

CAPITAL CASE

No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

RANDY HAIGHT,

Petitioner,

v.

SCOTT JORDAN, WARDEN, KENTUCKY STATE PENITENTIARY,

Respondent.

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

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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Appendix A

No. 17-6095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 10, 2023
DEBORAH S. HUNT, Clerk

RANDY HAIGHT,

Petitioner-Appellant,

V.

SCOTT JORDAN, WARDEN,

Respondent-Appellee.

[illegible]

ORDER

BEFORE: GIBBONS, ROGERS, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

Appendix B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0025p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RANDY HAIGHT,

Petitioner-Appellant,

v.

SCOTT JORDAN, Warden,

Respondent-Appellee.

No. 17-6095

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 3:02-cv-00206—Gregory N. Stivers, District Judge.

Argued: June 24, 2021

Decided and Filed: February 9, 2023

Before: GIBBONS, ROGERS, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: John M. Bailey, Brentwood, Tennessee, Bruce P. Hackett, Floyds Knobs, Indiana, for Appellant. Matthew R. Krygiel, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** John M. Bailey, Brentwood, Tennessee, Bruce P. Hackett, Floyds Knobs, Indiana, for Appellant. Matthew R. Krygiel, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

The court delivered a PER CURIAM opinion in which STRANCH, J., joined except as to Section III.C. STRANCH, J. (pp. 49–69), delivered a separate dissenting opinion.

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OPINION

PER CURIAM. Petitioner Randy Haight, who was sentenced to death, appeals the district court’s judgment dismissing his 28 U.S.C. § 2254 petition for a writ of habeas corpus, raising twenty-three grounds on appeal. We affirm the judgment of the district court.

I.

In 1994, Haight was convicted of the 1985 robberies and murders of Patricia Vance and David Omer, who were found shot to death in the back of Omer’s station wagon in rural Garrard County, Kentucky. Haight, who had escaped from the Johnson County Jail several days before the murders, was captured in a nearby cornfield after a brief chase. During the chase, police officers discovered the victims’ possessions and both handguns used to commit the murders in a stolen pickup truck abandoned by Haight.

Haight initially pled guilty to the murders in exchange for the prosecutor’s recommendation of a life sentence without parole for twenty-five years on each count of murder and twenty years on each count of robbery, to be served concurrently. The trial court accepted Haight’s guilty plea but rejected the prosecutor’s recommendation and sentenced him to death. On direct appeal, the Kentucky Supreme Court vacated the conviction on the ground that the trial court should not have accepted a guilty plea premised on the parties’ “understanding” that the court would sentence Haight in accordance with the agreement when in fact the court retained discretion in sentencing. *Haight v. Commonwealth*, 760 S.W.2d 84, 89 (Ky. 1988) (“*Haight I*”). Haight then sought specific enforcement of the terms of the plea agreement, to no avail. *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) (“*Haight II*”), *cert. denied*, 507 U.S. 925 (1993). Haight was then allowed to withdraw his guilty plea and go to trial, which began in late January 1994.

Haight admitted to the murders from the witness stand during the guilt phase of trial. His defense was that he was suffering from “extreme emotional disturbance” at the time of the crimes. The same theory was presented at the mitigation phase to convince the jury to impose a

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sentence less than death. Haight maintained that at the time of his escape from jail several days before the murders, he was extremely emotionally and mentally disturbed due to his obsession with fellow inmate and escapee Mabel Music, a woman with whom he had a sexual relationship while in jail. After his escape with Mabel and another inmate, Haight embarked on a drinking binge, and Mabel abandoned him. Haight argued to the jury that due to his drinking and Mabel's departure, he was at the time of the shootings completely irrational, severely intoxicated, and extremely disturbed, all of which caused him to act impulsively. The jury rejected Haight's defense and found him guilty of both counts of intentional murder, both counts of first-degree robbery, and one count of possession of a firearm by a convicted felon.

The penalty phase began on February 1, 1994, immediately after the guilt phase was completed. Haight was sentenced to death for each murder, concurrent twenty-year terms of imprisonment for each robbery, and a concurrent five-year term for the firearm conviction. Haight's convictions and penalties were affirmed on direct review, *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996) ("*Haight III*"), *cert. denied*, 522 U.S. 837 (1997), and Haight was subsequently denied postconviction relief without discovery or an evidentiary hearing on any of his claims, including ineffective assistance of counsel. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) ("*Haight IV*"), *cert. denied*, 534 U.S. 998 (2001).

On April 12, 2002, Haight filed his petition for writ of habeas corpus and requested that the district court stay the habeas proceeding while he exhausted certain state claims not related to the ineffective assistance of trial counsel mitigation claim at issue. The district court stayed the federal action in November 2002. In state court, after briefing, the Kentucky Court of Appeals found it lacked jurisdiction to address the merits of Haight's unexhausted issues. Without specifying the basis for dismissal of each claim, the Kentucky Supreme Court refused to consider the unexhausted issues on one of two grounds: (1) that it had previously denied the issue in *Haight IV*, or (2) that Haight had failed to raise it in his initial state collateral proceeding. *Haight v. Commonwealth*, No. 2006-SC-000344-MR, 2007 WL 2404494 (Ky. Aug. 23, 2007) ("*Haight V*"). Haight returned to federal court and successfully moved to have the two now-exhausted issues included in his amended § 2254 petition. His habeas petition raised forty-five grounds for relief.

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When Haight returned to federal court in 2008, his petition was referred to a new magistrate judge for a Report and Recommendation. Haight filed a detailed motion and application for the appointment of experts pursuant to 18 U.S.C. § 3599(f). The magistrate judge denied the motion, and the district court upheld the denial. Haight moved for discovery and an evidentiary hearing, both of which were also denied by the magistrate judge. Haight's objections were overruled by the district court. *Haight v. White*, No. 3:02-CV-206-GNS, 2013 WL 5146200 (W.D. Ky. Sept. 12, 2013). Two years later, the magistrate judge recommended the habeas petition be denied. *Haight v. Parker*, No. 3:02-CV-206-GNS, 2015 WL 13548182 (W.D. Ky. July 17, 2015). Over Haight's objections, the district court adopted the Report and Recommendation, denied the petition for relief, and certified twenty-five issues for appeal. *Haight v. White*, No. 3:02-CV-206-GNS, 2017 WL 3584218 (W.D. Ky. Aug. 18, 2017). Haight appealed to our court and moved to certify ten additional issues for review. We granted the request as to one additional issue concerning the jury instruction on the defense of extreme emotional disturbance.¹ *Haight v. Hart*, No. 17-6095 (6th Cir. Aug. 22, 2019).

II.

We review the district court's dismissal of a § 2254(d) petition de novo and its factual findings for clear error. *Lovins v. Parker*, 712 F.3d 283, 293 (6th Cir. 2013). Under § 2254(d), the district court "shall not [] grant[] [a habeas petition] 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 . . .; 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 proceedings." "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 decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

¹In his appellate briefing, Haight appears not to pursue three of the issues certified by the district court. These are Ground 9 (failure to strike jurors and misadvising jurors) and Grounds 29 and 30 (impermissible funneling of jurors' discretion through the order of jury instructions). Even if language in Haight's 354-page brief arguably raises any of these issues, none of them provides a sufficient basis for reversing the district court.

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“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.* at 413. “As a condition for obtaining habeas corpus from a federal court, [the petitioner] 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.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (“AEDPA”), is a “purposefully demanding standard,” *Montgomery v. Bobby*, 654 F.3d 668, 676 (6th Cir. 2011) (en banc), and it requires that state court determinations “be given the benefit of the doubt,” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

When the state court denies a petitioner’s federal claim, “it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Richter*, 562 U.S. at 99. This “presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” *Id.* at 99–100. If the state court does not adjudicate a petitioner’s claim on the merits, we review the claim de novo. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

Haight raises many claims relating to his trial counsel’s ineffective assistance. To establish ineffective assistance of counsel, Haight must show that his counsel provided deficient performance and that the deficient performance prejudiced his defense so as to render the trial unfair and the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Focusing on the performance prong, the Supreme Court explained “[w]hen a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687–88. The reviewing court’s scrutiny of counsel’s performance is deferential; “the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. The reviewing court must “eliminate the distorting effects of hindsight” and should review the reasonableness of

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counsel's performance within the context of the circumstances at the time of the alleged errors. *Id.* at 689–90. To satisfy the prejudice prong, “[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

AEDPA adds an additional layer of review. It requires us to evaluate whether the Kentucky Supreme Court’s resolution of Haight’s ineffective assistance of counsel claims was “contrary to, or involved an unreasonable application of, clearly established Federal law,” § 2254(d)(1), or whether it “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,” § 2254(d)(2). *See Bell v. Cone*, 535 U.S. 685, 693–94 (2002). There is a “strong presumption” that counsel’s representation was “within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689 (citation omitted). When this presumption is combined with the deference required by § 2254(d), we must be “doubly deferential” to the state court’s ruling on counsel’s performance. *See Pinholster*, 563 U.S. at 190. However, if the state court “relied only on one Strickland prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the Strickland prong not relied upon by the state court,” and that prong receives de novo review. *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012).

III.

A. Issue 1: Whether trial counsel rendered ineffective assistance by not moving to strike juror Gaugh for cause (Ground 5)

During voir dire, juror Gaugh stated he would not consider Haight’s deprived background as mitigation evidence in the sentencing phase of trial. Haight argues that trial counsel’s failure to strike Gaugh for cause constitutes ineffective assistance. Haight raised this claim in his state postconviction petition, the denial of which was affirmed by the Kentucky Supreme Court. *Haight IV*, 41 S.W.3d at 446.

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Haight argues AEDPA deference should not apply to this claim because the state court did not decide this issue on the merits, and we agree. On direct appeal from his convictions and death sentence, Haight challenged the seating of several jurors, including Gaugh. But Haight acknowledged that he had not preserved an objection as to Gaugh, and the Kentucky Supreme Court rejected the claim as to all jurors:

[Haight] has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann and Gaugh. . . . This Court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court.

Haight III, 938 S.W.2d at 247.

Haight raised a claim of ineffective assistance in his state postconviction motion to vacate, arguing that counsel rendered ineffective assistance by not using peremptory challenges on three jurors, including Gaugh. Haight again cited Gaugh's refusal to consider the potentially mitigating evidence of his troubled background. Haight also asserted that he told counsel he wanted Gaugh removed from the jury. In denying this claim, the Kentucky Supreme Court stated: "The questions relating to [Gaugh] were rejected on direct appeal by this Court . . . when it held that the defense decision to reject objections to the juror was legitimate trial strategy." *Haight IV*, 41 S.W.3d at 446 (citation omitted). But *Haight III* did not address trial counsel's performance in failing to excuse Gaugh, nor was there a determination that this performance constituted legitimate trial strategy. As there is "reason to think" Haight's claim was rejected on a procedural ground and the Kentucky Supreme Court erroneously concluded it had already rejected the claim on the merits, AEDPA deference is not warranted. *Richter*, 562 U.S. at 99–100; *Cone*, 556 U.S. at 472.

We review Haight's ineffective assistance of counsel claim de novo. During voir dire, Gaugh agreed that he would "listen to all the evidence" and "consider and give effect to any sentence" he thought was appropriate within the range of twenty years to death. DE 188-2, Tr., Page ID 4043–44. Gaugh also agreed to consider and give effect to "mitigating circumstances . . . that might tend to lower the appropriate penalty," including if the "defendant was under the influence of extreme emotional disturbance" or "under the influence of alcohol." *Id.* at 4047–50. But Gaugh expressly stated he would not consider evidence related to a defendant's "deprived

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home or background.” *Id.* at 4049. Gaugh said he had no personal experiences with people from such backgrounds, but he also stated that he was “[s]ympathetic somewhat” to people from those backgrounds. *Id.* at 4054. After briefly questioning Gaugh, the prosecutor requested Haight “be required to waive an objection for cause” to Gaugh. *Id.* at 4055–56. Counsel waived the objection, noting that they “move to strike when we think it’s appropriate” and they made “tactical decisions about each of” the jurors.” *Id.* at 4056–57.

Under the Sixth Amendment, a criminal defendant has a right to trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726–27 (1992); *Hodges v. Colson*, 727 F.3d 517, 528 (6th Cir. 2013) (“*Morgan* allows for the identification and exclusion of jurors who are biased for or against the death penalty before being presented with any evidence and would *always* vote in accordance with their biases without regard to the particular facts of the particular case.”). A jury that includes a “juror who will automatically vote for the death penalty in every case” violates a defendant’s right to an impartial jury. *Morgan*, 504 U.S. at 729. Defendants “may challenge for cause any prospective juror who maintains such views.” *Id.*

Haight must show that Gaugh was “actually biased against him.” *Holder v. Palmer*, 588 F.3d 328, 339 (6th Cir. 2009). Actual bias in this context is “the existence of a state of mind that leads to an inference that the person will not act with impartiality.” *Id.* at 339–40 (quoting *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001)). “A juror’s express doubt as to [his] own impartiality” is insufficient for a finding of actual bias as “[t]he Supreme Court has upheld the impaneling of jurors who had doubted, or disclaimed outright, their own impartiality on *voir dire*.” *Id.* at 339 (citation omitted). We consider “the totality of the juror’s statements” in “assessing whether a juror was actually biased against a defendant.” *Id.* at 340. In a capital punishment case, a juror is actually biased if he would “automatically vote for the death penalty in every case” or if he would “in no case . . . vote for capital punishment.” *Morgan*, 504 U.S. at 728–29. We note that “[c]ounsel is . . . accorded particular deference when conducting *voir dire*. An attorney’s actions during *voir dire* are considered to be matters of trial strategy.” *Hughes*, 258 F.3d at 457.

Gaugh was not actually biased because he did not state that he would automatically vote for or against the death penalty. Gaugh indicated that he would fully consider and give effect to

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mitigating evidence, including Haight's defenses of alcoholism and extreme emotional disturbance, and acknowledged that he had some sympathy for Haight's background. While Gaugh did express an unwillingness to consider mitigating evidence of Haight's personal history, we consider Gaugh's responses to voir dire questioning as a whole. *See Holder*, 588 F.3d at 340. Considering the totality of Gaugh's statements, there is no indication he would act with partiality.

Since Haight cannot establish that Gaugh was actually biased against him, he cannot establish his trial counsel's performance was objectively unreasonable. *See id.* at 339; *Strickland*, 466 U.S. at 688. The fact that Haight's counsel indicated he made a strategic decision not to strike Gaugh bolsters our conclusion. Haight has not overcome the presumption that counsel's decision was "sound trial strategy." *Strickland*, 466 U.S. at 689 (citation omitted). Because Haight cannot establish that trial counsel's performance was deficient, his ineffective assistance claim as to juror Gaugh fails.

B. Issue 2: Whether trial counsel rendered ineffective assistance by not exercising peremptory strikes on three jurors (Ground 8)

Haight argues that he received ineffective assistance of counsel when his trial attorneys failed to honor his request to remove certain jurors by use of peremptory strikes. Haight contends that three jurors were biased against him: (1) Gaugh, for the reasons discussed in III.A; (2) Charles Helton, because he was robbed at gunpoint when he owned a jewelry store; and (3) Deborah Nichols, because her father was a Louisville police officer.² The Kentucky Supreme Court denied Haight's claim on the merits, *see Haight IV*, 41 S.W.3d at 443–44, so we review its decision under AEDPA.

Haight argues that his counsel rendered deficient performance when they allegedly refused to exercise Haight's peremptory strikes in accordance with his wishes. Haight, however, utilized the full number of peremptory challenges available to him under state law. *Haight IV*, 41 S.W.3d at 443. He devotes considerable effort to arguing that the exercise of peremptory challenges is a substantial right in Kentucky but does not explain how his "counsel's

²Haight's claims based on these jurors' possession of prejudicial information are discussed at III.P.

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representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Haight’s assertions do not overcome the strong presumption that counsel “made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690.

Haight also cannot establish prejudice. He fails to show a reasonable probability that the result of his proceeding would have been different if the three jurors had been removed. *See id.* at 694. He argues that Gaugh was actually biased against him, but this argument fails for the reasons discussed above. *See supra* Section III.A. Haight does not allege that Helton or Nichols were actually biased against him, and we see no evidence that they would “automatically vote for the death penalty.” *Morgan*, 504 U.S. at 729.

Haight utilized the full number of peremptory challenges provided to him by state law. His counsel did not render ineffective assistance by failing to utilize his peremptory challenges in the manner he requested. *See Hughes*, 258 F.3d at 457 (“Counsel is . . . accorded particular deference when conducting *voir dire*.”). The Kentucky Supreme Court did not unreasonably apply *Strickland* to this claim.

C. Issue 3: Whether trial counsel rendered ineffective assistance by failing to adequately investigate and present mitigation evidence (Ground 13)

Haight alleges that trial counsel was constitutionally ineffective at the penalty phase for failing to adequately investigate and request experts to present evidence of organic brain damage. This claim stems from counsel’s failure to seek a neurological evaluation after discovering a 1974 psychological evaluation (“1974 Report”) that discussed potential limitations in Haight’s intellectual capacity.

The Kentucky Supreme Court rejected Haight’s ineffective assistance as to mitigation claim in *Haight IV*:

This Court has recognized the necessity for complete investigation by defense counsel. We must agree with the view expressed by the United States Supreme Court in *Strickland, supra*, to the effect that counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not

only with unlimited time and resources, but also with the benefit of hindsight, would conduct. *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998). The investigation must be reasonable under all the circumstances. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir. 1992).

Haight now complains that trial counsel was ineffective and deficient in not seeking expert assistance to evaluate his mental status and psychological makeup as early as possible in preparation for trial. In December of 1985, trial counsel filed a motion for funds for expert witnesses and for an ex parte hearing. The trial judge heard arguments and overruled the motions but granted leave to the defense to establish a need for experts. A month later, the defense made a request for a continuance, stating that it could not make requests for experts until after discovery was completed.

Here, Haight maintains that the need for neuropsychological evaluation and psychopharmacologist evaluation should have been obvious to defense counsel. He asserts that although counsel may have been prevented from expending funds for expert witnesses between May 8, 1991, until *Haight v. Williamson, supra*, was decided on May 14, 1992, counsel was not prevented from otherwise investigating and preparing the case.

On direct appeal, Haight made a claim that he was improperly denied the expert assistance of a neuropsychologist which was rejected when his conviction was affirmed.

The clinical forensic psychologist who examined Haight in preparation for trial, specifically found no evidence that Haight was psychotic or suffered from any serious neurological deficit or was otherwise retarded. This expert testified during the penalty phase of the trial. Here, as in his direct appeal, Haight is creating an issue based on the same brief references and reports from the mid-1970s which mentioned a possibility of brain damage but did not make such a finding.

The right to funding for expert psychiatric assistance only arises when a defendant's mental state is "seriously in question." *Hunter v. Commonwealth, Ky.*, 869 S.W.2d 719, 722 (1994), quoting *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985). Defense counsel was not ineffective for relying on the opinion of an expert he obtained who determined that Haight had no significant neurological deficit. See *Walls v. Bowersox*, 151 F.3d 827 (8th Cir. 1998). Trial counsel is required only to conduct a reasonable investigation. *Mahaffey v. Page*, 151 F.3d 671 (7th Cir. 1998).

In this case, there is no reasonable probability that the omitted evaluations would have changed the result reached by the jury or the sentencing fixed by it. He was not prejudiced by the alleged failure of trial counsel to investigate and present defense and mitigating evidence. There is no showing of either deficient

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performance or substantial prejudice which are required to present an ineffectiveness of counsel argument.

41 S.W.3d at 446–47.

First, we must determine whether AEDPA deference applies. AEDPA’s deferential standard of review only applies to claims that were “adjudicated *on the merits* in State court proceedings.” 28 U.S.C. § 2254(d) (emphasis added). We “begin by asking which is the last *explained* state-court judgment” on the habeas claim under consideration. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *see also Richter*, 562 U.S. at 97–99. Here, the Kentucky Supreme Court last addressed Haight’s ineffective assistance claim in *Haight IV*, holding that Haight’s trial counsel was not constitutionally ineffective as “[t]here [was] no showing of either deficient performance or substantial prejudice.” 41 S.W.3d at 447. There is no indication that this finding was based on a procedural rule, so we must presume it was adjudicated on the merits. *See Richter*, 562 U.S. at 99. This “presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” *Id.* at 99–100. Haight does not make such a showing. In the district court, Haight acknowledged that the Kentucky Supreme Court denied this ineffective assistance claim on the merits. DE 119-1, Mot., Page ID 1472 (“The Kentucky Supreme Court then denied [Ground 13’s] claims on the merits, finding ‘no showing of either deficient performance or substantial prejudice which are required to present an ineffectiveness of counsel argument.’” (citing *Haight IV*, 41 S.W.3d at 447)). Additionally, Haight did not challenge the magistrate judge’s finding that *Haight IV* decided the ineffective assistance at mitigation claim on the merits nor does he challenge the district court’s adoption of that finding on appeal. But Haight argues AEDPA should not apply because the Kentucky Supreme Court “failed to engage with the facts relevant to this issue and misapplied the law.” CA6 R. 41, Appellant Br., at 98–99. He does not, however, assert that *Haight IV* was not on the merits.

We note that the Kentucky Supreme Court referred to Haight’s claim on direct appeal that “he was improperly denied the expert assistance of a neuropsychologist,” but it did not base its ineffective assistance decision on this direct appeal finding. *Haight IV*, 41 S.W.3d at 446–47. This distinction is important because, at the time, Kentucky prohibited postconviction ineffective

assistance claims where the alleged underlying error by counsel was adjudicated on direct appeal. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998).³ The state trial court, in postconviction proceedings, appeared to follow *Sanborn* in denying Haight’s motions for discovery and appointment of experts because all alleged issues “were or should have been raised” on direct appeal. But the Kentucky Supreme Court in *Haight IV* addressed the merits of the ineffective assistance at mitigation claim and did not treat *Sanborn* as a procedural bar.

Nowhere in *Haight IV* is there any indication that the Kentucky Supreme Court rejected Haight’s ineffective assistance at mitigation claim based on a procedural bar.⁴ Moreover, its analysis, which sets out the *Strickland* standard and applies it to the facts of Haight’s case, does not provide a “reason to think some other explanation for the state court’s decision is more likely” than an adjudication on the merits. *Richter*, 562 U.S. at 99–100. For the foregoing reasons, AEDPA’s deferential standard of review applies.

Second, we must consider whether Haight has established a constitutional violation and whether the Kentucky Supreme Court unreasonably applied federal law to this claim. See *Williams*, 529 U.S. at 399; *Cone*, 535 U.S. at 693–94; *Caudill v. Conover*, 881 F.3d 454, 460 (6th Cir. 2018) (holding that, for petitioner to prevail on her ineffective assistance claim, “[s]he must establish a Sixth (and Fourteenth) Amendment violation—that her lawyers performed well below the norm of competence in the profession and that this failing prejudiced her . . . [a]nd she must satisfy AEDPA—by showing that any rulings by the state courts on the merits . . . were unreasonable”). “[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law,” and “a federal habeas court may not issue the writ simply because that court concludes . . . that the relevant state-court decision applied clearly established federal

³Notably, *Haight IV* itself was later overruled in part because “appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel” in postconviction proceedings. *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009). But *Haight IV*’s holding on the ineffective assistance at mitigation claim does not conflict with *Leonard* because it does not rely on the direct appeal as a procedural bar to postconviction relief and directly addressed the merits of the ineffective assistance of counsel at mitigation claim.

⁴The Kentucky Supreme Court’s analysis of Haight’s ineffective assistance at mitigation claim is distinguishable from claims it did reject as procedurally barred due to alleged direct error below in accordance with *Sanborn*. For example, the court rejected Haight’s claim that “trial counsel was ineffective by not requesting that a ‘No adverse inference’ instruction relating to [his] right to remain silent be given at the penalty phase” as not properly before it because the claim “was an issue on direct appeal of the case.” *Haight IV*, 41 S.W.3d at 448.

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law erroneously or incorrectly.” *Williams*, 529 U.S. at 410–11 (emphasis in original); *see also Mills v. Cason*, 572 F.3d 246, 250 (6th Cir. 2009).

To evaluate the performance prong of Haight’s ineffective assistance at mitigation claim, “it is best to begin with the evidence . . . actually presented in mitigation.” *Lorraine v. Coyle*, 291 F.3d 416, 427 (6th Cir. 2002). Counsel hired Carol Good, a social work professor, who testified during the penalty phase of the trial. Good reviewed Haight’s background, including his school, mental health, and institutional histories. She interviewed Haight and several family members. Good described the neglect and abuse suffered by Haight as “among the worst situations” she had ever evaluated in her twenty-eight years of experience. DE 188-11, Tr., Page ID 4695. Good testified that Haight’s parents had a tumultuous marriage, which included domestic violence towards each other and their children. Social workers concluded that the parents were unable to raise their children properly and made records of inconsistent childcare, supervision, and food. Haight was placed in a juvenile home when he was six years old, then he was shuttled between juvenile homes, foster care, and his mother’s house. Haight was sexually abused during childhood. His IQ scores decreased from age six to age thirteen, which is a sign of serious emotional trauma. Haight was examined by a psychologist when he was fourteen, and the psychologist noted that Haight’s behavior was impulsive and that he had difficulty exercising appropriate judgment. By the time he was a teenager, Haight began abusing drugs. He married at sixteen and divorced at seventeen. Good concluded that the chronic and extreme neglect, periodic abuse, violence, and lack of supervision led to the development of a person who was an unpredictable teenager, had little understanding of structure and limits, and lacked the ability to control himself or appreciate the difference between right and wrong.

Counsel also retained Dr. Brad Fisher, a clinical forensic psychologist, and Fisher also testified during the penalty phase. Fisher interviewed Haight twice and extensively reviewed his personal and family history. Fisher noted that Haight was evaluated by a clinical psychologist when he was fourteen, and the psychologist reported that, due to “a chaotic, abusive, neglectful family” life, Haight suffered from feelings of worthlessness and inferiority, behavior problems, poor judgment, and impulsive behaviors. DE 188-12, Tr., Page ID 4722–24. Haight also suffered from attention deficit disorder or hyperactivity. After two interviews with Haight when

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he was forty-one years old, Fisher's primary findings were consistent with the psychological evaluation from his teenage years. As a result of Haight's chaotic background, Fisher found that Haight suffered from a fear of rejection, failed to develop appropriate decisionmaking and problem-solving skills, and experienced confusion under stress. Fisher opined that Haight was emotionally and mentally disturbed at the time of the murders, describing his emotions as "totally out of control" and stating he was unable to exercise appropriate decisionmaking. *Id.* at 4731. Fisher also opined that Haight was not psychotic, did not suffer from any serious neurological deficits, and was not intellectually disabled.

Counsel also called two of Haight's family members to testify during sentencing. Lana Walker, Haight's half-sister, described Haight's father as "abusive, hateful, [and] mean" and said he was someone who "hurt everyone in his path." DE 188-10, Tr., Page ID 4561. Haight's father regularly beat Haight and his mother, and family members feared him. Their home was filthy with garbage lying around. As Haight and his brothers grew older, they resorted to theft to feed themselves. Betty Smith, Haight's mother, also testified. She described her marriage to Haight's father as abusive, "[w]orse than anything [she] can sit here and describe." *Id.* at 4582. She described an incident in which he knocked her down a flight of stairs while pregnant, causing her to miscarry, and another in which he slammed her head against a wall until she was unconscious. Smith was hospitalized for mental health issues on more than one occasion.

Additionally, Haight testified in his own defense during the guilt phase, and his testimony included mitigating evidence. *Bell*, 535 U.S. at 699–700; *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998) (In Kentucky, "[w]hen the same jury sits in both parts of a bifurcated proceeding in a capital murder trial, all evidence introduced in the guilt phase may be considered by the jury during the sentencing phase."). Haight noted that he and his brothers were removed from his family's home when he was three and placed in a children's home. Haight lived there for many years and also spent time in foster homes. After he turned twelve, he returned to his mother's custody. Despite returning home, Haight frequently ran away. He resorted to stealing food and clothes out of necessity and started drinking alcohol when he was twelve. Haight dropped out of school at age sixteen as an eighth grader. By the time he was eighteen, Haight was serving his first time in prison.

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Despite this presentation of mitigating evidence, Haight asserts trial counsel's performance was deficient for numerous reasons. Haight faults his counsel for not retaining the services of Good and Fisher until approximately a month before trial. But counsel was not allowed to access expert funding until the Kentucky Supreme Court decided *Haight II*, which could have rendered funding moot.⁵ Further delay then resulted when the first expert who agreed to evaluate Haight unexpectedly declined.

