minor (complicity) role in the murder and implicated McCary in the major (principal) role, the death penalty would be taken off the table.[5]

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[5] The following exchanges occurred during the interrogation:

> Hendley: I'm telling you this as a friend, alright? Forget the badge. You need to tell them what happened. You need to tell them about the deal with Ty, because, now, this is punishable by death. . . . You can lawyer up or whatever. But if you don't cooperate and tell them your side, because I keep saying when he picks up Ty, Ty's gonna say that you done every bit of it. I'm telling you, Stevie, Ty's gonna blame every bit of it on you. . . . I'm telling you as a friend. I played ball with you. They got you. You looking at the death penalty. I realize that

The Kentucky Supreme Court held that the police interrogator statements did not bind the Commonwealth and prohibit it from seeking the death penalty because there never was a true plea offer and police need not be absolutely honest when interrogating suspects:

> England asserts that the death penalty should have been taken out of the realm of potential penalties because he relied on an offer by the Commonwealth when he confessed to

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> you got some other charges. Those are Mickey Mouse, Stevie. (p. 39 of 165).
>
> . . .
>
> Saylor: We have talked to the prosecutor, Stevie. You can ask Bubba [Hendley]. We've talked to him. There's, there's one deal. There's one deal. Okay?
>
> England: What is it?
>
> . . .
>
> Saylor: If you cooperate, one of these days you might get to see your kids again.
>
> . . .
>
> Hendley: If you take this on your own, you know what will happen? The County Attorney is going to seek the death penalty on you, buddy. (p. 40).
>
> . . .
>
> Saylor: As bad as it, as bad as what you did, Stevie. As bad as what you did, Tyrone paying you to do it is worse. Okay? He's the one we want. You're the one we're dealing with. You tell us the truth, you got the deal. Okay?
>
> Hendley: He's not going to get a deal. (p. 45).

Transcript of police-station interrogation, 1 of the 18 DVDs labeled "01-C8-68; Documents," 1 of 10 pdf files containing 7,368 KB of data, pp. 39, 40, and 45 of 165.

> the crime. However, there never was an offer to England. It is true that the interrogators noted that the death penalty was an option, and it is also true that the interrogators said they had talked to the prosecutor and there was only one deal. But England puts words into the interrogators' mouths when he states that the deal was that the death penalty would not be pursued. The prosecution is not required to be absolutely honest with the suspect, and since there was no true offer upon which England could rely, we affirm the trial court's ruling that the prosecution was properly allowed to seek the death penalty in England's trial. (2005 WL 1185204, at *4).

The Court is unaware of any Supreme Court authority for the proposition that police, during interrogation of a suspect, has the authority to bind the prosecution to specific charges or penalties. The Kentucky Supreme Court's finding that there was no offer was not an "unreasonable determination of the facts" and did not result in a decision that was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States" as required by 28 U.S.C. 2254(d)(1) and (2) to be entitled to habeas relief. Therefore, in light of this standard of review, Petitioner's claim is without merit. Alternatively, even if Due Process did require that the death penalty be taken off the table, the error was harmless because Petitioner did not receive the death penalty. He is presently serving a life sentence. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (An error is harmless

unless it had a "substantial and injurious effect or influence in determining the jury's verdict").

Claim 4: The Merits

Petitioner's fourth claim is that his Sixth Amendment right "to be confronted with the witnesses against him" (hereinafter "the Confrontation Clause") was violated when the Commonwealth admitted into evidence the content of Lisa's affidavit in support of EPO. The affidavit informed the jury that McCary threatened to kill Lisa or have someone kill her for him.

The Kentucky Supreme Court acknowledged that "[Petitioner] is correct insofar as he contends that this evidence [from the affidavit] is inadmissible because it does not meet any exceptions to the hearsay rule, is inherently unreliable, and violates his Sixth Amendment right 'to be confronted with the witnesses against him," but concluded that the error was harmless. 2005 WL 1185204, at *4-5.[6]

Crawford v. Washington, 541 U.S. 36 (2004) overruled Ohio v. Roberts, 448 U.S. 56 (1980) and thereby initiated significant changes in Confrontation Clause

[6] In finding a Sixth Amendment violation, the Kentucky Supreme Court cited (n.11) Crawford v. Washington, 541 U.S. 36 (2004).

jurisprudence. McCarley v. Kelly, 801 F.3d 652, 662 (6th Cir. 2015).[7]

Respondent's position is that, while admission of the affidavit violated state evidence law (and perhaps pre-Crawford Confrontation Clause jurisprudence[8]), it did not violate Petitioner's rights under the Confrontation Clause (as understood by Crawford).

The Court finds that Respondent's position is unpersuasive and that the Kentucky Supreme Court correctly acknowledged that admission of the content of the affidavit violated Petitioner's rights under the Confrontation Clause as understood by Crawford.

Crawford held that the Confrontation Clause does not allow the admission of testimonial statements of a witness who did not appear at trial "unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." U.S. pp. 53-54. The "core class of testimonial statements" include "ex parte

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[7] Ohio v. Roberts held that hearsay can be admitted into evidence without violating the Confrontation Clause when the statement: (1) falls within a firmly-rooted exception to the hearsay rule, or (2) contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement's reliability.

Crawford v. Washington held that out-of-court statements that are testimonial in nature are barred by the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether a reviewing court deems such statements reliable.

[8] All of the case-law cited by the Kentucky Supreme Court in support of a finding of erroneous admission of the affidavit predate Crawford.

in-court testimony or its functional equivalent – that is, material such as affidavits . . . which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." U.S. pp. 51-52.

Davis v. Washington, 547 U.S. 813, 822 (2006) clarified what constitutes a "testimonial" statement:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In concluding that the Kentucky Supreme Court correctly recognized that admission of Lisa's affidavit violated the Confrontation Clause, the Court agrees with the reasoning of a 2011 decision of the Virginia Supreme Court. Crawford v. Commonwealth, 281 Va. 84 (Va.2011).

The murder victim in Crawford v. Commonwealth executed an affidavit in support of a protective order against her husband. Among other things, the affidavit stated that the defendant "called me and told me that I must want to die . . . I want him to stay away from me." The defendant filed a pre-trial motion to suppress

the affidavit as inadmissible under Crawford v. Washington.

The Virginia Supreme Court held that the affiant (i.e., the murder victim) would have "reason[] to believe that the statement would be available for use at a later trial," Crawford at U.S. pp. 51-52, and that the affiant's statements were given "to establish or prove past events potentially relevant to later criminal prosecution," Davis at U.S. p. 822. Therefore, the affidavit was testimonial in nature and should not have been admitted against the defendant at trial. Because the victim was unavailable to testify at trial and the defendant did not have a prior opportunity to cross-examine her concerning her affidavit statements, the Confrontation Clause was violated when the statements were admitted against the defendant.

The same logic and conclusion applies in this case. The Kentucky Supreme Court correctly determined that admission of Lisa's affidavit in support of EPO violated Petitioner's Confrontation Clause rights.[9]

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[9] The Kentucky Supreme Court also correctly determined that, in light of the facts of this case, the fact that the "defendant on trial [Petitioner] is [not] the person against whom the restraining order was sought [McCary]" is a "distinction without a difference." The affidavit mentioned McCary's threat to have someone else (for example, Petitioner) do the killing. This, from a juror's perspective, may have made it simultaneously less likely that McCary was innocently present at the murder scene with McCary (i.e., the affidavit shows Petitioner's intent to assist in the murder) and more likely that his presence was financially motivated.

Claim 4: Harmless Error

Confrontation Clause violations are subject to harmless-error analysis. McCarley v. Kelly, 801 F.3d 652, 665 (6th Cir.2015) citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Therefore, Petitioner is entitled to habeas relief only if the erroneous admission of the affidavit was harmful.

A habeas court assesses the harmfulness of constitutional error in a state-court criminal trial under the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), i.e., whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." The question is not whether the error was harmless beyond a reasonable doubt, which is too Petitioner favorable; nor is the question "merely whether there was enough to support the result, apart from the phase affected by the error," which is too Respondent favorable. Id. quoting O'Neal v. McAninch, 513 U.S. 432 (1995). Rather, the Court is supposed "to ask [itself] directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?" Id. quoting O'Neal. If so, or if [the Court] is left in grave doubt, the conviction cannot stand." Id.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) identifies factors to consider in determining whether an error was harmful:

(1) the importance of the witness' testimony in the prosecution's case;

(2) whether the testimony was cumulative;

> (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
>
> (4) the extent of cross-examination otherwise permitted; and
>
> (5) the overall strength of the prosecution's case.

In this case, the Kentucky Supreme Court found that the erroneous admission of the affidavit was harmless in light of Petitioner's police-station confession[10] and the secretly-recorded WoodforkPetitioner conversations[11]:

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[10] Petitioner did not confess to murdering Lisa. He admitted to striking Lisa and knocking her to the ground. According to Petitioner, McCary actually committed the murder. The admission, however, constituted a sufficient bad act to be guilty of the crime of conviction, which was complicity to murder. See Kentucky Revised Statutes (KRS) 502.020(1)(b) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense").

[11] Due to poor sound quality of this Court's copy of the audio-video of the trial (in which the Woodfork-Petitioner conversations were played to the jury), the Court is unable to verify whether the conversations themselves evidence that Petitioner told Woodfork that McCary had not paid money owed to him and considered ways to get McCary to pay. See playing of Woodfork-Petitioner conversations to jury, Day 4 (January 14, 2003), 11:52:00. However, Woodfork, who participated in the conversations, testified that this is what Petitioner told him. See Woodfork testimony, Day 4, 11:36:00. Additionally, the Commonwealth argued, during closing argument, that this is what the conversations revealed.

> Simply put, had this [EPO affidavit] evidence been excluded from the jury's consideration no different result could have logically been reached. The prosecution had a taped confession with England admitting participation in this crime. This evidence is corroborated by both the circumstances of the murder and the crime scene, and is enough to deem the admission of the affidavit against England's co-conspirator harmless. But there is more. The prosecution also introduced competent evidence of a taped conversation between England and Karl Woodfork. In March 2000, Woodfork contacted the police and informed it that he had information regarding Lisa's murder. After telling the police that McCary had sought to hire him and England to murder Lisa, Woodfork agreed to record conversations with England. In those conversations, which were played for the jury, England said McCary had not paid money owed to him and considered ways to coerce McCary to pay him the money. (2005 WL 1185204, at *5).

The Kentucky Supreme Court correctly determined that the erroneously-admitted affidavit was harmless in light of other properly-admitted evidence.[12]

Commonwealth's closing argument, Day 6 (January 16, 2003), 11:17:00.

[12] The state court's determination is buttressed by a consideration of the first and second Van Arsdall factors:

> (1) *The importance of the witness' testimony in the prosecution's case:* The affidavit testimony was important to the Commonwealth's case against Petitioner

Claim 5

Petitioner's fifth claim is that the trial court erroneously granted the Commonwealth's motion to sever the trials of Petitioner and McCary.

Under certain circumstances, granting a motion to sever the trials of co-defendants is required by the Confrontation Clause. See Bruton v. United States, 391 U.S. 123, 137 (1968) (The Confrontation Clause is violated when a non-testifying codefendant's confession is introduced into evidence at the defendants' joint trial).

Petitioner's motivation for a joint trial is clear enough: If tried together and McCary exercised his right not to testify, the Commonwealth would not have been able to use portions of Petitioner's confession that

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primarily as background information showing that McCary threatened to murder Lisa. However, in mentioning McCary's threat to have someone else (for example, Petitioner) do the killing for him, the affidavit may have (in the jury's mind) made it less likely that McCary was innocently present at the murder scene (i.e., the affidavit suggests Petitioner's intent to assist the murder) and more likely that his presence was financially motivated.

(2) *Whether the testimony was cumulative:* To the extent the affidavit testimony suggested that the "someone else" McCary threatened to get to murder Lisa was Petitioner, the testimony was cumulative in light of Petitioner's police-station confession to striking Lisa to the ground, Woodfork's testimony that McCary paid Petitioner $1,000 as down-payment for committing the murder, and Woodfork's testimony about Petitioner complaining about McCary owing him money.

referred to McCary and, therefore, plausibly Petitioner would have been convicted only of assault.

The Court is unaware of any Supreme Court authority for the proposition that, under certain circumstances, granting a motion to sever rises to the level of a constitutional error.

The Kentucky Supreme Court's adjudication of Petitioner's fifth claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> [Petitioner's argument] only proves the Commonwealth's argument that it would have been prejudiced had its motion to sever the trials not been granted. In fact, this is a picture-perfect case for the efficacy of severing trials. Here there are two defendants who conspired to murder. Without severance, one's confession could not have been fully used against him to avoid violating the constitutional rights of the other. (2005 WL 1185204, at *5).

Claim 6

Petitioner's sixth claim is that, in light of his indigent status, Due Process required the Commonwealth to hire a criminologist on his behalf, who allegedly would have testified that Lisa's body was moved after death.

In cases where a defendant's sanity at the time of the offense is a significant factor at trial, states must

provide an indigent defendant with access to a competent psychiatrist to conduct an appropriate examination and to assist in the preparation and presentation of a defense. Ake v. Oklahoma, 470 U.S. 68 (1985). The Supreme Court has not, however, extended the right to other expert witnesses. See Babick v. Berghuis, 620 F.3d 571, 579 (6th Cir.2010) ("[Babick] assumes that the right recognized in Ake . . . extends to non-psychiatric experts as well. But the Supreme Court has treated that question as open"). Even the cases that extend Ake beyond the mental health arena do not question that a defendant's right to expert funding is contingent on the expert's testimony being a major focus at the trial. Bowling v. Haeberlin, 2013 WL 1182515 (E.D.Ky.).

Petitioner admitted to assaulting Lisa, and he and McCary allegedly left while she was still alive. Whether or not the body was moved after death does not change the fact of Petitioner's involvement. He has not shown that the body's having been moved (assuming it was) would have been a major focus at trial.

The Kentucky Supreme Court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> England next claims that his conviction should be reversed because he was denied sufficient public funds to employ a criminologist. The criminologist was purportedly going to testify that the body was moved after death, that Caucasian hairs were found in Lisa's hands and panties, and that the sperm found in Lisa's vagina did not come from either

> England or McCary. However, this evidence, except for movement of the body, was presented at trial from other witnesses.[13] The only facts that the criminologist was to testify to that could merit reversal is that the body was moved after death. However, upon England's motion for the Commonwealth to pay for a criminologist, the trial judge disallowed the employment of the criminologist because the cost was an unreasonable $3,500 per day. The judge stated that England could submit other names, but England failed to do this. Instead, England requested that the state pay for the purchase of a forensic pathology treatise, which was granted by the trial court. There was no reversible error. (2005 WL 1185204, at *6).

Claim 7

Cori Poindexter was the last person to see Lisa alive. Poindexter overhead Lisa's side of a phone conversation with McCary. Poindexter testified that Lisa told her that, during the conversation, McCary accused her of having an affair and told her that, if he could not have her, nobody would. Poindexter also testified that Lisa cried and refused to eat. Petitioner's seventh claim is that this testimony violated the Confrontation Clause.

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[13] Petitioner was aware that Jenkins had admitted to recent sexual intercourse with Lisa and that the hairs were not of African-American origin, hence, they were not from Petitioner or McCary.

Crawford v. Washington, 541 U.S. 36 (2004) held that out-of-court statements that are testimonial in nature are barred by the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Lisa's statement was nontestimonial because Poindexter was privy to it only as a friend and confidant who was present during a phone conversation. See Crawford at 51 (An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not; the same applies to "off-hand, overheard remark[s])"; see also United States v. Franklin, 415 F.3d 537, 545 (6th Cir.2005) (Statements to a friend or confidant are generally not testimonial because the witness "was privy to [declarant's] statements only as his friend and confidant").

"Where [as here] nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford at 68.

The Kentucky Supreme Court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> [Lisa's statement regarding the affair] is not hearsay. The matter asserted was that Lisa was having an affair, and it was not offered by the Commonwealth to prove the truth of it. It was ostensibly used, rather, to show the

> general belligerency McCary had toward Lisa at a time near to her murder. . . . [The crying and refusing to eat are not hearsay because] there must be a statement. [The "if you can't have me, nobody will" statement] is hearsay. The declarant was Lisa, and the matter asserted is that McCary said that nobody would have her if he couldn't. However, this statement is admissible under the spontaneous statement exceptions to the hearsay rule, present sense impressions and excited utterances. (2005 WL 1185204, at *6).

Claim 8

Petitioner's eighth claim is that his Sixth Amendment right to a jury composed of a fair cross-section of the community was violated due to an insufficient number of African-Americans on the jury panel.

The Sixth Amendment protects against the systematic exclusion of identifiable groups from the jury selection process, but it does not guarantee a "jury of any particular composition." United States v. Miller, 562 Fed.Appx. 272 (6th Cir.2014) quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

The Kentucky Supreme Court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> England does not . . . assert any wrongdoing on the part of the judicial system. His only assertion is that the courts are required to ensure that African-Americans are represented

> in the jury panel, regardless of the results of the selection process, which is random. Here, the jury panel was randomly selected by computer from registered voters who also had a driver's license. This process resulted in two African-Americans being randomly selected to be on the jury panel. One of two was dismissed for cause because of a familial relationship with the defendant. The other was not dismissed for cause or peremptorily challenged, but was not seated on the jury because of the draw. Because there is not even a scintilla of evidence that African-Americans were systematically excluded from the jury panel, England is not entitled to reversal of his conviction. (2005 WL 1185204, at *7).