Haight also argues that counsel did not timely discover the 1974 Report. The 1974 Report noted Haight's early drug abuse, discussed potential limitations in his intellectual capacity, and observed he may have "some cortical dysfunction." CA6 R. 35-5, 1974 Report, Page ID 254. His "[p]sychological testing and social history support an impression that there is a possibility of brain damage." *Id.* at 255. An affidavit from the Department of Public Advocacy's senior investigator explains that she began attempting to obtain this report in mid-November 1993, but she did not receive a copy until January 22, 1994, after the trial had begun. Counsel did not share this report with Fisher or move for neurological testing of Haight while the trial was ongoing. In a motion for a new trial, counsel requested funds to hire an expert to conduct a complete neuropsychological evaluation of Haight, but the court denied the motion. While Haight faults counsel for not discovering this evidence sooner, the record reflects that counsel began investigating potential mitigating evidence months before trial and obtained the 1974 Report only after considerable effort. Further, before trial, Haight was evaluated by Fisher, who did not suggest that Haight needed neurological testing and repeatedly asserted that Haight was not intellectually disabled. It is "not unreasonable" for counsel, "untrained in the field of mental health," to rely on the professional opinions of expert witnesses. *Clark v. Mitchell*, 425 F.3d 270, 285 (6th Cir. 2005). Although "the Supreme Court has held that a criminal defendant is entitled to the assistance of a competent psychiatrist if the defendant can demonstrate that his sanity will be a significant issue at trial," it "has never stated as a per se rule

⁵*Haight II*, issued on May 14, 1992, held Haight was not entitled to specific performance of the Commonwealth's recommendation of a life sentence from the previous plea proceeding. 883 S.W.2d at 824. If Haight had prevailed in *Haight II*, he would have pled guilty and received a life sentence without the possibility of parole for twenty-five years—thereby obviating the need to present mitigation evidence.

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that a particular type of mental health expert is required in death penalty cases.” *Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).⁶

Haight also argues that counsel was deficient in failing to further investigate and present evidence concerning his substance abuse. But Good and Fisher testified about Haight’s substance abuse, and Haight also discussed it in his testimony during the guilt phase. Counsel’s failure to hire a substance abuse expert usually does not constitute ineffective assistance if the evidence would have been cumulative to that provided by other experts and would not have changed the result. *Otte v. Houk*, 654 F.3d 594, 602 (6th Cir. 2011).

Haight’s arguments on delay and potential additional evidence do not show constitutionally deficient performance where counsel investigated and presented evidence regarding Haight’s mental health, alcohol and drug abuse, and family background. The Kentucky Supreme Court’s holding that Haight’s trial counsel was not ineffective was not unreasonable or contrary to federal law.

Even if counsel’s performance was deficient, Haight must demonstrate that this deficiency prejudiced his case. Haight must show a reasonable probability exists that, without the errors, at least one juror “would conclude that the balance of aggravating and mitigating circumstances did not warrant death.” *Wheeler v. Simpson*, 852 F.3d 509, 515–16 (6th Cir.

⁶The dissent agrees with Haight’s position that trial counsel failed to timely investigate his background and failed to timely use the 1974 report once it was discovered. The cases cited by the dissent in support of this position, however, involve much more egregious conduct than that of Haight’s counsel. In *Rompilla v. Beard*, counsel failed to investigate the court file from the defendant’s prior conviction despite notice that the prosecution intended to seek the death penalty by proving the defendant had a significant history of felony convictions involving violence. 545 U.S. 374, 383 (2005). In *Wiggins v. Smith*, counsel conducted a cursory review of the defendant’s background and made only a passing reference to their client’s “difficult life” during sentencing because they instead elected to focus on re-litigating the extent of their client’s involvement in the crime. 539 U.S. 510, 514–15 (2003). Haight’s counsel, in contrast, went to considerable effort to investigate Haight’s background and present mitigation evidence. Counsel introduced evidence of Haight’s dysfunctional upbringing and history of substance abuse. Counsel obtained expert witnesses who provided favorable reports and who testified for the defense. And although the dissent believes that counsel should have recognized a need for neurological testing given Haight’s background, Fisher had examined Haight and concluded that he was not intellectually disabled and did not need additional testing. Counsel is generally not considered ineffective for failing to independently discover the need to order neurological testing after an expert opines that there is no need. *Clark*, 425 F.3d at 286. Counsel was similarly “not required to continue looking for experts just because the one [counsel] had consulted gave an unfavorable opinion.” *Walls*, 151 F.3d at 836 (internal quotation marks omitted). Thus, we conclude that the Kentucky Supreme Court did not unreasonably apply federal law in determining that counsel conducted an adequate investigation and that counsel’s decision to prioritize other evidence over the 1974 report was reasonable.

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2017) (quoting *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005)); see also *Andrus v. Texas*, 140 S. Ct. 1875, 1885–86 (2020); *Wiggins v. Smith*, 539 U.S. 510, 534–37 (2003); *Wong v. Belmontes*, 558 U.S. 15, 19 (2009); *Porter v. McCollum*, 558 U.S. 30, 40 (2009). Conversely, the defendant fails to show prejudice if the new evidence would not significantly alter the sentencing profile, would be cumulative, or would not differ in a substantial way from the evidence presented. *Sears v. Upton*, 561 U.S. 945, 954 (2010); *Bobby v. Van Hook*, 558 U.S. 4, 11–13 (2009); *Caudill*, 881 F.3d at 462–64.

Haight maintains he was prejudiced because counsel failed to develop and present evidence that he suffered from organic brain damage and alcoholism. But Haight has not presented sufficient evidence supporting these claims. For his allegation that he suffers from organic brain damage, Haight relies on declarations from Dr. George Woods, a neuropsychiatrist, and Dr. Myla Young, a neuropsychologist. Based on their review of the available records concerning Haight’s personal and medical history, both opined that Haight has signs of organic brain impairment and recommended further neurological testing. For his argument about his history of alcoholism, Haight relies on a declaration from Dr. David Benjamin, a psychopharmacologist, who opined that Haight’s lengthy history of substance abuse impacted his ability to self-control and reinforced schizophrenic psychotic breaks from reality. Haight, however, presented these declarations for the first time in federal court. As discussed above, because AEDPA review applies to this claim, our review is limited to the record that was available to the state courts, and we cannot consider these declarations in determining whether Haight has demonstrated prejudice. *Pinholster*, 563 U.S. at 185; *Carter v. Bogan*, 900 F.3d 754, 776, 779 (6th Cir. 2018).

Counsel presented a strong case for mitigation on Haight’s behalf, even though it was ultimately unsuccessful. The witnesses during the sentencing phase testified that Haight experienced a devastatingly dysfunctional and abusive childhood—bouncing between family members, foster care, and juvenile institutions, and not receiving adequate care, support, or discipline. This upbringing resulted in impaired judgment and a lack of critical thinking skills. The jury also heard evidence regarding Haight’s substance abuse. While additional evidence that Haight suffered a brain injury would have provided further support for his mitigation case,

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Haight has not shown this evidence would be sufficiently compelling to result in a noncapital sentence when weighing all the evidence presented at sentencing. The Kentucky Supreme Court did not unreasonably apply federal law and therefore the district court did not err in dismissing Haight's ineffective assistance at mitigation claim.

D. Issue 4: Whether the trial court erred in refusing to permit the defense to have Haight examined by a neuropsychologist before sentencing (Ground 31)

Haight first argues that the trial court's refusal to permit an expert in brain damage or neuropsychology to evaluate him after the 1974 Report came to light was error and hindered his due process right to present nonstatutory mitigating evidence. Haight claims that his three new experts will prove that his brain damage is "not hypothetical," but we review the record from the perspective of the Kentucky Supreme Court at the time of its decision. *Pinholster*, 563 U.S. at 185. The facts before the Kentucky Supreme Court were as follows: the trial court was presented with the 1974 Report that gave "an impression that there is a possibility of brain damage," and Fisher testified that, according to his "clinical impression," there was "no indication that [Haight] is psychotic, suffers from serious neurological deficits, or is in any way retarded." CA6 R. 35-5, 1974 Report, Page ID 255; DE 188-12, Tr., Page ID 4741. Haight did not argue that Fisher was unqualified, and the trial court gave weight to the testimony of Haight's own expert. In light of Fisher's testimony, the Kentucky Supreme Court did not unreasonably apply federal law by concluding that the trial court did not err in refusing a further examination.

Haight also argues that the trial court's refusal to grant him funds to hire a neuropsychologist violated his due process right to access a psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, in violation of *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985). But this argument is before us for the first time on appeal. In state court, Haight only argued that the trial court's refusal to allow a neuropsychological evaluation was effectively a refusal to consider relevant mitigation evidence. *Haight III*, 938 S.W.2d at 249. Haight raised the same singular argument in the district court. *Haight*, 2017 WL 3584218, at *41–42. Because the state court never considered this new argument, it is unexhausted, and we may not consider it here.

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E. Issue 5: Whether the district court improperly denied Haight's request for the appointment of medical experts

Haight asserts that the district court erred in denying his request to appoint Dr. Woods, Dr. Young, and Dr. Benjamin to evaluate and assist him during the federal habeas proceedings. We review the district court's decision for an abuse of discretion. *Foley v. White*, 835 F.3d 561, 563 (6th Cir. 2016). Under 18 U.S.C. § 3599(f), the district court may authorize the payment of expert services if reasonably necessary for the representation of the habeas petitioner. The district court must determine "whether a reasonable attorney would regard the services as sufficiently important." *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018). In considering the "reasonably necessary" standard, courts must "consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.* at 1094. While the "reasonably necessary" test requires an assessment of the likely utility of the requested services, the habeas petitioner is not "expected to *prove* that he will be able to win relief if given" those services. *Id.* (emphasis in original).

"Along with his ex parte motion, Haight included the initial evaluation results obtained by the three proposed experts following their review of his existing records." *Haight*, 2015 WL 13548182, at *70 n.27. Although the district court did not have the benefit of the Supreme Court decision in *Ayestas* when deciding Haight's request, it considered the appropriate factors under § 3599(f) and found the appointment of these experts was not reasonably necessary because they were not likely to generate useful information concerning the merits of Haight's ineffective assistance claim. *See id.* Even though all three proposed experts' declarations found indications of organic brain damage, the Kentucky Supreme Court's conclusion that counsel's performance was not deficient was a reasonable application of federal law. The new information that Haight hopes to learn from his proposed experts would only go to *Strickland*'s prejudice inquiry and would not impact the state court's conclusion regarding the performance prong. Therefore, any new evidence would not change the result for this issue.

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F. Issue 6: Whether trial counsel rendered ineffective assistance by not moving to admit the 1986 plea agreement (Ground 16)

Haight argues that his trial counsel rendered ineffective assistance by not introducing his rejected agreement with the prosecution to plead guilty in exchange for a life sentence. The Kentucky Supreme Court addressed this issue in *Haight IV*, noting a “split of authority” as to whether a criminal defendant has a right to introduce evidence of a withdrawn guilty plea as mitigation evidence in a capital trial. 41 S.W.3d at 447–48. The court concluded that counsel’s performance was not deficient because no relevant authority clearly established Haight’s right to introduce this evidence. *Id.* at 448. This court has held that a capital defendant has no right to present evidence of a willingness to accept a guilty plea in exchange for a life sentence during his mitigation case. *See Wright v. Bell*, 619 F.3d 586, 598–601 (6th Cir. 2010); *Owens v. Guida*, 549 F.3d 399, 419–22 (6th Cir. 2008). Here, we must defer to the Kentucky Supreme Court’s opinion. Given the law’s ambiguity on this issue, we cannot say that the state court unreasonably applied federal law.

G. Issue 7: Whether trial counsel rendered ineffective assistance by not moving to admit the Jeanne Omer letter (Ground 6)

Haight argues that, during the sentencing phase, his trial counsel should have introduced a letter from Haight to Jeanne Omer, the sister of one of his victims. In the letter, Haight expresses deep remorse and sorrow for his crime and hopes that Omer can forgive him. While remorse is an appropriate mitigating factor, the jury heard directly from Haight about his remorse when he testified during the guilt phase. When asked how he “fe[lt] about killing two innocent people,” Haight told the jury he did not “like it a bit and wish[ed] that [he] could redo it—or give [his] life for it . . . it’s not right.” DE 188-7, Tr., Page ID 4364–65. In the letter, Haight expressed the same feelings by writing that a death sentence would be an appropriate penalty and one that he might welcome: “If you think I should pay with my life then I’d have to agree with you.” CA6 R. 35-6, Ltr., Page ID 117. He wrote: “I have to face the fact that I’ll be caged the rest of my life or most of it. Would death be easier? At times I feel it would be.” *Id.*

The Kentucky Supreme Court affirmed the denial of this claim in *Haight IV*, concluding that defense counsel did not wish to “reemphasize Haight’s guilt phase testimony to the jury”

during mitigation. 41 S.W.3d at 448. This was not an unreasonable application of federal law. First, because evidence of Haight's remorse had already been presented, trial counsel was not ineffective for failing to present cumulative evidence of his remorse. *Niels v. Bradshaw*, 482 F.3d 442, 459 (6th Cir. 2007). Second, Haight twice acknowledged in his letter that death would be an appropriate penalty. Counsel could have decided that the potential harm from these statements outweighed any benefit from presenting cumulative evidence of remorse. Haight presents no evidence to counter the presumption that failing to introduce the letter during the penalty phase was trial strategy, so we reject Haight's ineffective assistance of counsel claim.

H. Issue 8: Whether the jury instruction on manslaughter violated due process (Ground 26)

Haight argues that a due process violation occurred because the jury instruction in the guilt phase for first-degree manslaughter improperly required Haight to demonstrate that he was suffering from an extreme emotional disturbance.⁷ Under Kentucky law, if the defendant offers evidence at trial that he was suffering from extreme emotional disturbance, it is the Commonwealth's burden to prove the absence of extreme emotional disturbance beyond a reasonable doubt in order to convict the defendant of murder.⁸ The crime of manslaughter does

⁷Instruction No. 4, First Degree Manslaughter, was read to the jury as follows:

If you do not find the defendant . . . guilty of Murder under Instruction No. 3, you will find the defendant guilty of First Degree Manslaughter under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

A. That . . . [defendant] killed David Omer by shooting him with a gun;

AND

B. That in so doing, he intended to cause the death of David Omer, and was acting under the influence of extreme emotional disturbance.

App'x Vol. 4, at A1584. An identical instruction was given as to victim Patricia Vance in Instruction No. 2.

⁸Instruction No. 3, Murder, was read to the jury as follows:

You will find the defendant . . . guilty of Murder under this Instruction if you believe from the evidence beyond a reasonable doubt all of the following:

A. That . . . [defendant] killed David Omer by shooting him with a gun;

AND

B. That in so doing, he intended to cause the death of David Omer, and he was not acting under the influence of extreme emotional disturbance.

App'x Vol. 4, at 1583. An identical instruction was given as to victim Patricia Vance in Instruction No. 1.

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not require any finding on the presence or absence of extreme emotional disturbance. *See Elery v. Commonwealth*, 368 S.W.3d 78, 91–93 (Ky. 2012). “The best way to address the issue is to include [extreme emotional disturbance] in the murder instruction and make no mention of it in the manslaughter instruction.” *Id.* at 92. The manslaughter instruction tendered by Haight, which was not adopted by the trial court, accordingly omitted any reference to extreme emotional disturbance, but the court instead required extreme emotional disturbance in the manslaughter instruction. The Kentucky Supreme Court rejected Haight’s argument on the merits, holding that any error in the manslaughter instruction was harmless. *Haight III*, 938 S.W.2d at 248–49.

The Warden concedes that the manslaughter instruction was erroneous because it should have been silent as to extreme emotional disturbance. Warden’s Br. at 76. But the fact that a jury instruction was incorrect under state law does not necessarily warrant habeas relief—there must be a federal constitutional violation. *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991). Generally, a jury instruction that shifts or relieves the prosecution of its burden of proof violates due process. *See In re Winship*, 397 U.S. 358, 364 (1970). For example, in *Sandstrom v. Montana*, 442 U.S. 510 (1970), the Supreme Court held that a jury instruction that eliminates or shifts a state’s burden to prove every element of an alleged crime beyond a reasonable doubt violates the defendant’s due process rights. *See id.* at 524. However, we must also look at the challenged instruction within the context of the overall instructions. *See Estelle*, 502 U.S. at 72. Here, the instructions as a whole did not shift the burden of proof. The jury was instructed that under the evidence presented, it could find Haight (1) not guilty; (2) guilty of murder as set out in Instructions Nos. 1 and 3; or (3) guilty of First-Degree Manslaughter as set out in Instructions Nos. 2 and 4. App’x Vol. 4, at A1579. The trial court instructed that the jury could not find the defendant guilty of murder unless it found beyond a reasonable doubt that Haight was not acting under the influence of extreme emotional disturbance. In addition, Instruction No. 8, Presumption of Innocence, instructed the jury that if it had a reasonable doubt as to guilt, it must find Haight not guilty, and if it had a “reasonable doubt as to the degree of the offense, you shall find him guilty of the lower degree. Murder is the higher degree. Manslaughter First Degree is the lower degree.” App’x Vol. 4, at A1588. The instructions, when taken as a whole, did not impermissibly shift the burden of proof.

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In any event, the error here was harmless. The Warden contends that any error was harmless because the additional requirement in the manslaughter instruction *increased* the burden on the Commonwealth to prove either the presence or the absence of extreme emotional disturbance beyond a reasonable doubt for both murder and manslaughter instead of only murder. Furthermore, the Warden contends, the jury found Haight guilty of murder and thus found the absence of extreme emotional disturbance, so any error in the manslaughter instruction was harmless. Viewed through the lens of AEDPA, the Kentucky Supreme Court did not unreasonably apply federal law when it found that any error in the manslaughter instruction was harmless. Erroneous jury instructions will only warrant federal habeas relief if they were “so infirm that they rendered the entire trial fundamentally unfair.” *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997). The state court concluded that Haight was not prejudiced by any error in the manslaughter instruction given at his trial, and he has not shown that conclusion to be contrary to or an unreasonable application of any Supreme Court precedent.

I. Issue 9: Whether appellate counsel rendered ineffective assistance of counsel for failing to challenge the trial court’s refusal to give a jury instruction on the lesser-included offense of theft (Ground 43)

At trial, Haight requested an instruction on theft as a lesser-included-offense to first-degree robbery based on his testimony during the guilt phase that he did not intend to rob Omer or Vance. The trial court denied the request. Although preserved, Haight’s appellate counsel did not raise the issue on direct appeal. Haight did not raise an ineffective assistance of appellate counsel claim (“IAAC”), but later raised it in his amended petition. He withdrew the claim from his amended petition, acknowledging that then-current Kentucky law did not recognize, and the state courts would not adjudicate, claims of IAAC. *See, e.g., Parrish v. Commonwealth*, 272 S.W.3d 161, 173–74 (Ky. 2008).⁹ Haight raised his IAAC claim in his habeas petition, but both the magistrate judge and the district court found the claim procedurally defaulted because he had not raised it in his state postconviction petition. *Haight*, 2017 WL 3584218, at *46–47; *Haight*, 2015 WL 13548182, at *136–39.

⁹The Kentucky Supreme Court later overruled this line of cases and recognized that an attorney’s failure to raise a meritorious issue on appeal may constitute ineffective assistance of counsel. *Hollon v. Commonwealth*, 334 S.W.3d 431, 434–37 (Ky. 2010).

Contrary to the district court's conclusion, the claim is not procedurally defaulted. Even before *Hollon*, when the Kentucky courts did not provide an avenue for raising an IAAC claim, we considered such claims from Kentucky habeas petitioners on the merits. *Boykin v. Webb*, 541 F.3d 638, 647–48 (6th Cir. 2008). Likewise, we reviewed the merits of an IAAC claim from a Kentucky habeas petitioner even though the petitioner never raised the claim in the Kentucky state courts due to the state precedent at the time that prevented the adjudication of such claims. *Halvorsen v. White*, 746 F. App'x 489, 494 (6th Cir. 2018). Based on this precedent, Haight was not required to make the futile gesture of presenting a claim to state courts that would not recognize the claim, and his failure to do so does not preclude federal habeas review.

Because the Kentucky state courts never reviewed the IAAC claim, AEDPA deference does not apply to the claim, and we review it de novo. However, even under de novo review, the claim fails. Appellant counsel is not required to raise every non-frivolous claim. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). To prevail on a claim of IAAC, petitioner must show that the omitted claim was stronger than the issues actually raised. *Smith v. Robbins*, 528 U.S. 259, 288–89 (2000); *Caver*, 349 F.3d at 348. To obtain habeas relief for failure to instruct the jury, Haight must show that the failure “so infected the entire trial that the resulting conviction violates due process,” *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)), rendering the trial fundamentally unfair.

Haight has not shown that the failure to give an instruction on theft rendered his whole trial unfair. Although he testified that he did not intend to take the victims' property, he does not contest that he shot them and had their property in his possession. Under similar circumstances, Kentucky courts have upheld the discretion of trial courts to refuse to give a defense-tendered instruction on theft. *See Sanders v. Commonwealth*, 301 S.W.3d 497, 500–01 (Ky. 2010); *Nutter v. Commonwealth*, No. 2006-SC-000234-MR, 2008 WL 1850595, at *2 (Ky. Apr. 24, 2008); *Cobb v. Commonwealth*, No. 2002-SC-0052-MR, 2003 WL 21990530, at *5 (Ky. Aug. 22, 2003). In addition, the aggravator for multiple intentional murders remained even if the murder-in-the-course-of-robbery aggravator were eliminated, so Haight would still be death eligible regardless of whether the requested theft instruction was given. While he spends much time in his brief explaining how the removal of the robbery aggravator could have changed his entire

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trial, such an outcome was highly unlikely. In light of the evidence presented at trial, and the case law on the issue, appellate counsel cannot be found ineffective for failing to pursue this claim on appeal when other, stronger issues were raised.

J. Issue 10: Whether trial and appellate counsel rendered ineffective assistance regarding the lack of a jury instruction on wanton murder (Ground 44)

Haight seeks relief due to the failure of trial counsel to tender an instruction on wanton murder as an alternative to intentional murder.¹⁰ According to Haight, a conviction of wanton murder, which he contends does not contain an intent element under Kentucky law, would have eliminated one of two aggravating circumstances and he potentially could have avoided the death penalty. See Ky. Rev. Stat. § 532.025. The district court found the claim procedurally defaulted because Haight did not present it to the Kentucky state courts. *Haight*, 2017 WL 3584218, at *47. Haight does not dispute the procedural default finding, but instead contends that the ineffective assistance of his postconviction counsel excuses the default. See *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). In *Martinez*, the Supreme Court held that ineffective assistance of counsel during the initial postconviction collateral proceedings can establish cause to excuse a procedural default. *Id.* at 17. In *Trevino v. Thaler*, 569 U.S. 413 (2013), the Court interpreted *Martinez* to hold that a federal habeas court can find cause to excuse a procedural default where: (1) the ineffective assistance of trial counsel claim was “substantial,” (2) the petitioner lacked counsel or counsel was ineffective during the postconviction proceeding, (3) the state postconviction proceeding was the first opportunity for petitioner to raise an ineffective assistance of trial counsel claim, and (4) state law requires that the ineffective assistance of trial counsel (“IATC”) claim must be raised in the initial postconviction proceeding and generally cannot be raised on direct appeal. *Id.* at 423. We have held that the *Martinez/Trevino* exception may excuse procedural default of IATC claims in Kentucky state court. *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015).

¹⁰Haight also claims IAAC in not presenting the instruction issue on direct appeal and ineffective assistance of postconviction counsel in failing to raise the issue in the initial RCr 11.42 motion. Even if these claims are cognizable, our holding that Haight’s trial counsel was not ineffective on this issue precludes any finding that appellate and postconviction counsel could be ineffective for failing to raise the underlying claim regarding the wanton murder jury instructions.

Haight cannot excuse the procedural default here, however, due to his failure to show that the claim is “substantial.” Haight’s counsel had a strategic reason for not requesting a wanton murder charge, because wanton murder is not a lesser-included offense of intentional murder, but instead is another form of committing murder. See Ky. Rev. Stat. § 507.020(b); *Ratliff v. Commonwealth*, 194 S.W.3d 258, 275 (Ky. 2006) (quoting *Foster v. Commonwealth*, 827 S.W.2d 670, 677–78 (Ky. 1991)). Both intentional murder and wanton murder are capital offenses, meaning Haight still would have potentially faced the death penalty if convicted of wanton murder. See Ky. Rev. Stat. § 507.020(2).¹¹ Trial counsel pursued a defense of extreme emotional disturbance, which was a reasonable strategy under the circumstances. They also requested and received an alternative instruction for the lesser-included offense of manslaughter, which is not a capital offense. Haight has not demonstrated that counsel’s failure to pursue a wanton murder instruction, when a wanton murder conviction would not have allowed him to escape the death penalty, was unreasonable.

K. Issue 11: Whether trial counsel rendered ineffective assistance by not requesting a “no adverse inference” instruction (Ground 15)

Haight claims his trial counsel was ineffective for failing to request a “no-adverse-inference” instruction relating to his right to remain silent during the penalty phase. Haight testified at the guilt phase of his trial, but not at the penalty phase. The Kentucky Supreme Court in *Haight IV* resolved the matter as follows:

¹¹Indeed, the Kentucky murder statute can fairly be read to *include* the wanton conduct described in Ky. Rev. Stat. § 507.020(b) within the intent crime defined in Ky. Rev. Stat. § 507.020(1)(a), rather than adding a different crime. *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 2013), relied upon repeatedly by Haight in this context, when carefully read, is fully consistent with such a reading. The Kentucky statute provides that a person is guilty of murder when:

- (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or
- (b) *including*, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

Ky. Rev. Stat. § 507.020 (emphasis added).

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Haight complains that trial counsel was ineffective by not requesting that a “No adverse inference” instruction relating to the defendant’s right to remain silent be given at the penalty phase. Haight testified at the guilt phase of this trial, but he did not testify during the penalty phase. His counsel did not tender a “No adverse inference” instruction, did not request such an instruction or object to the failure of the court to give one. He asserts that it was incumbent upon the trial judge to instruct the jury that the defendant did not have an obligation to testify in mitigation and no adverse [inference] could be drawn from his failure to do so.

This claim does not amount to ineffective assistance of counsel. The allegation is not properly presented on [t]his appeal because it was an issue on direct appeal of the case. Haight did testify during the guilt phase of his trial and admitted killing the two victims. *Carter v. Kentucky*, 450 U.S. 288 (1981), is not applicable.

Haight IV, 41 S.W.3d at 448 (parallel citations omitted). We agree with Haight that the Kentucky Supreme Court made a factual error when it said that the no-adverse-inference instruction was an issue on direct appeal. But Haight did raise an IATC claim relating to the failure to request a no-adverse-inference instruction in postconviction proceedings. As discussed above, at the time of Haight’s direct appeal and postconviction proceedings, Kentucky courts did not recognize IATC claims in postconviction proceedings if the underlying claim had been rejected on direct appeal. It appears likely that the Kentucky Supreme Court erroneously believed it had rejected the underlying no-adverse-instruction claim on direct appeal. That error notwithstanding, and although admittedly not a model of clarity, the Kentucky Supreme Court reached the merits of the IATC claim based on its statement that “[t]his claim does not amount to ineffective assistance of counsel” followed by its observation that *Carter* is not applicable because it holds that a no-adverse-inference instruction is required only at the guilt phase.

Haight’s trial counsel did not render deficient performance because it was a reasonable strategy not to remind the jury of Haight’s highly damaging guilt phase admission to the murders by requesting a no adverse inference instruction at the penalty phase. “Judicial scrutiny of counsel’s performance must be highly deferential,” and there is a presumption that “the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689 (quotation omitted). Trial counsel’s choice here could be classified as a reasonable strategic choice. Trial counsel may have chosen to limit the damaging impact of Haight’s guilt phase testimony by keeping references to it from the jury when possible. The jury was concerned enough about that damaging testimony to request to hear it again during the penalty phase—a

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request that was denied. A no-adverse-inference instruction in the penalty phase would merely have reminded the jury that Haight did testify, much to his own detriment, during the guilt phase of the trial. Trial counsel's evaluation of the situation was accordingly reasonable. This claim is accordingly without merit under *Strickland* regardless of whether we review the issue de novo or apply AEDPA deference to the Kentucky Supreme Court's holding.

L. Issue 12: Whether the trial court improperly excluded jurors who were not substantially impaired in considering death as a sentence (Ground 19)

Haight argues that the trial court improperly excluded jurors Hansen and Ireland for cause after it erroneously concluded that they would not consider the death penalty. The Kentucky Supreme Court dismissed this claim along with other alleged jury selection issues, stating: "[A]ppellant has raised questions concerning jurors Hansen [and] Ireland . . . This Court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court." *Haight III*, 938 S.W.2d at 247. Although the exact basis for the Kentucky Supreme Court's denial of this claim is unclear, AEDPA deference still applies. When a state court denies relief on a federal claim, we presume "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson v. Williams*, 568 U.S. 289, 298 (2013) (quoting *Richter*, 562 U.S. at 99). Haight provides no basis for overcoming this presumption.

During voir dire, Hansen stated multiple times she was morally opposed to the death penalty. After further questioning from the trial court and each party, she stated that she "might seriously consider it, but then [she would] probably reject it." DE 188-4, Tr., Page ID 4144. When asked whether she could "seriously consider the whole range of penalties," Hansen answered no. *Id.* at 4148. The trial court determined that "her ability to consider the whole range of penalty [was] seriously impaired" and excused her from service. *Id.* at 4150. Ireland stated he did not believe in the death penalty. While he at one point said he would try to consider death as a penalty, he also definitively stated he could not consider it under any circumstances. The trial court also excused Ireland from service.

In *Uttecht v. Brown*, 551 U.S. 1, 9 (2007), the Supreme Court articulated the “principles of relevance” for considering whether excluding a juror for cause based on opposition to the death penalty is appropriate. It stated:

First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. . . . Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. . . . Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. . . . Fourth, in determining whether the removal of a potential juror would vindicate the State’s interest without violating the defendant’s right, the trial court makes a judgment, a judgment owed deference by reviewing courts.

Id. at 9 (citations omitted).

Despite some hesitation on close questioning, both jurors ultimately stated they could not seriously consider the death penalty regardless of the evidence presented. To the extent that any ambiguity existed in the jurors’ testimony, it is within the province of the trial court to resolve it. *Bryan v. Bobby*, 843 F.3d 1099, 1109 (6th Cir. 2016). The trial court elected to excuse them, and “[d]eference to the trial court is appropriate.” *Uttecht*, 551 U.S. at 9. The Kentucky Supreme Court’s rejection of this claim was not contrary to or an unreasonable application of clearly established federal law.

M. Issue 13: Whether the trial court failed to exclude jurors who were substantially impaired in considering and giving effect to mitigation evidence (Ground 20)

Haight contends that jurors Huffman, Nestmann, and Gaugh were not constitutionally qualified to sit as jurors in his capital case. All three jurors stated that they would not consider Haight’s background as mitigating evidence. The Kentucky Supreme Court considered this claim with the other jury issues, concluding that there was no preservation of the claim or that it was within the trial court’s discretion. *Haight III*, 938 S.W.2d at 247. For the same reasons as above, *see supra* Section III.L (applying AEDPA deference to Issue 12), we review this claim under AEDPA.

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Any juror not willing to consider mitigating evidence should be disqualified for cause. *Morgan*, 504 U.S. at 739. In *Morgan*, the Court stated “[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.” *Id.* The primary concern expressed in *Morgan* is a juror who would automatically recommend death regardless of any mitigating evidence. *Id.* at 738–39.

Gaugh’s alleged refusal to consider mitigating evidence was discussed at length above in connection with Haight’s ineffective assistance claim regarding the failure to request removal of Gaugh for cause. *See supra* Section III.A. In this claim, however, Haight alleges that the *trial court* erred by not removing Gaugh for cause. For the reasons previously discussed, Haight’s claim that Gaugh should have been removed for cause is without merit.

Haight removed Huffman from the venire with a peremptory challenge. When a “defendant elects to cure” the trial court’s failure to dismiss a juror for cause “by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.” *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Claims that the jury was not impartial must focus on the jurors who ultimately sat on the jury, not on those dismissed through peremptory challenges. *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). Haight’s claim therefore fails as to Huffman.

Nestmann acknowledged during voir dire that he would have difficulty considering certain categories of mitigating evidence, but ultimately agreed that he would seriously consider all the mitigating evidence in the case. Nestmann stated that his “job as a juror is to listen to . . . and try to accept” all evidence. DE 188-2, Tr., Page ID 4090. Haight does not argue that Nestmann was actually biased against him, and we see no evidence suggesting Nestmann would “automatically vote for the death penalty.” *Morgan*, 504 U.S. at 729.

N. Issue 14: Whether an alternate juror associated with the victims’ families
(Ground 21)

Haight argues that the jury was improperly affected by the presence of alternate juror Donohue who, after being excused from the jury following the guilt phase, sat in the courtroom

near the victims' families during the penalty phase. It is undisputed that Donohue did not talk or have direct contact with these families. Yet, Haight maintains that Donohue was exhibiting silent support for the families, which could have influenced the jury during the sentencing proceedings. The Supreme Court has never found the conduct of a private actor in the courtroom "so inherently prejudicial that it deprived a defendant of a fair trial." *Carey v. Musladin*, 549 U.S. 70, 76 (2006). Given the lack of Supreme Court precedent regarding the potentially prejudicial effect of spectators' courtroom conduct, the Kentucky Supreme Court's opinion denying this claim was not an unreasonable application of clearly established federal law. See *id.* at 77.

O. Issue 15: Whether trial counsel rendered ineffective assistance by failing to make a record and move for mistrial regarding a sleeping juror (Ground 14)

The record reflects that Haight's trial counsel mentioned some of the jurors had been sleeping during the penalty phase to the trial judge during a bench conference at the conclusion of his mitigation presentation. Haight argues that trial counsel rendered ineffective assistance by not making an adequate record identifying the allegedly sleeping jurors, by not providing the trial court with any details concerning when or how long the jurors had been asleep, and by not moving for a mistrial or requesting other relief. Consequently, the trial court took no action, and the alleged error was not preserved for direct review on appeal under Kentucky law.

Haight raised this claim in his state postconviction petition. He did not identify which jurors were sleeping, when they were sleeping, what information they missed, or how it would have changed the outcome of his trial. *Haight IV*, 41 S.W.3d at 447. The Kentucky Supreme Court therefore concluded that Haight failed to plead sufficient facts under Kentucky Rule of Criminal Procedure ("RCr") 11.42(2) to state a Sixth Amendment claim for ineffective assistance of counsel under *Strickland*. Kentucky law uniformly holds that a criminal defendant seeking postconviction relief by way of Kentucky Rule of Criminal Procedure 11.42 may not rely on vague allegations without offering specific facts to support his or her claims of ineffective assistance. See, e.g., *Foley v. Commonwealth*, 17 S.W.3d 878, 884, 888 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

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The district court agreed that Haight failed to provide any meaningful detail concerning the circumstances of the alleged sleeping jurors. It declined to reach the merits of the claim, agreeing with the magistrate judge's finding that it is procedurally defaulted for "fail[ure] to comply with a well-established, regularly followed rule of state procedure that was explicitly relied upon by the state's highest court to decline to reach the merits of this Sixth Amendment Claim." *Haight*, 2015 WL 13548182, at *78–80.

Even if this claim was not procedurally defaulted, it is without merit. We agree with the district court that if Haight had presented evidence supporting his claim that a juror was sleeping during the penalty phase of his trial, he still cannot show his counsel's performance was deficient. By mentioning to the trial judge that some jurors might be sleeping, but not objecting or otherwise asking the judge at that time for any corrective action, trial counsel's failure to act was likely tactical strategy, and thus not an objectively unreasonable performance under *Strickland*. See, e.g., *Arispe v. United States*, No. 03-10124-BC, 2005 WL 3132211, at *2 (E.D. Mich. Nov. 21, 2005) ("It is not necessarily an unreasonable strategy for a defense attorney to decline to object to juror inattentiveness, especially when the jurors may have been inattentive to the government's case.").

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Haight has not overcome the presumption in this circumstance that his trial counsel's actions "might be considered sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Because counsel's performance was not deficient, Haight cannot establish ineffective assistance.

P. Issue 16: Whether Haight's right to an impartial jury was violated when jurors who knew prejudicial facts sat on his jury (Ground 17)

Haight contends that three jurors were improperly influenced by extrajudicial information before jury selection, and that the trial court's failure to dismiss these jurors violated his due process rights. A local newspaper article reported that Haight previously pled guilty to the murders and was sentenced to death but that the sentence was overturned on appeal. It further stated that a police officer was accidentally shot to death by a Kentucky state trooper during Haight's arrest. This information was not admitted into evidence at trial. During voir dire, eight

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jurors were excused after they acknowledged their exposure to the article. Haight raised this issue on direct appeal as to jurors Helton, Nichols, and Gaugh, and the Kentucky Supreme Court found it meritless. *Haight III*, 938 S.W.2d at 245–47.

During voir dire, Helton acknowledged that he read the newspaper article prior to reporting for jury duty, stating he vaguely remembered it. Helton claimed that he read only the headline, did not read anything regarding the history of the case, and did not discuss the article with anyone other than his wife. When the trial court judge asked him whether he had a fixed opinion about the case, given the details or facts he may have learned from the article, Helton answered no. He also agreed to consider all the evidence and the full range of punishments. Haight did not move to exclude Helton for cause, and no peremptory challenge was used to remove him. Helton was seated and participated in the verdict.

During the postconviction hearing, Helton stated that nothing from the article “would have swayed [his] decision one way or another.” DE 188-14, Tr., Page ID 4919. The trial court specifically found that Helton “answered questions truthfully, both on voir dire, and at the [postconviction] hearing” and that he was credible and unbiased. DE 188-15, Tr., Page ID 4982–83. The court further stated, “[t]here was no deliberate concealment on his part, of information, which would compel this court to reach a conclusion that he was partial.” *Id.* at 4983.

The Kentucky Supreme Court stated it could “hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court.” *Haight III*, 938 S.W.2d at 246. Citing Kentucky precedent, the court explained that “exposure to newspaper accounts of trials in progress does not automatically require reversal,” and it distinguished this instance from cases in which jurors deliberately concealed information revealing their bias and partiality. *Id.* (citations omitted). The court found no prejudice to Haight on account of Helton’s service on the jury and upheld the trial court’s ruling. *Id.*

During voir dire, Nichols stated she “heard that [the article] . . . was in the paper, but [she] did not hear what it was about.” DE 188-3, Tr., Page ID 4112. Nichols stated that she would listen to all the evidence and consider all penalties. After the trial, Nichols stated to the

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prosecutor that she knew a police officer had been killed. During Haight's postconviction hearing, when the judge asked Nichols how she knew that information, she claimed that Haight's counsel revealed the information during voir dire. The court clarified that Haight's counsel said the officer had been shot but did not say the officer had been killed. Nichols claimed she did not believe that Haight shot the officer and that the officer shooting was not discussed in the jury room. Nichols also stated that she was fair and impartial and considered only the evidence presented at trial. The Kentucky Supreme Court found that Haight's contentions with Nichols were "insubstantial." *Haight III*, 938 S.W.2d at 247. It found that Nichols "was given enough information during voir dire to have led to a mistaken belief on her part." *Id.* The court further found that Nichol's postconviction testimony was "without any hint of dishonesty." *Id.*

Gaugh was not questioned about the article during voir dire. During the postconviction hearing, the prosecutor testified that, after the trial, Gaugh and fellow juror Nestmann asked her if "something else" occurred in the cornfield that they were not allowed to hear during trial. DE 188-14, Tr., Page ID 4931. The prosecutor informed them a police officer had been killed. Gaugh did not indicate that he had any prior information about the officer's death. Haight's counsel argued that Gaugh could have been "expressing that there was information expended in the jury room that something else occurred in the cornfield" and asked for further testimony. *Id.* at 4932.

During the final sentencing hearing, Gaugh testified that he knew "during the trial that an officer had been killed." DE 188-15, Tr., Page ID 4957. Upon further questioning, Gaugh stated that he only knew the officer had been shot and that he did not know anything about the case other than the evidence presented at trial. Gaugh clarified that he first learned of the officer being killed when the prosecutor revealed the information after trial.

On direct appeal, Haight argued that Gaugh's postconviction testimony was "more than enough to compel the inference that Gaugh concealed vital information." *Haight III*, 938 S.W.2d at 247. The Kentucky Supreme Court found the evidence "ambiguous" and deferred to the trial court's conclusion that Gaugh "had no information which would cause the court to believe that [he was] in any way partial in [his] deliberations or [his] final conclusions." *Id.*

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The Kentucky Supreme Court's denial of this claim was not an unreasonable application of federal law. Once concerns of juror bias due to extrajudicial information were raised, the trial court held a hearing, and the court and counsel for both sides had an opportunity to explore any potential bias. "[A] trial court's finding that a juror was impartial is entitled to a presumption of correctness, rebuttable only upon on a showing of clear and convincing evidence." *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003). Pretrial publicity itself, even when pervasive and adverse, "does not inevitably lead to an unfair trial," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976), and Haight has failed to demonstrate any jurors were actually biased.

Q. Issue 17: Whether Haight's jury was unfairly selected (Ground 18)

Haight argues that he was denied due process and an impartial jury because the procedures used in his trial violated Kentucky rules for jury selection. First, instead of qualifying thirty jurors as required by Kentucky Rule of Criminal Procedure 9.36(2), the trial court erroneously qualified thirty-two. This resulted in seventeen jurors remaining after the exercise of peremptory challenges, instead of the fourteen needed to seat twelve jurors and two alternates. Because the trial court permitted too many jurors to be qualified, the judge's clerk drew the names of three jurors to strike from the wheel containing the seventeen remaining jurors, rather than pulling the names of fourteen jurors to be seated as required by Rule 9.36. The three jurors selected to be stricken were women, and one of the three was African-American. After this second mistake, rather than continuing to draw an additional eleven names in addition to the three names already removed from the jury wheel, the trial judge directed his clerk to redraw the names of fourteen jurors. When the clerk redrew fourteen names, in a highly unlikely occurrence, the same three female jurors were again excluded from sitting on the jury.

Haight first argues that the trial court's selection procedure violated his "right to a fair and impartial jury, including the right to a venire that represents a fair cross-section of the community." CA6 R. 41, Appellant Br., at 283. Citing *Batson v. Kentucky*, 476 U.S. 79 (1986), Haight claims "[t]he irregularities in the selection of the venire . . . resulted in an arbitrary exclusion of women and African-Americans" from his jury. *Batson* objections, however, must be "made before the jury is sworn and the trial commences." *United States v. Tomlinson*, 764 F.3d 535, 537 (6th Cir. 2014). As Haight did not raise a *Batson* objection at trial, his claim

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is not preserved. *Id.* Haight does not argue cause and prejudice to excuse his procedural default. *See Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc). Regardless, Haight has not provided evidence that the three women were excluded from the jury due to their race or gender, or that the empaneled jury did not represent a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (“The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.”). The Kentucky Supreme Court’s holding was not an unreasonable application of clearly established federal law.

Haight next argues that the selection procedure was not random and claims “[s]omething improper happened.” CA6 R. 41, Appellant Br., at 283. The Kentucky Supreme Court rejected this claim on the merits in *Haight III*, so we review Haight’s arguments under AEDPA. The Kentucky Supreme Court found “no evidence upon which any impropriety may be inferred.” 938 S.W.2d at 247. The court also found that the initial procedure utilized by the clerk was permitted by state procedural rules and that the redraw was “merely redundant.” *Id.* The court held that the trial court substantially complied with jury selection rules and found “no error of sufficient gravity to overcome the trial court’s discretion with respect to a new trial.” *Id.* Although Haight frames his arguments in constitutional terms, he essentially argues that the trial court failed to follow state procedural rules in selecting the jury. The Kentucky Supreme Court found that the trial court complied with the relevant state rules. “[A] state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). We affirm the district court’s denial of this claim.

R. Issue 18: Whether the trial court improperly refused to tell the jurors that their decision on mitigation did not have to be unanimous (Ground 27)

Haight argues that the trial judge failed to properly instruct the jury that each juror may individually determine, weigh, and consider evidence of mitigation, and that they did not all have to agree on the mitigators, thereby depriving Haight of a reliable verdict on punishment in violation of the Sixth, Eighth and Fourteenth Amendments.

First, the trial judge did not err by failing to instruct the jury that findings of mitigating circumstances do not need to be unanimous. The Supreme Court has determined that a

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defendant's constitutional rights are not violated by the failure to give an instruction on mitigation unanimity, *Smith v. Spisak*, 558 U.S. 139, 148–49 (2010), and a state is not *required* to, although it may, adopt specific standards for instructing the jury in its consideration of mitigating factors under a death penalty scheme. *See Goff v. Bagley*, 601 F.3d 445, 461 (6th Cir. 2010) (citing *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998)). Kentucky has chosen not to require the trial judge to instruct the jury that its findings on the existence of any particular mitigating factor do not have to be unanimous. *See Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1993) (“An instruction on unanimous findings on mitigation is not required. The instructions only require the jury to consider mitigating circumstances.” (internal citation omitted)).

Second, the jury instructions did not create a substantial probability that the jury would believe its decision on mitigating factors had to be unanimous with respect to each factor. It is unconstitutional for a state to instruct jurors that they must unanimously agree on the existence of any mitigating factor, *Mills v. Maryland*, 486 U.S. 367, 384 (1988), and it is undisputed that the state did not do so here. However, jury instructions are still invalid if they create a “substantial probability” that reasonable jurors might think that they are precluded from considering any mitigating evidence unless jurors unanimously agree that the mitigator is proven. *See id.* In *Mills*, the Supreme Court vacated the conviction and remanded for further proceedings because the jury had received a verdict form which contained a list of possible mitigating circumstances, accompanied by spaces in which the jury could check “yes” or “no” and preceded by a statement that the jury “unanimously find[s] that each of the following mitigating circumstances which is marked ‘yes’ has been proven to exist.” *Id.* at 384–89. The Supreme Court found that there was a “substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular” mitigating factor. *Id.* at 384.

The question, then, becomes whether there is a “substantial probability” that a reasonable juror would have thought that mitigating circumstances in Haight’s case could not be considered unless the jury unanimously agreed that a particular mitigating circumstance existed. An answer in the affirmative would render the Kentucky Supreme Court’s contrary decision an

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unreasonable application of clearly established federal law. Haight’s argument focuses on Instruction No. 5, entitled “UNANIMOUS VERDICT,” which provided: “[e]ach verdict of the jury must be unanimous and be signed by one of you as foreperson. You may use the forms at the end of these instructions in writing your verdict.” Haight argues that when Instruction No. 5 is read in conjunction with Instruction No. 3, which informed the jury that they shall consider mitigating evidence, it would cause a reasonable juror to believe that a finding of a mitigating factor by the jury must be unanimous. But in this case, unlike in *Mills*, the instructions did not explicitly refer to the issue of unanimity in the discussion of mitigating circumstances. Instruction No. 5 simply stated that the jury’s verdict *itself* had to be unanimous, and nothing in the record suggests that the jurors were confused by these instructions. There is not a reasonable likelihood that a reasonable juror would have thought that she could not consider mitigating circumstances unless the jury unanimously agreed on that factor’s presence. We rejected Haight’s argument in *Wheeler v. Simpson*, 852 F.3d 509 (6th Cir. 2017), in which we held that the Kentucky Supreme Court did not unreasonably apply *Mills* when it affirmed a Kentucky trial court’s instruction that the verdict must be unanimous in combination with the court’s silence with respect to “unanimity as applied to mitigating factors.” *Id.* at 519.

Haight’s reliance on the Sixth Circuit decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), is misplaced because Haight must point to Supreme Court, not Sixth Circuit, caselaw. To prevail on a habeas claim, the state court’s decision must be contrary to or an unreasonable application of “clearly established Federal law, as determined by the Supreme Court of the United States” 28 U.S.C. § 2254(d)(1).

S. Issue 19: Whether due process requires specific performance of the prosecution’s written plea agreement (Ground 1), whether the prosecution was vindictive (Ground 2), whether the subsequent prosecution violated the Double Jeopardy Clause (Ground 3), whether the sentence was arbitrary, capricious, or discriminatory (Ground 4), and whether there was irrevocable prejudice (Ground 33)

As the parties do in their briefs, we group these grounds because they all relate to the fact that the initial trial court judge rejected Haight’s plea agreement and sentenced him to death, and then after that guilty plea was vacated, the state was permitted to try him and obtain the death penalty.

1. Due process and specific performance of the plea agreement (Ground 1)

Due process did not require the Kentucky courts to allow Haight to specifically enforce his plea agreement. While it is true that a criminal defendant has a due process right to enforce the terms of his plea agreement, *Santobello v. New York*, 404 U.S. 257, 261–62 (1971), when a promise on which a plea rests is not fulfilled, state courts are permitted to determine the remedy. *See id.* at 263. Here, the Kentucky Supreme Court held that the trial court had erred in sentencing Haight to death based upon a guilty plea pursuant to an agreement that the court rejected; the court then permitted Haight to withdraw his guilty plea and proceed to trial. Haight argues that the court should have directed specific performance of the plea agreement. However, states are not constitutionally required to provide specific enforcement of a plea agreement; they can instead remedy a plea agreement violation by allowing the defendant to withdraw the guilty plea. *See id.* at 262–63; *Mabry v. Johnson*, 467 U.S. 504, 511 n.11 (1984), *see also Puckett v. United States*, 556 U.S. 129, 137, 140 (2009). Indeed, the Supreme Court recently held that in the event of the breach of a plea agreement, “no decision from this Court clearly establishes that” a state court is required “to impose the lower sentence that the parties originally expected.” *Kernan v. Cuero*, 138 S. Ct. 4, 6 (2017) (per curiam). The Kentucky Supreme Court thus reasonably applied federal law when it decided to permit Haight to withdraw his guilty plea and proceed to trial instead of mandating specific enforcement of the original agreement.

2. Vindictive prosecution (Ground 2)

Haight also maintains that the prosecution’s refusal to abide by the terms of the plea agreement after the Kentucky Supreme Court vacated his guilty plea reflected vindictive intent. A defendant may establish vindictive prosecution two ways. He can demonstrate “actual vindictiveness” by establishing through objective evidence that the prosecutor’s actions were to punish the defendant for standing on his legal rights. *Bragan v. Poindexter*, 249 F.3d 476, 481 (6th Cir. 2001). Alternatively, the defendant may show that, in his particular situation, a “realistic likelihood of vindictiveness” existed for the prosecutor’s action. *Id.* The court presumes an improper vindictive motive only when this reasonable likelihood of vindictiveness exists. *Id.* at 481–82. The defendant must establish that: (1) the prosecutor had “some stake” in

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detering the exercise of his rights; and (2) the prosecutor's conduct was somehow unreasonable. *Id.* at 482.

The Kentucky Supreme Court's rejection of this argument was a reasonable application of federal constitutional law. The court concluded that its decision to vacate Haight's guilty plea and reinstate the charges from the indictment reflected an understanding "that the Commonwealth might abandon the recommended sentence found within the plea agreement." *Haight II*, 833 S.W.2d at 824. Beyond his own speculation, Haight has not shown any evidence that the prosecutor's decision to pursue a death sentence on remand resulted from either actual vindictiveness or a reasonable likelihood of vindictiveness. Haight makes a conclusory argument that the prosecution still was obligated to follow the terms of the plea agreement once the Kentucky Supreme Court vacated his plea, but he presents no clearly established law in support of this argument that would render the Kentucky Supreme Court's decision unreasonable.

3. Double Jeopardy Clause (Ground 3)

Haight next asserts that the imposition of a death sentence following remand from the Kentucky Supreme Court violated his double jeopardy rights. However, it is well established that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent a government from retrying a defendant who is successful in getting his first conviction set aside, whether through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *Palazzolo v. Gorcyca*, 244 F.3d 512, 516 (6th Cir. 2001). Nonetheless, double jeopardy may bar imposition of the death penalty upon reconviction under certain circumstances if the initial conviction, subsequently set aside, had rejected a death sentence. *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984); *Bullington v. Missouri*, 451 U.S. 430, 438 (1981). The relevant question is "not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence[.]" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108 (2003). In Haight's case, reimposition of the death penalty following his successful appeal did not constitute a double

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jeopardy violation because no “acquittal” occurred in the original proceedings regarding the imposition of the death penalty. *See Mason v. Mitchell*, 729 F.3d 545, 552 (6th Cir. 2013).

Haight’s circumstances do not fall within the exception to the general rule that permits the imposition of the death sentence upon retrial. Most importantly, Haight was never acquitted. In *Sattazahn, supra*, the Supreme Court held that the imposition of the death penalty did not violate the Double Jeopardy Clause when the jury sentenced the defendant to death after a retrial. The Court noted that although the first trial resulted in a hung jury on the death issue, and the judge accordingly imposed a life sentence, that sequence of proceedings did not amount to an acquittal. *See id.* at 109. The same is true here. Haight initially pled guilty and was sentenced to death. The sentencing decision was made by the trial judge, no jury was ever impaneled, and there was no finding that Haight was innocent or that there were a lack of mitigating circumstances. When the Kentucky Supreme Court vacated the death sentence and remanded for a retrial, the decision was based on the trial judge’s failure to honor the plea agreement, not on any finding with respect to Haight’s innocence.

Haight points out that Kentucky Rule of Criminal Procedure 9.84 requires a jury to decide the appropriate punishment in capital cases. There is no question that the trial judge at Haight’s initial sentencing did not impanel a jury, but instead made the unilateral decision to sentence Haight to death. But any error in this decision was corrected in *Haight I* when Haight was allowed to withdraw his guilty plea. There is nothing to suggest that the state court decision was contrary to or an objectively unreasonable application of clearly established federal law to the facts of this case. Reasonable jurists could not disagree that the protections against double jeopardy do not apply to this case as Haight was never acquitted or sentenced to an earlier, lighter sentence by a jury.

4. Arbitrary, capricious, and discriminatory imposition of the death penalty (Ground 4)

Haight’s death sentence did not involve the arbitrary application of the death penalty, vindictive prosecution, or irrevocable prejudice stemming from the disregarded guilty plea. Haight argues that he is “a class of one,” and the legal and factual aberrations that led to his death sentence were therefore imposed arbitrarily and capriciously by definition. Haight

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contends that a case like his has never occurred—either before 1986 or after. In the 10 years preceding Haight’s guilty plea in 1986, 332 Kentucky defendants were “death eligible” but had their cases resolved through plea agreements. None of those defendants had their plea agreement disregarded and instead received a judicially imposed death sentence in contravention of the terms of the plea agreement and the prosecution’s recommendation. Haight argues that there is no way to distinguish his case from those of the other death-eligible defendants in Kentucky who pled guilty with a plea agreement recommending a life sentence and who did in fact receive life sentences or other less-than-death sentences. Haight contends that “[n]o Kentucky prosecutor has ever had the opportunity to seek death on remand after recommending life.” Appellant’s Br. at 320. The original trial judge, who sentenced Haight death after refusing to honor the plea agreement, acknowledged that Haight’s case was unique:

You may be the only person ever treated differently . . . in light of literally hundreds and hundreds of murders [in Kentucky]. You may in fact be the only one sentenced according to my judgment here today.

App’x 2 at A0938. In fact, the unusual posture of Haight’s case led to a change in the Kentucky Criminal Rules, which were amended to require the trial court to allow a defendant to withdraw his guilty plea if the trial court does not adopt the terms of the plea agreement and imposes a harsher sentence.

The arbitrary or discriminatory imposition of the death penalty can violate the Eighth or Fourteenth Amendments, but the fact that Haight’s case is unique is not enough to establish a constitutional violation. The Supreme Court held that the death penalty “may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.” *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citing *Furman v. Georgia*, 408 U.S. 238 (1976)). Consequently, a death penalty scheme must “provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.” *Id.* (internal quotations omitted). Haight argues that the Kentucky Supreme Court’s use of the very same words used by the Supreme Court in its Eighth Amendment jurisprudence, including terms such as “arbitrary” and “discriminatory,” renders the Kentucky’s Supreme Court’s decision an unreasonable application of federal law. The Kentucky Supreme Court noted:

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In his brief and at oral argument, appellant has vehemently contended that the fact of his death sentence following his guilty plea has placed him in a class by himself due to the subsequent change in RCr 8.10 which permitted withdrawal of guilty pleas on failure of the court to approve the agreement. Again and again we have been bombarded with the words “arbitrary, freakish, discriminatory and disproportionate,” terms which have little analytical force and serve only to elevate the decibel level of the discussion.

Haight III, 938 S.W.2d at 250.

We acknowledge that Haight may sense unfairness “in the air” stemming from the undeniably unique circumstances he faced, but Haight has not met the high bar required to demonstrate that the death penalty was applied in an arbitrary or discriminatory way here. First, Haight’s initial death sentence was vacated, and the death penalty challenged here was imposed by a jury, which remedies any unfairness from the conduct of the first trial judge. Second, according to the Supreme Court, the fact that a defendant’s case is statistically unique, or that other similar defendants did not receive the death penalty, is not enough to establish the arbitrary or discriminatory application of the death penalty. See *McCleskey v. Kemp*, 481 U.S. 279, 306–08 (1987). The Supreme Court has required only that a death penalty regime must “permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). That occurred here—at the penalty phase the jury heard mitigating evidence from a clinical psychologist, a social worker, and several members of Haight’s family. The jury was instructed to consider mitigating evidence and had a full opportunity to examine Haight’s entire background and record. In light of Supreme Court precedent and the jury’s consideration of Haight’s individualized situation, the unique nature of Haight’s case alone is not sufficient to establish the arbitrary or discriminatory application of the death penalty.

5. Irrevocable prejudice (Ground 33)

As the last argument concerning his vacated guilty plea, Haight argues that he was unduly prejudiced by the delay from the time of his original plea in April 1986 to his trial in January 1994. He contends that two witnesses at trial had poor memories of the events underlying his

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crimes due to the passage of time. Further, the delay prevented him from receiving a more timely psychological evaluation. In demonstrating a violation of his constitutional rights due to pre-trial delay, the defendant must demonstrate that he suffered substantial prejudice. *United States v. Schreane*, 331 F.3d 548, 557 (6th Cir. 2003). Potential prejudice includes the possibility that the defense will be impaired by “dimming memories and the loss of exculpatory evidence.” *Doggett v. United States*, 505 U.S. 647, 654 (1992) (addressing prejudice in context of speedy trial claim); *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (same). However, Haight’s prejudice is largely speculative. He does not allege additional factual information forgotten by his witness that would have been pertinent to his defense. Nor has he demonstrated the manner in which a more timely psychological evaluation would have been valuable. Consequently, he has not shown substantial prejudice from the delay. Further, much of the delay was due to Haight’s decision to seek enforcement of his original plea agreement. His unsuccessful pursuit of that enforcement postponed the trial proceedings several years.

Haight also argues that he was prejudiced by the media coverage concerning the plea agreement and the trial court’s original decision to impose a death sentence. In order to address this concern, Haight’s trial was transferred to another county. Further, several potential jurors were dismissed because they had read the *Louisville Courier-Journal* article about Haight’s case. The trial court has wide discretion in conducting voir dire about pretrial publicity and other areas of inquiry that might tend to show juror bias. *Mu’Min v. Virginia*, 500 U.S. 415, 427 (1991); *Jackson v. Houk*, 687 F.3d 723, 733 (6th Cir. 2012). It is clear that the trial court actively attempted to obviate any potential prejudice to Haight from the prior proceedings in his case, and Haight has not shown that he suffered any prejudice.