Claim 9

Petitioner's ninth claim is that his Sixth Amendment fair cross-section right was violated when all jurors who were opposed to the death penalty were excluded from the jury panel.

The Sixth Amendment allows for-cause exclusion of prospective jurors due to substantial impairment of ability to impose the death penalty. White v. Wheeler, 136 S.Ct. 456 (2015).

The Kentucky Supreme Court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> It is well-settled law in this Commonwealth that a juror may be stricken for cause if she is

> unable to consider the death penalty when considering the sentence upon conviction of the defendant. We hold that England's constitutional rights were not violated by excusing jurors who could not consider the death penalty as a sentence upon his conviction. (2005 WL 1185204, at *7).

Claim 10

Petitioner's tenth claim is that the trial court erred when it allowed the Commonwealth to utilize certain transcripts during its case-in-chief and in closing argument. The transcripts consisted of enlarged, typewritten interpretations or excepts of relatively-inaudible and allegedly-incriminating portions of the secretly-recorded Woodfork-Petitioner conversations.

The trial court admitted the audio recordings themselves into evidence, and Petitioner does not challenge the correctness of that ruling. The trial court, however, disallowed admission of the excerpt transcripts. The court ruled that the transcripts would be used only as a jury aid during the playing of the recordings and only for argument purposes during closing argument. See Day 4 (January 14, 2003), 1:21:00 (sustaining Petitioner's objection to admission of transcripts) and Day 7 (January 16, 2003), 11:03:00 (rulings prior to closing arguments).

Petitioner's claim lacks a constitutional basis and concerns only the state court's interpretation of its own procedural rules concerning use of transcripts as a jury

aid. This is not a case in which the trial court admitted or excluded any particular evidence (the recording were played in their entirety), thereby arguably denying Petitioner a meaningful opportunity to present a complete defense in violation of Due Process. Petitioner was allowed to and did disagree with the Commonwealth's transcripts/interpretations during his closing argument. Nothing in the Kentucky Supreme Court's determination of the claim or the case-law citations[14] reference any constitutional provision or decision. 2005 WL 1185204, at *8.

The Kentucky Supreme Court determined that the trial court did not abuse its discretion in allowing the transcripts as a jury aid. 2005 WL 1185204, at *8. This was not contrary to Supreme Court precedent as required for this Court to grant relief.

Claim 11

Petitioner's eleventh claim is that Due Process was violated when the Commonwealth misstated the law in its closing argument. While the jury was properly instructed that it could return a verdict of guilty if it believed that England killed Lisa by "striking her, running over her with a truck, and causing her death by strangulation," during its closing, the Commonwealth stated that the jury could return a verdict

[14] Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky.1988) and Norton v. Commonwealth, 890 S.W.2d 632 (Ky.App.1995).

of guilty if it found that England engaged in one of those actions.

A prosecutor's improper comments violate a criminal defendant's constitutional rights only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Kelly v. McKee, 847 F.3d 316 (6th Cir.2017) quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986).

The Kentucky Supreme Court found that Petitioner's claim was procedurally defaulted due to trial counsel's failure to raise a contemporaneous objection. 2005 WL 1185204, at *8. This finding of a procedural default under state law bars this Court from considering the constitutional merits. See Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment").[15]

Alternatively, this Court finds that, even if it were not procedurally defaulted, Petitioner's claim is not of

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[15] Constitutionally-ineffective counsel may constitute cause excusing a procedural default. Edwards v. Carpenter, 529 U.S. 446, 453 (2000). In order to constitute cause, however, the ineffectiveness claim generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Id. at 452. In his 11.42 motion, Petitioner raised ten claims of ineffective assistance of trial counsel. England v. Commonwealth, 2008 WL 4182027 (Ky.App.). This particular ineffectiveness claim is not among them. Therefore, Petitioner's claim is procedurally barred.

constitutional dimension. There was no Due Process violation because, in light of its argument as a whole, the Commonwealth's statement was not unfairly prejudicial or misleading. The Commonwealth insisted that it did not care whether the jury found Petitioner guilty of murder or complicity to murder. Day 7 (January 16, 2003), 12:10:00. One need not commit every act that resulted in the victim's death (or even any act) to be guilty of complicity. See KRS 502.020(1)(b) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense"). The Commonwealth argued that Petitioner admitted that his role in assaulting Lisa was to "soften her up," which was enough to convict him of complicity to murder.

Claim 12

Petitioner's twelfth claim is that the Kentucky Supreme Court erred in declining to overturn his conviction due to lack of written notice by the Commonwealth of the particular aggravating circumstances that warranted the death penalty, i.e., committing the offense for another for the purpose of receiving money as contemplated by KRS 532.025(a)(4).[16]

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[16] The rationale for reversal of conviction as opposed to a new sentence appears to be that the proof regarding profit was presented during the guilt-innocence phase of trial.

The Kentucky Supreme Court held that Petitioner was mistaken in assuming that the Commonwealth had to provide him written notice of the aggravating circumstances. KRS 532.025 does not mention any "notice" (as such) but states simply that, at the presentence hearing, "only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible." KRS 532.025(1)(a). According to the Supreme Court, "[Petitioner] was certainly made known of the aggravating evidence, which was that England participated in the murder of Lisa for profit." 2005 WL 1185204, at *9.

The Court may not grant relief on Petitioner's claim because: 1) The claim is not of constitutional dimension as it involves only interpretation of a state statutory sentencing scheme. 2) The Kentucky Supreme Court's finding that Petitioner was aware of the aggravating evidence before trial was not an unreasonable determination of the facts. 3) The Kentucky Supreme Court's adjudication of the claim was not

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Notice of aggravating circumstances remains relevant notwithstanding the fact that Petitioner did not receive the death penalty because it is part of a larger sentencing scheme when the death penalty is sought. During the penalty phase, the jury was instructed that, if and only if it found, beyond a reasonable doubt, that Petitioner committed complicity to murder for profit, could it fix the sentence at: death, life without parole, or life without parole for 25 years. The jury found the aggravator to be present and sentenced Petitioner to life without parole. See Instruction No. 3, 1 of the 18 DVDs labeled "01-C8-68; Documents," 1 of 10 pdf files containing 11,372 KB of data, p. 133 of 168.

contrary to any Supreme Court precedent of which the Court is aware.

Claim 13

Petitioner's thirteenth claim is that the Kentucky Supreme Court erred in declining to overturn his conviction because the aggravating circumstances were not included in the indictment.

The Kentucky Supreme Court held that the claim is procedurally defaulted because it was "not preserved for review by a pre-trial motion as required by Kentucky Rules of Criminal Procedure (RCr) 8.18" and is without merit for the same reasons Petitioner's twelfth claim is without merit, i.e., "England was made known of the specific evidence upon which it intended to seek capital punishment." 2005 WL 1185204, at *9.

Petitioner's twelfth claim is procedurally defaulted as the state procedural rule invoked by the state court constitutes an independent and adequate reason for this Court's declining to reach the merits. See Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). Alternatively, this Court finds that the claim is not of constitutional dimension and that the Kentucky Supreme Court's adjudication of the claim was not contrary to Supreme Court precedent.

Claim 14

Petitioner's fourteenth claim is that his Fourth Amendment rights were violated when the trial court refused to suppress the secretly-recorded Woodfork-Petitioner conversations in the absence of a search warrant.

The Kentucky Supreme Court found that there was no Fourth Amendment violation because the informant (Woodfork) was legally in the place where the taped conversations took place and every conversation used by the prosecution was either directly with the informant or carried on with the defendant's knowledge of his presence. 2005 WL 1185204, at *10 citing Hoffa v. United States, 385 U.S. 293 (1966).

The Kentucky Supreme Court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief.

Claim 15

Petitioner's fifteenth claim is that Due Process was violated when the Commonwealth failed to disclose exculpatory physical evidence. Petitioner and McCary are African-American, and Lisa's boyfriend, Shannon Jenkins, who admitted to recent sexual intercourse with Lisa, is Caucasian. Petitioner claims that the Commonwealth wrongly withheld evidence that the sperm found in Lisa's vagina was consist with being from Jenkins, that the head hairs found in her

hands were Caucasian, and the head hair found in her panties was Caucasian.

Due Process requires that the prosecution disclose exculpatory and impeachment evidence that is "material either to guilt or to punishment." Strickler v. Greene, 527 U.S. 263, 280 (1999) quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). A Brady violation includes three elements: (1) The evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) The "evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "[P]rejudice must have ensued." Id. at 281-82. Prejudice ensued "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," i.e., due to the failure to disclose, the "verdict [was not] worthy of confidence." Id. at 289-90.

This Court finds that Petitioner has not shown that any physical evidence favorable to the accused existed, was exculpatory, and was suppressed as required to support a Brady claim. See Strickler, supra. Even if such evidence existed and would have linked other individuals to Lisa's murder, the evidence falls short of being exculpatory as it does not change the fact that competent evidence supported Petitioner's conviction of complicity to commit murder.

Additionally, the Kentucky Supreme Court's finding of lack of prejudice resulting from any suppression of evidence was not contrary to Supreme Court precedent as required for this Court to grant relief:

> . . . England was aware of the crucial parts of this information prior to trial. For instance, he was aware that the hair in Lisa's hand was probably from a cat. As to the sperm found, England argued that the sperm taken from Lisa did not match either England or McCary. Also, England was aware that Jenkins stated that he recently had sexual intercourse with Lisa. In fact, the additional test taken with Jenkins' sample was done so the prosecutor could rebut a claim that the sperm could have come from Lisa's killer.
>
> Therefore, all the evidence England claims could have given the jury a reasonable doubt was available to England: that the hairs and sperm did not match England or McCary. . . . Had the evidence been as England wishes, the result would not have changed. He was properly convicted on the competent evidence, and we see no reason to overturn that conviction. (2005 WL 1185204, at *10).

Claim 16

Petitioner's sixteenth claim is that Due Process was violated "when the trial court refused to order DNA testing on the Brady evidence found on Lisa's body, which were not of African-American origin." Petition, Docket 1, p. 10. The DNA testing to which Petitioner refers is testing on the hairs found in Lisa's hands and in her panties. While authorities determined that the hairs were Caucasian, they apparently did not do DNA testing to determine whether the hair

matched that of two Caucasian suspects, Jenkins and Lisa's ex-husband, Pat Halvorson. According to Petitioner, if such testing did occur, the results were not disclosed to him. Petitioner's reply brief, Docket 81, p. 12.

Whether or not Jenkins and/or Pat Halvorson were also involved in Lisa's murder, this does not change the fact that competent evidence supported Petitioner's conviction of complicity to commit murder. Petitioner has not shown that DNA hair testing and disclosure of the results to Petitioner would have likely resulted in a different verdict. Additionally, Petitioner has not shown that any evidence favorable to the accused existed, was exculpatory, and was suppressed as required to support a Brady claim. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (A Brady violation requires a showing that the evidence was favorable to the accused, suppressed by the prosecution, and prejudicial).

Claim 17

Petitioner's seventeenth claim is that his trial counsel was constitutionally ineffective for failing to object to the jury instruction on complicity to commit murder on the ground that there was a fatal variance between the instruction and the indictment, or an impermissible constructive amendment to the indictment.

Petitioner was indicted for capital murder. The trial court granted the Commonwealth's pretrial motion

to amend the indictment to include a charge of complicity to commit murder. Petitioner's claim that counsel was ineffective for objecting to the jury instructions on fatal variance grounds lacks a factual basis because there was no variance – fatal or otherwise – at the time the instructions were given.

The Kentucky Court of Appeals held that "[b]ecause the Commonwealth sought and received permission from the trial court to amend the indictment to include complicity to commit murder, this instruction did not 'fatally vary' from the indictment nor did it operate as a 'constructive amendment.' Consequently, all [ineffectiveness] claims brought under this theory lack merit." 2008 WL 4182027, at *3. This adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief.

Additionally, Petitioner is not entitled to relief on this claim because it is procedurally defaulted and without merit. It is procedurally defaulted because, to the extent the underlying substance is that the trial court erred in granting the Commonwealth's motion, the claim could and should have been presented on direct appeal. See Simmons v. Commonwealth, 191 S.W.3d 557, 561 (Ky.2006) (A criminal defendant may not use an 11.42 motion to relitigate an issue that was addressed or should have been addressed on direct appeal by claiming that it constituted ineffective assistance of counsel). The claim is without merit because "[t]he Sixth Circuit has routinely rejected claims that a defendant indicted as a principal cannot be convicted

as an accomplice." Halverson v. Simpson, 2014 WL 5419373 (E.D.Ky.) (collecting authorities).

Claim 18

Petitioner's eighteenth claim is that his trial counsel was constitutionally ineffective for failing to object to the jury instructions on the ground that, under Kentucky law, accomplice liability requires that another defendant first be convicted of principal liability (i.e., murder). Petitioner's co-defendant, McCary, was convicted (pled guilty) to complicity to murder.

The Kentucky Court of Appeals held that the ineffectiveness claim is without merit because Petitioner's underlying assumption about Kentucky law is false:

> According to Kentucky Revised Statute (KRS) 502.030(1), it is not a defense to a complicity charge that the principal actor, "has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct[.]" See also Tharp v. Commonwealth, 40 S.W.3d 356, 366 (Ky.2000) ("[I]t is immaterial to Appellant's criminal liability or the degree thereof whether [the principal actor] is ever convicted of criminal homicide for causing the death of [the victim], or, if so, of which degree of homicide he is convicted."). Consequently, both the relevant caselaw and statute contradict England's assertion that the

> Commonwealth had to prove that McCary had been previously found guilty of murdering Halvorson.[17] (2008 WL 4182027, at *2).

The state court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief.

Claim 19

Petitioner's nineteenth claim is that his trial counsel was ineffective for deciding not to present mitigating evidence at sentencing (in a capital case). This is the claim that the Kentucky Court of Appeals remanded for an evidentiary hearing to determine if counsel's decision was supported by reasonable investigation. England v. Commonwealth, 2008 WL 4182027 (Ky.App.).

On remand, Petitioner agreed to a sentence of life imprisonment in lieu of evidentiary hearing. See Agreed Order Amending Judgment, Docket 47-1, p. 25.

Petitioner is equivocal on whether he has abandoned his nineteenth claim in light of the Agreed Order Amending Judgment or whether the claim remains viable. On one hand, Petitioner states that he "does not pursue Ground 19 here." Docket 47, p. 11. On the other hand, he recounts that, from September 2008 until

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[17] See also Halverson v. Simpson, 2014 WL 5419373 (E.D.Ky.) (collecting authorities for the proposition that "[t]he Sixth Circuit has routinely rejected claims that a defendant indicted as a principal cannot be convicted as an accomplice").

May 2015, a series of defense attorneys advised him to accept various offers of a new sentence in lieu of evidentiary hearing, which he rejected. Finally, in May 2015, "realizing that [I] was never going to have the evidentiary hearing [I] agreed to a life sentence which was entered on May 26, 2015." Id.

The Court concludes that Petitioner has abandoned his nineteenth claim.[18]

Claim 20

Petitioner's twentieth claim is that trial counsel was ineffective for failing to object to the Commonwealth's comment during closing argument: "What do you think Tyrone [McCary] would have said? I bet he would have said Steven England did it all."

A prosecutor's improper comments violate a criminal defendant's constitutional rights only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Kelly v. McKee, 847 F.3d 316 (6th Cir.2017) quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986).

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[18] To the extent a viable constitutional claim remains in light of the allegedly-involuntary character of the so-called Agreed Order, Petitioner has failed to exhaust his state-court remedies. Either no state-court remedy remains (at this point), in which case the claim is procedurally defaulted; or alternatively, in insisting that the present habeas petition proceed, Petitioner has implicitly agreed to dismiss his unexhausted claim (Claim 19), thereby converting his mixed petition (containing both exhausted and unexhausted claims) into a fully-exhausted petition, as is required for the petition to proceed.

The Kentucky Court of Appeals held that counsel was effective for choosing not to object to the comment because it was not improper. The state court's adjudication of Petitioner's claim was not contrary to Supreme Court precedent as required for this Court to grant relief:

> It has long been recognized in the Commonwealth that counsel has great leeway in making closing arguments. Brewer v. Commonwealth, 206 S.W.3d 343, 350 (Ky.2006). In addition to having great leeway during closing, a prosecutor may also comment on the evidence during closing. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky.1987). After reviewing the prosecutor's closing argument in context, it is clear that he was not testifying. Rather, he was commenting on the evidence adduced at trial. Because the prosecutor's remarks were permissible, England's counsel's performance did not fall below the objective standard of reasonableness for failing to object. (2008 WL 4182027, at *7).

Claim 21

Petitioner's twenty-first claim is that trial counsel was ineffective for failing to object to Cori Poindexter's testimony under the correct legal theory. Poindexter was Lisa's friend and the last person to see her alive. Poindexter overhead Lisa's side of a phone conversation with McCary. Poindexter testified that Lisa told her that, during the conversation, McCary told her that, if he could not have her, nobody would.

Petitioner's twenty-first claim is a variation on his seventh claim. Whereas the seventh claim focuses on Lisa as the hearsay declarant (and argues that the trial court admitted her statements in violation of the Confrontation Clause), the present claim focuses on McCary as declarant and argues that trial counsel ineffectively failed to object to the statements on that theory.

The Kentucky Court of Appeals held that the two theories are sufficiently related that Petitioner could and should have presented both theories on direct appeal in conjunction with his seventh claim; hence, his twenty-first claim is procedurally barred:

> In England's direct appeal to the Supreme Court of Kentucky, he complained about the same testimony from Poindexter but ascribed the hearsay statements to the victim, Halvorson. The Supreme Court determined that the statements were hearsay but fell under the present sense impression and the excited utterance exceptions to the hearsay rule. As we previously stated, a criminal defendant cannot use a RCr 11.42 motion to relitigate issues that were addressed or should have been addressed by direct appeal. [Simmons v. Commonwealth, 191 S.W.3d 557, 561 (Ky.2006).] Whether England ascribes the hearsay statements to Halvorson or McCary, these statements were addressed by direct appeal; thus, England was prohibited from raising the issue again in his RCr 11.42 motion. Consequently, this claim is without merit. (2008 WL 4182027, at *7).

Petitioner's claim is procedurally defaulted as the state procedural rule invoked by the state court constitutes an independent and adequate reason for this Court's declining to reach the merits. See Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment").

Alternatively, counsel was effective despite not objecting to Poindexter's testimony under the theory that the declarant was McCary because McCary's statements were nontestimonial and, hence, constitutionally admissible. The analysis is essentially the same as for Claim 7, supra.

Claim 22

Petitioner's twenty-second claim is that trial counsel was ineffective for failing to object to systematic exclusion of African-Americans from the grand jury.

Petitioner's twenty-second claim is a variation on his eighth claim, which was that his conviction should be overturned because there were not a sufficient number of African-Americans on the jury panel. As stated above, Claim 8 is without merit because the Sixth Amendment protects against the systematic exclusion of identifiable groups from the jury selection process, but it does not guarantee a "jury of any particular composition." United States v. Miller, 562 Fed.Appx. 272 (6th Cir.2014) quoting Taylor v. Louisiana, 419 U.S.

522, 538 (1975). Now, Petitioner alleges that there was a systematic exclusion and claims that counsel was ineffective for failing to raise the matter.

The Kentucky Court of Appeals held that Petitioner failed to allege any facts from which counsel could have argued that there was systematic exclusion:

> As we noted earlier, a criminal defendant must set forth in his RCr 11.42 motion all the facts necessary to demonstrate the existence of a constitutional violation. While England claims that African-Americans were systematically excluded from the grand jury, he has not alleged any facts to support this assertion. He also claims African-Americans have been systematically excluded from grand juries in Graves County for the past fifteen years; however, he has not set forth a single fact to support that claim. Accordingly, England has failed to cast any doubt on his attorney's performance regarding this issue. (2008 WL 4182027, at *7).

Petitioner's claim is without merit because it lacks a supporting factual basis and because the Kentucky Court of Appeals' adjudication of the claim was not contrary to Supreme Court precedent as required for this Court to grant relief.

Claim 23

Petitioner's twenty-third claim is that trial counsel was ineffective during closing argument for not backing up his argument regarding the proper interpretation

of the Woodfork-Petitioner conversations with transcript excerpts (as did the Commonwealth).

Where the question is the effectiveness of trial counsel's strategy, the standard of review is doubly deferential: The first level of deference is based on Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential"); the second level of deference is based on 28 U.S.C. 2254(d)(1) (When the state court rules that counsel's performance was effective, a habeas court cannot upset that ruling unless the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). See Leonard v. Warden, Ohio State Penitentiary, 846 F.3d 832, 848 (6th Cir.2017) quoting Harrington v. Richter, 562 U.S. 86, 89 (2011) ("[B]ecause the state court correctly identified and attempted to apply the Strickland standard, under [Section 2254(d)(1)], we apply a doubly deferential standard. . . . 'The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard'").

The Kentucky Court of Appeals held that:

> England's trial counsel did not use a similar transcript prepared by the defense; however, England's trial attorney commented extensively on the audiotape and commented extensively on the prosecution's interpretation of the tape giving his own opinion regarding the content of the audiotape. In this

> particular claim, England is merely disagreeing with his attorney's strategy regarding closing argument. However, "[t]rial strategy will not be second guessed in an RCr 11.42 proceeding." Hodge v. Commonwealth, 116 S.W.3d 463, 473 (Ky.2003) (citation omitted). Thus, England has failed to demonstrate that his counsel's performance fell below the objective standard of reasonableness. (2008 WL 4182027, at *8).

Petitioner's claim is without merit because the Kentucky Court of Appeals articulated a "reasonable argument that counsel satisfied Strickland's deferential standard" as contemplated by Harrington v. Richter, 562 U.S. 86, 89 (2011).

Claim 24

Petitioner's twenty-fourth claim is that trial counsel was ineffective for failing to file a pre-trial motion pursuant to RCr 8.18 objecting to the indictment because the aggravating circumstances were not included.

Petitioner's twenty-fourth claim is a variation on his thirteenth claim, which was that his conviction should be overturned because the aggravating circumstances were not included in the indictment. The Kentucky Supreme Court held that the thirteenth claim is procedurally defaulted for lack of a RCr 8.18 motion and, alternatively, the claim is without merit because it was legally sufficient that "England was made known

of the specific evidence upon which it intended to seek capital punishment." 2005 WL 1185204, at *9.

The Kentucky Court of Appeals held that Petitioner is not entitled to relief on his twenty-fourth claim because: 1) It runs afoul of the Kentucky's procedural rule that RCr 11.42 may not be used to relitigate an issue that was addressed on direct appeal by claiming that it constituted ineffective assistance of counsel; and 2) The underlying assumption that counsel had a legal basis (under state law) for objecting is false:

> On direct appeal, the Supreme Court addressed the issue of the lack of aggravating circumstances in the indictment. While the Court noted that the issue was not preserved for appeal because RCr 8.18 required the issue to be raised by pretrial motion, the Supreme Court still addressed the merits of the argument. So, despite his trial counsel's error in failing to address the issue pretrial, England suffered no prejudice. Furthermore, England is trying to relitigate an issue that was addressed on direct appeal by claiming it constituted ineffective assistance of counsel, which is prohibited. [Simmons v. Commonwealth, 191 S.W.3d 557, 561 (Ky.2006).] Accordingly, England is prohibited from raising this issue via his RCr 11.42 motion. (2008 WL 4182027, at *8).

Petitioner's claim is procedurally defaulted as the state procedural rule invoked by the state court constitutes an independent and adequate reason for this

Court's declining to reach the merits. See Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). Alternative, the claim is not of constitutional dimension, and the Kentucky Supreme Court's adjudication thereof was not contrary to Supreme Court precedent as required for this Court to grant relief.

Claim 25

Petitioner's twenty-fifth claim is that trial counsel was ineffective for failing to move for a change of venue due to pre-trial publicity.

To prevail on an ineffective assistance of counsel claim based on counsel's failure to move for a change of venue, Petitioner must show, at minimum, that the trial court would have, or should have, granted the motion. Gordon v. Taylor, 2012 WL 462916 (E.D.Ky.) citing Dell v. Straub, 194 F.Supp.2d 629, 649 (E.D.Mich.2002). This, in turn, requires Petitioner to show that the publicity was prejudicial, i.e., it jeopardized his right to a fair trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717 (1961).

Although the Sixth Circuit has developed various tests to assist courts in determining whether pre-trial

publicity was prejudicial,[19] the Supreme Court has yet to articulate a precise standard. Hodge v. White, 2016 WL 4425094 (E.D.Ky.). Because Supreme Court law is not "clearly established" in this respect, the Kentucky Court of Appeals' finding that any publicity was non-prejudicial was not "unreasonable" as contemplated by 28 U.S.C. 2254(d)(1):

> According to McKinney v. Commonwealth, 445 S.W.2d 874, 877 (Ky.1969), the decision whether or not to request a change of venue falls within trial counsel's discretion. Furthermore, upon appeal, in determining whether trial counsel was ineffective, we must give deference to the attorney's performance. Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky.1998). In the present case, England does not explain how he was prejudiced by his counsel's decision not to seek a change of venue; moreover, he does not claim that he did not receive a fair trial in Graves County. Given the lack of supporting facts and given the strong presumption that the performance of England's counsel fell within the wide range of reasonable professional assistance,

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[19] Prejudice is presumed when "an inflammatory circus-like atmosphere pervades both the courthouse and the surrounding community." Foley v. Parker, 488 F.3d 377, 387 (6th Cir.2007). Actual prejudice (falling short of presumed prejudice) also warrants a change of venue. The "primary tool" for determining whether actual prejudice arose is a "searching voir dire of the prospective jurors." Ritchie v. Rogers, 313 F.3d 948, 962 (6th Cir.2002). Petitioner has not alleged that a circus-like atmosphere contaminated his trial, nor has he identified any voir dire responses indicative of actual prejudice.

> we find that this claim did not establish ineffective assistance of counsel. (2008 WL 4182027, at *9).

Claim 26

Petitioner's twenty-sixth claim is that trial counsel was ineffective for failing to move to suppress the Woodfork-Petitioner conversations pursuant to 18 U.S.C. § 2511 (the federal wiretapping statute). The claim is a variation on Petitioner's fourteenth claim, which was that the conversations should have been suppressed under the Fourth Amendment because authorities failed to obtain a search warrant.

For present purposes, there is no substantial difference between the requirements of Section 2511 and the Fourth Amendment. Both allow for secret recordings when one party to the conversation (i.e., the informant, Woodfork) was legally in the place where the taped conversations took place and every conversation used by the prosecution was either directly with the informant or carried on with the target's (i.e., Petitioner's) knowledge of his presence. No warrant or wiretap order was necessary.

The Kentucky Court of Appeals rejected Petitioner's claim because it amounted to an improper attempt to resurrect a losing argument under a slightly-revised theory, via an allegation of ineffectiveness:

> . . . Despite this [Fourth Amendment versus Section 2511] difference, this current issue is the same as the one previously raised and

> rejected on direct appeal. As a result, England was and is barred from raising it again.
>
> Second, even if this claim is not barred, England has failed to show error on the part of his trial counsel. If the government acquires the consent to record from one person involved in a conversation, then the government has no need to obtain a court order under 18 U.S.C. § 2511. United States v. Barone, 913 F.2d 46, 49 (2d Cir.1990). . . . England's attorney, therefore, did not render ineffective assistance of counsel by failing to suppress the audiotape pursuant to 18 U.S.C. § 2511, because that statute simply did not apply. (2008 WL 4182027, at *9).

Petitioner's claim is procedurally defaulted as the state procedural rule invoked by the state court constitutes an independent and adequate reason for this Court's declining to reach the merits. See Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). Alternatively, the state court's adjudication of the claim was not contrary to Supreme Court precedent as required for this Court to grant relief.

RECOMMENDATION

The Magistrate Judge RECOMMENDS that the Court DENY the petition and amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dockets 1 and 47) and DENY a certificate of appealability.[20]

[Notice Omitted]

[20] The Court should deny a certificate of appealability unless it is persuaded that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION NO. 5:06-CV-091-TBR-LLK

STEVIE LYN ENGLAND, PETITIONER

v.

RANDY WHITE, WARDEN, RESPONDENT

MEMORANDUM OPINION

(Filed Sep. 11, 2018)

This matter is before the Court on Petitioner Stevie Lynn England's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, [R. 1], and Amended Petition, [R. 47]. The Magistrate Judge filed Findings of Fact and Conclusions of Law and Recommendation. [R. 94.] England filed objections thereto. [R. 95.] Having conducted a de novo review of the portions of the Magistrate Judge's report to which Potter objected,[1] the Court ADOPTS the Findings of Fact and Conclusions of Law as set forth in the report submitted by the Magistrate Judge, [R. 94]. For the reasons stated herein, England's objections, [R.95], are DENIED. The

[1] It is well-established that the failure to object to any portion of a magistrate judge's report results in a waiver of both district-court and appellate review of that portion. *See Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987) ("[O]nly those specific objections to the magistrate's report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have.").

Court will enter a separate Order and Judgment consistent with this Memorandum Opinion.

BACKGROUND

On May 19, 2005, the Kentucky Supreme Court affirmed the conviction of Stevie Lyn England of complicity to murder Lisa Halvorson. *See England v. Commonwealth*, No. 2003-SC-0328-MR, 2005 WL 1185204, at *1 (Ky. May 19, 2005). England and his co-defendant, Tyrone McCary, were originally indicted of capital murder and tried separately. [R. 94 at 1 (Findings of Fact and Conclusions of Law and Recommendation).] McCary was Halvorson's ex-boyfriend. [*Id.* at 2.] At England's trial before the Graves Circuit Court, the Commonwealth introduced evidence showing that Halvorson obtained an emergency protective order (EPO) against McCary shortly before her death, and her affidavit in support of the EPO claimed that McCary threatened to kill her or have someone kill her for him. [*Id.*] Also, Cori Poindexter, Halvorson's friend and the last person to see her alive, testified at trial that she was present when McCary called Halvorson and heard Halvorson's side of the conversation. [*Id.*] Poindexter testified that, while Halvorson was on the phone with McCary, Halvorson told Poindexter that McCary said that if he could not have her, nobody would. [*Id.*]

During the trial, the Commonwealth's theory of the case was that England was present at the scene and assisted McCary in committing the murder. [*Id.*]

The Magistrate Judge summarized the Commonwealth's theory as follows:

> McCary and/or Petitioner devised a plan to make it appear that Lisa was accidentally run over by her own truck while exiting her garage. McCary and/or Petitioner: drove to Lisa's house; knocked her to the ground in or near the garage; beat her severely; accelerated the truck backward out of the garage, causing Lisa's face to be caught in the right bumper and spinning her into the wheel well; got on top of her and broke her windpipe, resulting in death by asphyxia.

[*Id.* (citing Audio-video of trial, Day 1 (January 8, 2003), 3:13:00).] England and McCary were originally implicated in the crime by the testimony of Karl Woodfork. According to Woodfork, McCary described various plots to him and England for murdering Halvorson and making it appear like an accident. [*Id.* (citing Audio-video of trial, Day 4 (January 14, 2003), 11:07:00).] Furthermore, Woodfork testified that McCary paid both him and England an initial payment of $1,000.00, with a promise of an additional payment of $10,000.00 (each) after the murder. [*Id.*]

Before the trial, Woodfork agreed to be wired for sound, and the police secretly recorded conversations between Woodfork and England, in which England complained about McCary owing him money. After informing England of these recordings during an interrogation at the police station, England admitted to being present at the murder scene with McCary but

insisted that he only punched Halvorson in the jaw one time—to "soften her up"—causing her to fall to the ground. [*Id.* at 3.] Furthermore, England claimed that he attempted to dissuade McCary from committing the other terrible acts, and he also claimed Halvorson was alive when he and McCary left the scene. [*Id.*]

After the Kentucky Supreme Court affirmed England's conviction, England filed a Motion to Vacate pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, containing ten claims of ineffective assistance of counsel. [*Id.*] It was denied by the trial court. [*Id.*] Upon appeal, the Kentucky Court of Appeals affirmed the rejection of all claims except for one, which was remanded for an evidentiary hearing. [*Id.*] However, this evidentiary hearing was rendered moot when England agreed to a sentence of life imprisonment. [*Id.* at 3-4 (citing R. 47-1 at 25).]

Subsequently, England filed a Habeas Corpus Petition, [R. 1], and an Amended Petition, [R. 47], consisting of twenty-six claims. On March 6, 2017, the Magistrate Judge entered a Findings, Conclusions, and Recommendation, recommending that the Habeas Corpus Petition and the Amended Petition be denied. [R. 94 at 1.] On March 24, 2017, England filed an Objection to the Magistrate Judge's Recommendation, [R. 95], which involved seventeen of the twenty-six previous claims. The matter came before the undersigned when this case was reassigned to this Court on April 25, 2018, [R. 96].

LEGAL STANDARD

"Under the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), federal habeas relief may not be granted unless the state court decision at issue: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Coleman v. Bergh*, 804 F.3d 816, 819 n. 1 (6th Cir. 2015).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court reaches a decision different from that of the Supreme Court on a set of materially indistinguishable facts." *Trimble v. Bobby*, 804 F.3d 767, 773 (6th Cir. 2015). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *Id.* "For factual matters, a district court may not grant a habeas petition unless the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

"To obtain habeas relief, 'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). This standard is "difficult to meet." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation omitted).

DISCUSSION

In his Objection, England lists many arguments regarding seventeen of the claims from his Petition for Writ of Habeas Corpus and Amended Petition. The Court will address each in turn.