T. Issue 20: Whether Kentucky’s death penalty scheme is facially unconstitutional
(Ground 37)

Kentucky’s death penalty statute is not facially unconstitutional. In affirming Haight’s convictions and death sentence, the Kentucky Supreme Court rejected Haight’s claims to the contrary:

For his final claims of error, appellant has attacked various aspects of the Kentucky death penalty statute and asserted, among other things, that the Act is unconstitutional. We have answered appellant’s contentions in this regard on

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numerous occasions including *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990); *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987); and *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980). As such, we will not reiterate those discussions.

Haight III, 938 S.W.2d at 253. We have also rejected this argument. *McQueen v. Scroggy*, 99 F.3d 1302, 1333 (6th Cir. 1996), *overruled on other grounds by In re Abdur’Rahman*, 392 F.3d 174 (6th Cir. 2004); *see also Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003). In granting a certificate of appealability on this issue, the district court relied on Justice Breyer’s dissent in *Glossip v. Gross*, 576 U.S. 863, 909 (2015), which argued that all death penalty statutes involve “fundamental constitutional defects,” including “serious unreliability,” “arbitrariness in application,” and “unconscionably long delays” that render them facially unconstitutional. But the Supreme Court has repeatedly emphasized that the death penalty is constitutional. *See, e.g., id.* at 89; *Baze v. Rees*, 553 U.S. 35, 47 (2008).

U. Issue 21: Whether the district court abused its discretion in denying Haight discovery and an evidentiary hearing

The district court did not abuse its discretion when it denied Haight’s requests for discovery and an evidentiary hearing relating to the issues of ineffective assistance of counsel, juror strikes, procedural default, the appointment of expert witnesses, and more. The Supreme Court held in *Cullen v. Pinholster*, 563 U.S. 170 (2011), that habeas review by a federal court “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Id.* at 180. As a result, “a district court cannot use a federal evidentiary hearing to supplement the record when assessing a claim under § 2254(d).” *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020). Most of Haight’s claims were adjudicated on the merits by the Kentucky courts, so no basis existed for the district court to order discovery or an evidentiary hearing.

With respect to the few claims that were not adjudicated on the merits in state court, Haight has failed to show that an evidentiary hearing was warranted. Among the claims on which Haight sought an evidentiary hearing, Grounds 14, 43, and 44 were not, or arguably were not, decided on the merits in state court. R.119, PID.1411. “[A] federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief . . . It follows that if the record

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refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schiro v. Landrigan*, 550 U.S. 465, 474 (2007). That is the case here. Ground 14 is an IATC claim based on trial counsel's failure to object when jurors may have been sleeping during the penalty phase of the trial. As discussed above in Section III.O (which addressed Ground 14 on the merits), Haight cannot show IATC even if it is true that jurors were sleeping, so further factual development would not help Haight's case. In Ground 43, Haight asserts an IAAC claim stemming from appellate counsel's decision not to raise on direct appeal the trial court's refusal to instruct the jury on theft, which would be a lesser offense than first-degree robbery. Again, as explained above, Haight cannot show that appellate counsel was ineffective, and holding a hearing would not make Haight's claim more likely to succeed. Finally, further factual development on Ground 44 would not help Haight obtain habeas relief on that claim. Ground 44 is an IATC claim based on trial counsel's failure to tender an instruction on wanton murder. We previously explained that trial counsel was not ineffective for failing to tender that instruction because wanton murder is still a separate, death-eligible category of murder under Kentucky law. The district court thus did not abuse its discretion when it denied Haight an evidentiary hearing because such a hearing would have had no tendency to help Haight's claims.

The district court also did not abuse its discretion when it denied Haight's requests for discovery. "Habeas petitioners have no right to automatic discovery. A district court has discretion to grant discovery in a habeas case upon a fact specific showing of good cause." *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001). Haight requested discovery on many claims, and of them Grounds 5, 14, 43, and 44 were not, or arguably were not, decided on the merits. For the same reasons stated with respect to the request for an evidentiary hearing, discovery on Grounds 14, 43, and 44 would not have made Haight more likely to prevail, so the district court did not abuse its discretion when it concluded that Haight did not show good cause. The district court also did not abuse its discretion when it denied discovery on Ground 5, which alleged IATC based on counsel's failure to move to strike juror Gaugh for cause. As discussed above in Section III.A, Gaugh was not actually biased as a matter of law, so Haight cannot show that counsel's performance was objectively unreasonable. Conducting discovery would not change that outcome.

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IV.

We affirm the district court's judgment dismissing Haight's habeas petition.

DISSENT

STRANCH, Circuit Judge, dissenting. I concur in the majority opinion except Section III.C. I respectfully dissent concerning Haight’s claim in Ground 13 that counsel was ineffective at the penalty phase of trial for failing to investigate and request the appropriate experts in light of the abundant and readily available evidence that Haight likely suffered from brain damage. For the reasons below, I would grant relief and remand to the district court for further proceedings on Haight’s claim that his trial counsel rendered deficient representation by failing to timely investigate and present evidence concerning Haight’s likely brain damage, including counsel’s failure to request and obtain an appropriate expert prior to the penalty phase of trial, thereby prejudicing Haight’s chances of receiving a sentence less than death.

I. *STRICKLAND* AND AEDPA

To establish a violation of the Sixth Amendment right to counsel, a defendant must demonstrate that counsel’s representation was deficient and that it actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). That standard requires Haight to establish “a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,” and “that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.” *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003). As the majority concedes, it takes only one juror to “conclude that the balance of aggravating and mitigating circumstances did not warrant death.” Maj. Op. at 17 (quoting *Wheeler v. Simpson*, 852 F.3d 509, 515-16 (6th Cir. 2017)). Representation is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. A petitioner must then show prejudice by demonstrating that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 693-94. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) requires habeas courts to evaluate whether the Kentucky Supreme Court's determination of Haight's ineffective-assistance-of-counsel-at-mitigation claim (IAC-Mitigation) was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or whether it "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," 28 U.S.C. § 2254(d)(2). There is a "strong presumption" that counsel's representation was "within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotation omitted). When this presumption is combined with the deference required by § 2254(d), the result is "double deference" to the state court's ruling on counsel's performance. Double deference to a state court's adjudication of a *Strickland* claim applies only to *Strickland*'s performance prong, not to the prejudice inquiry. Because I find deficient performance by trial counsel and prejudice resulting from that deficiency, I would hold that the Kentucky Supreme Court's decision to the contrary in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) (*Haight IV*), was unreasonable under both subsections (d)(1) and (d)(2) of § 2254.

A. Deficient Performance under *Strickland*

1. Unreasonable Application of *Strickland* under § 2254(d)(1)

A defense attorney engaged in the representation of one accused of a crime has a well-established duty to "make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary." *Strickland*, 466 U.S. at 691; see *Cauthern v. Colson*, 736 F.3d 465, 485 (6th Cir. 2013) (discussing the failure of counsel to investigate potential mitigation evidence under *Wiggins* and *Strickland*). The controlling inquiry in such instances is whether the decisions were objectively reasonable. *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013).

The state court record demonstrates that counsel's failure to timely investigate and seek an appropriate expert prior to trial who could diagnose and explain brain damage to the jury fell below prevailing professional norms. Prior to trial, counsel failed to discover or to pursue

evidence from Haight's childhood and adolescence that showed Haight likely suffered from brain damage. Upon receiving the 1974 Report on January 22, 1994, during the guilt phase of the trial, trial counsel belatedly realized that Haight might suffer from brain damage, but counsel failed to act on this critical information in a timely manner. At the very least, trial counsel should have introduced information from the 1974 Report concerning possible brain damage to the jury during the mitigation phase through the two retained experts—Dr. Brad Fisher, a forensic psychologist, and Carol Good, a social worker. Or, counsel could have immediately requested postponement of the penalty phase to conduct further investigation based on the evidence of brain damage from the 1974 Report. Counsel did neither, and when they requested a new trial or postponement of sentencing after the trial ended to further investigate the 1974 report, it was too late. Neither request was granted, and no mention of possible brain damage was ever put in front of the jury.

It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase. At the time of Haight's trial in early 1994, counsel's failure to investigate and present evidence of a defendant's mental defect constituted deficient performance. The 1989 ABA Guidelines direct counsel in capital cases to "collect information relevant to the sentencing phase of trial including, but not limited to: medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities)." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1(C), p. 93 (1989) (ABA Guidelines); *see also id.* at Guideline 11.4.1(d)(7), p. 16 (Counsel should secure the assistance of experts where it is necessary or appropriate for "the sentencing phase of the trial," and the "presentation of mitigation").¹ Also relevant, ABA criminal-representation standards at the time provided that "[i]nformation concerning the defendant's background, education, employment

¹The ABA Guidelines look to prevailing professional norms and provide general guidance as to what is reasonable attorney performance; they are not rules or commands that demand strict compliance. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."); *see also Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam) ("Restatements of professional standards, we have recognized, can be useful as guides to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." (cleaned up)).

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record, mental and emotional stability, family relationships and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.” ABA Standards for Criminal Justice, Standard 4-4.1 (1982 Supp.). Under the then-prevailing professional norms, counsel had an “obligation to conduct a thorough investigation of the defendant’s background.” *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing American Bar Association Standards for Criminal Justice 4-4.1, commentary, p.4-55 (2d ed 1980)); accord *Rompilla v. Beard*, 545 U.S. 374, 385-86 (2005).²

When evaluating counsel’s performance, we must examine what counsel did (as well as what counsel did not do), and when he did it. In this case, we are not asked to decide whether counsel investigated—Haight’s counsel did seek mental health assistance from two experts—instead we must peer into the adequacy of counsel’s investigation. “In assessing counsel’s performance, a court must thus consider whether counsel adequately followed up on the ‘leads’ that were available to them.” *Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007).

The Supreme Court has highlighted the importance of following evidence of possible brain damage in a defendant’s past when evaluating the adequacy of counsel’s investigation. In *Rompilla*, the Court held that a petitioner’s trial counsel was deficient by failing to discover mitigating evidence, including evidence that Rompilla suffered from organic brain damage. 545 U.S. at 385-90. Rompilla’s counsel, though on notice that the state would attempt to prove the defendant’s history of violence by introducing his prior conviction for rape and assault, failed to examine the record of that conviction. *Id.* at 385-86. The Court emphasized that “[i]f the defense lawyers had looked in the file on Rompilla’s prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up.” *Id.* at 390. While the defense lawyers interviewed Rompilla and members of his family and consulted with three different mental health workers, their investigation failed to uncover any evidence of mental deficiency for use during the sentencing phase. Yet when the postconviction attorneys

²As seen from the Supreme Court’s decisions in *Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), the clearly established federal law and prevailing professional norms at the time of Haight’s trial in 1994 required his trial counsel to conduct a thorough background investigation for mitigating evidence. The trials in those cases pre-date Haight’s trial. *Sears* was tried in 1993, *Porter* in 1988, *Rompilla* in 1988, *Wiggins* in 1989, and *Williams* in 1986.

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examined Rompilla's prison records, they "found plenty of 'red flags' pointing up a need to test further." *Id.* at 392. The Court determined that following these leads would have brought important mitigating evidence to light.

Like the deficiencies found in *Rompilla*, the "red flags" alerting counsel to possible brain damage in Haight's past included readily available documentation from Haight's childhood, such as medical and school records, and the results of various testing, such as IQ tests and other mental evaluations. Although counsel conducted some investigation, evidence of Haight's traumatic birth, head injuries in childhood and beyond, serious drug and alcohol abuse during adolescence, poor academic performance, and low IQ in available records was either not discovered or ignored, resulting in counsel's failure to hire a qualified expert to diagnose and explain the consequences of possible brain damage to the jury. Whether counsel failed to uncover these many "red flags" in Haight's background, or failed to see their significance, the result was the same: counsel missed numerous readily available indicators that Haight might have brain damage. A thorough investigation would have revealed the need for an expert with experience diagnosing and explaining brain damage well before the start of the guilt phase of Haight's trial. Instead, counsel hired a social worker and a forensic psychologist, missing the opportunity to hire appropriate experts, such as a neurologist, who could diagnose and explain the effects of possible brain damage to a jury. Identifying the "red flags" in Haight's history is not the result of 20-20 hindsight; the records indicating such damage were all available by the time of Haight's arrest in 1985, and a reasonable attorney in the late 1980s and early 1990s would have been alerted to the need for a neurological examination based on Haight's background alone, long before the 1974 Report surfaced during Haight's trial. Counsel's failure to investigate obvious sources of mitigating evidence, or to follow important leads they did uncover, constitutes deficient performance under *Strickland*.

The timing of counsel's investigation is also critical in evaluating whether performance was deficient. *See Williams*, 529 U.S. at 395. The 1989 ABA Guidelines state that "[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial[.]" and "[b]oth investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously." ABA Guidelines for the

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Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(A), p. 13 (1989); *see also id.* at Guideline 11.8.3, p. 23 (“[P]reparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel’s entry into the case.”). Based on then-prevailing norms, a thorough investigation into Haight’s mental health background should have been pursued well in advance of counsel’s receipt of the 1974 Report on January 22, 1994. Counsel had almost eight years between Haight’s arrest and trial to gather information from available sources such as schools, prisons, state agencies and the like, that should have been pursued even if a court order prevented counsel from hiring experts for several years.

Trial counsel’s lack of timely investigation is also evident from the delay in retaining experts. Pretrial history of Haight’s case shows that after an initial unsuccessful effort to obtain funds for an expert witness in December 1985, no further efforts were made until shortly before the January 1994 trial.³ The record indicates that by September 1992 counsel was free to hire experts, but counsel delayed at least another year once funds became available from the courts. Carol Good, the social worker, was not rehired until November 1993, and Dr. Fisher, Haight’s key mental-health expert, was not hired until mid-December 1993, less than one month before trial. Fisher met with Haight for the first time less than two weeks prior to trial, far too late for counsel to have the key mitigation witness begin work on the case.

Counsel also failed to timely utilize the valuable information contained in the 1974 Report concerning Haight’s mental deficiencies, including “borderline mental retardation,” “psychosis,” and the critical finding of possible “organic brain damage,” further demonstrating counsel’s deficient performance. Counsel received the Report in the mail on January 22, 1994, in the middle of the guilt phase of the trial, but 11 days before Good and Fisher gave their testimony on February 2 during the penalty phase. By failing to act on the Report’s contents

³The Report and Recommendation’s reasoning, adopted by the district court, erroneously muses without foundation that the reason was strategic because “defense counsel consciously elected not to pursue such efforts while they were attempting to obtain specific enforcement of the plea agreement as reflected in an order of Gerrard Circuit Court entered in April of 1991, which stated that ‘the parties shall not incur further expert witness fees until questions raised in a petition for a writ of prohibition are finally resolved.’” *Haight v. Parker*, No. 3:02-CV-206-S, 2015 WL 3548182, at *71 (W.D. Ky. 2015). The record is at best conflicting as to whether trial counsel agreed or was ordered not to expend funds during the period between 1985 and 1992, but, if the decision was indeed “strategic,” it constituted deficient performance not to continue investigating Haight’s background during this time, even if experts could not be retained. Nor does this explain why counsel waited another year after funds were released to hire experts.

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immediately, counsel was deficient in at least two ways: first, by failing to give experts Good and Fisher access to the report before they testified at the penalty phase, and second, by failing to bring the Report to the attention of the trial court immediately. These failures of counsel resulted in missing the only opportunity to get evidence of Haight's possible brain damage before the jury. The majority fails to grapple with this critical error by trial counsel.

Not only did Counsel fail to bring the Report to the attention of the two experts upon its receipt, but the record also reveals that counsel made no attempt to get his experts' assistance concerning the Report before the completion of trial. In Haight's motion for a new trial or postponement of sentencing, filed on February 7, counsel requested that Dr. Eric Engum, a neuropsychologist, be allowed to examine Haight for possible brain damage. This was only five days after the conclusion of the penalty phase, which indicates that counsel had ready access to an expert who could have assisted counsel with interpreting the significance 1974 Report prior to the start of the penalty phase.

The record does not reflect why counsel did not give the 1974 Report to the two expert witnesses before they testified except for counsel's explanation that he did not have time during a capital trial to review it. As a result of counsel's apparent failure to even look at the Report upon receipt, no effort was made to utilize it in any way at trial, or to obtain any further evaluation of it from the existing experts or new experts between January 22 and February 2, 1994. Had counsel spent just a few minutes reviewing the report, or simply handed it over to his two retained experts to review, it is highly likely that the numerous "red flags" raised by the three mental health professionals who wrote the Report would have been considered during the mitigation phase. The significance of this inadequacy of counsel, is not only that the jury was not told about the 1974 Report's conclusions of "borderline mental retardation," "psychosis," "cortical dysfunction," and the possibility of "organic brain damage," but that counsel permitted Fisher to testify to exactly the opposite when he testified that Haight had "no psychosis or schizophrenia," no retardation, and no neurological deficits. Allowing Fisher to give this testimony despite the available evidence of significant mental abnormalities was deficient performance and prejudiced Haight.

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That all these records existed prior to 1985, moreover, shows that proper investigation would have put counsel on notice that Haight may have suffered from brain damage even before receipt of the 1974 Report. Yet because counsel failed to adequately investigate Haight's background, it failed to obtain the appropriate mental health expert to explain to the jury the significance of the school, government, medical, and other available records as well as the possibility of brain damage and its likely effect on Haight's conduct. *See Wiggins*, 539 U.S. at 527–28.

Lastly, counsel performed deficiently by waiting until the penalty phase was completed before bringing the Report to the attention of the trial court in a motion for new trial. The trial court would likely have been more receptive to this reasonable request for a short delay in starting the penalty phase than it was to a new trial motion after completion of all proceedings.

The state court record establishes that the failure to adequately investigate and obtain an expert in brain damage cannot be justified as a reasonable strategic decision. When defense counsel is on notice of past incidents that would suggest brain damage, “[w]e can conceive of no rational trial strategy that would justify the failure of [defense] counsel to investigate and present evidence of his brain impairment . . .” *Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003) (counsel did no investigation into the presence of an organic brain impairment after learning from medical records that the defendant fell from a ladder). Counsel specifically stated at the hearing on the motion for a new trial that had he known about the information in the 1974 Report before trial, he would have been ineffective had he not investigated the possibility of brain damage further and hired a qualified expert to assist his preparation. Motion for New Trial Hr’g Trans. at 33–37. The available evidence demonstrates that the information in the 1974 Report, and other records from Haight’s past, should have been investigated by and known to counsel prior to trial. Counsel’s failure to obtain the appropriate expert was based not on strategy, but on lack of preparation. Counsel tacitly admitted at the hearing on the motion for a new trial that prior to receiving the 1974 Report he did not consider hiring a neurologist or neuropsychiatrist before trial, so the failure to do so was not strategic. Counsel fell below an objectively reasonable standard of performance given the numerous “red flags” that Haight likely suffered

from some form of brain damage. Pursuant to § 2254(d)(1), the Kentucky Supreme Court unreasonably applied the deficiency prong of *Strickland*.

2. Unreasonable application of *Strickland* under § 2254(d)(2)

Under § 2254(d)(2), a petitioner may challenge a state court's conclusion that is based upon an unreasonable determination of the facts. Haight bases his federal challenge in part on the Supreme Court of Kentucky's decision in *Haight IV* to dismiss his ineffective assistance of counsel claim without affording him an evidentiary hearing and the opportunity to develop a factual record in state court. At the time of the decision in *Haight IV*, the state court record included substantial and significant evidence that Haight likely suffered from brain damage, including the affidavit of Dr. Engum and the 1974 Report, as well as numerous other documents that clearly contradict Fisher's testimony at the penalty phase that Haight did not suffer from brain damage or other neurologic deficiency. Without the benefit of an evidentiary hearing or other factfinding regarding the factual discrepancies in the record, the Kentucky Supreme Court adopted the factual determination of Fisher that Haight did not suffer from brain damage and concluded that Haight's trial counsel was not ineffective.

Under § 2254(d)(2), a state's factual findings are entitled to a presumption of correctness, but a petitioner can rebut these findings by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007). Under § 2254(d)(2), the habeas court will not conclude that a state court's factual findings are unreasonable "merely because we would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015). Instead, we defer to the state court's factual determinations if "reasonable minds reviewing the record might disagree about the finding in question." *Id.* at 314. But "'deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). "Clear and convincing evidence is a demanding but not insatiable standard, requiring proof that a claim is highly probable." *Nejad v. Att'y Gen., State of Ga.*, 830 F.3d 1280, 1289 (11th Cir. 2016) (quotations omitted). "Highly probable is a standard that requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Id.* (cleaned up). Accordingly, if Haight can show that the state courts plainly

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misapprehended or misstated the record in making their findings, and the misapprehension goes to a material factual issue that is central to his claim, that misapprehension can fatally undermine the factfinding process, rendering the resulting factual finding an unreasonable determination of the facts under § 2254(d)(2).

The Supreme Court of Kentucky affirmed the postconviction trial court's decision that Haight's counsel was not ineffective at mitigation, as well as denying further funding for experts and the request for an evidentiary hearing:

Haight contends that he wanted to ask for funding for expert assistance in neuropsychology in order to prove ineffective assistance of counsel at trial. The trial judge correctly interpreted *Sanborn* in reaching its decision. This Court has already found that Haight had the full benefit of mental health evaluations and experts during his trial. *Haight [III]*, *supra*.

The expert offered by Haight [Eric Engum] said that there was a high degree of certainty that it's possible that Haight may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance. This is mere speculation. An RCr 11.42 proceeding does not provide for a relitigation of the performance of trial counsel.

Haight IV, 41 S.W.3d at 444-45. While recognizing the deference that must be given to factual findings, the Engum affidavit is only one example from a state court record that, on balance, presents a starkly different picture of the possible cause of Haight's mental status than that presented by trial experts Fisher and Good. While Fisher's testimony recognized that Haight suffers from some abnormalities, for example, fluctuating IQ that might result from "neurological problems," Fisher, despite minimal testing of Haight and only spending six hours with him, testified that there "appears to be no indication that [Haight] is psychotic, suffers from serious neurological deficits, or is in any way retarded." Instead, Fisher attributes Haight's problems to lack of coping skills, unresolved conflicts, and an inability to manage stress. Fisher's testimony does not reflect that he was aware of the available records identifying Haight's multiple head traumas, difficult birth, prenatal injuries, poor academic record, adolescent drug and alcohol abuse, and multiple evaluations from Haight's childhood and teen years where Haight was determined to have a low-average IQ bordering on mental retardation.

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In contrast to Fisher, Engum relied on testing of Haight, citing numerous historical records, to conclude that “[a]fter reviewing [the available records] it is my opinion . . . that there is a strong basis for inferring that Mr. Haight may suffer from brain damage, with one or more etiologies, and that the nature and extent of his cognitive dysfunction may be material to . . . mitigating the offense.” A state court’s factfinding may be unreasonable when the court “had before it, and apparently ignored,” evidence supporting a petitioner’s claim. *See Miller–El*, 537 U.S. at 346. The Kentucky Supreme Court ignored evidence in the record of Haight’s brain damage when it labeled Engum’s opinion that Haight may suffer from brain damage “pure speculation.” Engum’s opinion was based on testing and extensive review of Haight’s background and childhood records—it was not speculation. That Court also failed to provide Haight any opportunity to develop a factual record on the issue of possible brain damage during the state proceedings, erroneously concluding that Haight had “the full benefits of mental health evaluations” when he clearly did not.

The federal district court simply assumed that the Kentucky Supreme Court appropriately evaluated Engum’s affidavit, relying on its brief reference to “the expert offered by Haight.” *Haight IV*, 41 S.W.3d at 445.⁴ Its conclusion that the Kentucky Supreme Court evaluated the IAC-Mitigation claim is questionable given that Court’s explicit reference to the Kentucky practice of barring “relitigation” of the performance of trial counsel in postconviction proceedings pursuant to *Sanborn v. Comm.*, 975 S.W.2d 905 (Ky. 1988), *overruled*, *Leonard v. Comm.*, 279 S.W.2d 151 (Ky. 2009). Without regard to the federal court’s assumption, it erroneously called Engum’s conclusion “mere speculation” when Engum’s affidavit relied on testing and review of numerous detailed records, which are specifically identified by Engum in the affidavit. *See id.* at ¶¶ 8, 10. The evidence submitted in the postconviction motions filed by Haight directly contradict the penalty-phase testimony of Fisher that Haight did not suffer from

⁴The magistrate judge stated that:

the Supreme Court of Kentucky was well aware that Haight had obtained a postconviction opinion of a mental health expert, Dr. Eric Engum, a forensic psychologist and clinical neuropsychologist, who concluded that a substantial possibility existed that Haight suffered from organic brain damage. Thus, the Kentucky Supreme Court was not unaware when it rejected Haight’s ineffective assistance of counsel claim that other experts held out a possible diagnosis of brain damage.

Haight v. Parker, 2015 WL 13548182, at *73.

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any neurologic deficits. Considering this conflicting evidence, the Kentucky Supreme Court improperly concluded that Engum was “speculating” when further factfinding was necessary to resolve the disputed facts in the record.

In addition, the postconviction trial court made a baseless, or at least uninformed, factual finding when it ruled that Fisher was an appropriate expert on brain damage. It made this finding without granting Haight’s request for appointment of an expert to diagnose possible brain damage and then inform the court of its findings, and without holding an evidentiary hearing in which Haight could show why Fisher was not a qualified expert on brain damage. Likewise, the Kentucky Supreme Court erred by focusing only on the fact that Haight had a “mental-health expert” without engaging in any meaningful way as to whether counsel hired the correct type of expert as required by the professional standards at that time. *See* 1989 ABA Guidelines.

At issue here is not whether Haight suffers from brain damage, but whether his counsel’s performance was deficient in discovering, analyzing, and presenting evidence of that brain damage to the jury during mitigation. The facts presented in the Engum affidavit and an abundance of other record evidence stands in direct conflict with the conclusions offered by Fisher at trial. As explained further below, the affidavit of Engum, as well as the three expert declarations offered by Haight and rejected in the district court, form the core of Haight’s prejudice analysis under *Strickland* regarding his claim of ineffective assistance for failure to hire an appropriate expert. Accordingly, while “[a] rational fact-finder might discount [the affidavit] or, conceivably, find it incredible, . . . no rational fact-finder would simply ignore” the affidavit or fail to address it entirely. *See Taylor v. Maddox*, 366 F.3d 992, 1006 (9th Cir. 2004). The Supreme Court of Kentucky—in resolving disputed issues of fact, based on conflicting evidence and without an evidentiary hearing—made an unreasonable determination of the facts under § 2254(d)(2).

At bottom, trial counsel had evidence, or had access to evidence upon reasonable investigation, showing that Haight suffered significant head injuries in his youth and young adulthood, and that he abused drugs and alcohol from a young age. Both are “red flags” indicating possible brain damage. There existed substantial available evidence of brain damage—that Haight suffers from psychosis, delusions, borderline mental retardation, and low

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IQ—yet it was never presented to the jury. Despite these red flags, trial counsel never sought neurological testing of Haight. “[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Wiggins*, 539 U.S. at 527–28. Furthermore, counsel’s own testimony at the hearing on the motion for new trial shows he knew his representation would be judged deficient if he did not investigate Haight’s brain damage documented in the 1974 Report. And yet, no further investigation was undertaken for the penalty phase once that information was known to counsel.

Given the unusual procedural posture of this claim when it came to federal court, including the lack of an evidentiary hearing in state court on the IAC-mitigation claim and the since-overruled limitation in Kentucky on raising IAC claims in postconviction proceedings, I am dubious that it meets the definition of “adjudicated on the merits.” But, because the Kentucky Supreme Court addressed the claim in its opinion in *Haight IV*, I agree with the majority and give the claim AEDPA deference. But I then part ways with the majority and would hold that the Kentucky Supreme Court unreasonably applied *Strickland* to the facts of this case based on counsel’s failure to investigate and hire an appropriate expert to diagnose and opine on the issue of brain damage to the jury. As explained in the next section, this deficiency prejudiced Haight.

B. Prejudice Prong under *Strickland*

In addition to demonstrating deficient performance, Haight must also demonstrate prejudice; he must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U. S. at 694. “[A] defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. “[P]rejudice exists if there is a reasonable probability that, but for his counsel’s ineffectiveness, the jury would have made a different judgment about whether [Haight] deserved the death penalty as opposed to a lesser sentence.” *Andrus v. Texas*, 140 S. Ct. 1875, 1885–86 (2020). This inquiry “will necessarily require a court to ‘speculate’ as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase.” *Sears v. Upton*, 561 U.S. 945, 956 (2010).

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“[B]ecause [Haight’s] death sentence required a unanimous jury recommendation . . . , prejudice here requires only ‘a reasonable probability that at least one juror would have struck a different balance’ regarding [Haight’s] moral culpability.” *Andrus*, 140 S. Ct. at 1886 (quoting *Wiggins*, 539 U.S. at 537–38).