A. Claims 1-3

The first ground raised under England's Petition for Writ of Habeas Corpus was that England's Fifth Amendment right to counsel during custodial interrogation was violated when England's alleged request for an attorney was ignored by police. [R. 95 at 38 (England Objection).] Specifically, England argues that the following statement qualified as an unequivocal request for an attorney: "I guess you'll just have to go on and lock me up then and call my lawyer, 'cause I don't, I don't know what you're talking about. I'll be honest with you. Like I said, me and Tyrone are friends. I've never seen that woman." [R. 94 at 5-6 (quoting *England*, Nos. 2003-SC-0328-MR, 2005 WL 1185204, at *2;

R. 95 at 38.] After further questioning, England said, "I don't want to get in no trouble. I mean my lawyer. I don't know." [R. 94 at 5-6 (quoting *England*, Nos. 2003-SC-0328-MR, 2005 WL 1185204, at *2).] The Magistrate Judge held that this statement did not invoke the Fifth Amendment right to counsel, citing the finding of the Supreme Court in *Davis v. United States*, in which the Supreme Court found that the words "maybe I should talk to a lawyer" are equivocal. [*Id.* at 6 (citing *Davis*, 512 U.S. 452, 459 (1994).][2] Furthermore, the Magistrate Judge found that the Kentucky Supreme Court's holding that England's statement did not amount to a request for an attorney was not contrary to the United States Supreme Court's precedent. [R. 94 at 6.]

In his Objection to the Magistrate Judge's findings, England argues that his statement was an "unequivocal request for an attorney" under Supreme Court precedent[3] and questioning by police should have ceased at that time. [R. 95 at 38-39.] Furthermore, England contends that the Kentucky Supreme Court, which the Magistrate Judge quoted in his findings, cited to inapplicable case law in its opinion. [R. *Id.* at 39.]

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[2] The Magistrate Judge also cited *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), for the notion that "a defendant's assertion that he has an attorney in another matter does not constitute a request for counsel in the present issue." [R. 94 at 6.]

[3] Specifically, England cites to *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Smith v. Illinois*, 469 U.S. 91, (1984).

The Court agrees with the Magistrate Judge's findings and denies England's objection. First, the Court finds that England's statements did not constitute an unambiguous request for counsel. The Sixth Circuit has succinctly summarized the requirements of the Supreme Court for such a situation as follows:

> A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If the suspect invokes that right, police must stop questioning him until his attorney arrives or the suspect reinitiates discussion. *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In determining whether a suspect has invoked his right to counsel, we apply an objective standard, asking whether a reasonable police officer would have understood the suspect to be asking for an attorney. *Davis v. United States*, 512 U.S. 452, 458–59, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The request must be unequivocal. *Id.* at 459, 114 S.Ct. 2350.

Perreault v. Smith, 874 F.3d 516, 519–20 (6th Cir. 2017), *cert. denied sub nom. Perreault v. Stewart*, 138 S. Ct. 1299, 200 L. Ed. 2d 473 (2018). In *Perreault*, the Sixth Circuit found that the state court reasonably interpreted the defendant's statement during the police interview as being a negotiation tactic, not an unequivocal request for counsel. *See* 874 F.3d at 520. In detail, after the police officer accused his story of being

inconsistent, the defendant retorted: "Well, then let's call the lawyer then 'cause I gave what I could." *Id.* The Court finds this statement to be extremely similar to England's response of "I guess you'll just have to go on and lock me up then and call my lawyer." [R. 94 at 5-6 (quoting *England*, Nos. 2003-SC-0328-MR, 2005 WL 1185204, at *2; R. 95 at 38.] A reasonable police officer could have interpreted this statement as a negotiation tactic, rather than a request for counsel. Therefore, this statement was not an "unequivocal request" for counsel as required by Supreme Court precedent. *See Davis*, 512 U.S. at 459 ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.") (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991); *Edwards*, 451 U.S. at 485).

Secondly, the Court fords that the case law cited by the Kentucky Supreme Court is applicable to the case at hand. England claims that the Kentucky Supreme Court should have cited to the Supreme Court's holding in *Smith v. Illinois* in analyzing his request for counsel, rather than *Colorado v. Spring*, 479 U.S. 564 (1987). After examining the opinion of the Kentucky Supreme Court, the Court finds that England mischaracterizes its findings. The Kentucky Supreme Court did not cite to *Colorado* while analyzing England's right to counsel. It cited to *Colorado* in the section entitled "Coercion," which was appropriate because the

Supreme Court discusses police coercion of confessions in detail in that case. *See England*, Nos. 2003-SC-0328-MR, 2005 WL 1185204, at *3 (citing *Colorado*, 479 U.S. at 574). Moreover, in evaluating England's request for counsel, the court appropriately cited to the Supreme Court's findings in *Davis*, which references *Smith* for support. *Id.* at *2 (citing *Davis*, 512 U.S. at 459).

In sum, the Court agrees with the Magistrate Judge's findings regarding Claim 1, and England's objections as to Claims 1, 2, and 3 are denied.[4]

B. Claim 4

Under Claim 4, England argued that his rights under the Confrontation Clause were violated during the trial when the Commonwealth admitted the affidavit of the deceased victim, Lisa Halvorson, into evidence. [R. 81 at 2 (England Partial Reply).] According to the Magistrate Judge, "[t]he affidavit informed the jury that McCrary threatened to kill Lisa or have someone kill her for him." [R. 94 at 9.] The Magistrate Judge held that the Kentucky Supreme Court correctly acknowledged that the admission of the affidavit violated England's rights under the Confrontation Clause, but the admission amounted to harmless error. [*Id.* at 11-12.] In detail, the Magistrate Judge found

[4] England contends that his arguments under Claim 1 should apply to Claims 2 and 3 because "Habeas Claims II-III were direct prejudicial derivitives [sic] of Habeas Claim I. . . ." [R. 95 at 38.] As the Court has denied England's objection to Claim 1, his objections to Claim 2 and Claim 3 are denied as well.

that the erroneous admission of the affidavit was harmless in light of England's police station confession, in which the Magistrate Judge asserted that "he admitted to striking Lisa and knocking her to the ground," and in light of the recorded conversation between England and Karl Woodfork, during which Woodwork subsequently testified that England told him that McCrary had not paid him the money owed for the crime. [*Id.* at 12.]

England objects to these findings, stating that "[t]hings cannot be looked at in a vacuum." [R. 95 at 16.] England contends that the Magistrate Judge ignored the effect of the state court's error on several of his other claims, and he states that "the Magistrate circumvents his obligation to review each of these errors in context to the *Crawford* error as required by *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) and refuses to look at the error as a whole." [*Id.* at 17.]

The Court agrees with the Magistrate Judge's findings and denies England's objection. Despite England's contention, the Magistrate Judge recited the factors of *Delaware* and found the state court's conclusions under the first and second factors to be satisfactory. [R. 94 at 12.] Furthermore, the court's consideration under those factors referenced the Commonwealth's case as a whole, as well as the cumulative nature of other evidence admitted in the case. [*Id.* at 13.][5] Thus, the Court agrees with the Magistrate

[5] Explicitly, the Magistrate Judge stated:

Judge's findings regarding Claim 4, and England's objection is denied.

C. Claim 6

In Claim 6, England argued that his due process rights were violated when he was denied sufficient public funds to hire a criminologist who could have testified that Ms. Halvorson's body was moved after her death. [R. 81 at 2; R. 94 at 14; R. 95 at 40.] The Magistrate Judge held that the Supreme Court's holding in *Ake v. Oklahoma*, which found that states must provide

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> The state court's determination is buttressed by a consideration of the first and second Van Arsdall factors:
>
> (1) *The importance of the witness' testimony in the prosecution's case:* The affidavit testimony was important to the Commonwealth's case against Petitioner primarily as background information showing that McCary threatened to murder Lisa. However, in mentioning McCary's threat to have someone else (for example, Petitioner) do the killing for him, the affidavit may have (in the jury's mind) made it less likely that McCary was innocently present at the murder scene (i.e., the affidavit suggests Petitioner's intent to assist the murder) and more likely that his presence was financially motivated.
>
> (2) *Whether the testimony was cumulative:* To the extent the affidavit testimony suggested that the "someone else" McCary threatened to get to murder Lisa was Petitioner, the testimony was cumulative in light of Petitioner's police-station confession to striking Lisa to the ground, Woodfork's testimony that McCary paid Petitioner $1,000 as down-payment for committing the murder, and Woodfork's testimony about Petitioner complaining about McCary owing him money.

[R. 94 at 12-13n.12.]

an indigent defendant with a psychiatric expert when the defendant's sanity is a significant factor at trial, does not extend that right to other types of expert witnesses. [R. 94 at 14 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)).] Furthermore, the Magistrate Judge observed that "Petitioner admitted to assaulting Lisa, and he and McCary allegedly left while she was still alive. Whether or not the body was moved after death does not change the fact of Petitioner's involvement." [*Id.*]

In his Objection, England contends that "the trial court possessed no discretion to deny England funding to retain an expert for investigation and preparation of his defense." [R. 95 at 40.] Furthermore, he concludes that the assistance of an expert would have allowed him to "fairly present at least enough forensic information to the jury, in a meaningful manner, as to permit it to have made a sensible determination." [*Id.* at 41.] England explains that an expert could have examined the "veracity of the handling of the evidence" and possibly compelled the testing of evidence for DNA before trial. [*Id.*]

The Court agrees with the Magistrate Judge's findings and denies England's objection. First, the Court finds that England's claim that the trial court did not have discretion to deny funding for an expert is incorrect. In fact, in Kentucky, a trial court has discretion to decide whether funds should be provided under KRS 31.110 based off the "specific information that [the defense counsel] expects the expert to provide at trial." *Davenport v. Commonwealth*, 177 S.W.3d 763,

774 (Ky. 2005). Secondly, the Court agrees with the Magistrate Judge's holding that any finding of a criminologist on this specific matter would not change England's admitted involvement in the murder of Halvorson. Testing of the Caucasian hairs in Halvorson's hands and underwear and the sperm in her vagina could have proven or disproves Shannon Jenkins's testimony that he had sexual intercourse with Halvorson before her death. [R. 94 at 14- 15.] However, this evidence would not change the fact that England admitted to police that he was present at the murder scene with McCrary and he punched Halvorson in the jaw, knocking her to the ground. [R. 94 at 3.]

In sum, the Court agrees with the Magistrate Judge's findings regarding Claim 6 and denies England's objections.

D. Claim 9

Under Claim 9, England argued that his rights under the Sixth and Fourteenth Amendment were violated when the jurors opposed to the death penalty were excluded from the jury panel. [R. 91 at 18; R. 95 at 42.] The Magistrate Judge held that "[t]he Sixth Amendment allows for-cause exclusion of prospective jurors due to substantial impairment of ability to impose the death penalty." [R. 94 at 17 (citing *White v. Wheeler*, 136 S.Ct. 456 (2015).] Thus, the Magistrate Judge concluded that the Kentucky Supreme Court's holding that a juror may be stricken for cause if she is

unable to consider the death penalty was not contrary to United States Supreme Court precedent. [*Id.*]

In his Objection, England claims that he was denied the right to "life-qualify" the jury because "[n]o where in the Kentucky Supreme Court decision can it be found that it discharged this balancing test as required by *Morgan* at 728." [R. 95 at 42.] In *Morgan v. Illinois*, the Supreme Court reiterated that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 504 U.S. 719, 728 (1992). Furthermore, the Court stated: "Under this standard, . . . a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Id.* Here, the Kentucky Supreme Court concluded: "It is well-settled law in this Commonwealth that a juror may be stricken for cause if she is unable to consider the death penalty when considering the sentence upon conviction of the defendant. We hold that England's constitutional rights were not violated by excusing jurors who could not consider the death penalty as a sentence upon his conviction." *England*, No. 2003-SC-0328-MR, 2005 WL 1185204, at *7. The Court finds that the Kentucky Supreme Court's holding aligns with the United States Supreme Court's holding regarding when an impartial juror must be removed for cause. Thus, the Court agrees with the Magistrate

Judge's findings regarding Claim 9 and denies England's objection.

E. Claim 11

In Claim 11, England argued that his rights under the Fourteenth Amendment were violated when the attorney for the Commonwealth misstated the law during closing argument. [R. 91 at 23; R. 94 at 18.] At trial, the jury instructions stated that the jury could return a guilty verdict if it believed that England killed Ms. Halvorson by "striking her, running over her with a truck, and causing her death by strangulation." [R. 94 at 18; R. 95 at 43; *England*, No. 2003-SC-0328-MR, 2005 WL 1185204, at *8.] However, during its closing argument, the Commonwealth stated that the jury could return a guilty verdict if it found that England engaged in only one of those actions listed in the jury instructions. [*Id.*] The Magistrate Judge held that the Kentucky Supreme Court's holding that England's claim was procedurally defaulted due to trial counsel's failure to raise a contemporaneous objection barred the Magistrate Judge from considering the constitutional merits of the claim. [R. 94 at 18.][6] In his Objection, England states that by directing the jury to not follow the jury instructions, the Commonwealth violated his rights "under the Fourteenth Amendment as

[6] The Magistrate Judge also found that "[t]here was no Due Process violation because, in light of its argument as a whole, the Commonwealth's statement was not unfairly prejudicial or misleading." [R. 94 at 19.]

held by *In Re Winship.*" [R. 95 at 43 (citing *In Re Winship*, 397 U.S. 358, 364 (1970)).]

The Court agrees with the Magistrate Judge's findings and denies England's objection. First, the Court agrees that the state court's finding of procedural default bars this Court from considering the constitutional merits of the claim. "A petitioner procedurally defaults claims for habeas relief if the petitioner has not presented those claims to the state courts in accordance with the state's procedural rules." *Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991)). A federal claim brought by a state prisoner in a habeas action may become procedurally defaulted in state court in two different ways. *See Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). A prisoner first may procedurally default a given claim by failing to comply with an established state procedural rule when presenting his claim at trial or on appeal in the state courts. *See Wainwright*, 433 U.S. at 87. Additionally, procedural default can occur when a petitioner completely "fail[s] to raise a claim in state court, and pursue that claim through the state's ordinary appellate review procedures." *Carter v. Mitchell*, 693 F.3d 555, 563 (6th Cir. 2012) (quoting *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)).

To determine whether a claim is procedurally defaulted, the Sixth Circuit applies the 4–prong test announced in *Maupin v. Smith*, 785 F.2d 135, 138 (6th

Cir. 1986). The Sixth Circuit in *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001) explained the *Maupin* test as follows:

> This court's *Maupin* decision sets out four inquiries that a district court should make when the state argues that a habeas claim has been defaulted by petitioner's failure to observe a state procedural rule. First, the court must determine whether there is such a procedural rule that is applicable to the claim at issue and whether the petitioner did, in fact, fail to follow it. *Maupin*, 785 F.2d at 138. Second, the court must decide whether the state courts actually enforced its procedural sanction. *Id.* Third, the court must decide whether the state's procedural forfeiture is an "adequate and independent" ground on which the state can rely to foreclose review of a federal constitutional claim. "This question will usually involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." *Id.* And, fourth, the petitioner must demonstrate, consistent with *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that there was "cause" for him to neglect the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.;* see also *Scott v. Mitchell*, 209 F.3d 854, 864 (6th Cir.), cert. denied, 531 U.S. 1021, 121 S.Ct. 588, 148 L.Ed.2d 503 (2000).

Id. Here, the Kentucky Supreme Court found that counsel failed to object to the Commonwealth's

comment during closing as required under RCr 9.22, and the Commonwealth's comment was not "palpable error," thus not reversible under RCr 10.26. *See England*, No. 2003-SC-0328-MR, 2005 WL 1185204, at *8-9. England has not demonstrated that there was cause to neglect RCr 9.22's requirement of a contemporaneous objection. Furthermore, he does not explain how this error prejudiced him when he was not convicted of murder by the jury but complicity to murder.

Even if there was not an issue of procedural default present, England's Fourteenth Amendment argument under *In re Winship* fails because that case is inapplicable to the matter at hand. In *In re Winship*, the Supreme Court held that juveniles are entitled to the standard of proof beyond a reasonable doubt when charged with the violation of a criminal law. *See* 397 U.S. at 365. This does not support England's contention that "[t]he jury was required to find all three of these shared elements in order to find him guilty under *In Re Winship.*" [R. 95 at 43.]

In sum, the Court agrees with the Magistrate Judge's findings regarding Claim 11 and denies England's objection.

F. Claim 15

Under Claim 15, England argued that his rights under the Sixth and Fourteenth Amendments were violated when "the trial court refused to grant a new trial when presented with *Brady* evidence and DNA." [R. 95 at 3; R. 91 at 27.] Specifically, this was the

previously mentioned evidence of the Caucasian hairs in Ms. Halvorson's hands and underwear and the sperm in her vagina. [*Id.*] The Magistrate Judge held that a *Brady* violation did not occur because England did not show that "any physical evidence favorable to the accused existed, was exculpatory, and was suppressed as required to support a Brady claim." [R. 94 at 22.] Furthermore, the Magistrate Judge found that "[e]ven if such evidence existed and would have linked other individuals to Lisa's murder, the evidence falls short of being exculpatory as it does not change the fact that competent evidence supported Petitioner's conviction of complicity to commit murder." [*Id.*] England objects to the Magistrate Judge's holding, stating that he had a right to place this evidence before a jury in order to demonstrate that "the last person Lisa saw when she was alive was her killer and his name is in those hairs that were clenched in her fists that has never been tested." [R. 95 at 4-5.]

The Court agrees with the Magistrate Judge's findings and denies England's objection. England has provided no further evidence or explanation in support of a *Brady* claim.[7] Moreover, the evidence England speaks of does not affect the evidence that was before the trial court supporting his conviction of complicity

[7] "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

to commit murder. Thus, England's objection to the Magistrate Judge's findings under Claim 15 is denied.

G. Claim 16

Claim 16 is a continuation of the arguments in Claim 15. Specifically, England argued that his Sixth and Fourteenth Amendment rights were violated "when the trial court refused to order DNA testing on the Brady evidence found on Lisa's body, which were not of African-American origin." [R. 1 at 10.][8] The Magistrate Judge held that revealing the identity of another person possibly involved in the murder of Ms. Halvorson would not change the fact that "competent evidence supported Petitioner's conviction of complicity to commit murder." [R. 94 at 23.] Moreover, the Magistrate Judge concluded that England did not show that "DNA hair testing and disclosure of the results to Petitioner would have likely resulted in a different verdict." [*Id.*]

England objects to this finding under several arguments. First, England contends:

> [U]nder the charge of complicity, only McCray [sic] was named, neither Jenkins nor Pat Halvorson were named, thus, if the last person who Lisa saw alive was her killer attested forensically by the Caucasion [sic] hairs found in her clenched fists, then there is no competent evidence to support a conviction for

[8] The Court notes that England and McCary are African American.

> complicity to murder, for there was no evidence to suggest that England was complicit with anyone to Lisa's murder.

[R. 95 at 5.] Second, England argues that, under Kentucky law, if he was acquitted as the principle, he could not be convicted as complicit to the murder. [*Id.*] Lastly, England claims that he has met the burden required under *Stopher v. Simpson*, No. 3:08-CV-9-DJH-CHL, 2017 WL 957423 (W.D. Ky. Mar. 10, 2017), to conduct an evidentiary hearing regarding the testing of DNA. [*Id.* at 6.]

The Court agrees with the Magistrate Judge's findings and denies England's objections. As an initial matter, the Court finds that England's first and second arguments depend on an incorrect interpretation of Kentucky law. Kentucky Revised Statute (KRS) § 502.030 states:

> In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to KRS 502.010 and 502.020, it is no defense that:
>
> (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct

Ky. Rev. Stat. Ann. § 502.030(1). Moreover, as cited by the Kentucky Court of Appeals, the Kentucky Supreme

Court stated: "The principal actor's mental state with respect to his own conduct, or the degree of his criminal liability, is largely immaterial to the criminal liability of an accomplice or the degree thereof." *Tharp v. Commonwealth*, 40 S.W.3d 356, 365 (Ky. 2000); *Moore v. Commonwealth*, No. 2006-SC-000315-MR, 2008 WL 3890039, at *3 (Ky. Aug. 21, 2008) ("In this case, Appellant argues that his conviction of Complicity to Murder requires a finding by the jury that the principals (Reece and Overbee) were guilty of Murder. We disagree."). Thus, England's liability for complicity to murder does not depend on the liability of the principle. Also, murder, like other offenses, is capable of being committed as a principal actor or a complicitor. Therefore, just because England was acquitted of murder as the principal actor does not mean he could not be convicted as complicitor to the murder. *K.R. v. Commonwealth*, 360 S.W.3d 179, 186 (Ky. 2012) ("Rather than being a separate crime, complicity is simply the means of committing another crime.").

Regarding England's final argument, the Court finds that England has not met the burden required to entitle one to an evidentiary hearing. Ultimately, "the decision of whether to hold an evidentiary hearing is within the discretion of this Court." *Stopher*, No. 3:08-CV-9-DJH-CHL, 2017 WL 957423, at *2 (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). Furthermore, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* Here, England requests habeas relief from his conviction of

complicity to commit murder, but there is evidence in the record, including England's confession, that England is guilty of that charge. This evidence precludes habeas relief; thus, the Court is not required to hold an evidentiary hearing. *See id.*

In sum, England's objections to the Magistrate Judge's findings under Claim 16 are denied.

H. Claim 17

Under Claim 17, England argued that his rights under the Sixth and Fourteenth Amendment were denied when his counsel failed to "contemporaneously object to the fatal variance and constructive amendment to the indictment." [R. 47 at 2.] The Magistrate Judge held that the finding of the Kentucky Court of Appeals was not contrary to Supreme Court Precedent. [R. 94 at 23.] Specifically, the Kentucky Court of Appeals stated:

> Because the Commonwealth sought and received permission from the trial court to amend the indictment to include complicity to commit murder, this instruction did not "fatally vary" from the indictment nor did it operate as a "constructive amendment." Consequently, all [ineffectiveness] claims brought under this theory lack merit.

[*Id.* (citing *England v. Commonwealth*, No. 2007-CA-000935-MR, 2008 WL 4182027, at *3 (Ky. Ct. App. Sept. 12, 2008)).] The Magistrate Judge also concluded in the

alternative that England's claim is procedurally defaulted. [R. 94 at 24.]

England objects to the findings of the Magistrate Judge, arguing that Supreme Court precedent prohibits a trial court from amending an indictment after its returned by a grand jury. [R. 95 at 8 (citing *Stirone v. United States*, 361 U.S. 212, 217-19 (1960); *Russell v. United States*, 369 U.S. 749, 770 (1962)).] True, the Supreme Court held in *Stirone* that "it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself" 361 U.S. at 215–16. However, in the matter at hand, the indictment was not broadened nor were new charges added because, under Kentucky law, "amending the indictment to include an allegation that the defendant is guilty of the underlying charge by complicity does not constitute charging an additional or different offense." *Commonwealth v. Combs*, 316 S.W.3d 877, 880 (Ky. 2010).

Also, England argues that his counsel was ineffective for failing to object to the jury instructions that contained this alleged constitutional error. [R. 95 at 8.] As the Court already explained, the trial court did not violate the Supreme Court precedent of *Stirone* by amending the indictment to include complicity to the underlying charge. Thus, this omission of counsel is "the result of reasonable professional judgment," and falls short of the standard required for ineffective assistance of counsel, as described in *Strickland v. Washington*. 466 U.S. 668, 690 (1984).

Finally, England argues, once again, that his acquittal of murder as the principal actor precluded the jury from finding him guilty of complicity to the murder. [R. 95 at 9.] As the Court previously explained, this is an incorrect interpretation of Kentucky law.

In sum, England's objections to the Magistrate Judge's findings under Claim 17 are denied.

I. Claim 18

Claim 18 derives from the error claimed in Claim 17. England argues that in addition to what was stated in Claim 17, his counsel rendered ineffective assistance of counsel when he failed to object to the jury instruction that allegedly required the jury to find McCary guilty of murder as the principle actor in order to find England guilty as complicitor. [R. 95 at 13.] In support, England cites to the United States Supreme Court's findings in *Sandstrom v. Montana*, 442 U.S. 510 (1979), and the findings of the Kentucky Supreme Court in *Fields v. Commonwealth*, 219 S.W. 3d 742, 759 (Ky. 2007). [R. 95 at 12-13.]

Although the jury instructions have not been provided in the record before the Court, the Court finds that even if the instructions did assume McCary's guilt as principle actor in the murder, the error was harmless. As previously discussed, McCary's liability as principle has no effect on England's liability under complicity to the murder. *Tharp*, 40 S.W.3d at 365; *Moore*, No. 2006-SC-000315-MR, 2008 WL 3890039, at *3. Thus, the Court finds that such an error would not

have been prejudicial. *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997) (quoting *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715, 18-19 (1931) ("It is a general rule that an error in the instructions is ground for reversal, unless it affirmatively appears that it was not prejudicial.").

Furthermore, after examining the cases cited by England, i.e., *Sandstrom* and *Fields*, the Court finds neither case is on point. In *Sandstrom*, the Supreme Court found a jury instruction to be unconstitutional when the jury may have interpreted it as allowing them to presume there was intent upon finding that the petitioner's act was voluntary. 442 U.S. at 517-24. Whereas, in the matter at hand, England claims the jury instructions allowed the jury to presume a separate defendant, McCary, had committed murder, relieving the Commonwealth of its responsibility of proving McCary committed the crime before England's trial. [R. 95 at 12.] Beyond the fact that it was never necessary for McCary to be convicted of murder before the commencement of England's trial, *Sandstrom* can be distinguished in that the alleged error did not affect England's conviction of complicity as it did the petitioner in *Sandstrom*.

In *Fields*, the Kentucky Supreme Court found that the defendant was not entitled to a jury instruction for assault in the fourth degree as a lesser included offense to complicity to assault in the second degree because they constituted two separate offenses. *Fields*, 219 S.W.3d at 750. In contrast, as the Court previously explained, complicity to murder is not considered a

separate offense from murder under Kentucky law. *Combs*, 316 S.W.3d at 880.

In sum, England's objections to the Magistrate Judge's findings under Claim 18 are denied.

J. Claim 20

In Claim 20, England claimed that his rights under the Sixth Amendment, Fourteenth Amendment, and the Confrontation Clause were violated when his counsel failed to object when the Commonwealth stated in his closing argument: "What do you think Tyrone [McCary] would have said? I bet he would have said Steven England did it all." [R. 94 at 26.] The Magistrate Judge held that the state court's adjudication of England's claim was not contrary to Supreme Court precedent when it held that counsel was effective for choosing not to object to the comment because the comment was not improper. [*Id.*]

England first objects to the Magistrate Judge's findings on the grounds that the statement constituted inadmissible hearsay and, moreover, "the Commonwealth's statements to the jury equated to the Commonwealth testifying to facts it alluded to that it alone knew of. . . ." [R. 95 at 14-15.] The Commonwealth's comment consisted of the Commonwealth attorney guessing what McCary "would have said." Thus, this was not an actual statement from McCary, and it cannot be considered hearsay or a "fact" that the attorney "alone knew of."

England also objects on the grounds that his counsel was ineffective when he failed to object to the Commonwealth's statement during closing. [R. 95 at 15.] As an initial matter, the Court notes that, in Kentucky, attorneys have "great leeway in making closing arguments." *Brewer v. Commonwealth*, 206 S.W. 3d 343, 350 (Ky. 2006). Furthermore, as the Court has found that the statement at issue did not amount to hearsay or testimony by the attorney, it was objectively reasonable for the attorney to refrain from objecting to the Commonwealth's statement.

In sum, England's objections to the Magistrate Judge's findings under Claim 20 are denied.

K. Claim 21

Under Claim 21, England claimed that his rights under the Sixth Amendment, Fourteenth Amendment, and the Confrontation Clause were violated when his counsel failed to object to the introduction of statements made by Halvorson, who did not testify, to Poindexter. [R. 91-1 at 10.] Specifically, Poindexter testified that Lisa told her, as she spoke on the phone with McCary, that McCary told her that if he could not have her, nobody would. [R. 94 at 26.] The Magistrate Judge held that this claim was procedurally defaulted because the state court's holding by way of procedural rule was an independent and adequate reason for the Magistrate Judge not to reach the merits. [R. 94 at 27.][9]

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[9] In detail, the Magistrate Judge quoted the Kentucky Court of Appeals's finding that the statements, whether ascribed to

Alternatively, the Magistrate Judge held that "counsel was effective despite not objecting to Poindexter's testimony under the theory that the declarant was McCary because McCary's statements were nontestimonial and, hence, constitutionally admissible." [*Id.*]

As the Court understands it, England's objection consists of the argument that his ineffective assistance of counsel claim should survive procedural default under *Leonard v. Commonwealth*, 279 S.W. 3d 151 (Ky. 2009). [R. 95 at 20-22.] Furthermore, he asserts that his counsel was ineffective when he failed to object to Poindexter's testimony as a violation of the Confrontation Clause under *Crawford.*

In *Crawford*, the Supreme Court imposed an "absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine. . . ." 541 U.S. 36, 61 (2004). However, the Supreme Court stated that an "off-hand, overheard remark," such as the one at issue, "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Crawford*, 541 U.S. at 51 (2004). Moreover, the examples of "testimony" given by the Court in *Crawford*, such as ex parte testimony at a preliminary hearing or statements taken by a police officer during an interrogation, are quite unlike the statement at issue. *Id.* at 51-52. Thus, even if the claim were to survive procedural default, the Court finds that the Confrontation Clause does not apply to

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Halvorson or McCary, were addressed by direct appeal and, thus, England was prohibited from raising the issue again. [R. 94 at 27.]

McCary's statement as it was nontestimonial. As there was no violation of the Confrontation Clause, counsel's decision not to object was "the result of reasonable professional judgment," and falls short of the standard required for ineffective assistance of counsel, as described in *Strickland.* 466 U.S. at 690.

In sum, England's objections to the Magistrate Judge's findings under Claim 21 are denied.

L. Claim 22

Under Claim 22, England argued his rights under the Sixth and Fourteenth Amendment were violated when his counsel was ineffective by failing to object to the systematic exclusion of African Americans from the grand jury. [R. 91-1 at 16; R. 95 at 23.] The Magistrate Judge held that England's claim "is without merit because it lacks a supporting factual basis" and the Kentucky Court of Appeals's adjudication was not contrary to Supreme Court precedent. [R. 94 at 28.] England objects on two different grounds. First, England claims that he is entitled to an RCr 11.42 evidentiary hearing on this issue. Secondly, England contends that the Magistrate Judge erred by citing to *Taylor v. Louisiana*, 419 U.S. 522 (1975), in considering England's claim, rather than the ineffective assistance of counsel analysis required by *Strickland.* [R. 95 at 26.]

Regarding England's first argument, the Court finds that England has not provided what is required for the Court to grant an evidentiary hearing: "a material issue of fact that cannot be conclusively resolved,

i.e., conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). England states that "he alleged sufficient facts that required further inquiry by an evidentiary hearing . . . ," [R. 95 at 25], but he never actually provides these allegations of fact, nor can the Court find any such allegations in the record before it.

As for England's second argument, the Court finds that England mischaracterizes the Magistrate Judge's reference to *Taylor*. The Magistrate Judge properly cited a quotation from *Taylor* in the context of recalling his reasoning under Claim 8 of England's petition—not in support of the Magistrate Judge's conclusion regarding Claim 22. [R. 94 at 28.] As for England's claim of ineffective assistance of counsel under *Strickland*, the Court finds that defense counsel's decision not to object to the jury panel was reasonable in that there was no evidence of systemic exclusion of African Americans. Furthermore, England fails to analyze counsel's actions under the analysis required under *Strickland*. *See Strickland*, 466 U.S. at 690.[10]

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[10] *Strickland* requires:

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally

In sum, England's objections to the Magistrate Judge's findings under Claim 22 are denied.

M. Claim 23

In Claim 23, England contended that his rights under the Sixth and Fourteenth Amendment were violated when his counsel failed to present a "defense version" of transcripts from England's conversation with Woodfork during closing argument. [R. 91-1 at 24; R. 95 at 29]. The Magistrate Judge held that England's claim "is without merit because the Kentucky Court of Appeals articulated a 'reasonable argument that counsel satisfied Strickland's deferential standard' as contemplated by Harrington v. Richter, 562 U.S. 86, 89 (2011)." [R. 94 at 29.] Specifically, the Magistrate Judge quoted the portion of the Kentucky Court of Appeals's opinion in which the court held that England was "merely disagreeing with his attorney's strategy regarding closing argument" when his attorney "commented extensively on the audiotape and commented extensively on the prosecution's interpretation of the tape giving his own opinion regarding the content of the audiotape" instead of preparing a separate transcript from that presented by the Commonwealth. [*Id.*

> competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

466 U.S. 668, 690 (1984).

(quoting *England*, No. 2007-CA-000935-MR, 2008 WL 4182027, at *8).]

In his Objection, England argues that his counsel was ineffective when he failed to "utilize a defense version" of the transcript during his closing argument. [R. 95 at 29.] England claims that under the precedent of *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983), and *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), "[s]imply commenting extensively is not sufficient to meet *Strickland.*" [R. 95 at 29.] The Court disagrees.

In *Sanborn*, the Supreme Court of Kentucky found that although "[i]t is within the discretion of a trial judge to decide whether because portions of a tape are inaudible or indistinct, the entire tape must be excluded. It is not, however, within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions." *Sanborn*, 754 S.W.2d at 540 (citing *Robinson*, 707 F.2d at 876). However, *Sanborn* is distinguishable from the case at hand in that *Sanborn* involved a transcript that was *given* to the jury *during the proof stage* of trial, whereas, here, the transcript was *presented* to the jury as a theory of the case *during closing argument. Id.* Furthermore, England does not allege specific errors in the Commonwealth's transcript, unlike in *Sanborn* where there were allegedly twenty-five specific instances of alleged error in the transcript. *Id.* As cited by the Kentucky Court of Appeals, a similar situation to the one at hand occurred in *Norton v. Commonwealth*, 890 S.W.2d 632, 637 (Ky. Ct. App. 1994), when

the court distinguished the matter from *Sanborn* because there was no argument of inaccuracies in the transcript and the transcript at issue was not made an exhibit and taken to the jury room during deliberations. Thus, England's objection to the Magistrate Judge's findings under Claim 23 is denied.