To establish prejudice, the habeas petitioner must demonstrate that evidence that could have been presented “differ[s] in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing.” *Foust v. Houk*, 655 F.3d 524, 539 (6th Cir. 2011) (quoting *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005)). Although the evidence cannot be cumulative to that presented to the jury, the Supreme Court has made clear that it has “never limited the prejudice inquiry under *Strickland* to cases in which there was only ‘little or no mitigation evidence’ presented.” *Sears*, 561 U.S. at 954. When evaluating the reasonable probability of a different result in a capital sentencing proceeding based on allegedly inadequate or incomplete investigation by counsel, the court must consider the totality of the available mitigation evidence—both that presented at trial and evidence that could have been adduced at trial and was not. In this case, we compare the expert testimony given at mitigation with the proposed expert testimony submitted in the postconviction proceedings to analyze Haight’s claim of ineffective assistance for failure to retain the appropriate experts. See *Wiggins*, 539 U.S. at 527–28, 534; *Williams*, 529 U. S. at 397–98; *James v. Ryan*, 679 F.3d 780, 810 (9th Cir. 2012) (“The measure of prejudice is the magnitude of discrepancy between what counsel did investigate and present and what counsel could have investigated and presented.”), *vacated on other grounds*, 568 U.S. 1224 (2013).

In the district court, the magistrate judge concluded that the Kentucky Supreme Court made the “entirely reasonable” determination that Haight failed to demonstrate any prejudice “due to the absence of further expert testimony that he suffered from brain damage.” *Haight v. Parker*, No. 3:02-cv-206, 2015 WL 13548182, at *74 (W.D. Ky. July 17, 2015). But that conclusion begs the question because the reason no “further expert testimony” exists stems directly from trial counsel’s deficient performance, coupled with the refusal of the trial court, postconviction court, and the federal court to allow further expert testimony into the record, despite Haight’s repeated requests.

A comparison of the available evidence of brain damage with what was presented by trial counsel at mitigation reveals the significant amount of evidence the jury never heard. Haight's postconviction counsel found extensive evidence of Haight's likely brain damage stemming from illness, abuse and head trauma in childhood, and alcohol and substance abuse in his teens and adult years—evidence that should have alerted trial counsel to Haight's need for examination by a neurologist or neuropsychiatrist. Based on the available evidence, trial counsel was aware, or should have been, that Haight suffered numerous head injuries throughout his childhood and as an adult. This included falling from an automobile at age 2, receiving a blow to the head and losing consciousness while at the Methodist Children's Home, being hit by a car at age 14, being pistol whipped about the head at age 16, being hit in the head with a baseball, and receiving a very serious head injury after being hit with a horseshoe as an adult. RCr. 11.42 Motion at p. 21. There are also numerous references to the beatings Haight received from his father. Haight's mother was severely beaten by Haight's father while pregnant, drank alcohol to excess while pregnant, and took the drug Demarol. Haight's birth was also traumatic. He was delivered by forceps, and the umbilical cord was around his neck, resulting in a very low Apgar score. *Id.* Counsel also knew Haight had a history of drug and alcohol abuse during his adolescence, *id.* at 22, which can exacerbate existing brain damage, or cause brain damage itself.

The documents attached to Haight's Kentucky Civil Rule 59.05 Motion to Vacate are even more telling. Counsel submitted hundreds of pages of documents, many related to possible brain injury, that counsel intended to explore with witnesses at an evidentiary hearing scheduled at the postconviction stage. That hearing, however, was abruptly cancelled sua sponte and without explanation by the postconviction trial judge, Judge Shobe. Much of the evidence was included in Haight's RCr 11.42 motion, but because the trial court cancelled the evidentiary hearing where Haight planned to introduce and explain the evidence, Haight was forced to submit the evidence in a RCR 59.05 motion. The documents include evidence of school trancies, poor academic performance, armed robberies, destruction of property and abuse of animals when Haight was 14 and 15 (Attachment 2); a psychological evaluation when Haight was 13 that concluded that he might have "experienced cerebral dysfunction in his early school years, creating a serious academic difficulty" (Attachment 7); psychological testing when Haight was 14 that indicated his IQ had dropped from 86 at age 7 to 72, and noted that he functioned

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near the borderline of retardation (Attachment 8); severe substance abuse beginning at age 12 with alcohol, marijuana, LSD, hallucinogens, and sniffing toluene, glue and gasoline, and taking cocaine, heroin, morphine, and dilaudid by age 14 (Attachment 10); prenatal substance abuse by Haight's mother, as well as beatings suffered by his mother during her pregnancy (Attachment 11); and numerous head traumas (Attachment 14). This is a sample of the evidence that Haight would have introduced at an evidentiary hearing to demonstrate that his trial counsel failed to adequately investigate his background. This failure to investigate resulted in trial counsel's failure to hire an appropriate expert to evaluate Haight and to present the powerful mitigating evidence of possible brain damage to the jury, thereby prejudicing Haight. *See Coleman v. Mitchell*, 268 F.3d 417, 447 n.15 (6th Cir. 2001) (noting there is a "direct relationship between the quality of background investigation and the quality of mitigation strategy")

The documents from the postconviction motions paint a picture of a sexually, physically, and emotionally abused child and teenager, largely abandoned by his family and failed by social workers and others in the foster-care system, much of which was not referenced during mitigation. Most important to the focus here, the documents include many references to incidents that might cause brain damage, as referenced above. All this evidence was available and discoverable to trial counsel before trial. The "red flags" indicating the need for further investigation into Haight's neurological functioning were present long before the 1974 Report came to light during trial in January 1994.

As the Supreme Court in *Rompilla* concluded when describing the significant mitigating evidence *Rompilla*'s jury never heard:

It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [defendant's] culpability," *Wiggins v. Smith*, 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S. at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S. at 694.

545 U.S. at 393. The reasoning from *Rompilla* applies here. Trial counsel overlooked or ignored a "tidal wave" of available mitigating evidence that was used by postconviction counsel. *See Andrus*, 140 S. Ct. at 1887. The evidence not presented at mitigation but available to counsel

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prior to trial—and uncovered and offered by postconviction counsel—differs in strength and subject matter from the evidence presented in mitigation. “[R]ather than being cumulative . . . , provides a more nuanced understanding of [Haight’s] psychological background and presents a more sympathetic picture of [Haight].” *Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008). The evidence of brain damage would have differed “in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing.” *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (quoting *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir. 2005)); *Rompilla*, 545 U.S. at 392–93. The jury heard none of this evidence, evidence that might well have influenced the jury’s appraisal of Haight’s culpability. Counsel’s inadequate investigation resulted in the failure to find or to understand the significance of the numerous red flags in Haight’s history pointing to the likelihood of brain damage, and, in turn, causing counsel not to hire an appropriate neurological expert.

In contrast to the information outlined above that should have alerted trial counsel to Haight’s possible brain damage and the necessity for an expert well-versed in diagnosing and explaining brain damage, Haight’s counsel procured the services of two expert witnesses: (1) Good, an associate professor of social work, who prepared a social history on Haight’s family; and (2) Fisher, a clinical forensic psychologist who does not hold an M.D. or any specialized training in neurological functioning or brain damage. Good was first hired within a year or so after Haight’s arrest in 1985, but she could not complete her work at that time due to lack of court-approved funding. She was rehired in 1993 and concluded her research and prepared a report. Fisher was not hired until one month before trial. He reviewed Good’s report on December 17, 1993, and conducted two interviews with Haight, one each on December 27 and 28, 1993, two weeks prior to the start of trial.

The Kentucky Supreme Court held that Haight did not demonstrate deficiency or prejudice from counsel’s failure to hire additional or different experts. It stated, without any analysis, “Defense counsel was not ineffective for relying on the opinion of an expert [Dr. Fisher] . . . who determined Haight had no significant neurological deficit.” *Haight IV*, 41 S.W.3d at 446-47. In reaching this conclusion, the Kentucky Supreme Court incorrectly

characterized Dr. Engum's affidavit,⁵ never referenced the records that indicate Haight likely suffers from a "neurological deficit" in contradiction to Fisher's testimony, and provided no basis for its conclusion that "Haight had the full benefit of mental health evaluations and experts during his trial." *Haight IV*, 41 S.W.3d at 445-47.

The state court's ruling that the two experts who testified for Haight provided all the expert assistance Haight needed to assist with mitigation seemingly relied only on the quantity of experts, not the quality or appropriateness of the testimony. Quality, not quantity, is the touchstone of an adequate investigation. *See, e.g., Rompilla*, 545 U.S. at 388. A review of the qualifications and testimony of Good and Fisher reveal that neither was professionally qualified to diagnose or opine on the effects of brain damage on Haight's conduct. Although trained to assess and explain some mental deficits and illnesses, Fisher's testimony would at best be of limited value because forensic psychologists, unlike neurologists or neuropsychologists, are not trained to diagnose or evaluate organic brain damage even if they suspect it exists. That point was driven home when Fisher testified that Haight "might" have neurologic deficits, but apparently did not recognize that it could be important information requiring further investigation by a neurologist, given the possible impact a brain-damage diagnosis could have on the jurors. Fisher gave precisely the opposite information to the jury. Despite admitting that he undertook limited testing of Haight and was not qualified to give such a diagnosis—he testified that "[t]here appears to be no indication that this man is psychotic, suffers from serious neurologic deficits, or is any way retarded." Fisher Trial Test. at 27. This testimony was one of

⁵Engum, Ph.D., concluded that "there is a strong basis for inferring that Mr. Haight may suffer from brain damage" and that Haight suffered from this defect in 1985 at the time of the murders. The brain damage may have resulted from (1) his mother's ingestion of alcohol in the months preceding his birth; (2) multiple head injuries he suffered as a child; (3) substance abuse, including hallucinogens and glue sniffing from age 12; or (4) a combination of some or all of these factors. In other words, this mental defect dates back to his childhood, which is relevant to his moral culpability and determination of the appropriate sentence.

In support of his request for an evidentiary hearing, Haight included in his habeas petition three declarations from Myla H. Young, Ph.D., a neuropsychologist; David M. Benjamin, Ph.D., a psychopharmacologist; and George W. Woods, Jr., M.D., a neuropsychiatrist. The experts' declarations present conclusions gleaned from childhood records; reports and interviews by Good and Fisher at trial; the 1974 Ohio prison report; and other sources, that Haight was likely brain damaged since childhood, and perhaps from birth. They state that the damage in childhood was likely exacerbated by drug and alcohol abuse. These experts from fields at issue in Haight's claim concluded that his condition was present at the time of the murders, and that the brain disorder significantly contributed to Haight's criminal activity. Though these experts were proffered to demonstrate prejudice by showing what evidence counsel should have presented during mitigation, the district court refused to consider the declarations because they were prepared for the habeas petition and are not part of the state court record.

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the primary bases for the Kentucky courts' continued denial of further factfinding, including expert assistance, and their conclusion that his counsel was not ineffective. Haight suffered prejudice because Fisher's testimony was lacking in the critical information the sentencing jury needed to hear about brain injury, and instead gave damaging conclusions that were beyond his expertise.

Good testified about Haight's poor upbringing, including time in foster homes, and the lack of stability in his childhood. Fisher's testimony was largely duplicative of Good's. They both testified about Haight's unstable childhood and his drug and alcohol abuse as an adult, focusing on the same facts that formed the basis for Haight's guilt-phase defense of extreme emotional disturbance. Dr. Fisher testified that Haight's chronic drug and alcohol abuse were simply "coping mechanisms" without mentioning the brain changes that may result from chronic drug and alcohol abuse, especially if there is underlying brain damage, or that the substance abuse began in adolescence as Haight's did. Fisher summarily concluded that Haight did not suffer from any "serious neurological deficits" or intellectual disability.

The testimony of Good and Fisher demonstrates that even though they knew of Haight's long history of drug and alcohol abuse, they did not or could not explain how Haight's drug and alcohol abuse could cause or exacerbate any existing brain damage. For example, both Fisher and Good referenced Haight's low IQ and noted that the fluctuations and the drop in his IQ from childhood to teenage years was indicative of something "serious," without further explanation. Brain damage as a possible cause was either not within their experience or expertise, or it did not otherwise occur to them as a possible cause of Haight's behavior. Apparently, it did not occur to counsel either, an omission that prejudiced Haight and may cost him his life.

Prejudice is especially likely here because the jury told the judge it was "stalemated" after several hours of deliberation during the penalty phase, but the judge sent them back to deliberate further. The jury's apparent difficulty in reaching a decision regarding the appropriate penalty lends weight to Haight's prejudice argument that if counsel had presented competent proof of possible brain damage in mitigation, there is a reasonable probability that at least one juror would have voted for life imprisonment instead of the death penalty. *See Williams*, 529 U.S. at 396.

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In sum, there is at least a reasonable probability that development and presentation of testimony by a neurologist and/or neuropsychologist about possible brain damage would have changed the result of the sentencing proceeding. Therefore, I conclude that Haight has demonstrated prejudice under *Strickland*. See *Boyde v. California*, 494 U.S. 370, 382 (1990) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989))).

Mitigation evidence existed establishing that Haight’s life was not only disadvantaged but so physically, mentally, and emotionally destructive as to result in brain damage and substantial emotional and mental problems. The significant amount of evidence supporting that conclusion was never presented to the jury—a jury that reported itself to be “stalemated” on the penalty after several hours of deliberation and on which only one juror was needed to change the penalty outcome. In sum, for the reasons explained above, I would issue the writ based on ineffective assistance of counsel at mitigation and remand to the state court to conduct a new penalty phase. I therefore respectfully dissent from Section III.C of the majority opinion.

Appendix C

2015 WL 13548182

Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
at Louisville.

Randy HAIGHT, Petitioner

v.

Phil PARKER, Respondent

CIVIL ACTION NO. 3:02-CV-206-S

I

Signed 07/17/2015

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FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION

[Dave Whalin](#), Magistrate Judge

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INTRODUCTION

***2** The Petitioner in this capital habeas case is Randy Haight. Haight is currently awaiting execution following his conviction for the 1985 murder and robbery of Patricia Vance and David Omer, who were found in rural Garrard County, Kentucky, on August 23, 1985, shot to death in the backseat of Omer's Chrysler station wagon. Omer, a 40-year-old rental store operator, had been shot in the face, chest, shoulder, and back of his head. Vance, a 33-year-old dental receptionist, had been shot in the shoulder, right eye, temple, and back of her head. Haight, a jail escapee, was captured in a nearby cornfield following a brief chase during which police officers discovered the possessions of the victims and both handguns used to commit the murders in a stolen pickup truck abandoned by the fleeing Haight.

Haight does not deny that he repeatedly shot both victims, or that he admitted as much from the witness stand at trial, along with his possible willingness to die for his crimes. He nonetheless maintains that his conviction and death sentences are unconstitutional based on 45 claims for relief raised in his petition and motion for summary judgment. Because none of the grounds raised therein demonstrates that the adverse decisions of the Kentucky Supreme Court were either contrary to, or an unreasonable application of, the clearly established precedent of the U.S. Supreme Court, or that any prejudicial constitutional error otherwise occurred, the Magistrate Judge shall recommend that Haight's petition be dismissed with prejudice.

FINDINGS OF FACT

a. Procedural History.

On Sept. 3, 1985, a grand jury seated in Garrard County, Kentucky, returned an indictment against Haight, charging him with two counts of murder, two counts of first degree

robbery, and possession of a handgun by a convicted felon. The Commonwealth filed a notice of intention to seek the death penalty two months later on Nov. 8, 1985. On April 10, 1986, Haight, with advice of counsel, entered into a pretrial agreement and filed petition to enter a plea of guilty.

Under the terms of the agreement, Haight agreed to enter a plea of guilty to the two counts of murder and two counts of first degree robbery set forth in indictment no. 85-CR-032. In return, the Commonwealth agreed to recommend to the Garrard Circuit Court that Haight be sentenced to life without parole for 25 years on each count of murder and sentenced to 20 years on each count of first degree robbery with all sentences to run concurrently. The petition to enter a plea of guilty acknowledged both the maximum potential penalty of death and that the recommendation of the Commonwealth would not bind the Court; however, the petition continued in handwritten language to add, “but it is my understanding that it is the announced general policy of this court to accept the recommendation of the Commonwealth. Otherwise, I would not be pleading guilty.” (App. No. 86-SC-971, Appx. Vol. 1, p. A10).

On May 8, 1986, the Garrard Circuit Court entered an order that accepted Haight's pleas of guilty to the murder and robbery of Omer and Vance. While the order acknowledged the recommendation of the prosecutor, the circuit court set the matter for a sentencing hearing. Haight moved the circuit court prior to the hearing to enter the recommended sentence or, in the alternative, to permit him to withdraw his plea of guilty. (Id. at 121-14). The Garrard Circuit Court denied both of these requests. Instead, on Sept. 15, 1986, the court entered a final judgment that sentenced Haight to death, over his objection, for the intentional killing of Omer and Vance while engaged in the commission of first degree robbery. (Id. at 262-26). A separate order entered on the same date by the court formally denied Haight's motions to enter the recommended sentence, to withdraw his plea of guilty, and to impanel a jury to fix the penalty. (Id. at 260-261).

*3 Haight sought immediate review before the Kentucky Supreme Court seeking to reverse his death sentence and receive a sentence of life without parole for at least 25 years as recommended by the Commonwealth, or alternatively, that the state Supreme Court permit him to withdraw his plea of guilty and proceed to trial.

On Sept. 8, 1988, the Kentucky Supreme Court entered its opinion in  *Haight v. Commonwealth*, 760 S.W.2d 84 (Ky.

1988) (hereinafter  *Haight I*). In its opinion, the Kentucky Supreme Court concluded that Haight's plea of guilty to the murder and robbery charges was defective and that the refusal of the trial court to permit Haight to withdraw his guilty plea after having sentenced him to death was improper. In reaching this conclusion, the Kentucky Supreme Court determined that the record of the trial court proceedings did not demonstrate the existence of an outright commitment by the Garrard Circuit Court to impose a particular sentence. Accordingly, while the Kentucky Supreme Court vacated the final judgment of the trial court, and likewise vacated its order accepting Haight's plea of guilty, the court specifically declined to require enforcement of the plea agreement absent an unmistakable commitment to impose a particular sentence.

 *Haight I*, 760 S.W.2d at 88. The court instead reinstated all of the charges of the original indictment and remanded Haight's case to the trial court for entry of a new plea to the crimes charged in that indictment.  *Id.* at 89. The Kentucky Supreme Court subsequently denied Haight's petition for rehearing of its decision in  *Haight I*.

On return to the Garrard Circuit Court, Haight filed a motion in October of 1989, to exclude death as a possible penalty. Haight entered a plea of not guilty to the original charges the following month. A special judge was assigned to the case, which was transferred to the Jefferson Circuit Court upon a motion for a change of venue.

On June 11, 1990, the Commonwealth again filed notice of its intention to seek the death penalty. The following month, on July 26, 1990, the special judge overruled Haight's motion to exclude death as a possible sentence. Haight then filed a motion to enforce the terms of the original plea agreement, which the trial judge overruled in August of 1990. Haight responded with a petition for a writ of prohibition filed in the Kentucky Court of Appeals on Dec. 11, 1990, in an attempt to prevent his trial based on the terms of the 1986 plea agreement. The Kentucky Court of Appeals denied Haight's petition on May 31, 1991. Haight took appeal to the Kentucky Supreme Court, which entered its opinion in *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) (hereinafter *Haight II*) on May 14, 1992.

On appeal in *Haight II*, the Kentucky Supreme Court held that the Court of Appeals properly exercised its discretion in denying Haight's petition for a writ of prohibition. *Haight II*, 833 S.W.2d at 824. In so holding, the court explained:

In the case at bar appellant's request to withdraw his guilty plea was honored in our previous opinion.  *Haight I* ... with reinstatement of the original indictment and appellant's entry of a plea of not guilty to these charges, appellant returned to the place he was in before the plea agreement was entered. The Commonwealth exhibits no prosecutorial vindictiveness for there is no appearance of retaliation when a defendant is placed in the same position as he was in before he accepted the plea bargain.

*4 *Haight II*, 833 S.W.2d at 824 (citing  *United States v. Anderson*, 514 F.2d 583, 588 (7th Cir. 1975)).

Haight's jury trial began in the Jefferson Circuit Court on Jan. 10, 1994. Jury selection required four days. Opening statements followed on Jan. 14. Due to a severe snowstorm, however, the Commonwealth did not begin to present its evidence until Jan. 24. Haight acknowledged during his defense that he had killed Omer and Vance, but denied that he intended to bring about their deaths despite shooting them both repeatedly in the face and head.

Haight instead maintained that at the time of his escape from the Johnson County Jail several days prior to the murders, he was extremely disturbed emotionally and mentally due to his obsession with fellow prisoner Mabel Music, a problem compounded by his post-escape alcoholic binge drinking and Mabel's prompt abandonment of him following their escape. Haight argued to the jury that at the time of the shootings he was completely irrational, severely intoxicated, extremely disturbed, all of which cause him to act out impulsively when David Omer reached out of the station wagon and grabbed Haight's hand after Haight broke out the window.

The jury rejected Haight's theory of the defense. It found Haight guilty of both counts of intentional murder, both counts of robbery, and being a convicted felon in possession of a handgun (V.T. 9, 1/31/94, 16:10:55). The penalty phase trial then proceeded on Feb. 1, 1994. During this phase, Haight presented proof from Dr. Brad Fisher and Professor

Carol Goode that almost from birth Haight was an abused and neglected child with a borderline intelligence who was partially raised by his mentally ill mother, an unrelenting series of foster parents and institutions. Haight's extremely troubled family history, according to both Fisher and Goode, resulted in Haight, a delinquent and a runaway, becoming increasingly impulsive and unpredictable, unstable, unable to form lasting friendships and overly aggressive under stress. Despite this expert testimony, following 12 hours of deliberation on Feb. 3, 1994, the jury fixed Haight's punishment at death for each murder. The trial court subsequently sentenced Haight on March 21, 1994, to death for the murders of Omer and Vance; 20 years imprisonment for each robbery; and five years for unlawful possession of a handgun. (V.T. 10, 3/21/94, 11:17:30-11:22:30).

Haight took a direct appeal as a matter of right to the Kentucky Supreme Court. On appeal, Haight raised numerous issues on matters of jury selection, voir dire, jury bias, jury misconduct, instructional error, exclusion of evidence, improper admission of prior bad acts, prosecutorial misconduct, improper introduction of prior convictions, unconstitutional death penalty sentencing scheme, and improper denial of the enforcement of the original plea agreement. On this last issue, the Kentucky Supreme Court in its unanimous opinion rendered on November 21, 1996, explained for the third time:

We wiped the slate clean of the defective guilty plea negotiations and trial court sentence [in the Garrard Circuit Court] and restored the status quo immediately after the indictment.

*5

[I]t is clear that he [Haight] really wants and believes himself entitled to enforcement of the original agreement. On at least three prior occasions, this Court has said no to enforcement of the original agreement and in this opinion we say it again. The flaw in the Garrard Circuit Court proceeding was in the trial judge's failure to keep his distance from the plea negotiations with the result being that appellant was misled as to the trial judge's intentions. We corrected that error and restored appellant to all the rights he had prior to the guilty plea.

 *Haight v. Commonwealth*, 938 S.W.2d 243, 251-52 (Ky. 1996) ( *Haight III*). The court then continued in its 12-page opinion to reject all of the remaining arguments

raised by Haight on direct appeal. The U.S. Supreme Court subsequently denied Haight's petition for a writ of certiorari on Oct. 6, 1997. *Haight v. Kentucky*, 522 U.S. 837, 118 S.Ct. 110, 139 L.Ed.2d 63 (1997).

Haight then returned to the Jefferson Circuit Court to pursue his post-conviction remedies. On Oct. 14, 1997, Haight filed a motion to vacate or set aside his judgment of conviction pursuant to [Rule 11.42 of the Kentucky Rules of Criminal Procedure](#) (RCr). Haight requested that the trial court grant him the opportunity to take discovery and have an evidentiary hearing. Haight also sought to request expert funding pursuant to an ex parte hearing and requested leave to file a supplemental motion to vacate. (V.T. 12, 3/16/98, 12:38:20, 11:39:50, 11:44:00). The trial court scheduled a hearing for April 20, 1998, but the hearing was canceled. Instead, without ruling on Haight's pending motion for an ex parte hearing on the question of funding for experts, the trial court entered an order on Sept. 9, 1998, that denied Haight relief on his [RCr 11.42](#) motion while simultaneously denying his request for discovery, expert funding and an evidentiary hearing.

The trial court in its findings and order concluded that none of the claims of ineffective assistance of counsel raised by Haight warranted relief. The trial court further found that there were no material issues of fact that could not be determined from the face of the record. As for Haight's request for an evidentiary hearing, the trial court noted that Haight had not identified any witnesses or specific claims to be presented at such a hearing. After examining all 23 of the issues raised in Haight's motion to vacate, the trial court considered that most of the issues closely mirrored those raised and rejected by the Kentucky Supreme Court in an earlier death penalty case, *Sanborn v. Commonwealth*, Case No. 96-SC-939-MR. The trial court then concluded its order by noting that the death sentence imposed upon Haight is "not constitutionally invalid for lack of due process, for ineffective assistance of counsel, or for any other reason ascertainable by this court." (Appellee Brief on post-conviction appeal, 98-SC-931-MR, Appx. 1-2).

On Sept. 21, 1998, Haight filed a motion for the trial court to reconsider its final order pursuant to [Kentucky Rule of Civil Procedure 59.05](#). Haight filed along with his motion to reconsider a notice of appeal to the Kentucky Supreme Court. The trial court, however, did not rule upon the motion to reconsider, and the Kentucky Supreme Court declined to hold the appeal in abeyance in order to provide the lower court with

the opportunity to do so. Haight then took his fourth appeal to the Kentucky Supreme Court.

*6 On April 26, 2001, the Kentucky Supreme Court rendered its opinion in  *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) (hereinafter  *Haight IV*). In its opinion, the court held that Haight's trial counsel was not ineffective in preventing him from freely exercising his peremptory challenges, that he was not denied due process by the denial of his motion for leave to amend his post-conviction [RCr 11.42](#) motion, that Haight was not entitled to funding for experts in neuropsychology either at trial or on post-conviction review, that he was not entitled to discovery, that he failed to establish that the jury improperly considered the possibility of parole, or that members slept during the penalty phase of trial. Finally, the majority concluded that Haight's trial counsel were not ineffective at trial for their failure to introduce into evidence the previously withdrawn plea agreement of the Commonwealth as mitigating evidence during the penalty phase of trial. Two justices, Keller and Stumbo, dissented from this final holding based on their analysis of Kentucky evidence law.  *Haight IV*, 41 S.W.3d at 449-52. The U.S. Supreme Court denied Haight's petition for certiorari review of  *Haight IV* in *Haight v. Kentucky*, 534 U.S. 998, 122 S.Ct. 471, 151 L.Ed.2d 386 (2001).

On Nov. 29, 2001, Haight filed in the state trial court an amendment and supplement to his prior motion to vacate and motion for reconsideration. The Commonwealth filed its response to the amendment and supplement on March 28, 2002. On April 12, 2002, Haight filed his present petition for writ of habeas corpus and requested that the federal court stay proceedings pursuant to  [28 U.S.C. § 2254](#) while he sought a ruling from the Jefferson Circuit Court on his pending CR 59 motion to alter, amend or vacate. The prior magistrate judge entered a report and recommendation that Haight's habeas petition be stayed to permit him to exhaust his remaining state court remedies. The District Court adopted the recommendation and stayed further federal proceedings by order entered on Nov. 27, 2002.

Haight's case then returned to the Jefferson Circuit Court. After extensive briefing, the circuit court entered an order on April 6, 2006, finding that it lacked jurisdiction to address the merits of Haight's pending motions. Haight took appeal of this order to the Kentucky Supreme Court. On Aug. 23, 2007, the Kentucky Supreme Court entered its fifth and final

opinion affirming the trial court in *Haight v. Commonwealth*, 2007 WL 2404494 (Ky. Aug. 23, 2007) (hereinafter *Haight I*). Haight then notified the federal court of the conclusion of the state court proceedings and successfully moved to have included in his current  § 2254 petition the two issues that he had recently exhausted in the state courts. Before the Court now is his petition and motion for summary judgment which raise some 45 grounds for relief.

b. Evidence Presented at Trial.

No dispute existed during Haight's jury trial concerning his involvement in the deaths of Patricia Vance and David Omer. Haight admitted in his testimony that he shot both of the victims repeatedly. (V.T. 8, 01/28/94, 12:00:00-12:04:00, 13:19:16, 14:03:00-14:24:00, 15:05:00-15:12:00). As Haight described the events immediately surrounding the shooting on Aug. 22, 1985, Haight pulled onto what he thought was an old road in rural Garrard County. Haight was driving a stolen pickup truck and needed money for gas. Shortly after pulling off onto the supposed roadway, Haight heard another car pull up somewhere behind him. Haight feared that it might be the police as he had only recently broken out of the Johnson County Jail on Aug. 19 with fellow inmates Mabel Music, with whom Haight was romantically involved, and Tony Minnix. (V.T. 8, 1/28/94, 11:49:35). Following his escape early Sunday morning, Haight had gone on a drunken crime spree breaking into several homes, a business and stealing firearms and alcohol.