N. Claim 25

In Claim 25, England argued that his rights were violated under the Sixth and Fourteenth Amendment when his counsel failed to move for a change of venue due to pre-trial publicity. [R. 91-1 at 30; R. 95 at 29.] The Magistrate Judge held that "[b]ecause Supreme Court law is not 'clearly established' in this respect, the Kentucky Court of Appeals' finding that any publicity was non-prejudicial was not 'unreasonable' as contemplated by 28 U.S.C. 2254(d)(1). . . ." [R. 94 at 31.] The Magistrate Judge quoted the Kentucky Court of Appeals where it stated:

> According to McKinney v. Commonwealth, 445 S.W.2d 874, 877 (Ky.1969), the decision whether or not to request a change of venue falls within trial counsel's discretion. Furthermore, upon appeal, in determining whether trial counsel was ineffective, we must give deference to the attorney's performance. Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky.1998). In the present case, England does not explain how he was prejudiced by his counsel's decision not to seek a change of venue; moreover, he does not claim that he did not receive a fair trial in Graves County.

> Given the lack of supporting facts and given the strong presumption that the performance of England's counsel fell within the wide range of reasonable professional assistance, we find that this claim did not establish ineffective assistance of counsel. (2008 WL 4182027, at *9).

[R. 94 at 31 (citing *England*, No. 2007-CA-000935-MR, 2008 WL 4182027, at *9).]

England objects to this finding on a few different grounds. He contends that his attorney failed to investigate the possibility of making a motion to change the venue in the face of bad press, such as newspapers allegedly "stating that England had confessed to murdering Lisa," and failed to "preserve for appeal for a determination of whether the trial court abused its discretion." [R. 95 at 31.] He argues that prejudice was apparent "if the community for which potential jurors were to be selected to sit on England's trial had it in their minds, premised on the repeated newspaper articles claiming that England 'had confessed to the murder,' there was simply no need for them to even impartially consider any other evidence presented during the trial." [*Id.* at 32.] England also claims "[a]lways was there the reminder that the victim was white and the accused were black. This is still the South and prejudice runs strong in the veins of Kentucky." [*Id.* at 30.]

The Court agrees that England fails to explain how he was prejudiced by his counsel's decision not to seek a change of venue. As explained by the Magistrate

Judge, the state court's finding cannot be found as "unreasonable" because the Supreme Court has yet to provide a precise standard from determining when a change of venue is appropriate. *See Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (explaining that "[s]ection 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law"). The Supreme Court of Kentucky has stated:

> A corollary to the right to an impartial jury is that a change of venue may be constitutionally required where the jurors' "minds [are] ineradicably poisoned" by prejudicial publicity. In order to justify a change of venue on these grounds, a defendant must show that "there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced" him, though it is not enough "that jurors may have heard, talked, or read about a case."

Watkins v. Commonwealth, No. 2008-SC-000798-MR, 2011 WL 1641764, at *13 (Ky. Apr. 21, 2011) (citations omitted). Furthermore, "[g]reat weight is given to the trial court's decision because the judge is present in the county and is presumed to know the situation." *Stopher v. Commonwealth, 57* S.W.3d 787, 795 (Ky. 2001).

England provides no specific examples of how he was prejudiced that would have made it objectively unreasonable for his attorney not to move for a change in venue. For instance, England never claims that a juror

had to be excused due to any fixed opinions of guilt or that the trial court failed to excuse any biased jurors. *See*, *e.g.*, *Watkins*, No. 2008-SC-000798-MR, 2011 WL 1641764, at *14 (considering the percentage of excused jurors due to bias and the absence of any alleged error by the court in failing to excuse biased jurors in finding that the trial setting was not prejudicial). Mainly, England claims that the local newspapers suggested that he had confessed to murder. However, after examining the newspaper clipping exhibits cited by England, [R. 95 at 30 (citing Memorandum of Law and Fact in Support of RCr 11.42 Motion, Exhibits 1-29).], the Court found no such article.[11] England also claims that the newspaper articles provoked racism in the area, but he does not provide evidence or an explanation of how this affected the jury pool. Thus, England fails to prove that he was prejudiced by the publicity of the trial to the extent that his counsel's failure to move for a change of venue due to such publicity was objectively unreasonable.

In sum, England's objections to the Magistrate Judge's findings under Claim 25 are denied.

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[11] In one article, Detective John Saylor was quoted as claiming that England confessed to "taking part in the murder" during a taped interview. [*See* Memorandum of Law and Fact in Support of RCr 11.42 Motion, Exhibits 3.] However, none of the articles in the record claim that England confessed to murdering Halvorson.

O. Claim 26

In England's final claim, he argued that his rights under the Sixth and Fourteenth Amendment were violated when his counsel failed to move for suppression of the recorded conversations between England and Woodfork under 18 U.S.C. § 2511. [R. 95 at 34; R. 91 at 86-96.] The Magistrate Judge held that the claim is procedurally defaulted due to the state court barring the claim based on a state procedural rule. [R. 94 at 32.] Alternatively, the Magistrate Judge held that the state court's holding that there was no need for a court order under § 2511 was not contrary to Supreme Court precedent. [*Id.*]

In his Objection, England argues that his counsel was ineffective when he failed to move to suppress the recorded conversation between England and Woodfork. [R. 95 at 36.] England contends that "[a]cting as a KSP under cover and the color of law, Woodfork was not authorized to be in England's residence. . . ." [*Id.* at 34 (citing *United States v. Kam*, 468 U.S. 705, 706 (1984).] Furthermore, England asserts that the police were required to seek judicial approval before sending Woodfork to record conversations with England [*Id.* at 35-36 (citing *Gelbard v. United States*, 408 U.S. 41, 46 (1972).] Also, in response to the Magistrate Judge's finding of procedural default, England argues that he is authorized to present this claim in the context of an ineffective assistance of counsel claim. [*Id.* at 37 (citing *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006)).]

Even without considering the issue of procedural default, the Court agrees that the state court's finding was not contrary to Supreme Court precedent. The Supreme Court has stated: "Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." *United States v. Caceres*, 440 U.S. 741, 744 (1979) (citing *United States v. White*, 401 U.S. 745, 752 (1971) (finding that a police agent who conceals his police connections may record a conversation with electronic equipment without violating the other party's Fourth Amendment rights) (plurality opinion); *Lopez v. United States*, 373 U.S. 427, 437 (1963) (holding that an agent, who entered defendant's office with defendant's consent, did not violate defendant's Fourth Amendment's rights when he recorded their conversation); 18 U.S.C. § 2511(2)(c)). Moreover, §2511(2)(c) provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, *where such person is a party to the communication* or one of the parties to the communication has given prior consent to such interception."18 U.S.C. § 2511 (emphasis added). As it is undisputed that Woodfork was a party to the conversation, [*See* R. 95 at 34, 36; R. 94 at 32], the recording of Woodfork and England's conversation was lawful. *See* 18 U.S.C. § 2511. Despite England's contention, the fact that England was unaware that he was being recorded has no effect on the legality of the recording. *See White*, 401 U.S. at 752; *Lopez*, 373 U.S. at 437.

Furthermore, the Court finds that the Supreme Court cases cited by England to support his arguments are distinguishable from the matter at hand. First, England cites to *United States v. Karo* as support for the contention that "[a]cting as a KSP under cover and the color of law, Woodfork was not authorized to be in England's residence. . . ." [R. 95 at 34.] In *Karo*, the Supreme Court held that the warrantless installation of a monitoring beeper did not violate any one's Fourth Amendment rights; however, *the monitoring of the beeper* did violate privacy interests under the Fourth Amendment. *Karo*, 468 U.S. at 716. Here, no device was secretly installed in England's home and monitored by the police.

Also, England cites *Gelbard v. United States*, to support his argument that the police were required to seek judicial approval before sending Woodfork to record conversations with England [*Id.* at 35-36.] In *Gelbard*, the Supreme Court held that § 2515 is an available defense to a contempt charge when the defendants refused to testify about their conversations recorded via an allegedly illegal wiretap on the telephone. 408 U.S. at 51. However, unlike this case, the agent who intercepted the communication in *Gelbard* was not a party to the conversation, as required under § 2511(2)(c). Thus, both cases are distinguishable from the situation before the Court.

In sum, England's objections to the Magistrate Judge's findings under Claim 26 are denied.

P. Certificate of Appealability (COA)

Before England may appeal this Court's decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

At the end of each of the seventeen claims listed, England requests that a COA be issued. However, in accordance with the Court's analysis under each claim above, the Court finds that reasonable jurists would not find the district court's assessment of the constitutional claims to be debatable or wrong. Thus, a COA for these claims is DENIED.

CONCLUSION

In sum, the Court has "ma[d]e a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). For the reasons set forth above, the Court **ADOPTS** the Magistrate Judge's Findings of Fact and Conclusions of Law, [R. 94], consistent with the analysis set forth in this

Memorandum Opinion. Therefore, England's Objections to the Magistrate Judge's Recommendations, [R. 95], are **DENIED**. England's request for a Certificate of Appealability on each of these claims listed herein is **DENIED**.

[SEAL]

cc: Counsel of Record

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/s/ Thomas B. Russell

Thomas B. Russell,
Senior Judge
United States
District Court

September 11, 2018

COMMONWEALTH OF KENTUCKY
GRAVES CIRCUIT COURT
Indictment No. 01-CR-00068

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

STEVE ENGLAND DEFENDANT

TRANSCRIPT OF AUDIO TAPE TITLED "STEVE ENGLAND INTERVIEW 3-30-01"

Detective John Saylor
Detective Eric Walker
Kentucky State Police
Post 1
Hickory, Kentucky

Sergeant Steve Hendley
Mayfield Police Department
Mayfield, Kentucky

Stevie England

March 30, 2001
Kentucky State Police
Post 1 Headquarters
Hickory, Kentucky,

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[1] SAYLOR: This is John Saylor with the Kentucky State Police. The date is March 30th of 2001. The time is 1710 hours. We are in the conference room of Post 1 Mayfield, and I'm speaking to Mr. Steve

England. Steve, like I said I am required to read you your rights. You do have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you can't afford one, one will be appointed for you. Do you understand those rights.

ENGLAND: Yes, sir.

SAYLOR: Just, just coming in the room is Sgt. Steve Hendley with the Mayfield Police Department, who will be sitting in on the interview with Mr. England. Is it England or English?

ENGLAND: England.

SAYLOR: England. Okay. Alright. Lets see here. Are those loose enough?

ENGLAND: Yeah, they're fine.

SAYLOR: Let me get some information from you real quick, Steve. Is it Steve, Steven or?

ENGLAND: Stevie. S T E V I E.

SAYLOR: Stevie?

ENGLAND: Yeah.

SAYLOR: Oh, okay. S T E V I E?

ENGLAND: Um hmm.

SAYLOR: And what's your middle initial Steve?

ENGLAND: L.

SAYLOR: E N G L A N D?

ENGLAND: Um hmm.

SAYLOR: And I don't even know what address we . . .

ENGLAND: 701 West Water.

SAYLOR: What's your date of birth, Stevie?

[2] ENGLAND: 11, 15, 60.

SAYLOR: That makes you . . .

ENGLAND: 40 years old.

SAYLOR: Yeah. Okay. And can I get your social security number please.

ENGLAND: XXX-XX-XXX.

SAYLOR: How are tall are you, Steve?

ENGLAND: About six two and a half. Weight about two thirty-five.

SAYLOR: Now, do you have any scars, marks, tattoos or mutation?

ENGLAND: I got a tattoo.

SAYLOR: What kind of tattoo?

ENGLAND: Tribal with an E in the middle of it. Its called a Tribal and its just got my middle, my last intial. And scars, I got scars all over me.

SAYLOR: Alright. And you want anything to drink or anything before we start.

ENGLAND: Yeah, I am kind of thirsty.

SAYLOR: Yeah, what do you want?

ENGLAND: Oh, just, water'd be fine.

SAYLOR: Just water? I can get you a Coke or something.

ENGLAND: Coke.

SAYLOR: Coke?

ENGLAND: Yeah, Coke'd be fine.

HENDLEY: Don't want no Diet Coke.

ENGLAND: Un umm.

HENDLEY: Can't have that.

SAYLOR: You said you got a lot of scars. Any that really stand out?

[3] ENGLAND: No. No, I got a, I ruptured my Achilles tendon. I think it was on this leg.

SAYLOR: You played football with Bubba didn't you?

ENGLAND: Yep. Little bit of everything. Baseball, basketball. Little bit of everything.

SAYLOR: He said he – you play at Mayfield?

ENGLAND: I played at Mayfield for like two years. Well, all through school. I went to Sedalia my last two years.

SAYLOR: Oh yeah, yeah. Okay. Lets see. You said you had three kids?

ENGLAND: Yeah.

SAYLOR: How old are your kids?

ENGLAND: My oldest son is 15. My youngest – my daughter's 14. I got one that's like 12, 11.

SAYLOR: 15, 14, 11.

ENGLAND: Yeah, my oldest son, he's playing, he's playing basketball. He's starting for Mayfield right now.

SAYLOR: Oh, is that right?

ENGLAND: Yeah. Thank you, Bubba. I appreciate that.

SAYLOR: Hang on just a second.

HENDLEY: Always wipe my tops off, man. I don't never know who's handling . . .

ENGLAND: Ain't that the truth.

HENDLEY: You see, uh, you heard where they found Aubrey?

ENGLAND: Yeah, I heard that this morning, yeah. Man.

HENDLEY: Man it was ugly.

ENGLAND: Was it? You seen it?

HENDLEY: I was out there. That body was bloated. I bet, I bet – as far as looking at him, he looked like he weighed three and a half.

[4] ENGLAND: God, man.

HENDLEY: I tell you how big it was. You could sit, you could stand on the bridge, and I could have showed it to you. He was hung up on a tree, and it looked like a sand barge.

ENGLAND: Unh unh unh, nasty. That's terrible, man.

HENDLEY: Yeah, it is.

ENGLAND: Terrible stuff like that, man.

HENDLEY: Yep.

ENGLAND: I don't know what the motive was, I mean, whatever it was, its not worth taking nobody's life. That's all I'm gonna say about that.

HENDLEY: You know, course, I don't know, they, they probably had a good (inaudible), but that pretty much aired.

ENGLAND: That done it right there, didn't it?

HENDLEY: Yeah, pretty much. But see they got, we had people calling up saying "oh man, did he

get" – we had one guy call on Crimestoppers and said Aubrey was in, had flown to Las Vegas and was getting plastic surgery to change his identity. Let me tell you.

ENGLAND: Boy, I tell you what. I hate to say this, but, man, what happened to your buddy?

HENDLEY: Which one?

ENGLAND: Ronnie.

HENDLEY: Hey, man.

ENGLAND: I'm gonna tell you something. This is, is me and you talking. The night that they arrested me, we's standing out there in front of my house? If I'd known about that about that VCR you know what I would have said? Yell would have probably got mad. I'd have said "please don't let man take that VCR."

HENDLEY: Hey, when you're dirty man you got to, and you know.

ENGLAND: Man, that' don't, but it don't make sense.

HENDLEY: No.

[5] ENGLAND: Nothing like that. That's just pity. I mean it don't, that don't make no. That was pity.

HENDLEY: Well, see, as far as that, that wasn't nothing compared to what the damn (inaudible) investigation got on him. And then (inaudible)

ENGLAND: Yeah, but Bubba what I'm saying is, I mean know ya'll got a job to do, I understand that, you know what I'm saying?

HENDLEY: Right.

ENGLAND: But don't do something, don't be dirty and then turn and punish somebody else.

HENDLEY: Exactly.

ENGLAND: You know what I'm saying? I mean I don't have no problem with you doing your job, you know what I'm saying.

HENDLEY: But I . . .

ENGLAND: And I'll cooperate with you, but don't go out and do something, you know what I'm saying, and then turn around and, and.

HENDLEY: And then me be out here selling stolen stereos. I want to tell you, man, I told, I told some dudes before it ever happened, I said you, you can't treat people the way he treats people and it not come back and hit you.

ENGLAND: Um hmm.

HENDLEY: And it sure did. Sure did.

SAYLOR: Okay, joining, joining us on the interview is Sergeant Eric Walker out of Unit 186 for the Kentucky State Police. Um, lets see, Stevie I think I've got all your personal information. I'm going to get right to why you're out here.

ENGLAND: Okay.

SAYLOR: Okay. I'm going to tell you what we know. We know that you were present when Lisa Halvorson was killed. We know you were paid money to do it. Um, we know how it happened. We know it was staged to make it look like she was run over by her own vehicle. We know that Ty also promised you some [6] more money after it was done and you've not been paid yet, which may be good for you.

ENGLAND: Well, I'll be honest with you. I'll be honest with you. I don't know what you're talking about. I've never seen that woman. I don't know that woman. Me and Tyrone, we worked at the fire department together. We worked at Martin Marietta together. If Tyrone had paid me money wouldn't I have made bond? My bond was fifteen thousand dollars. Don't you think I would have made bond if he'd paid me fifteen thousand dollars or paid me what, anything.

SAYLOR: Well, you can't pay a fifteen thousand bond with one thousand dollars, which is what he paid you.

ENGLAND: No, I didn't receive any money from Tyrone. Like I said, Tyrone just come to my house in the summer time. We're friends and all that. And that's just, I mean that's the way it is.

SAYLOR: Well . . .

ENGLAND: Whatever somebody told you or whatever information you got, I don't know where you got it from.

SAYLOR: We know you have. We know you have. As a matter of fact, um, now, now is the time to be, to be straight with us. We've already talked to the prosecutor, David Hargrove, on this.