After hearing the approaching vehicle stop, Haight armed himself with a loaded stolen .38 pistol in his right hand and a stolen .45 semi-automatic in his left hand and approached the apparently unoccupied Chrysler station wagon of David Omer. Haight unsuccessfully tried to open the car door. When it would not open, he took the butt end of the .45 pistol and shattered out a car window. At that point, David Omer apparently reached up from the backseat and grabbed Haight's hand. Haight testified at trial he began shooting into the passenger compartment of the occupied vehicle with both handguns until one or both of the weapons were completely empty. (V.T. 8, 01/28/94, 14:16:00-14:18:00, 15:11:00-15:12:00). As noted, Vance and Omer died from multiple gunshot wounds to the head and body with Vance being shot on the right side of her forehead, in the back of her head, and the corner of her right eye. David Omer also was shot in the back of the head, the left side of his face, the left armpit area, and on the left side of his chest. (V.T. 7, 01/27/94, 10:41:50-11:00:04, 11:29:00-11:38:20).

*7 After shooting the partially clad couple to death, Haight moved the station wagon containing their dead bodies so that he could maneuver his stolen pickup truck back onto the highway. (V.T. 8, 1/28/94, 14:23:00, 14:19:00, 14:30:00). Haight took various items of the victims' clothing, as well as Omer's wallet and Vance's purse, both of which were later recovered from the stolen pickup truck after Haight abandoned it in a nearby cornfield.

As fate would have it, that evening at approximately 10:25 p.m., Kentucky State Trooper Phillip Yates was driving on Ky. Hwy. 152 in Mercer County when he heard a radio dispatch about a stolen GMC Jimmy pickup truck with handicap license plates. As Trooper Yates drove along Ky. 152 he saw a GMC pickup truck with handicap license plates pull out into the road in front of him. He decided to follow the vehicle, which had one occupant. Yates followed the truck for approximately five minutes before activating his emergency lights to pull the vehicle over. After the GMC truck stopped, Trooper Yates stepped out of his cruiser to approach. As he did so, the driver in the pickup truck slouched down in the seat, stuck his arm outside the driver side window and immediately fired four shots at Yates, who had stepped wide from his cruiser. All of the shots missed Yates, but several of them did hit the cruiser. Yates took cover behind his vehicle and returned fire. Haight sped off in the GMC truck with Yates quickly in pursuit as Haight fired two more shots toward the cruiser.

The chase lasted for five or six miles through Mercer County down U.S. Hwy. 68 onto Curry Pike. Although Trooper Yates lost sight of Haight during the chase, another officer, a deputy sheriff, saw the GMC lose control on a sharp curve and wreck in an adjacent cornfield. The deputy sheriff then approached the abandoned GMC truck. At that point, Haight had fled on foot and a manhunt was instituted while the pickup truck was searched.

David Omer's wallet was recovered in the front seat of the stolen truck. A .38 Smith & Wesson special was found lying inside the truck. Just outside the vehicle was the stolen Colt .45 semi-automatic, along with Patricia Vance's wallet and various items of clothing from both victims. Ballistic testing later confirmed both weapons to have been used in the murders. Additionally, fingerprints matching that of Randy Haight were taken from the pickup truck, as well.

Law enforcement officers tracked Haight through the cornfield throughout Thursday evening and into Friday when he was finally discovered at approximately 3 p.m. that afternoon hiding in a separate cornfield on an adjacent farm. When he was discovered, Haight had \$468 on his person, which matched the amount of money taken from David Omer. He also had in his possession two handcuff keys belonging to the owner of the stolen GMC pickup truck.

Events leading to the capture of Haight, and the discovery of the bodies of Omer and Vance began five days earlier at the Johnson County Jail, where Randy Haight was then incarcerated awaiting resentencing. Haight, a persistent felon, had been imprisoned for virtually all of his adult life except for two years. (V.T. 8, 1/28/94, 11:34:50, V.T. 9, 2/1/94, 10:05:33-10:29:25). Haight was scheduled to be released from the Johnson County Jail in three days when he escaped with Mabel Music and Tony Minnix on Sunday, Aug. 18, 1985. During his stay at the jail, Haight had developed a close, romantic relationship with Music, who was housed in the cell opposite his own. (V.T. 5, 1/24/94, 14:20:35). According to Haight, he was deeply in love with Music, who the jailers had permitted him to have contact visits with during their incarceration together. (V.T. 5, 1/24/94, 15:44:41).

*8 According to a separate attorney who represented Haight and had visited him in the jail in Johnson County prior to his escape, Haight was extremely tense and agitated as well as anxious about the status of Music. (V.T. 7, 1/28/94, 10:01:08-10:03:10). Music testified at trial that she and Haight did not actually discuss escaping from the Johnson County Jail. Haight, however, knew that Music wanted to leave the jail and that she believed she was being unjustly incarcerated in Kentucky. (V.T. 5, 1/24/94, 14:22:40). Haight apparently was afraid that he would be released from jail without Music, and therefore unable to see her. He, Music and Minnix consequently decided to escape from the jail in the early morning hours of Sunday, Aug. 18, 1985, by sawing through the jail cell bars. (V.T. 8, 1/28/94, 11:49:35).

Upon escaping, the trio went immediately to the home of Tony Minnix in Saylorsville, Kentucky, where they obtained Minnix's automobile. (V.T. 6, 1/26/94, 9:20:20). The group then drove to Richmond, Kentucky, where they met Haight's friend Teresa Henderson, who took them to a vacant home on Whitlock Rd. where they could stay. (V.T. 5, 1/24/95, 14:26:47-14:28:55). On Monday morning, Aug. 19, 1985, Haight, who had already started drinking alcohol, broke into a nearby home and stole a Smith & Wesson .38 special and

a .22 caliber pistol. (V.T. 5, 14:34:30, 14:44:10). Haight later became so intoxicated that he passed out along the roadside. (*Id.* 14:46:40). On Wednesday morning, he stole several cases of liquor from a local business and began drinking heavily that afternoon. (*Id.* 15:57:40). After becoming drunk, Haight and several others in the group shot pistols off inside the vacant home in which they were hiding. (V.T. 6, 1/26/94, 10:51:32). Haight then passed out again. When he awoke Thursday morning, he discovered that Mabel Music had fled during the night, taking Tony Minnix's automobile and the stolen .22 caliber pistol. (V.T. 5, 1/24/95, 14:52:00).

Haight then went to the home of Teresa Henderson. (V.T. 5, 1/26/94, 10:55:53). According to Henderson, Haight was extremely upset and cried for hours. (*Id.*, 11:15:16-11:21:00). Haight and Henderson then left to return Haight to the empty house on Whitlock Rd., but before they reached the home, Haight had Henderson drop him off at a store at approximately 11 a.m. that morning. Haight then stole several cases of liquor from the store. Later that afternoon at approximately 3:30 p.m., in Madison County, Haight stole the GMC Jimmy pickup truck of Madison County resident Joe Sasser, while Sasser was inside his home inspecting some repair work then being performed.

When Sasser came outside his gray and black 1979 GMC truck was gone. Inside the truck was a loaded .45 semi-automatic Colt pistol. On the ignition key ring were two handcuff keys used by Sasser to lock up expensive shotguns, which were not then in the cab of the truck. Later that same evening, sometime before 10:30 p.m., Haight, still in possession of Sasser's GMC truck, pulled off into the private driveway leading to Ed Poindexter's home in Garrard County. Soon thereafter, David Omer and Patricia Vance unknowingly pulled onto the same dirt road unaware that Haight was hiding nearby in the stolen vehicle. Omer's station wagon would later be discovered by Poindexter at approximately noon that Friday, Aug. 23, with most of the windows shot out and blood on the steering wheel indicating that the vehicle had been moved after the murders of Omer and Vance had been committed.

CONCLUSIONS OF LAW

Haight has filed a 221-page memorandum of law in support of his petition for habeas corpus relief along with a 37-page motion for summary judgment. (DN's 61, 141). In his petition, Haight raises some 45 grounds for relief. These grounds are

grouped into sections based upon the nature of the claims raised. The first section in Haight's memorandum includes grounds 1, 2, 3, 4, and 33, all of which relate to the 1986 plea agreement entered in the Garrard Circuit Court. (DN 61, pp. 18-47). His motion for summary judgment also includes these same grounds along with grounds 5, 8 and 20, which relate to his claims of denial of a fair and impartial jury. (DN 141, p. 3).

*9 That agreement, as noted, provided that in return for Haight's plea of guilty to the murder and robbery charges, the Commonwealth would dismiss the charge of being a felon in unlawful possession of a handgun and would recommend to the trial court that Haight receive a sentence of life without the possibility of parole for 25 years for the murder charges. After accepting Haight's plea of guilty based upon this plea agreement, the Garrard Circuit Court rejected the recommendation of the prosecutor, sentenced Haight to death, and refused to allow him to withdraw his guilty plea. Haight successfully appealed from this judgment, which the Kentucky Supreme Court vacated in [Haight I](#), along with the trial court order that accepted Haight's guilty plea. [Haight I](#), 760 S.W.2d at 89. With [Haight I](#), the Kentucky Supreme Court reinstated the original charges and remanded Haight's case to the trial court for the entry of a new plea in accordance with Haight's own alternative request for relief on appeal.

a. Standards of Review.

1. The AEDPA Standard

The first question that the Court must address before it may potentially reach the substance of any of the grounds raised in Haight's petition is the appropriate standard for review to be applied to those constitutional claims that were considered on their merits and those that were not. The Court accordingly turns to those decisions that discuss the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) and its standard of review contained in [28 U.S.C. § 2254\(d\)](#). Because Haight's petition was filed after the effective date of the AEDPA, its provisions apply in full to the consideration of his case. [Woodford v. Garceau](#), 538 U.S. 202, 210, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); [Barker v. Yukins](#), 199 F.3d 867, 871 (6th Cir. 1999).

Under the AEDPA, a federal court shall not grant a writ of habeas corpus to a person in custody pursuant to a state court

judgment unless the adjudication of the prisoner's claims in state court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as defined 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 proceedings. See [28 U.S.C. § 2254\(d\)\(1\)-\(2\)\(2004\)](#); [Murphy v. Ohio](#), 551 F.3d 485, 493-94 (6th Cir. 2009) (discussing the standard of [28 U.S.C. § 2254\(d\)\(1\)-\(2\)](#)).

The Supreme Court first elaborated on the meaning of this statutory language in [Terry Williams v. Taylor](#), 529 U.S. 362, 405-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In so doing, the Court noted that [§ 2254\(d\)](#) “places a new constraint on the power of the federal courts to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” [Williams](#), 529 U.S. at 412, 120 S.Ct. 1495. A state court decision that resolves a constitutional claim on its merits will be “contrary to” the precedent of the Supreme Court only if the “state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law” or “the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [the opposite] result.” [Id.](#) at 405, 120 S.Ct. 1495. See [Treesh v. Bagley](#), 612 F.3d 424, 428-29 (6th Cir. 2010) (discussing [Williams](#)).

A state court opinion will violate the “unreasonable application” clause of [§ 2254\(d\)\(1\)](#) when “the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts.” [Williams](#), 529 U.S. at 413, 120 S.Ct. 1495. See, [Bell v. Cone](#), 535 U.S. 685, 694-95, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); [Hodges v. Colson](#), 727 F.3d 517, 525-26 (6th Cir. 2013); [Phillips v. Bradshaw](#), 607 F.3d 199, 205 (6th Cir. 2010) (same). A state court opinion will not be an “unreasonable application” of Supreme Court precedent merely because it does not extend or refuses to extend a legal principle from Supreme Court precedent to a new context. [White v. Woodall](#), 572 U.S. —, 134 S.Ct. 1697, 1706, 188 L.Ed.2d 698 (2014).

*10 The Supreme Court in *Williams* explained that “a federal court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Williams*, 529 U.S. at 409, 120 S.Ct. 1495. The term “objectively unreasonable” means that “[a] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411, 120 S.Ct. 1495. See also, *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *Price v. Vincent*, 538 U.S. 634, 638-39, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003); *Owens v. Guida*, 549 F.3d 399, 404-05 (6th Cir. 2008) (“Ultimately, the AEDPA’s highly deferential standard requires that this court give the state-court decision ‘the benefit of the doubt.’”) (quoting *Slagle v. Bagley*, 457 F.3d 501, 514 (6th Cir. 2006)). See also, *Uttecht v. Brown*, 551 U.S. 1, 10, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) (The requirements of the AEDPA “create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings.”)

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 784-787, 178 L.Ed.2d 624 (U.S. Jan 19, 2011), “A state court’s determination that a [constitutional] claim lacks merit precludes federal habeas relief so long as “fair-minded jurists could disagree” on the correctness of the state court’s decision.” *Id.* at 785 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). The question in this regard is not whether the habeas court would have reached the same conclusion as the state court on *de novo* review, but rather whether reasonable jurists could debate the existence of arguments, based on existing Supreme Court precedent, that would support the outcome below. *Id.* If so—if the challenged result was at least reasonably debatable—even in those instances in which the state court does not reveal the reasoning for its outcome, then the habeas court must uphold the decision of the state court. *Id.* (*Renico v. Lett*, 559 U.S. 766, 772, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2011)). See *O’Neal v. Bagley*, 728 F.3d 552, 557

(6th Cir. 2013) (“In other words, ... [petitioner] must show that the challenged decision rested on “an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.”) (quoting, *Harrington*, 131 S.Ct. At 786-87).

This standard of review is intentionally a difficult one to satisfy and “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 533 U.S. 68, 71 (2003)); *Renico*, 559 U.S. at 773, 130 S.Ct. 1855 (the “AEDPA thus imposes a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the doubt.’”) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 (S.Ct. 2059, 138 L.Ed.2d 481 1997)); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (“[a] federal court’s collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.”).

In essence, § 2254(d), as amended by the AEDPA, only “preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.

It goes no farther.” *Harrington*, 131 S.Ct. at 786. Habeas corpus relief consequently stands as a guard against only “‘extreme malfunctions in the state criminal justice systems’” rather than a means to correct ordinary errors. *Id.* (*Jackson v. Virginia*, 443 U.S. 307, 332 n. 5(, 99 S.Ct. 2781, 61 L.Ed.2d 560 1979)). *Montgomery v. Bobby*, 654 F.3d 668, 676-77 (6th Cir. 2011) (“The Supreme Court has made clear that § 2254(d), as amend by the AEDPA is a purposefully demanding standard.”) (citing *Harrington*). It is “a substantially higher threshold” for obtaining relief that *de novo* review. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).

*11 When determining the “clearly established federal law,” the courts may look only to the holdings of decisions of the Supreme Court of the United States at the time the petitioner’s state conviction became final. *Williams*, 529 U.S. at 380, 120 S.Ct. 1495; *Abella v. Martin*, 380 F.3d 915, 924 (6th Cir. 2004). It is error for the federal courts to rely solely on

authority other than the Supreme Court of the United States in their analysis under § 2254(d). *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000), *cert. denied*, 532 U.S. 947, 121 S.Ct. 1415, 149 L.Ed.2d 356 (2001). The decisions of lower federal courts may be considered, however, as being informative of whether a legal principle or right has been clearly established by the Supreme Court. *Smith v. Stegall*, 385 F.3d 993, 997-98 (6th Cir. 2004).

Additionally, the AEDPA standard of review will only apply to those claims that were “ ‘adjudicated on the merits in the state court proceedings.’ ” *Harrington*, 131 S.Ct. at 784; *Nali v. Phillips*, 681 F.3d 837, 841 (6th Cir.) *cert denied*, 133 S.Ct. 525 (2012); *Phillips*, 607 F.3d at 205 (quoting *Hartman v. Bagley*, 492 F.3d 347, 356 (6th Cir. 2007)). See also, *Montes v. Trombley*, 599 F.3d 490, 494 (6th Cir. 2010) (“if a claim is fairly presented to the state courts, but those courts fail to adjudicate the claim on the merits, then the pre-AEDPA standards of review apply”). Claims that the state court resolves without deciding the federal constitutional issues, for example when they are held to be procedurally barred, are reviewed under the pre-existing law that predates the AEDPA. *Coley v. Bagley*, 706 F.3d 741, 749 (6th Cir.) *cert denied*, — U.S. —, 134 S.Ct. 513, 187 L.Ed.2d 371 (2013). See also, *Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).

Under such review, questions of law, including mixed questions of law and fact, are reviewed de novo, and questions of fact are reviewed under the clear-error standard. *Nichols v. Heidle*, 725 F.3d 516, 557 (6th Cir. 2013) (“Claims that were not adjudicated on the merits in [s]tate court proceedings receive the pre-AEDPA standard of review: de novo for questions of law (including mixed questions of law and fact), and clear error for questions of fact.”); *Brown v. Smith*, 551 F.3d 424, 430 (6th Cir. 2008); *Sowell v Anderson*, 663 F.3d 783, 789 (6th Cir. 2011) (discussing the pre-AEDPA standard of review). See *gen Johnson v. Beckstrom*, 2011 WL 1808334 at *12, 26 (E.D. Ky. May 12, 2011) (describing de novo review as being a “narrow sliver” in which review of a habeas corpus claim is otherwise appropriate).

Merely because a state court does not provide an explicit rationale for its ultimate result, however, does not mean that its judicial decision is not an “adjudication on the merits” for

the purposes of § 2254(d). *Harrington*, 131 S.Ct. at 784 (“[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning.”). Even in those instances in which the state court decision does not include any explanation for the adverse outcome of petitioner's properly raised constitutional claims, petitioner must still show that no reasonable basis existed for the state court to deny relief. *Id.* Indeed, according to *Harrington*, the state court need not even be aware of or cite to the published decisions of the U.S. Supreme Court so long as it does not run afoul of them. *Id.* at 786 (pursuant to § 2254(d) “a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court.”).

*12 When the petitioner's constitutional claim is fully and fairly presented to the state courts, a presumption arises that the state courts adjudicated the disputed claim on its merits absent any indication to the contrary such as a determination based on state procedural law. *Id.* at 785 (citing *Harris v Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)). See, *Brown v. Bobby*, 656 F.3d 325, 329 (6th Cir. 2011) *cert. denied* 568 U.S. 1192, 133 S.Ct. 1452, 185 L.Ed.2d 360 (2013). Petitioner may overcome such presumption if reason exists to believe that “some other explanation for the state court's decision is more likely.” *Id.*

The AEDPA also affords deferential treatment to the findings of fact made by the state court during the proceedings at trial and on appeal. Specifically, 28 U.S.C. § 2254(e) (1) provides that, “[a] determination of a factual issue made by state court shall be presumed to be correct.” *Id.* See *Thompson v. Bell*, 580 F.3d 423, 434 (6th Cir. 2009) (“A habeas court must presume the state court's factual findings are correct.”) Further, “[t]he applicant [for § 2254 relief] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” *Mahdi v. Bagley*, 522 F.3d 631, 636-37 (6th Cir. 2008). The factual findings of the state courts are reversed only if the petitioner establishes that they are clearly erroneous. See *Williams v. Bagley*, 380 F.3d 932, 941-42 (6th Cir. 2004); *Brumley*

v. *Wingard*, 269 F.3d 629, 637 (6th Cir. 2001) (presumption of correctness applies to fact findings made by a state appellate court based on the state trial record). See also, *Sumner v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (holding that § 2254 makes no distinction between the factual determination of a state trial court and those of the state appellate court). A clear factual error constitutes an unreasonable determination of the facts in light of the evidence presented if the state court's determination of facts is in conflict with clear and convincing evidence to the contrary. See *Wiggins v. Smith*, 539 U.S. 510, 528-29, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Finally, “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). See, *Fitzpatrick v. Robinson*, 723 F.3d 624, 633 (6th Cir. 2013) (“In addition to limiting the scope of our review, AEDPA encompasses an evidentiary limitation on federal habeas review. “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”) (citing, *Pinholster*, 131 S.Ct. at 1398); *Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir.) cert den'd, — U.S. —, 133 S.Ct. 2866, 186 L.Ed.2d 919 (2013) (same).

2. The Summary Judgment Standard.

The warden in response to Haight's petition has filed a memorandum of law that requests the dismissal of the petition, or in the alternative, that summary judgment be entered in his favor (DN 64). Haight has filed his own motion for summary judgment on claims 1, 2, 3, 4, 5, 8, 20 and 33 of his petition (DN 141). Such motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure may properly be filed in habeas corpus cases. See, *Slaughter v. Parker*, 187 F.Supp.2d 755, 785-86 (W.D. Ky. 2001), *aff'd in part, rev'd in part*, 450 F.3d 244 (6th Cir. 2006), cert. den'd, *Leonard v. Simpson*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007). A petition for a writ of habeas corpus in essence is merely a civil action brought in federal court based on claims related to a state criminal proceeding. See *Fisher v. Baker*, 203 U.S. 174, 181, 27 S.Ct. 135, 51 L.Ed. 142 (1906). The resolution of a habeas corpus petition therefore is subject to the Federal Rules of Civil Procedure to the extent that such rules are not inconsistent with habeas

practice and procedure. See Rule 12, *Rules Governing § 2254 Cases*.

*13 The U.S. Supreme Court explicitly recognized in *Blackledge v. Allison*, 431 U.S. 63, 80, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) that a motion for summary judgment is appropriate in a § 2254 proceedings. Our own federal courts in the Sixth Circuit repeatedly have confirmed that such Rule 56 motions may be made by either party in a habeas corpus proceeding. *Sanders v. Freeman*, 221 F.3d 846, 851 (6th Cir. 2000), cert. den'd, 531 U.S. 1014, 121 S.Ct. 571, 148 L.Ed.2d 489 (2000); *Workman v. Bell*, 178 F.3d 759, 765 (6th Cir. 1998), cert. den'd, 528 U.S. 913, 120 S.Ct. 264, 145 L.Ed.2d 221 (1999); *Redmond v. Jackson*, 295 F.Supp.2d 767, 769-770 (E.D. Mich. 2003); *Harris v. Stegal*, 157 F.Supp.2d 743, 746 (E.D. Mich. 2001); *Slaughter*, 187 F.Supp.2d at 785-86. See also, *Clark v. Johnson*, 202 F.3d 760, 764-65 (5th Cir.), cert. den'd, 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46 (2000) (“As a general principle, Rule 56 of the Federal Rules of Civil Procedure, applies with equal force in the context of habeas corpus cases.”).

Summary judgment will be appropriately entered “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). See gen., *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under the Rule, the moving party bears the burden to establish the absence of a genuine issue of material fact and to demonstrate an entitlement to judgment as a matter of law. See *Hauck v. Mills*, 941 F.Supp. 683, 686-88 (M.D. Tenn. 1996) (citing *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505). Ordinarily, the Court when it reviews such motions is required to view the evidence in favor of the non-moving party to decide if there is a genuine issue of material fact; this presumption however is materially altered by the operation of § 2254(e)(1) as explained below. *Slaughter*, 187 F.Supp.2d at 785-86. Only those factual disputes that may affect the outcome of any habeas corpus proceedings will prevent the entry of summary judgment. *Id.* (citing *Anderson*, 477 U.S. at 284, 106 S.Ct. 2523 and *Nernberg v. Pearce*, 35 F.3d 247, 249 (6th Cir. 1994)).

Disputes that involve facts that are irrelevant or unnecessary will not prevent the entry of summary judgment as a matter of law.  *Id.*

As *Hauck* teaches, “Substantive law of federal habeas corpus actions defines those facts which are material to the issuance of the writ.” *Hauck*, 941 F.Supp. at 687. Written findings of fact by the state courts, as noted above, are presumed to be correct absent clear and convincing evidence to the contrary. *Id.* Consequently, “while those facts tending to demonstrate the unconstitutionality of state custody are material, due to the statutory presumption of correctness, the petitioner faces a comparatively higher burden in establishing the genuineness (or hearing worthiness) of contested facts.” *Id.* (citing  *Sumner v. Mata*, 449 U.S. 539, 547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)) ( *Sumner I*) (stating that when state and federal courts review the same record, comity and federalism concerns mandate deference to state court factual findings). *See gen.*,  *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (“ § 2254(e)(1)—which mandates that findings of fact made by a state court are ‘presumed to be correct’—overrides the ordinary rule that, in a summary judgment proceeding, all disputed facts must be construed in the light most favorable to the nonmoving party. Unless [petitioner] Smith can ‘rebut ... the presumption of correctness by a clear and convincing evidence’ as to the state court’s finding of fact, they must be accepted as correct.”), *cert. dismissed*,  *Smith v. Dretke*, 541 U.S. 913, 124 S.Ct. 1652, 158 L.Ed.2d 263 (2004);  *Gentry v. Sinclair*, 576 F.Supp.2d 1130, 1139-40 (W.D. Wash. 2008) (recognizing that  § 2254(e)(1)’s presumption of correctness applies to summary judgment motions brought in habeas corpus proceedings), *aff’d*,  705 F.3d 884 (9th Cir. 2013), *cert. den’d*, — U.S. —, 134 S.Ct. 102, 187 L.Ed.2d 75 (2013).

b. Plea Agreement Claims.

*14 Haight now argues in ground 1 of the plea agreement section of his memorandum of law and motion for summary judgment that the due process clause of the United States Constitution compels the federal courts to order the specific performance of the plea agreement. (DN 61, pp.19-28; DN 141, 19-36). Haight contends that he was irrevocably prejudiced following the entry of his guilty plea by the conduct of both the Garrard Circuit Court and the ensuing state prosecutors, who in direct violation of the agreement,

sought to impose the death penalty upon him. Haight then continues in ground 2 to contend that the conduct of the state in seeking his death following his successful initial appeal in  *Haight I* was presumptively vindictive under both the Eighth and Fourteenth Amendments after the state had agreed in its own plea agreement to recommend a life sentence. (DN 61, pp. 29-31; DN 141, 19-36).

Haight then turns to the double jeopardy clause in ground 3 to argue that it barred his retrial for murder and robbery of the guilt phase given the Garrard Circuit Court’s acceptance of the guilty plea and its misleading conduct that resulted in the reversal in  *Haight I*. (DN 61, pp. 31-33; DN 141, pp. 18-36). In ground 4 of his plea agreement-related claims, Haight argues that the death sentence imposed against him is unconstitutional under both the Eighth and Fourteenth Amendments because it is arbitrary, capricious, discriminatory and disproportionate. (DN 61, pp. 33-35; DN 141, pp. 18-37). Finally, in ground 33, Haight concludes the plea agreement section of his memorandum of law with the argument that his death sentence was unconstitutionally obtained given the irrevocable prejudice that he suffered at his 1994 trial due to the prior 1986 plea agreement. (DN 61, pp. 36-47; DN 18-37).

1. Due Process Requires Specific Enforcement of the Plea Agreement.

In ground 1 of his petition, Haight argues that the due process clause of the U.S. Constitution requires this Court to order the specific performance of his 1986 plea agreement entered in the Garrard Circuit Court.¹ Haight maintains that with the entry of this plea agreement, and his subsequent plea of guilty to charges of capital murder, his opportunity to obtain a fair trial following remand upon entry of  *Haight I* was forever lost. The decision of the Kentucky Supreme Court to set aside the judgment and guilty plea on which it rested in Haight’s mind could not reset the counter to zero and return him to the same position that existed prior to his admission of guilt in April of 1986. Matters had forever changed, according to Haight, and only by the specific performance of the plea agreement’s terms could Haight obtain the benefit for which he had bargained, a recommendation of life without the possibility of parole for 25 years, rather than imposition of the death penalty.

Haight in raising his due process argument focuses directly on the language of the plea agreement, which provided:

It is the understanding of the defendant, and the same is hereby assured by the Commonwealth, that the above-stated sentence recommendation is, and will be presented to the Court, as a sincere and genuine request for imposition of the recommended sentence [of LWOP 25] and that **the Commonwealth will take no action inconsistent therewith.**

(Brief for Appellant, App. no. 86-SC-971-MR, Appx. Vol. I, pp. 11-12, pretrial agreement) (emphasis added).

Haight focuses his efforts on the highlighted portion of the quoted language from the plea agreement. This language is central to his due process argument. Haight claims that the plea agreement, as an enforceable contract with constitutional implications, in essence forever bound the Commonwealth from making any effort to seek the death penalty in the future following the remand of his case. Indeed, Haight maintains that the Commonwealth immediately breached its promise when it opposed his motion in the Supreme Court of Kentucky, filed concurrently with his original appeal in  *Haight I*, to enforce the terms of the plea agreement.

*15 The response of the Kentucky Attorney General in opposition to that motion was in direct contravention of the plea agreement, Haight insists. Haight also maintains that the argument of the Commonwealth on appeal in  *Haight I*, that the trial judge committed no error in sentencing Haight to death, despite the trial court's prior assurance that it ordinarily followed the recommendation of the prosecutor, itself also was raised in direct violation of the plea agreement and the state's original promise to "take no action inconsistent" with his recommendation of LWOP 25. Yet, when the Kentucky Supreme Court on Sept. 18, 1988, in  *Haight I* chose to reject Haight's plea for specific performance, and instead merely vacated the judgment and guilty pleas to remand the case to the trial court, its decision unfortunately failed to ensure that the Commonwealth would honor its promise and that Haight would have the benefit of his plea bargain agreement.

The same unsatisfactory resolution occurred again in *Haight II* according to Haight when the Kentucky Supreme Court in 1992, subsequently rejected his ongoing efforts to obtain merely what he had been promised throughout, that the Commonwealth would not seek the death penalty, but would recommend LWOP 25. Instead, in *Haight II*, the Supreme court of Kentucky held that in vacating the prior judgment of conviction and underlying guilty plea, the Court had merely granted Haight's underlying motion to the trial court, filed prior to his appeal in  *Haight I*, to withdraw his guilty plea. Therefore, the Supreme Court in *Haight II* concluded, incorrectly in Haight's view, that with the reinstatement of the original indictment and Haight's entry of a plea of not guilty, he was placed in exactly the same position legally that he was in before the 1986 plea agreement was entered. *Haight II*, 833 S.W.2d at 824.