ENGLAND: Um hmm.

SAYLOR: And there's, there's room open for some leeway on it There's, if, if you want to cooperate with us, now i the time, but I, I'm not bluffing. I'm not. I'm telling you the truth. We've got you.

ENGLAND: Well, I mean you know, I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about. I'll just be honest with you. Like I said, me and Tyrone are friends. I've never seen that woman in my life.

(Taped conversation is played)

SAYLOR: That's enough.

ENGLAND: I don't have no shoes. I don't know, you what I'm saying. I don't know. I don't know. You know what I'm saying.

[7] SAYLOR: Here's what's going to happen. We're, we're looking for Tyrone right now, and he's going to say its all you.

ENGLAND: I don't know nothing about kill, I don't know, like said I ain't gonna do nothing to nobody. I've not killed anybody. I don't know that woman. I wasn't there in on that. You know what I'm saying? I don't nothing about it. I will say this, and this is all I'm

gonna say. Yeah, he approached me with that, but I didn't. I didn't do nothing about it.

SAYLOR: What did he say when he approached you?

ENGLAND: Basically right there, but I didn't, you know what I saying.

SAYLOR: Well, what did he say exactly?

ENGLAND: I, I ain't gonna say nothing about it. I ain't gonna say nothing about it. I mean . . .

SAYLOR: Then you're going to go down for Tyrone?

ENGLAND: I'm not going down for nobody. I, like I said I . . .

SAYLOR: Do you want to hear what's on the rest of this tape?

ENGLAND: No, I'm not gonna go down for nobody. I don't know nothing about killing nobody. I haven't done anything I'm just gonna tell you I don't know nothing about this.

SAYLOR: Well, Steve, the reason that we brought you out here and the reason we didn't just immediately tell you you were under arrest and take you straight to jail is because we thought you might be smart enough to try to work your way out of this instead of pulling this crap about "I don't know".

ENGLAND: Well, what I'm saying is . . .

SAYLOR: Because we know you do know.

ENGLAND: What I . . .

SAYLOR: You want me to pull out the pile of tapes we got on you? Okay? We've been watching your every move for about the past week, listening to every word that you been saying. Okay? And if you're going to sit here and deny it, then we're just going to go ahead and take you and lock you up and let the Court sort it out.

[8] You want to work something out, let's work something out. Now, this man right here, you've known for how long?

ENGLAND: For years.

SAYLOR: Okay. Ask him if we don't have you over a barrell. Ask him if we don't have you by the short hairs?

ENGLAND: So what do I need to do. I don't want to go to jail again tonight. Man, I can't take no more.

HENDLEY: Stevie, listen to me. Listen to me.

ENGLAND: I can't take no more of this, man. Go ahead.

HENDLEY: I'm telling you this as a friend, alright? Forget the badge. You need to tell them what happened. You need to tell them about the deal with Ty, because, now, this is punishable by death. Okay?

ENGLAND: Um hmm, I know.

HENDLEY: Now, and I'm gonna, I'm looking straight in the face.

ENGLAND: Right.

HENDLEY: We know. Okay? They got it on tape, you know, how it happened, what your part was. This is your chance. Now, these boys ain't like me. They don't give you but one chance to talk, and that's what they're giving you right here. You can lawyer up or whatever. But if you don't cooperate and tell them your side, because I keep saying when he picks up Ty, Ty's gonna say that you done every bit of it. I'm telling you, Stevie, Ty's gonna blame every bit of it on you. And this is, this gonna be the only chance that you got to take up yourself. Man, we got, we got six, seven, ten tapes of people how it happened, where you was at. I'm telling you as a friend. I played ball with you. They got you You looking at the death penalty. I realize that you got some other charges. Those are Mickey Mouse, Stevie. This ain't Mickey Mouse, buddy. The reason I'm here, because I told them I said, "hey, I grew up with the boy. He's a, he's a friend of mine. We're on a different side of the law, so to speak, but that, that to me, that don't draw a line. I still consider you a friend. I'm telling you as a friend, you need to talk to them, buddy. You need to talk.

ENGLAND: Okay, I'll talk. I just, I'll just tell you what I know. You know, I, excuse me a minute.

[9] HENDLEY: Take your time. But now listen to me, when you start, like I said, tell them the truth, cause they, they can tell you. I, I'll tell you this, and I promise you this, give you my word, they can tell you everything that happened and what you did and what he did, the whole story. so, that's why I want you to tell the truth. Don't, they're not going to sit here all night and listen to you make up a story. When you start talking, I want you to tell them the gospel truth, cause I'm telling you, Stevie, this is gonna be the only shot you got.

SAYLOR: We have talked to the prosecutor, Stevie. You can ask Bubba. We've talked to him. There's, there's one deal. There's one deal. Okay?

ENGLAND: What is it?

HENDLEY: And you cooperate.

SAYLOR: If you cooperate, one of these days you might get to see your kids again.

ENGLAND: Oh, man. Oh, man.

HENDLEY: Listen to him, Stevie. Here's what he's telling you.

ENGLAND: Oh, man.

HENDLEY: If you take this on your own, you know what will happen? The County Attorney is going to seek the death penalty on you, buddy.

ENGLAND: Man.

HENDLEY: I'm telling you this as a friend. I ain't telling you this . . .

ENGLAND: Am I going back to jail tonight? I want to see my daddy one more time.

HENDLEY: We'll work, we'll work on that. Okay?

SAYLOR: We might be able to work something out.

HENDLEY: We'll work on that.

SAYLOR: Is your dad sick?

ENGLAND: My dad is sick, man.

SAYLOR: Okay, we might be able to work something out.

[10] ENGLAND: I don't want to go back to jail again. Man, I'm just. Man. I, I, I mean I'll come, I'll tell you what you want to know.

HENDLEY: Start from the beginning.

SAYLOR: Start from the beginning.

HENDLEY: And tell everything, Stevie.

ENGLAND: And then I'm going to tell you, I mean, I don't want See, I don't want to get in no trouble. I mean my lawyer. I don't know. I don't know if I should be talking or not. I don't know. I don't know what to do.

HENDLEY: I'm telling you as a friend, and you can talk to your lawyer, but I'm telling you as friend, you need to cut a break. You're not in the position to lawyer up and say "I ain't saying nothing" because they've got enough to take you on your own. And you know as good and well as I do, the minute you drove off in that cruiser and people seen you, now if Tyrone gets word that you got picked up again, if he thinks for one minute its got to do with this, we'll be getting post-cards from Tyrone in Tiajuana. You know that as well as I do.

ENGLAND: All I'm going to say is, well.

HENDLEY: Start from the. start.

ENGLAND: I'll tell you. I'll tell you. This is what happened. He picked me up. I rode with him to the house. Okay. They were arguing. I know that much. They started, they got into it, they started fighting, whatever. I tried to pull him off her. I didn't know he was going out there for that reason. I'll be honest with, cause he said he had to go pick his little girl up or something is what he told me. You know? And after that I'm going to tell you what I done. After I tried to pull him off of her I got back in the truck. And then evidently he did what he had to do. I didn't want no part of it cause I didn't know he was going to do that. Then I came back, we came back home. He took a shower at my house and that, and got rid of his clothes and stuff.

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RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0328-MR
AND
2004-SC-0506-TG

STEVIE LYN ENGLAND — APPELLANT

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
01-CR-00068

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Steven England was convicted of complicity to murder Lisa Halvorson. The jury sentenced him to life without parole after finding the aggravating circumstance of committing the crime for profit.[1] England appeals to this Court as a matter of right.[2]

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[1] KRS 532.025(2)(a)(4). The aggravating factors located in KRS 532.025(2) act to enhance a convict's sentence when the conviction was for an offense that authorizes the death penalty. In this case, England was convicted of complicity to commit murder, which is a capital offense. When one is convicted of complicity she is sentenced as if she had committed the crime herself. KRS 502.020. Murder is a capital offense. KRS 507.020(2).

[2] KY CONST. § 110(2)(b).

On or about July 7, 2000, England ended the life of Lisa Halvorson in her front yard. Lisa died from blunt-force trauma to the neck, and her body was bloodied and bruised from being strangled and run over by a car, among other things. England raises fifteen claims that this Court should grant him a new trial. Discerning no reversible error, we affirm the conviction.

I. Facts

Lisa Halvorson was found dead on July 10, 2000, by her mother and her sister. She was found in the gravel portion of her driveway, and had been lying there for about three days when she was found. It was later determined that Lisa died of asphyxia. The Kentucky State Police identified Cori Poindexter, a friend of the victim, as being the last person to see Lisa alive late on the night of July 7.

The police searched the home of Lisa's boyfriend, Tyrone McCary, and collected evidence from his body. That search did not lead to any evidence that merited his arrest. The police then focused the investigation on Lisa's former husband, Pat Halvorson. Halvorson's employees were interviewed in late 2000, and Halvorson himself was questioned in February 2001. The KSP also attempted to obtain more information regarding the life insurance policy Halvorson had on Lisa. However, while the KSP was conducting this investigation, Karl Woodfork contacted the KSP and informed a detective that he had information about Lisa's murder.

After meeting with Woodfork, the KSP wired him for sound and sent him to England's house with instructions to record discussions about the murder. During those taped conversations, England made statements that were sufficient to warrant further questioning.

England was brought in for questioning on March 30, 2001. During the interrogation England asked whether he should be talking and asked whether he should talk to his lawyer. His lawyer was not called, and England gave an inculpatory statement about the incident. He said that he and McCary went to Lisa's home at dusk where McCary repeatedly choked, beat, and ran over Lisa with a car. England admits that he punched Lisa in the jaw, knocking her to the ground. But he insists that he did not participate in the murder, and that he even tried to persuade McCary to stop. When McCary disregarded his entreaty, England went to the truck to wait for McCary. England claimed that they left her alive at the end of her driveway. Incidentally, Lisa was found dead where England said they left her. England was tried separately from McCary on November 6, 2002. He was convicted of complicity to murder, and sentenced to life in prison without parole. Additional relevant facts will be discussed below.

I. Analysis

A. The statement

England asserts that the inculpatory statement he gave to the police while being interrogated should not have been admitted into evidence because his Sixth Amendment rights were violated or because his statement was a result of coercion on the part of the police. Either of his two theories would suffice to exclude this evidence. However, we find that the statement was properly admitted by the trial judge.

1. Right to counsel

England asserts that his Sixth Amendment rights were violated by the police when they continued to question him after he invoked his right to counsel. But England's Sixth Amendment right to counsel had not attached at the time England confessed to the crime because adversarial judicial proceedings had not commenced.[3] Therefore, his Sixth Amendment rights were not violated. However, even if England had claimed that it was his Fifth Amendment right to counsel that was violated, rather than his Sixth Amendment right to counsel, he still would not prevail. This is not a pedantic distinction. Though both the Fifth and Sixth amendments contain a right to counsel, the effect of those rights is very different.

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[3] Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996).

In any event, England had not unambiguously invoked his Fifth Amendment right to counsel. His confession was properly admitted at trial. Indeed, even cases cited by England do not support his contention. For instance, England cites to this Court Dean v. Commonwealth[4] wherein we held that the statement "[s]hould, should I, should I have somebody here? I don't know" insufficient to invoke his Fifth Amendment rights.[5] This was a response to the police-interrogator ensuring that Dean understood his Miranda[6] rights. In Dean the Court noted that this statement was ineffectual to invoke the right to counsel because it was not "unambiguous and unequivocal."[7] The same is true here. After being advised that he had the right to counsel, Detective John Saylor informed England that he was being questioned because of his role in the murder of Lisa. Detective Saylor told England that he knew that England was there when Lisa was killed and that England was paid money to do it. England responded that he did not know what Detective Saylor was talking about and that he did not know Lisa. Therefore, it was clear that England understood the reasons for which he was being interrogated. A little later, England responded: "I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about. I'll be

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[4] 844 S.W.2d 417 (Ky. 1992).

[5] Id. at 420.

[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] Dean, 844 S.W.2d at 420.

honest with you. Like I said, me and Tyrone are friends. I've never seen that woman." After further questioning England said, "I don't want to get in no trouble. I mean my lawyer. I don't know."

These are not unambiguous and unequivocal invocations of the right to counsel. The United States Supreme Court held in Davis v. United States[8] that the words "maybe I should talk to a lawyer" are insufficient to invoke the right to counsel because the statement is equivocal. And contrary to England's assertion that mentioning that he had an attorney to Detective Saylor – "my lawyer" – was sufficient to invoke the right to counsel, the mere hint that a defendant has an attorney in another matter does not constitute a request for counsel in the present issue.[9] In essence, England merely said that I guess you will have to call my lawyer and I don't know if I need my lawyer because I don't want to get into trouble. We hold that these statements do not rise to the level of impressing upon the interrogator that the suspect has requested an attorney before continuing the questioning. The statements were properly admitted at trial.

2. Coercion

Second, England also argues that his confession to the police was involuntary because he was coerced. Consequently, he argues, his conviction should be overturned because the evidence should have been

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[8] 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

[9] See, e.g., Delap v. Duager, 890 F.2d 285 (11th Cir. 1989).

excluded at trial. There are three criteria that must be present for a confession to be deemed involuntary such that it should be inadmissible as evidence. First, the police activity should be objectively coercive. Second, the defendant's free will must be overwhelmed by the coercive activity. Finally, the coercive activity must be the crucial motivating factor behind the defendant's confession.[10]

To show that his confession was coerced England argues that the police promised him that if he cooperated the death penalty would be taken off the table and that he might see his kids and sick father again. He also claims that use of a false-friend during the interrogation constituted coercion.

First, we do not agree that the statements made by the interrogators with regard to the death penalty and England's family constitute coercion. The comments about the death penalty did not tell England anything he did not already know. The police had already informed England of the reason for his being questioned, and had already played a tape of England talking with Woodfork making inculpatory responses. This would lead anyone to understand the gravity of the situation. In fact, England said that he knew Lisa's murder could be punished by the death penalty when the police informed him of this fact. And the police were not telling England anything that was illegal or

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[10] Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 2000). See also Colorado v. Spring, 479 U.S. 564, 574, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987).

untrue. The death penalty could legally have been sought upon a conviction for the murder. Therefore, we do not agree that these comments amounted to objective coercion on behalf of the police such that England's confession should have been excluded.

Second, the false-friend technique is often used to make the suspect feel more at ease so that he will not feel intimidated by the situation. This technique does not amount to coercion in most circumstances. While there are situations when using a false-friend could amount to coercion, such a situation is not present here. Sergeant Hendley and England played on the same athletics teams in high school, which was more than twenty-five years earlier. Furthermore, there was no evidence in the record that the two had continued a friendly relationship after high school. This is not the type of relationship one would consider as inherently coercive. It is, rather, more akin to a good cop, bad cop routine. And there is nothing in the record that would show that Hendley's role in the interrogation was objectively coercive.

Additionally, England's will was never overcome by any allegedly objectively coercive actions on the part of the police. He made a reasoned determination to cooperate with the police after being presented with the evidence already compiled against him. In sum, we affirm the trial court's ruling to admit the confession because it was not coercively obtained.

B. Death penalty as an option

England asserts that the death penalty should have been taken out of the realm of potential penalties because he relied on an offer by the Commonwealth when he confessed to the crime. However, there never was an offer to England. It is true that the interrogators noted that the death penalty was an option, and it is also true that the interrogators said they had talked to the prosecutor and there was only one deal. But England puts words into the interrogators' mouths when he states that the deal was that the death penalty would not be pursued. The prosecution is not required to be absolutely honest with the suspect, and since there was no true offer upon which England could rely, we affirm the trial court's ruling that the prosecution was properly allowed to seek the death penalty in England's trial.

C. The restraining order affidavit

England further asserts that information contained in an affidavit in support of an Emergency Protective Order against his co-conspirator should have been excluded, and its admission was reversible error. England is correct insofar as he contends that this evidence is inadmissible because it does not meet any exceptions to the hearsay rule, is inherently unreliable, and violates his Sixth Amendment right "to be confronted with the witnesses against him."[11] This Court

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[11] U.S. CONST. amend. VI. See also Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

has made it abundantly clear that statements made for the purpose of obtaining a restraining order are not admissible at trial.

In both Bray v. Commonwealth[12] and Barnes v. Commonwealth[13] we said that affidavits for restraining orders were inadmissible hearsay because they were offered to prove the truth of the matter asserted – that the defendant had made a threat against the victim's life. And the facts of this case present distinctions without a difference. For example, the statement in Barnes, given by the victim, stated that the defendant had assaulted and threatened to kill her. The same is true here, except that it was against a co-conspirator of the defendant rather than the defendant himself. Lisa's statement was that McCary threatened to kill her or get someone to do it for him. Additionally, neither statement was subject to cross-examination. The distinction here is that the evidence regarding the restraining order was not against the defendant, but rather against the defendant's co-conspirator, Tyrone McCary. We see no meaningful difference in using this hearsay evidence against the defendant and in using it against a co-conspirator of the defendant. In both cases the evidence was used to establish intent by proving a threat had been made. This violates the hearsay rule regardless of whether the matter asserted was about the defendant or a co-conspirator. The Commonwealth's contention that the evidence was not against the

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[12] 68 S.W.3d 375 (Ky. 2002).