Haight now argues that such reasoning by the Kentucky Supreme Court is first, an unreasonable application of the facts given what actually occurred in his case; and second, is contrary to the fundamental principles involving plea agreements as announced in  *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), which recognizes that plea bargains are contractual in nature and an "essential component of the administration of justice."  *Id.*

Haight devotes a substantial portion of ground 1 of his petition memorandum to a discussion of the traditional principles of contract law in the setting of plea bargaining. He correctly notes that such traditional principles are used by the courts to interpret and enforce plea agreements. *See, United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991). He also observes, again correctly, that the U.S. Supreme Court in  *Santobello* relied upon such basic theories of contract law to declare "that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."  *Santobello*, 404 U.S. at 262, 92 S.Ct. 495. *See also*,  *Matheny v. Commonwealth*, 37 S.W.3d 756 (Ky. 2001);  *Commonwealth v. Reyes*, 764 S.W.2d 62 (Ky. 1989) (relying upon contract law to enforce a plea agreement).

Haight continues to explain that plea agreements, similar to contracts, take on a constitutional dimension in the context of a criminal prosecution.  *Johnson*, 979 F.2d at 399. The implication in such unique circumstances is that the intent of

the parties, as determined by the use of traditional principles of contract law, is to be fulfilled by the courts based on their factual determination of such intent. Haight maintains that the

Kentucky Supreme Court in  *Haight I* in essence found that the Commonwealth was free to ignore what the clear language of the plea agreement provided, that the state would “take no action inconsistent” with the recommendation of LWOP 25. In doing so, the Kentucky Supreme Court, according to Haight, made an unreasonable determination of the facts in light of the evidence.

***16** When one applies Kentucky's basic principles of contract law, Haight maintains that the quoted phrase “take no action inconsistent” could not be clearer in the plea agreement so that when the agreement is construed in accordance with the clear intent expressed therein, the only possible result in accordance with due process is that the April 10, 1986 plea agreement must be specifically enforced. Otherwise, the state will have sidestepped its legal obligation to take no action inconsistent with the recommendation of LWOP 25. Not only will the fundamental purpose of the plea agreement be thwarted, but Haight will have been its victim, and all that he hoped to obtain through it lost in the face of a fundamentally unfair prosecution in Jefferson Circuit Court.

As example of the inequities resulting from the refusal of the Kentucky Supreme Court in  *Haight I* to require specific performance, Haight points out that by his guilty plea in 1986, he forever lost the presumption of innocence with the result that his ensuing entire defense at trial was unfairly restricted, thereby greatly increasing the likelihood of a death sentence. By his guilty plea, he lost forever the ability to take the witness stand to assert his innocence. In addition, the guilty plea itself was highly publicized as shown by the publication of a newspaper article during jury selection that directly referred to his prior guilty plea to the murders of Omer and Vance. Haight also lost any leverage he might have had, he argues, to obtain a subsequent plea agreement.

In light of the death sentence ultimately returned against him, and the plea agreement that called for a specific recommended sentence of LWOP 25, Haight maintains that  *Santobello*, which ultimately resulted in specific performance upon remand to the New York state courts, requires that this Court now truly reset the counter to zero and order the only appropriate remedy possible—the specific performance of the agreement. See,  *United States v. Holman*, 728 F.2d 809,

813 (6th Cir. 1984), *superseded by statute as recognized in, United States v. Kemper*, 908 F.2d 47, 52 (6th Cir. 1990).

The Court upon consideration does not disagree with any of the basic principles of contract law that Haight sets forth in ground 1 of his petition memorandum or in his summary judgment memorandum. A plea agreement is indeed considered to be a form of contract. See,  *Puckett v. United States*, 556 U.S. 129, 137, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (“Although the analogy may not hold in all respects, plea bargains are essentially contracts.”) (citing  *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)) (“A plea bargain standing alone is without constitutional significance; in itself it is a merely executory agreement which, until embodied in the judgment of a court, does not deprive the accused of liberty or any other constitutional protected interest.”). The United States Court of Appeals for the Sixth Circuit has recognized this contractual nature of plea agreements on numerous occasions.

See,  *United States v. Moncivais*, 492 F.3d 652, 662-63 (6th Cir. 2007), *cert. denied*, 552 U.S. 1031, 128 S.Ct. 633, 169 L.Ed.2d 409 (2007) (“Plea agreements are contractual in nature, and as such, courts are guided by general principles of contract interpretation when construing plea agreements.”) (citing  *United States v. Mandell*, 905 F.2d 970, 973 (6th Cir. 1990)). The district courts in this circuit likewise recognize this principle. *United States v. Snow*, 2009 WL 81152 at *2 (S.D. Ohio Jan. 9, 2009) (“This Sixth Circuit views plea agreements as if they were contracts and employs traditional principles of contract law in reviewing them.”) (citing  *United States v. Lukse*, 286 F.3d 906, 909 (6th Cir. 2002)); *United States v. Flowers*, 934 F.Supp. 853, 855-56 (E.D. Mich. 1996) (Plea agreements are to be interpreted and enforced in accordance with “traditional principles of contract law.”) (citing *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991)).

***17** The primary focus of the courts when faced with a dispute based upon a plea agreement is to apply the “fundamental principle of contract interpretation” that the primary importance rests with the terms of the contract so that the actual intent of the parties expressed in the writing is fulfilled based on the literal terms of the plea agreement.

See,  *Smith v. Stegall*, 385 F.3d 993, 999 (6th Cir. 2004), *cert. denied*, 544 U.S. 1052, 125 S.Ct. 2299, 161 L.Ed.2d 1094 (2005) (citing *Williston on Contracts*, § 31:4 (Fourth Ed. 2000)). More simply put, “plea agreements are to be enforced

according to their terms.”  *Moncivais*, 492 F.3d at 662. As the Supreme Court in  *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) explained, “When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” See also,  *Mocivais*, 492 F.3d at 662 (“Because a defendant obtains a plea agreement only at the expense of his constitutional rights, ‘prosecutors are held to meticulous standards of performance.’”) (quoting  *United States v. Vaval*, 404 F.3d 144, 152-53 (2d Cir. 2005)). More than mere lip service on the part of the prosecutor is required, as the rule of  *Santobello* requires not only that the prosecutor honor his or her promise as encompassed in the plea agreement, but the interest of fairness also prohibits such prosecutor from in effect attempting an “end run” around the promises made by the Government.  *Moncivais*, 492 F.3d at 662 (citing *United States v. Saxena*, 229 F.3d 1, 6 (6th Cir. 2000)).

A plea bargain and the rules of contract that govern its interpretation are merely that—a contract—until the plea agreement becomes the basis of a guilty plea. See,  *United States v. Delgado*, 61 F.3d 904 at *7 (6th Cir. 1995) (“‘A plea bargain standing alone is without constitutional significance: in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.’”) (citing  *Mabry*, 467 U.S. at 507, 104 S.Ct. 2543). Thus, it is only when a defendant relies upon the promises of the Government to enter a plea of guilty that the Government therefore becomes constitutionally bound to carry out its representations to the defendant. See, *United States v. Peck*, 56 F.3d 65 at *4 (6th Cir. 1995) (“‘When the Government makes promises to a defendant who relies on those promises and pleads guilty, the Government must carry out its representations.’”) (quoting  *United States v. Streebing*, 987 F.2d 368, 372 (6th Cir.), cert. denied, 113 S.Ct. 2933 (1993)). See also,  *McPherson v. Barksdale*, 640 F.2d 780, 781-82 (6th Cir. 1981) (“ *Santobello* did not explicitly hold that breach of a plea agreement was a violation of constitutional guarantees, but stated that prosecutors’ promises must be fulfilled when such promises induce guilty pleas.”) (citing  *Santobello*, 404 U.S. at 262, 92 S.Ct. 495).

When a court determines that the prosecution indeed has breached its promise in a plea agreement that was the basis of a plea of guilty, then the question becomes what, if any, remedies are available under the Constitution for such a prosecutorial “end run.” Here, Haight insists that the due process clause of the Constitution entitles him to specific performance of the original plea agreement entered into with the prosecutor in Garrard County in 1986. The federal law relating to the enforcement of plea agreements, however, plainly holds otherwise.

The Sixth Circuit consistently has interpreted  *Santobello* to leave to the state courts in the exercise of their discretion the authority to determine which remedy, specific enforcement or rescission, is the best remedy in such circumstances. See,  *Dixon v. Alexander*, 741 F.2d 121, 123-24 (6th Cir. 1984) (“In  *Santobello*, the Supreme Court remanded to the state court the question of ultimate relief.”). As  *Dixon* recognizes, the Supreme Court in  *Santobello* determined that “the state court was in a better position to decide whether the circumstances called for specific performance or permitting appellant to withdraw the plea.”  *Id.* at 123. See also, *Chamberlain v. Celeste*, 729 F.2d 1071, 1075 (6th Cir. 1984) (The proper forum for a defendant to seek the enforcement of a plea agreement is the state courts.).

*18 This point, that the federal courts lack supervisory authority to order specific enforcement of a state defendant’s plea agreement, was brought home in  *McPherson v. Barksdale*, 640 F.2d 780, 781-82 (6th Cir. 1981), wherein the court unequivocally stated that “federal courts may not ordinarily choose the appropriate remedy for violations of plea bargains during state criminal proceedings.” While the breach of a plea agreement by a state prosecutor may be a violation of the federal constitution if that plea agreement is the basis for a guilty plea,  *McPherson* and the other Sixth Circuit opinions cited above recognize repeatedly that “federal courts lack the supervisory authority to specify the remedy for such a violation.”  *Id.* at 781. Thus, even if this Court were to accept the proposition that the state prosecutor in the Garrard Circuit Court and the subsequent state prosecutors in the Jefferson Circuit Court somehow breached the terms of the original plea agreement so as to violate due process under the U.S. Constitution, which it does not, our courts would have no authority to do

what the Kentucky Supreme Court repeatedly refused to do on multiple occasions—order the specific enforcement of Haight's original plea bargain.

Haight's due process arguments fail at a much more fundamental level, however, than the above discussion indicates initially. First, and most importantly, review of the record establishes that no breach of the plea agreement occurred by the actions of the prosecutor in the Garrard Circuit Court. The plea agreement's plain terms required only that the Commonwealth, in return for Haight's plea of guilty to the murder and robbery charges, recommend the sentence of LWOP 25 on each murder count and 20 years on each robbery count to run concurrently. (Appellant's brief in *Haight v. Commonwealth*, Case No. 94-SC-288, Appx. pp. A122-23). The plea agreement continued to provide, as Haight quotes in his petition, that

it is the understanding of the defendant, and the same is hereby assured by the Commonwealth, that the above-stated sentence recommendation is and will be presented to the Court as, a sincere and genuine request for imposition of the recommended sentence, and that the Commonwealth will take no action inconsistent therewith.

(*Id.* at A122-23).

Examination of the state court record reveals that at no time did the prosecutor in the Garrard Circuit Court take any action that was inconsistent with the Commonwealth's recommendation. To the contrary, the prosecutor repeatedly urged that the court adopt the recommendation. The circuit court simply chose not to do so, not because of any halfhearted efforts of the prosecutor, much less any breach of the above promise. Once the prosecutor recommended the agreed upon sentence, his promise had been fulfilled. At that point, the state had done all it could do to attempt to persuade the court to adopt the parties' bargain. The state court simply chose not to do so, not because of any misconduct by the state prosecutor or the court for that matter. Accordingly, no breach of the plea agreement occurred in the first instance.

Second, the Kentucky Supreme Court in  *Haight I* reasonably applied the legal principles of  *Santobello* decision. The court clearly provided Haight with the very relief that he had requested in the Garrard Circuit Court, that his plea agreement be withdrawn. In its opinion in  *Haight I*, the Kentucky Supreme Court set aside the final judgment of the Garrard Circuit Court, as well as its order of May 8, 1986, the order that accepted Haight's plea of guilty.  *Haight I*, 760 S.W.2d at 89. Haight therefore received the very relief that he asked for in the state trial court, not because the prosecutor in any sense breached the parties' plea agreement, but rather because the trial court, in the view of the Kentucky Supreme Court, inadvertently misled Haight concerning its willingness to follow the genuine recommendation put forth by the prosecutor. See,  *United States v. Allen*, 516 F.3d 364, 373 (6th Cir. 2008), *cert. denied*, 553 U.S. 1100, 128 S.Ct. 2919, 171 L.Ed.2d 853 (2008) (In  *Cohen v. United States*, 593 F.2d 766, 771 (6th Cir. 1979), “We explained that ‘the touchstone of *Santobello* is whether the prosecution met its commitment [to make a sentencing recommendation] and not whether the court would have adopted the Government's recommendation.’ ”).

*19 Once the Kentucky Supreme Court vacated both the judgment and the guilty plea, Haight had no further constitutional basis on which to insist upon the performance of the plea agreement. At that point, following remand to the Garrard Circuit Court, Haight had nothing more than a plea agreement that had not been incorporated into a judgment based on a plea of guilty. No due process right existed at that point to order the specific performance of that plea as “a plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in a judgment of the court, does not deprive an accused of liberty or any other constitutionally protected interest.”  *Mabry*, 467 U.S. at 507, 104 S.Ct. 2543; *Roby v. United States*, 815 F.2d 705 at *4 (6th Cir. 1987);  *United States v. Delgado*, 1995 WL 419003 at *7, 61 F.3d 904 (6th Cir. 1995).

Our sister district court in the Southern District of Ohio in *Prom v. Warden, Ohio Reformatory for Women*, 2009 WL 1270463 at *17 (S.D. Ohio, May 5, 2009) faced a similar situation in which a criminal defendant succeeded in having her guilty plea vacated and subsequently attempted to turn to the federal courts to obtain specific enforcement

of the plea agreement as opposed to the mere reinstatement of her original charges, the exact remedy imposed by the Kentucky Supreme Court in  *Haight I*. The district court in *Prom* entirely rejected the notion that the Ohio defendant therein had any constitutional right whatsoever to such relief. Indeed, the court in *Prom* explained that “the Supreme Court has never held that a criminal defendant who succeeds in having his or her guilty plea vacated is nevertheless entitled to enforcement of the plea agreement as opposed to reinstatement of the original charges.” *Id.* (citing  *Santobello*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)).

Prom then continued to add, significantly, that “ *Santobello* actually supports the State's position that the state court's refusal on remand to enforce the original plea agreement does not implicate constitutional concerns.”  *Id.* *Prom* concluded by observing, as noted above, “this court lacks supervisory authority to specify the appropriate remedy for the constitutional violation....”  *Id.* (citing  *McPherson*, 640 F.2d at 781-82). *See gen., United States v. Snow*, 2009 WL 81152 at *2 (S.D. Ohio, Jan. 9, 2009) (“‘[U]ntil accepted by the court, a plea bargain is a mere executory agreement, and is not specifically enforceable.’”) (quoting *Robey v. United States*, 815 F.2d 705, 187 WL 36860 at *3 (6th Cir. 1987)) (quoting  *Mabry*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)); *Boatfield v. Bowlen*, 2008 WL 762240 at *10 (E.D. Tenn., March 20, 2008) (No due process right exists to obtain specific enforcement of a plea agreement where the defendant has merely accepted a prosecutor's proposed plea bargain that has not been embodied in a judgment via a plea of guilty).

The implication of the above case law in its interpretation of both  *Santobello* and  *Mabry* is that Haight had and has no due process right to the specific enforcement of the original plea agreement. Once the situation changed following remand, and the original judgment and guilty plea were vacated, what existed was merely at most an executory plea agreement, a contract without constitutional dimension. The state prosecutors from that point forward had no constitutional duty whatsoever to seek the enforcement of the original plea agreement or to put it again before the state courts as the basis for a future plea of guilty.

The prosecutors could, and did, walk away from the plea agreement without the violation of any federal constitutional rights as Haight had none in the enforcement of the contract at that point. As a consequence, the actions of the state prosecutors in re-instituting notice of the death penalty and in seeking to obtain it were entirely proper and did not violate the Constitution, or even the terms of the original agreement, which provided only for a sincere recommendation in the original trial court. Haight therefore has not been subject to an unreasonable application of either the law or the facts by the Kentucky Supreme court in any of its three original opinions in *Haight I*, *Haight II*, or  *Haight III*, that dealt with the issue of his plea agreement.

*20 This conclusion is not altered by the arguments raised in Haight's motion for summary judgment at pages 18-36. (DN 141). Haight argues in essence that the Supreme Court of Kentucky in both  *Haight I* and  *Haight III* unreasonably applied  *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). His argument in this regard appears to be that judicial misconduct by the Garrard Circuit Court—in the form of a false promise to adhere to the recommendation of the prosecutor for LWOP 25 based on the parties' plea agreement—intentionally misled him into entering an involuntary plea of guilty, which the trial court then refused to permit him to withdraw thereby compelling him to seek to have the plea and resulting conviction set aside on appeal. Because he had no choice but to seek such relief, Haight insists that his double jeopardy protection, having attached with his guilty plea, was not voluntarily waived and continued to prevent his further prosecution on the existing charges. Drawing on  *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), a case involving a claim of ineffective assistance of counsel in plea bargaining rendered nearly five years after Haight's last post-conviction appeal became final, he concludes that the only appropriate remedy for the denial of an impartial trial court is that the Commonwealth be compelled to re-offer him the original plea agreement he accepted some 28 years ago now.

A number of insurmountable problems immediately confront Haight in his efforts to piece together  *Kennedy* and  *Lafler* to obtain what is, in effect, the specific enforcement of the original plea agreement. First, the entire argument is based on a factual assumption that is refuted by the record; one that Haight has never established—that the Garrard Circuit Court intentionally misled him in order to induce his

original guilty plea. The Supreme Court of Kentucky directly found as a matter of fact to the contrary in [Haight III](#) wherein the court explained that

The conduct of the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious or deliberate misleading. The trial court simply made an error which was corrected on appeal.

[Haight III](#), 938 S.W.2d at 252 While Haight obviously disputes this finding, he has not shown it to be clearly erroneous. We therefor are bound by it. No judicial overreaching or intentional misconduct was found and in the absence of such misconduct Haight's summary judgment arguments come unraveled.²

Second, Haight's reliance on [Lafler](#) is entirely misplaced. [Lafler](#) post-dates Haight's final post-conviction appeal in [Haight V](#) by nearly 5 years. [Haight V](#) was rendered by the Supreme Court of Kentucky on August 23, 2007. [Haight V](#), 2007 WL 2404494 (Ky. Aug 23, 2007), whereas [Lafler](#) was rendered on March 21, 2012. [Lafler](#), 132 S.Ct. at 1376. [Lafler](#) is not a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. See [In re Liddell](#), 722 F.3d 737, 738-39 (6th Cir. 2013) (“[A]s held by every other circuit to consider the issue, neither [Frye](#) nor [Cooper](#) created a ‘new rule of constitutional law’ made retroactive to cases on collateral review”)(collecting cases from 2nd, 5th, 7th, 8th, 9th, 10th, and 11th circuits).

Also, [Lafler](#) involved a claim of ineffective assistance of counsel during plea bargaining, a claim that Haight concedes he does not, and realistically could not, make in his current petition given the diligent efforts of his original counsel to obtain what would have been a highly favorable outcome had the Garrard Circuit Court accepted the prosecutor's recommendation. Even if such a claim were before this Court, the relief that [Lafler](#) envisions requires, in either of its alternative factual scenarios, that the affected defendant

establish that the trial court would accept the revived plea agreement. As the warden points out, Haight would have had little or no likelihood of success under this standard, even if it did apply, as the trial court had already once rejected the terms of the same plea agreement. In short, Haight's efforts in his summary judgment motion to graft together [Kennedy](#) and [Lafler](#) are little more than an alternative means, albeit an elaborate one, to seek specific performance of his original plea agreement, which he cannot obtain and we have no authority to order.

2. Vindictive Prosecution.

*21 Haight in ground 2 of his petition memorandum and summary judgment motion turns to the issue of vindictive prosecution.³ He essentially argues that the decision of the state to seek the death penalty following his initial successful appeal was presumptively vindictive in violation of the Eighth and Fourteenth Amendments in view of his existent written plea agreement for LWOP 25 in return for his guilty plea to the murders of Omer and Vance. Haight condemns as vindictive and unjustified the actions of the Commonwealth initially in seeking to uphold the judgment vacated in [Haight I](#) and in subsequently pursuing the death penalty following the remand of the case in September of 1988.

Haight points out that virtually nothing had changed following remand other than the Commonwealth's position on the death penalty. No additional incriminating evidence had surfaced and Haight was exactly the same defendant following the remand as he was before when the state entered into the original plea agreement. Haight insists that his plea agreement was with the Commonwealth, not with any individual prosecutor, and that all of the subsequent prosecutors were thereby precluded from breaking the plea agreement absent a change in circumstances. Citing [People v. Brownell](#), 96 Ill.2d 167, 70 Ill.Dec. 714, 449 N.E.2d 1318, 1320-21 (Ill. 1983) in his petition memorandum, he argues that the Commonwealth's change in position on the question of the death penalty for Haight violated his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

The warden responds that Haight's arguments miss the mark. All of the arguments raised in ground 2 of the petition, according to the warden, assert propositions of contract law rather than existing U.S. Supreme Court precedent that interpret the federal Constitution. The warden points out

that existing precedent announced in  *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) clearly held that no presumption of vindictiveness will arise for the purpose of the due process clause merely because a defendant who has successfully attacked a guilty plea later receives a more severe jury sentence for the same charges following trial. Additionally, the warden notes that Haight's petition arguments, apart from their failure to cite to a controlling precedent of the U.S. Supreme Court in this respect, also rest on the false notion that Haight's original plea agreement was somehow binding and enforceable against the Commonwealth in all future state criminal proceedings following  *Haight I*.

The Court must agree with the warden in both of these respects. First, and most importantly, Haight does not tell us in his petition memorandum what clearly established precedent of the U.S. Supreme Court was unreasonably applied or is clearly contrary to the decisions of the Kentucky Supreme Court in *Haight I*, *Haight II* or *Haight III* in this particular regard. Haight cites no then existing U.S. Supreme Court case law in his legal arguments in ground 2. At most, he offers merely a decision of the Illinois Supreme Court in his petition memorandum, which while interesting reading, does not begin to approach the required standard for relief under the applicable provision of the AEDPA discussed above.⁴ Haight's failure to explain in what respect the Kentucky Supreme Court's decisions in  *Haight I-III* were contrary to or an unreasonable application of a clearly established precedent of the U.S. Supreme Court by itself would defeat any relief requested on this particular argument.

*22 What Supreme Court precedent was in existence at the time that Haight's conviction became final on direct appeal on Oct. 6, 1997, is directly contrary to Haight's arguments of prosecutorial vindictiveness. No presumption of vindictiveness whatsoever arises merely because a defendant receives a greater punishment on trial than he originally would have received pursuant to a plea of guilty but for the fact that the defendant successfully challenged the original plea.  *Alabama v. Smith*, 490 U.S. at 801, 109 S.Ct. 2201 (“We think the same reasoning leads to the conclusion that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge.”). See *gen.*, *Goodeell v. Williams*, 643 F.3d 490, 499-500 (6th Cir.

2011)(discussing the evolution of Supreme Court law related to the presumption of vindictiveness upon resentencing following remand), *cert denied*, 565 U.S. 1127, 132 S.Ct. 1036, 181 L.Ed.2d 763 (2012).

A number of district courts in this circuit have reaffirmed this proposition. See, *Godsey v. Berghuis*, 2009 WL 4980899 at *7 (E.D. Mich., Nov. 24, 2008) (“The presumption of vindictiveness does not arise when the first sentence was based upon a guilty plea and the second follows a trial because a sentencing judge has considerably more relevant sentencing information after trial than is generally available when the defendant pleads guilty.”); *Gossard v. Bell*, 2006 WL 2460768 at *23-24 (E.D. Mich., Aug. 23, 2006) (“The rationale and holding of  *Smith* apply equally when a defendant is sentenced after conviction at trial following his decision to reject a plea bargain and plead not guilty.”);  *Williams v. Jones*, 231 F.Supp.2d 586, 597-99 (E.D. Mich., Oct. 30, 2002) (same).

Haight's argument for prosecutorial vindictiveness is flawed in yet one other fundamental respect. Haight's entire argument assumes that the state was bound following remand in  *Haight I* to continue to offer the original plea agreement. As explained above, once the Kentucky Supreme Court in  *Haight I* set aside the judgment of conviction and guilty plea so that Haight could enter a new plea to the original charges, the Commonwealth was no longer bound as a matter of constitutional law to keep open the original plea agreement. By that time, the original plea agreement had been fully performed by the Commonwealth, which even Haight concedes earnestly recommended to the Garrard Circuit Court that the recommended sentence of LWOP 25 for the two murders be imposed following Haight's original plea of guilty.

After the Kentucky Supreme Court vacated that guilty plea and the judgment on which it was based, what existed was merely a prior plea agreement that had been fully performed and was no longer enforceable against the Commonwealth so that the state's actions in seeking the death penalty were in no fashion vindictive whatsoever, presumptively or otherwise.

See,  *United States v. Townsend*, 796 F.2d 158, 164 (6th Cir. 1986) (“No presumption of vindictiveness arises merely because a defendant receives a more severe sentence than he or she originally would have under a proposed plea agreement that ultimately was rejected.”). Likewise, the Eighth Circuit has held that “there is no duty by a prosecutor to keep a plea

bargain open for any length of time.”  *Stokes v. Armontrout*, 851 F.2d 1085, 1089 (8th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 823, 102 L.Ed.2d 812 (1989). Because Haight has failed to adequately explain in what fashion the Kentucky Supreme Court unreasonably applied existing Supreme Court precedent on the question of prosecutorial vindictiveness, and because absolutely no presumption of vindictiveness arose merely because the Commonwealth elected not to renew the original plea bargain following remand after  *Haight I*, Haight is not entitled to habeas corpus relief under ground 2 of his petition.

3. Double Jeopardy Clause.

*23 Haight turns to the double jeopardy clause of the U.S. Constitution in ground 3 of his petition and his summary judgment motion.⁵ Haight argues in this section of his petition memorandum that upon the acceptance of his plea of guilty, the Garrard Circuit Court was required to either follow the recommendation of the prosecution or to accept the guilty plea and impanel a jury to determine the penalty pursuant to *Kentucky Rule of Criminal Procedure (RCr) 9.84*, which in 1986 read that “when the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.” *RCr 9.84* (1986). Haight reasons that based on the explicit language of the Rule, he was entitled to a jury penalty trial once the trial court accepted his plea of guilty, but rejected the LWOP 25 recommendation on the murder charges.

Citing  *Ricketts v. Adamson*, 483 U.S. 1, 8, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) in his petition memorandum, Haight reasons that when he entered his guilty plea and the court unconditionally accepted it, jeopardy attached as he stood convicted of the crimes of murder and robbery. As a result, Haight maintains that at that moment an absolute “state-based right” existed for him to have his penalty determined by a jury, which the judge denied. *See*,  *Wade v. Hunter*, 336 U.S. 684, 698, 69 S.Ct. 834, 93 L.Ed. 974 (1949). In his view, the actions of the trial court in unlawfully sentencing him to death, not only usurped the role of the jury, but “constituted the functional equivalent of a mistrial, over [his] ... objection, without being manifestly necessary.” (DN 61, pp. 32-33). From this reasoning, Haight concludes that the actions of the Garrard Circuit Court were the equivalent of improperly discharging a jury during a trial so that double jeopardy works to bar re-prosecution. As support for this proposition, Haight

cites  *United States v. Jorn*, 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) in his petition memorandum. Haight ultimately concludes that the Kentucky Supreme Court was barred by operation of the double jeopardy clause from vacating his original conviction absent his consent and from placing him again under jeopardy of death.

The warden counters in his response that the Kentucky Supreme Court in  *Haight III* properly applied the prevailing U.S. Supreme Court precedent, as previously noted, when it held that

The error of the trial court was not the type in fact which precludes re-prosecution.  *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). The comment to the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious deliberate misleading. The trial court simply made an error which was corrected on appeal. Double jeopardy principles do not preclude further prosecution with all lawful punishments being available.  *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

 *Haight III*, 938 S.W.2d at 252.

The warden also points out in response that the Kentucky Supreme Court in  *Haight I* vacated Haight's guilty plea as a result of Haight's own request in the trial court to withdraw from the plea. The outcome in  *Haight I* therefore was in no sense contrary to Haight's original request for relief, a fact the warden maintains distinguishes Haight's case from that in which a trial court improperly declares a mistrial over the objection of the defendant. Here, there was no objection to the withdrawal of the guilty plea in the warden's view. The warden also again turns to  *Alabama v. Smith*, 490 U.S. at 801, 109 S.Ct. 2201 as an analogy to Haight's own case

in which a dissatisfied defendant obtains reversal of a lower court judgment upon appellate review and upon remand of his case may be tried anew upon the same indictment for the very offenses for which he had previously been convicted. See,  *Ball v. United States*, 163 U.S. at 662, 16 S.Ct. 1192.

*24 The Kentucky Supreme Court directly addressed Haight's double jeopardy argument on direct appeal in  *Haight III. Haight III*, 938 S.W.2d at 252. In its opinion, the court explained that

Appellant's double jeopardy claim has been reviewed and determined to be without merit. The essence of this claim is that upon the prior guilty plea and death sentence, jeopardy attached. Because RCr 9.84 precluded imposition of the death penalty, the argument goes, appellant was "implicitly acquitted."