[13] 794 S.W.2d 165 (Ky. 1990).

defendant may be germane as to relevance, but not as to hearsay. As England was being prosecuted for complicity with McCary in the murder of Lisa Halvorson, and proof of McCary's intent was an element,[14] hearsay evidence that would have been error against McCary is also error against England.

Therefore, we reaffirm and extend the Barnes doctrine,[15] which is that an affidavit in support of a motion for a restraining order is not admissible at trial regardless of whether the defendant on trial is the person against whom the restraining order was sought.[16]

Of course, to overturn England's conviction, the improperly admitted evidence must have been prejudicial to his case. The Kentucky Rules of Evidence state that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party has been affected."[17] And in Crane v. Commonwealth we noted that one's substantial rights are affected when there is a "reasonable possibility that absent error the verdict would have been different."[18] We now turn to the harmless error inquiry.

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[14] KRS 502.020.

[15] Id.

[16] Obviously, this evidence may be admitted for other reasons provided that the hearsay and relevance rules are satisfied. For instance, it may be used under KRE 801A as a prior statement of a witness.

[17] KRE 103(a).

[18] 726 S.W.2d 302, 307 (Ky. 1987).

If ever there were evidence that (put into the context of the particular facts of the case) failed to satisfy the "verdict would have been different" standard required for reversal, it is here. Simply put, had this evidence been excluded from the jury's consideration no different result could have logically been reached. The prosecution had a taped confession with England admitting participation in this crime. This evidence is corroborated by both the circumstances of the murder and the crime scene, and is enough to deem the admission of the affidavit against England's co-conspirator harmless. But there is more. The prosecution also introduced competent evidence of a taped conversation between England and Karl Woodfork. In March 2000, Woodfork contacted the police and informed it that he had information regarding Lisa's murder. After telling the police that McCary had sought to hire him and England to murder Lisa, Woodfork agreed to record conversations with England. In those conversations, which were played for the jury, England said McCary had not paid money owed to him and considered ways to coerce McCary to pay him the money.

With this abundance of evidence, we hold that the improper admission of the affidavit was harmless, as the jury would not have returned a different verdict had the evidence been excluded.

D. Motion to sever trials

England next asserts that granting the Commonwealth's motion to sever the trials of England and

McCary was reversible error. England argues that the Commonwealth failed to meet its burden for severance, and that he was prejudiced because had he and McCary been tried jointly the most England could have been convicted of was assault. This contention is based on the fact that at a joint trial the Commonwealth would not have been able to use any portions of England's confession that referred to McCary.[19] This only proves the Commonwealth's argument that it would have been prejudiced had its motion to sever the trials not been granted. In fact, this is a picture-perfect case for the efficacy of severing trials. Here there are two defendants who conspired to murder. Without severance, one's confession could not have been fully used against him to avoid violating the constitutional rights of the other.

Furthermore, England made a motion to sever the trials one week before the trial was scheduled to begin on September 3, 2002, which shows that he must not have seriously objected to severance. From the foregoing, the trial judge did not abuse his discretion in granting the Commonwealth's motion to sever the trials of England and McCary.[20]

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[19] Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[20] See Boggs v. Commonwealth, 424 S.W.2d 806 (Ky. 1966) (holding that there should be no reversal of a judge's ruling to sever in the absence of an abuse of discretion).

E. Right to employ a criminologist

England next claims that his conviction should be reversed because he was denied sufficient public funds to employ a criminologist. The criminologist was purportedly going to testify that the body was moved after death, that Caucasian hairs were found in Lisa's hands and panties, and that the sperm found in Lisa's vagina did not come from either England. or McCary. However, this evidence, except for movement of the body, was presented at trial from other witnesses. The only facts that the criminologist was to testify to that could merit reversal is that the body was moved after death. However, upon England's motion for the Commonwealth to pay for a criminologist, the trial judge disallowed the employment of the criminologist because the cost was an unreasonable $3,500 per day. The judge stated that England could submit other names, but England failed to do this. Instead, England requested that the state pay for the purchase of a forensic pathology treatise, which was granted by the trial court. There was no reversible error.

F. Statements of the victim

England next contends that it was improper to allow Cori Poindexter to testify about statements made by Lisa during a telephone conversation she overheard between Lisa and McCary. Poindexter testified that during the conversation McCary accused Lisa of having an affair, that Lisa responded by crying and refusing to eat, and that Lisa told her that McCary had said

if he could not have her, nobody would. England appeals from the admission of this evidence because it is not relevant and violates the hearsay rule.

Hearsay is a statement by a declarant, other than one made while testifying at trial or at a hearing, offered to prove the truth of the matter asserted.[21] There were three statements about which Poindexter testified. First, Poindexter testified that she overheard McCary accuse Lisa of having an affair. This statement is not hearsay. The matter asserted was that Lisa was having an affair, and it was not offered by the Commonwealth to prove the truth of it. It was ostensibly used, rather, to show the general belligerency McCary had toward Lisa at a time near to her murder. Second, Poindexter testified that Lisa cried and refused to eat in response to the conversation with McCary. This, too, is not hearsay. To be hearsay, there must be a statement. A statement is defined in KRE 801(a)(2), and it requires that the statement be intended as an assertion. Crying is not an assertion. Rather, it is a physical manifestation of an emotion or sensation. It is not a statement for hearsay purposes. However, even if crying were intended as an assertion and offered to prove the truth of whatever was asserted – thereby implicating the hearsay rule, it would still be subject to admission into evidence as a statement of Lisa's then-existing emotional condition of mental feeling or pain.[22] Finally, Poindexter testified that Lisa told her

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[21] KRE 801(c).

[22] KRE 803(3).

that McCary told her that if he couldn't have her, nobody would. This is hearsay. The declarant was Lisa, and the matter asserted is that McCary said that nobody would have her if he couldn't.[23] However, this statement is admissible under the spontaneous statement exceptions to the hearsay rule, present sense impressions[24] and excited utterances.[25] The underlying premise behind these exceptions is that they are inherently reliable because they are contemporaneous with the observation, safe from defects in memory, and unlikely to result from calculated thought. Lisa's statement described what McCary said immediately after their phone conversation ended. Thus it qualifies as an exception under KRE 803(1). Furthermore, Lisa's statement was an excited utterance because McCary's statement that he would not let anybody else have her if he couldn't precipitated a startling event to Lisa, and her statement to Poindexter relating to McCary's threat was made immediately after the phone conversation while she was crying. Therefore, the trial court

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[23] It is important to note that the matter asserted is not that nobody would have Lisa if McCary couldn't, but that McCary said those words. Lisa is the declarant, not McCary. Had the declarant been McCary, then this statement would not be hearsay because the statement was not offered to prove that Lisa would not be had by anyone but McCary. Rather, the statement was offered to prove that McCary made that threat.

[24] KRE 803(1).

[25] KRE 803(2).

did not abuse its discretion,[26] and the statement was properly admitted.

Second, this evidence meets the test of relevance. The Commonwealth was charged with the burden of proving that England conspired with McCary to kill his ex-girlfriend, Lisa. The trial court allowed this statement into evidence after considering its relevance, noting that evidence that McCary threatened Lisa the day of the murder and that Lisa was scared of McCary goes to the Commonwealth's theory.

England further contends that the out of court statements should have been excluded because their probative value is substantially outweighed by the prejudicial effect.[27] We agree with the overwhelming precedent on this issue, that we should not disturb a trial court's KRE 403 ruling to admit evidence unless the trial judge has abused his discretion.[28] This deference is bestowed upon the trial judge because she is in a much better position to determine the prejudicial effect of particular evidence due to being infinitely more familiar with the case than are appellate judges. In light of the deference given to the trial court, we affirm this ruling of the trial court.

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[26] See Souder v. Commonwealth, 719 S.W.2d 730 (Ky. 1986) (trial court rulings regarding hearsay exceptions are entitled to deference).

[27] KRE 403.

[28] See Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.10 (3d ed. 1993) for a more thorough discussion of federal decisions regarding FRE 403.

However, even if we were to conclude that the trial judge abused his discretion in admitting this evidence, such an error would be harmless in light of the remaining competent evidence. As discussed above, the Commonwealth presented two audio tapes to the jury: in one England confessed to the crime at the police station, and in the other England made inculpatory statements to Woodfork.

G. African-Americans on the jury panel

England further asserts that his conviction should be overturned because there were not a sufficient number of African-Americans on the jury panel. England does not, however, assert any wrongdoing on the part of the judicial system. His only assertion is that the courts are required to ensure that African-Americans are represented in the jury panel, regardless of the results of the selection process, which is random. Here, the jury panel was randomly selected by computer from registered voters who also had a driver's license. This process resulted in two African-Americans being randomly selected to be on the jury panel. One of two was dismissed for cause because of a familial relationship with the defendant. The other was not dismissed for cause or peremptorily challenged, but was not seated on the jury because of the draw. Because there is not even a scintilla of evidence that African-Americans were systematically excluded from the jury panel, England is not entitled to reversal of his conviction. Simply put, one is entitled to a fair process whereby there is no systematic exclusion of qualified

candidates for the jury panel; but one is not entitled to a jury composed of a certain number of persons of a given race.[29]

H. Death-qualified jury

Similarly, England argues that his conviction should be reversed because jurors who were opposed to the death penalty should have been allowed to remain on the jury. It is well-settled law in this Commonwealth that a juror may be stricken for cause if she is unable to consider the death penalty when considering the sentence upon conviction of the defendant.[30] We hold that England's constitutional rights were not violated by excusing jurors who could not consider the death penalty as a sentence upon his conviction.

I. Tape transcripts used during closing argument

England's next assertion is that he is entitled to a new trial because the Commonwealth used enlarged, typewritten transcripts of portions of the audio tapes between England and Woodfork. The Commonwealth attempted to introduce this evidence as an exhibit during the proof phase of the trial, but the trial court

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[29] See Patterson v. Commonwealth, 555 S.W.2d 607 (Ky. App. 1977) (disproportionate number of young people on the jury panel did not establish *systematic exclusion*).

[30] E.g., Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994). See also 9 Leslie W. Abramson, Kentucky Practice § 25.49 (4th ed. 2003).

sustained England's objection because it was difficult to conclude what was said on the tapes and the interpretation was properly left to the jury. However, the trial court allowed this evidence to be used during the Commonwealth's closing argument because the prosecutor's closing remarks were the Commonwealth's theory of the case rather than evidence.

This was the proper ruling by the trial court. A party has the right to present his theory of the case to the jury as long as the evidence supports such a theory.[31] Appellant cites Sanborn v. Commonwealth[32] as support for his argument that giving the jury a transcript of an unclear tape recording is reversible error. However, the issue in Sanborn was whether it was reversible error to give the jury a transcript of such a tape recording during the proof stage of trial. Here the issue is whether a transcript is improperly presented to the jury during closing argument, not as proof but as a theory of the case. But this evidence is more akin to the transcript in Norton v. Commonwealth[33] than it is to Sanborn. The Court of Appeals, in affirming Judge (now Justice) Graves' decision to admit the transcript, noted in Norton that there is a difference in a transcript offered as evidence and one offered as guidance.[34] Also, there is no allegation of particularized errors in the Commonwealth's transcript. Such was

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[31] Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987).

[32] 754 S.W.2d 534 (1988).

[33] 890 S.W.2d 632 (Ky. App. 1995).

[34] Id. at 637.

not the case in Sanborn, where there were discrepancies even between the court reporter's transcript of the trial and the Commonwealth's transcript. We find that the trial judge did not abuse his discretion, and decline to extend Sanborn to include all instances where a transcript is presented to the jury when the tape is unclear.

J. Commonwealth's closing argument about instructions

England claims that his conviction should be reversed because he was prejudiced by the Commonwealth's improper closing argument. England argues that the Commonwealth's argument was in contradiction to the instructions given to the jury. The instructions stated that the jury could return a verdict of guilty if it believed that England killed her by "striking her, running over her with a truck, and causing her death by strangulation." During its closing the Commonwealth stated that the jury could return a verdict of guilty if it found that England engaged in one of those actions. The Commonwealth concedes that the prosecutor made the alleged statement. However, England did not make a proper objection to this statement. Pursuant to RCr 9.22, counsel must make a contemporaneous objection to any improper comment during closing argument. If counsel fails to so object, then a reviewing court will not reverse a conviction unless the comment rises to the level of palpable error, as enunciated in RCr 10.26.

The only question respecting this issue is whether there was palpable error, which exists when a reviewing court concludes that a substantial possibility exists that the result would have been different.[35] When taken as a whole, we find that the Commonwealth's closing argument was not palpable error. Had England properly objected to the comment he may have been entitled to some form of relief, such as an admonition. However, he did not, and we do not find palpable error.

K. Notice of aggravating circumstances

Furthermore, England claims that his conviction should be reversed because he did not receive notice of the Commonwealth's evidence of aggravation, which triggered the death penalty. However, KRS 532.025 does not require written notice to the defendant of the Commonwealth's evidence. It only requires that the defendant be made known of such evidence. Here, England was certainly made known of the aggravating evidence, which was that England participated in the murder of Lisa for profit. This was dealt with at the pre-trial suppression hearing, where England claimed that he had not received notice that the Commonwealth was seeking the death penalty. However, England had such notice. For example, England received the revised notice dated August 12, 2002, of aggravating circumstances sent to both him and McCary (his co-conspirator). England's argument that it does not

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[35] E.g., Jackson v. Commonwealth, 717 S.W.2d 511 (Ky. App. 1986).

reference him in the body of the notice is unpersuasive, as he was mentioned in the heading and the notice was sent to his attorney. In fact, England attached the notice to his motion and argued that such notice was not contained in the indictment.

This is not a novel proposition. In Francis v. Commonwealth[36] we held that it was not necessary for the defendant to receive written notice. What was important was that the defendant be apprised of the aggravating evidence and have the ability to prepare to meet it.[37] The same is true here. It is clear that England understood that the Commonwealth was seeking the death penalty, he understood the evidence upon which the Commonwealth was seeking the death penalty, and he had the opportunity to prepare to meet that evidence. In short, England had the type of notice KRS 532.025 contemplated. We decline this invitation to overturn his conviction.

L. Aggravating circumstances in the indictment

Closely akin to England's most previous argument, England asserts that because the aggravating circumstances were not included in the indictment the Commonwealth was prohibited from seeking the death penalty. However, this issue has been recently decided by this Court in Furnish v. Commonwealth,[38] a case in

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[36] 752 S.W.2d 309 (Ky. 1988).

[37] Id. at 311.

[38] 95 S.W.3d 34 (Ky. 2003).

which three opinions were written, but all agreeing to the pertinent issue in this case: aggravating circumstances need not be included in the indictment for the Commonwealth to seek the death penalty.[39] Like in Furnish, the indictment here clearly noted that England was being charged with "Murder, A Capital Offense" for "running over and strangling Lisa Halvorson." Moreover, England was made known of the specific evidence upon which it intended to seek capital punishment. Additionally, this was not preserved for review by a pre-trial motion as required by RCr 8.18, which was also the case in Furnish.[40]

M. Recorded conversations

England further contends (apparently without the agreement of his counsel) that the trial court should not have allowed the Commonwealth to introduce the taped conversation between himself and Woodfork. He claims that this is a violation of his Fourth Amendment rights, as applied to the states by the Fourteenth Amendment, and that he is entitled to a new trial. However, use of this type of evidence does not violate a defendant's Fourth Amendment rights. A defendant's conversations with a police informant do not violate the defendant's constitutional rights where the informant was legally in the place where the taped conversations took place and every conversation used by the prosecution was either directly with the informant or

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[39] Id. at 41.

[40] Id.

carried on with the defendant's knowledge of his presence.[41]

N. Exculpatory evidence

England's last claim for reversal of his conviction is that he was not given exculpatory evidence by the Commonwealth. Specifically, he contends that he was not informed that the sperm found in Lisa's vagina was from her boyfriend, Shannon Jenkins, that there was a Caucasian head hair found in Lisa's panties, and that there were Caucasian head hairs in her hands. However, England was aware of the crucial parts of this information prior to trial. For instance, he was aware that the hair in Lisa's hand was probably from a cat. As to the sperm found, England argued that the sperm taken from Lisa did not match either England or McCary. Also, England was aware that Jenkins stated that he recently had sexual intercourse with Lisa. In fact, the additional test taken with Jenkins' sample was done so the prosecutor could rebut a claim that the sperm could have come from Lisa's killer.

Therefore, all the evidence England claims could have given the jury a reasonable doubt was available to England: that the hairs and sperm did not match England or McCary. The trial judge's ruling is not to be disturbed absent an abuse of discretion,[42] and we hold

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[41] See e.g., Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).

[42] E.g., Anderson v. Commonwealth, 63 S.W.3d 135. 141 (Ky. 2001).

that it was not an abuse of discretion to deny a new trial. This is true especially in light of the competent evidence that England and McCary left Lisa to die in the exact location in which she was found. "It is clear that in order to warrant a new trial, the defendant must make a showing of reasonable certainty that a different verdict would have been reached had the evidence been presented."[43] Had the evidence been as England wishes, the result would not have changed. He was properly convicted on the competent evidence, and we see no reason to overturn that conviction.

Lambert, C.J., and Graves, Johnstone, Keller, Scott, and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

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[43] Id. (citing Carwile v. Commonwealth, 694 S.W.2d 469, 470 (1985)).