The error of the trial court was not the type and kind which preclude re-prosecution.  *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). The conduct of the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious or deliberate misleading. The trial court simply made an error which was corrected on appeal. Double jeopardy principles do not preclude further prosecution with all lawful punishments being available.  *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In  *Simpson v. Commonwealth*, 759 S.W.2d 224, 228 (Ky. 1988), we answered appellant's double jeopardy claim as follows:

It was appellant who moved the court to withdraw his guilty plea and his confession made during the plea proceeding. Such constitutes a waiver of his constitutional protection against double jeopardy for the purpose of trial on the charge in the indictment.  *Id.* at 288, 106 S.Ct. 2523.

 *Haight III*, 938 S.W.2d at 252 (parallel citations omitted).

This resolution of Haight's double jeopardy claim is entirely in accord with the principles of the double jeopardy clause in existence at the time that Haight's conviction became final on direct appeal in October of 1997. The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This guarantee of the

Fifth Amendment applies to the states through the Fourteenth Amendment. See,  *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). At the heart of the double jeopardy clause is the protection against multiple prosecutions for the same offense and protection against multiple punishments for the same offense. See,  *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977);  *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (citing  *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The fundamental philosophy that underlies these protections is that the state should not be allowed to use its many resources to make repeated efforts to convict an individual of an alleged offense with the consequence of subjecting him or her to embarrassment, expense and ordeal which greatly increasing the possibility that an innocent individual will be found guilty thereby. See,  *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976);  *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

The protection of the double jeopardy clause ordinarily will attach in the context of a trial either when a jury is empaneled or sworn, or in the case of a bench trial, when the court begins to hear evidence.  *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975);  *United States v. McIntosh*, 580 F.3d 1222, 1226-28 (11th Cir. 2009). A different rule will apply, however, when a criminal defendant elects not to proceed to trial, but rather chooses to enter a plea of guilty. In this context, jeopardy will attach when the trial court unconditionally accepts the guilty plea. See,  *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 (1927) (Acceptance of an unconditional plea "is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but to give judgment and sentence.");  *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990);  *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980) (jeopardy attaches with the acceptance of a guilty plea). Accordingly, when the Garrard Circuit Court accepted Haight's plea of guilty in 1986, double jeopardy did attach at that point. To this extent, Haight is correct.

*25 Merely because double jeopardy attached when the trial court accepted Haight's plea of guilty, however, does

not end the double jeopardy inquiry or mean that Haight's prosecution, along with the potential imposition of the death penalty, was automatically precluded. See,  *Illinois v. Somerville*, 410 U.S. 458, 459, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) (The attachment of jeopardy does not automatically prevent a defendant's retrial or re-indictment for the same crime);  *Ball v. United States*, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). When a criminal defendant is successful in his or her efforts to set aside a conviction, whether through a direct appeal or a subsequent collateral attack, due to an error that occurred in the proceedings that resulted in the conviction, the general prohibition of the double jeopardy clause against successive prosecutions does not apply to prevent the Government from retrying that defendant.  *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

In other words, “the double jeopardy clause ... does not relieve a defendant from the consequences of his voluntary choice.”  *United States v. Scott*, 437 U.S. 82, 99, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978);  *Ricketts v. Adamson*, 483 U.S. 1, 11, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (quoting  *Scott*, 437 U.S. at 99, 98 S.Ct. 2187). This circumstance applies with equal force in those situations in which a criminal defendant is successful in challenging a conviction based upon a plea of guilty. See,  *United States v. Moulder*, 141 F.3d 568, 571 (5th Cir. 1998) (“ ‘When a defendant repudiates the plea bargain, either by withdrawing the plea or by successfully challenging his conviction on appeal, there is no double jeopardy (or other) obstacle to restoring the relationship between the defendant and state as it existed prior to the defunct bargain.’ ”) (quoting  *Fransaw v. Lynaugh*, 810 F.2d 518, 524-25 (5th Cir.), cert. denied,  483 U.S. 1007 (1987));  *United States v. Dyer*, 136 F.3d 417, 429 n.29 (5th Cir. 1998) (“If a plea of guilty is withdrawn, or a plea agreement is abrogated, double jeopardy principles do not proscribe the imposition of a harsher punishment if the defendant is re-convicted.”) (citing  *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989));  *United States v. Podde*, 105 F.3d 813, 816-17 (2nd Cir. 1997) (“The numerous cases that consider this issue [of whether the double jeopardy clause applies when a defendant has withdrawn or successfully challenged his plea of guilty] ‘hold with apparent unanimity that when [the] defendant

repudiates the plea bargain, either by withdrawing the plea or by successfully challenging his conviction on appeal, there is no double jeopardy ... obstacle to restoring the relationship between defendant and state as it existed prior to the defunct bargain.’ ”) (citing  *Farnsaw*, 810 F.2d at 524-25). See also,  *United States v. Baggett*, 901 F.2d at 1546, 1549 (11th Cir. 1990), cert. denied, 498 U.S. 862, 111 S.Ct. 168, 112 L.Ed.2d 133 (1990) (defendant who successfully withdrew from his guilty plea could not thereafter argue that the double jeopardy clause prohibited trial on the counts originally dismissed as a result of the later withdrawn guilty plea);  *United States v. Whitely*, 759 F.2d 327, 332 (4th Cir. 1985), cert. denied, 474 U.S. 873, 106 S.Ct. 196, 88 L.Ed.2d 164 (1985) (“After a guilty plea has been set aside, neither retrial nor an increased sentence infringes the rights protected by the double jeopardy.”) (citing  *North Carolina v. Pearce*, 395 U.S. 711, 719-21, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). See gen.,  *United States v. Holman*, 728 F.2d 809, 813 (6th Cir. 1984), cert. denied, 469 U.S. 983, 105 S.Ct. 388, 83 L.Ed.2d 323 (1984), superseded by statute,  *United States v. Kemper*, 908 F.2d 33 (6th Cir. 1990) (“The double jeopardy clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Nor does it ‘require that a sentence be given a degree of finality that prevents it later increase.’ ”) (citing   *United States v. DiFrancesco*, 449 U.S. 117, 137, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980)).

***26** The upshot of the above U.S. Supreme Court case law that interprets the protections of the double jeopardy clause is that a defendant who is successful in setting aside his conviction, such as Haight, is not protected from the prospect of retrial or a potentially harsher sentence. A defendant in such a position has voluntarily elected to take action that continues the jeopardy and therefore cannot as a matter of sound constitutional principle argue that the state is precluded from pursuing the imposition of punishment against him. While certain narrow exceptions exist in those instances in which a defendant's challenge to his guilty plea or conviction is based upon clear evidence of misconduct by prosecutor or trial court, no such circumstances exist in the present case as the Court has already determined in its discussion of ground one above. The Kentucky Supreme Court correctly found in  *Haight III* that the record contained no indication of malicious or deliberate misleading by the trial court, which simply made an error in attempting to accommodate counsel

for both sides in their efforts to achieve a beneficial plea agreement, while simultaneously attempting to maintain its independence.  *Haight III*, 938 S.W.2d at 252. The Court reiterates Haight has not shown this finding to be clearly erroneous.

Unfortunately, the trial court upon further consideration rejected the plea agreement and elected to impose the death penalty, resulting in Haight's understandable action in successfully challenging the judgment of conviction and sentence on appeal. This decision by Haight was in no fashion an involuntary one and to hold otherwise would mean that virtually no defendant, who withdrew from a plea agreement or succeeded in challenging a plea based conviction, could be re-prosecuted on the same charges without violating the double jeopardy clause. Haight therefore voluntarily surrendered any protection of the double jeopardy clause might otherwise have rendered from future prosecution or the possibility of a harsher punishment. Certainly, the decision of the Kentucky Supreme Court in  *Haight III* was neither contrary to nor unreasonable application of any clearly established double jeopardy precedent of the U.S. Supreme Court in this respect. Haight has no claim to relief on this argument as a result.

4. Arbitrary, Capricious and Discriminatory Death Sentence.

In ground 4, Haight argues that the Commonwealth violated the Eighth Amendment prohibition against the arbitrary imposition of the death penalty when, after it had agreed to recommend a life sentence, the Commonwealth promptly proceeded to seek the death penalty following the remand of Haight's case after the decision entered in  *Haight I*.⁶ Haight maintains that such action by the state was wholly arbitrary, smacked of gamesmanship with the Constitution and put Haight's life on a roulette wheel despite the fact that the circumstances of the charged offenses and the Defendant were exactly the same at the plea stage in 1986, as they were later at trial in 1994. Citing  *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), Haight maintains that the state acted in an entirely arbitrary fashion in seeking the death penalty after it initially decided that life was the appropriate sentence.

Haight insists that the circumstances of his case were an aberration because what occurred to him has never happened before, nor will it ever happen again in Kentucky. He explains

that when he entered his original plea of guilty in 1986, over the past ten years in Kentucky, over 332 Kentucky defendants who were eligible to receive the death penalty had their cases resolved by a plea of guilty. In his case, and his case alone, the trial court disregarded the plea agreement, and to make matters more bizarre, judicially imposed a death sentence despite Kentucky criminal procedure requiring that the death penalty be fixed by a jury. No judge, Haight insists, had ever overruled a defendant's motion for withdrawal of his guilty plea, which [RCr 8.10](#) at that time made withdrawal discretionary, and then immediately proceeded to sentence a defendant to death over the recommendation of a prosecutor for a life sentence. No judge in Kentucky, according to Haight, had ever refused to impanel a sentencing jury in a capital case, as required by Kentucky law, as a prelude to the judicial imposition of a death sentence following a guilty plea in a Kentucky capital case.

***27** Such circumstances are entirely unique and, according to Haight, distinguish his case from all other capital defendants in Kentucky who had elected to plead guilty pursuant to a plea agreement in which the Commonwealth recommends a sentence less than death. Haight continues to note that the Kentucky prosecutors, who ultimately obtained his conviction following a jury trial in 1994, were the first state prosecutors, and last, who would have the opportunity to seek death on remand after the prosecution originally recommended a life sentence as part of a plea agreement.

Haight notes additionally that even the trial judge in imposing the original death sentence overturned on appeal noted that Haight may be the only individual in literally hundreds and hundreds of murder prosecutions sentenced to death following the acceptance of a plea agreement with a sentencing recommendation rejected by the trial court. These circumstances taken in their entirety Haight claims place his case in a category by itself, and aberration that will never occur again under Kentucky law given the July 12, 1989 amendment of [RCr 8.10](#) to permit then future defendants in similar circumstances to withdraw their plea of guilty when the trial court rejects the recommendation of the prosecutor. For these reasons, Haight maintains that the death sentence imposed against him is arbitrary, capricious, discriminatory and disproportionate.

The warden directly challenges Haight's claim of unique circumstances in his response to the petition (DN 64, pp. 25-26). In the warden's view, what happened in Haight's case was not significantly different than what happens in any other

criminal case in Kentucky when a defendant successfully attacks his conviction on appeal only to subsequently be convicted following trial by a jury that fixes a harsher penalty than the one the defendant succeeded in overturning. The warden cites to just such an example in a capital case,  *Brown v. Commonwealth*, 313 S.W.3d 577, 588-89 (Ky. 2010), wherein a murder defendant sentenced in his original trial to LWOP 25 successfully appealed his conviction, and following remand for retrial, was retried and sentenced to death. This result in  *Brown*, according to the warden, clearly demonstrates that what Haight now claims to be arbitrary, capricious and discriminatory is in fact a relatively common occurrence both within and outside the context of death penalty case law.

The fact that Kentucky at the time of Haight's original prosecution in Garrard Circuit Court had not yet amended RCr 8.10 to permit the withdrawal of the guilty plea under such circumstances is at most merely an interesting historic development, the warden reasons, in light of the fact that the decision of the Kentucky Supreme Court in  *Haight I* gave Randy Haight exactly what he would have been entitled to under the amended version of RCr 8.10 following July 12, 1989. Therefore, the warden maintains that Haight's argument, while perhaps dramatic, is ultimately unavailing as Haight was treated like any other defendant would be under similar circumstances, his conviction was reversed, his case was remanded, and the proceedings started anew with Haight given the opportunity to enter a new plea to the original murder and robbery charges.

The Kentucky Supreme Court directly addressed this argument on the merits in  *Haight III*, 938 S.W.2d at 250-51, explaining that

We reversed the final judgment on grounds that when he entered the guilty plea, appellant was misled into believing that the trial court had committed itself to sentence him in accordance with the Commonwealth's recommendation. We noted, however, that appellant, by counsel had pressured the trial court in the direction of making such a commitment, but that the trial court had refused. Parenthetically, we observe here that at that stage of the proceedings, any such commitment from the trial court would have been unlawful.  *Commonwealth v. Corey*, Ky., 826 S.W.2d 319 (1992). We rejected appellant's contentions, however, that the trial court had

indeed made such a commitment and held *Johnson v. Commonwealth*, Ky., 609 S.W.2d 360 (1980), and  *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979), to be inapplicable. However, we did find statements by the trial court sufficient to result in a commitment to permit withdrawal of the guilty plea in the event sentence was not imposed in accordance with the agreement. Effectively, we enforced the agreement to permit appellant to withdraw his guilty plea after the trial court had determined that a death sentence would be appropriate. We wiped the slate clean of the defective guilty plea negotiations and trial court sentence and restored the status quo immediately after the indictment. "For the foregoing reasons the final judgment of the trial court and the trial court's order of May 8, 1986, accepting appellant's guilty plea are vacated. All charges in the indictment as originally returned by the Grand Jury are reinstated and this cause remanded to the trial court for a plea to the crimes charged."

 *Haight v. Commonwealth*, 760 S.W.2d at 89 ( *Haight I*).

*28  *Haight III*, 938 S.W.2d at 250-51.

Once again, the Court finds nothing unreasonable or contrary to then existing Supreme Court precedent in the above quoted language of the Kentucky Supreme Court in  *Haight III*. Far from being arbitrary, capricious, discriminatory or disproportionate, the result obtained by the Kentucky Supreme Court in fact remedied the possibility of exactly that, the imposition of the death penalty pursuant to a defective guilty plea that was based on mistaken communications by the trial court. Had the original sentence imposed by the Garrard Circuit Court remained unaltered on appeal, then, as the Kentucky Supreme Court pointed out, Haight might have some claim that his situation was unique from that of other Kentucky defendants.

The Kentucky Supreme Court, however, removed this possibility—that Haight would be subjected to the death penalty by the unanticipated decision of the Garrard Circuit Court to reject the recommendation of the prosecutor and to itself impose a death penalty without first seating a jury—by vacating the judgment of conviction, and the guilty plea. As a consequence, the Kentucky Supreme Court did exactly what would be suggested in  *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) was required. It tailored and applied its existing law in a manner

that avoided an arguably arbitrary and capricious infliction of the death penalty by the Garrard Circuit Court.

One can hardly characterize the opinion in  *Haight III* as being contrary to or an unreasonable application of  *Godfrey* under the circumstances. See *gen., Getsy v. Strickland*, 577 F.3d 320, 331-333 (6th Cir. 2009) (generally discussing unequal or disproportionate punishments in death penalty cases) (Merritt, J., dissenting). Indeed, the Kentucky Supreme Court used rational arguments that fully comported with the Fourteenth Amendment to set aside the death penalty thereby avoiding the very harm that Haight now insists occurred. We therefore cannot say that the Kentucky Supreme Court unreasonably applied or acted contrary to  *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the only other U.S. Supreme Court decision cited by Haight in this section of his petition memorandum (DN 61, pp. 33-35). Once again, Haight is not entitled to relief under the AEDPA standard found in  28 U.S.C. § 2254(d).

33. Irrevocable Prejudice.

In ground 33 of his petition and in his summary judgment motion, Haight makes the final argument directly related to the 1986 plea agreement. Haight argues that the death sentence ultimately imposed on him by the Jefferson Circuit Court in 1994 is unconstitutional due to the irrevocable prejudice that flowed from the plea agreement eight years earlier.⁷ Haight provides the Court with a raft of examples of this alleged prejudice. He claims in this regard that following the acceptance of his guilty plea and the judgment of conviction based thereon, he “was no longer charged with murder and robbery, but became a “convicted killer.” (DN 61, p. 36). In his view, his opportunity for a fair trial thereafter was “forever destroyed.” (Id.).

*29 As one example of this unrelenting prejudice, Haight points to the media attention he received as an admitted killer, attention which in his view could not be overcome despite a change of venue that transferred his case from the Garrard Circuit Court in south central Kentucky, to the Jefferson Circuit Court located in Louisville, Kentucky, 100 miles to the northwest. Haight points out that eight prospective jurors at his trial were excused after reading a newspaper article printed in the Courier-Journal entitled “Murder Trial Begins for Man Once Sentenced to Death in Case.” Indeed, three of the jurors that actually heard his case, according to Haight, possessed extra-judicial, inadmissible information obtained

from the same newspaper article, a fact that he insists standing alone made his jury trial unconstitutional.

Haight also offers up as an example of the unfair prejudice that flowed from his plea of guilty the unavailability of a general denial defense at trial. Haight argues that as a result of his admission of guilt during the Garrard Circuit Court change of plea proceedings, his defense counsel could not ethically present a general denial defense despite the fact that the incriminating evidence offered against him was entirely circumstantial and no eyewitness to the crimes existed.

Haight then turns to the impact of the passage of time that occurred while he repeatedly returned to the state appellate courts, first to successfully set aside the initial judgment of conviction entered by the Garrard Circuit Court in 1988, and then in a second unsuccessful effort in 1992 to obtain specific enforcement of the original plea agreement in the Jefferson Circuit Court after the Kentucky Supreme Court in  *Haight I* set aside Haight's plea of guilty, vacated the order that accepted the guilty plea and the judgment of conviction. Haight claims that this “unavoidable delay” was doubly damning to his efforts to receive a fair trial in several significant respects.

The mere passage of time, for example, greatly reduced the ability of his witnesses, Mabel Music and Tony Minnix, to recall the events that occurred nearly a decade earlier. The state in contrast had the benefit of numerous written police and witness reports so that the prosecution “had the best of both worlds.” (DN 61, p. 39). The passage of time also was put to effective use, according to Haight, by the prosecutor in his cross-examination of Haight's expert witness, clinical forensic psychologist Brad Fisher, Ph.D., who was left with the unenviable goal of attempting to evaluate his Defendant client's state of mind eight years earlier.

Haight also points to his guilty plea in Mercer County to the attempted murder of Trooper Yates, whom Haight shot at repeatedly while fleeing the scene of the murders, as being a separate example of the type of irrevocable prejudice that flowed from the unenforced guilty plea in Garrard Circuit Court. Haight argues that the only reason he entered into this separate guilty plea to attempted murder was his belief that the Garrard plea agreement would be honored. Yet, after the guilty plea was set aside, and the plea agreement abandoned by the Commonwealth, the Mercer County conviction and guilty plea colloquy were used to cross-examine Haight during his subsequent death penalty trial in Jefferson County.

Haight claims that absent the unfulfilled plea agreement, he never would have considered a guilty plea to the charges involving Trooper Yates.

Also, as a result of the failed effort to enforce the original plea agreement, Haight immediately faced the additional charge of possession of a handgun by a convicted felon, a charge that had been dismissed as part of the plea agreement. Prosecution on this charge permitted the Commonwealth to introduce evidence of Haight's extensive prior criminal history during his death penalty trial. Haight and his attorneys also had cooperated extensively with the prosecution in Garrard County during the plea negotiation process. Counsel revealed their theories of defense and Haight participated in an interview and reenactment of the cornfield chase which led to his capture.

***30** Haight explains that none of these otherwise self-defeating efforts would have occurred but for the belief of Haight and the defense that they had a guarantee that the non-death plea agreement would be honored. When it was not, and the trial court and prosecutors walked away, according to Haight, no means existed to “reset the counter to zero”

as the Kentucky Supreme Court claimed in both  *Haight I* and *Haight II*. As yet another example of this conclusion, Haight points to his own correspondence with Jeanne Omer, the sister of victim David Omer, in December of 1988, in which he admitted his guilt for the death of Jeanne's brother and Patricia Vance, thereby making it impossible for him to start over anew. In this regard, Haight maintains that the posture of his case became similar to another Kentucky death penalty case,  *Commonwealth v. Reyes*, 764 S.W.2d 62, 58 (Ky. 1989), in which a Kentucky defendant detrimentally relied on a plea agreement to confess and the Supreme Court of Kentucky ultimately concluded that “[i]t appears highly unlikely that Reyes can now receive a fair trial if the state's promises successfully repudiate it.”  *Id.* at 68.

Finally, Haight challenges the good faith of both the original trial court and all of the subsequent prosecutors following the remand of his case after  *Haight I*. Haight maintains that he was directly misled by the Garrard Circuit Court into relying on its assurance that absent extraordinary circumstances he would be sentenced in accordance with the LWOP 25 recommendation of the Commonwealth. Not only did the trial court betray Haight's trust, it continued to rely upon *ex parte* letters from surviving family members, letters that were not made available to the defense prior to Haight's initial

sentencing. Haight now insists that the trial court cannot be permitted to “reneg” on its acceptance of the plea agreement as conveyed by its conduct and then force a defendant to go to trial in a death penalty case.

Haight argues that the law imposed an implied promise on the state to act in good faith. He insists that the integrity of the plea bargaining process is called into serious question absent specific enforcement of the plea agreement, which contemplated that the Commonwealth “would not anywhere, at any time, or by any prosecutorial force, seek the death penalty against him for these charges.” (DN 61, p. 45). Haight insists that both the language and the spirit of the plea agreement contemplated that it would remain in effect

after sentencing “and in all future proceedings.”  *Id.* To the extent that the plea agreement could be considered to be ambiguous in any respect, Haight concludes his argument with the claim that such ambiguity, or even silence, must be construed in his favor where to do otherwise would render the entire course of proceedings following remand a direct violation of his constitutional right to a fundamentally fair trial.

The warden in response to Haight's lengthy arguments in ground 33 counters that Haight has simply attempted to relitigate earlier arguments for specific enforcement of the original plea agreement based upon principles of contract law. (DN 65, pp. 26-28). Despite these latest arguments by Haight, the warden points out that the Supreme Court of Kentucky directly applied the principles of  *Santobello v. New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) in deciding that specific enforcement of Haight's plea agreement in the Garrard Circuit Court was not the appropriate remedy, but rather that Haight should return to the trial court to plead anew to the original charges, a decision entirely within the appropriate exercise of its discretion under  *Santobello*. Further, the warden challenges several of the examples of unfair prejudice offered by Haight.

For example, the warden points out that the mere passage of time was not the real basis for the Commonwealth's cross-examination of Haight's expert, Dr. Fisher. Rather, Dr. Fisher's expert opinion was challenged because his conclusions rested fundamentally on Haight's own statements to the doctor that were not objectively confirmed. As for pretrial publicity, the warden insists that some of Haight's arguments are barred at least to the extent that defense counsel during voir dire, with full knowledge of the Courier-Journal article referred to

above, elected not to challenge at least one juror, Juror Helton, on this basis, thereby waiving the issue absent a satisfactory showing of cause and prejudice (DN 64, p. 27).

*31 Haight also received a change of venue that removed his trial from the central Kentucky area where the crimes occurred. The fact that some limited pretrial publicity occurred nevertheless does not automatically render Haight's 1994 trial in Jefferson County, Kentucky, unconstitutional according to the warden. See,  *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). So long as the affected jurors could set aside their impression or opinion and render a verdict based on the evidence presented at trial, no reversible constitutional error has occurred justifying habeas corpus relief.

The Court is in agreement with the warden on most of the above points. More fundamentally, however, we are again faced with the dilemma that Haight does not tell us in ground 33 in his petition memorandum what clearly established precedent of the Supreme Court was contrary to or unreasonably applied in any of the  *Haight* decisions that directly addressed the plea agreement-related issues that arose following remand after  *Haight I*.⁸ Certainly,  *Santobello* affords the states broad discretion in determining what remedy to craft when a failed plea agreement has been incorporated into an unjust plea of guilty. The Kentucky Supreme Court exercised its discretion and Haight cannot tell us now how that decision runs seriously afoul of any clearly established U.S. Supreme Court precedent.

Many of the arguments raised in ground 33, as noted by the warden, are merely a rehash of earlier arguments offered in support of specific performance. The Court already has addressed these arguments. Its view on their merit remains unchanged. The U.S. Constitution affords Haight no due process right to the specific enforcement of the 1986 plea agreement. Further, many of the examples of alleged undue prejudice now put forward by Haight are classic examples of *post hoc ergo propter hoc* ("after this, therefore, because of this") logical fallacy. In other words, Haight appears to reason that any possible adverse event that occurred following the remand of his case to the Garrard Circuit Court for entry of a new plea to the original charges must have been caused due to the refusal of the Kentucky Supreme Court to compel the specific performance of his plea agreement. In fact, many of the adverse consequences that occurred were

directly the result of Haight's own independent decisions, or forces completely outside the control of either party to the prosecution.

A classic example is Haight's decision to respond to a letter from David Omer's surviving sister, Jeanne. Haight of his own volition freely admitted his involvement in the deaths of Omer and Vance and went so far as to concede that he could not disagree if the surviving family members thought that he should pay with his life. The state of Kentucky played no role in this adverse admission. This candor was entirely Haight's own doing, just as the decision to plead guilty to the criminal charges involving his attempted shooting of Trooper Yates. While Haight may now regret both decisions, they cannot be laid at the feet of the Commonwealth and provide no basis in support of his claim of undue prejudice or for relief by way of his current petition.

As for the publication of the Courier-Journal newspaper article regarding his earlier 1986 conviction and death sentence, the Commonwealth certainly cannot be held responsible for such a private publication. See  *Stokes v. Armontrout*, 851 F.2d 1085, 1089-90 (8th Cir. 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 823, 102 L.Ed.2d 812 (1989)(State not responsible for newspaper article published after plea agreement was withdrawn). More importantly, the subject of juror exposure to the same article was explored in depth by the trial court during both voir dire and in a post-conviction hearing, which resulted in specific findings by the trial judge that no juror was unduly influenced to the prejudice of the petitioner. These same findings were upheld on appeal by the Supreme Court of Kentucky in  *Haight III*. Haight has not shown them to be clearly erroneous.

*32 Even less persuasive is Haight's reliance upon the passage of time. Haight acknowledges that he elected to pursue the specific enforcement of the original plea agreement following  *Haight I*. In making this choice, he, and not the state, is necessarily responsible for the resulting period of delay related to the pursuit of *Haight II*. Moreover, no guarantee exists that even had Haight gone to trial immediately following  *Haight I*, so that his fellow escapees, Mabel Music and Tony Minnix, could have offered their testimony in a more timely fashion, that the memory of either witness would have been significantly better.

It must be recalled in this respect that Haight and his companions all were drinking for several days following

their escape from jail. Consequently, the perceptions and recollection of Music and Minnix may well have been substantially impaired regardless of when Haight's trial occurred. Also, Minnix left the group to return to eastern Kentucky relatively soon after their post-escape adventures began thereby limiting his value as a witness to events immediately prior to the double homicide. Music similarly fled prior to the murders and had no involvement in them as well.

Once again, the state cannot be held accountable for any such failed recollection. Haight has not shown this Court how the decisions of the Kentucky Supreme Court in *Haight I, II* or *III* were contrary to or unreasonably applied  *Santobello*, or any other then-existing U.S. Supreme Court decision. Accordingly, he is not entitled to habeas corpus relief on this ground either given his failure to meet the AEDPA standard as defined in  *Williams*.

Ineffective Assistance of Counsel

Haight next turns in section III of his petition to claims that involve ineffective assistance of counsel at trial.⁹ Haight raises eight claims of ineffective assistance of counsel that are contained in grounds 5, 6, 8, 9, 13, 14, 15 and 16 of his petition (DN 61, pp. 47-85). Three of these grounds, grounds 5, 8 and 9, allege ineffective assistance of counsel during the jury selection phase of Haight's jury trial in 1994. Grounds 5 and 8 are also addressed in his motion for summary judgment (DN 141, pp. 6-17).

Haight claims in ground 5 that his two trial counsel were ineffective when they failed to move to strike for cause jury Gaugh after Gaugh allegedly stated that he would not give serious consideration to Haight's deprived family background as evidence of mitigation. Haight next argues in ground 8 that his trial attorneys were ineffective when they failed to honor his direct request to remove three jurors (Gaugh, Helton and Nichols) by use of peremptory strikes. Haight continues in ground 9 to argue that his trial attorney failed to render effective assistance when he did not move the court to strike for cause jurors Kaiser, Helton, Karnes and Cunagin, and misadvised two jurors, Larch and Karnes, on the nature of the extreme emotional disturbance defense.

In grounds 6 and 16, Haight argues that he also received ineffective assistance of counsel at trial when his counsel

did not move for the admission of Haight's responsive letter to the letter of David Omer's sister in which he expressed remorse for his crimes and did not introduce into evidence the 1986 plea bargain by which the Commonwealth offered Haight a sentence of life imprisonment in exchange for his guilty plea to the murder and robbery charges. Haight argues in ground 13 that his two trial counsel were ineffective due to their failure to adequately investigate his mental status and psychological makeup and to present expert testimony by a psychopharmacologist and neurologist at trial given Haight's lifelong history of drug abuse and their possession of a 1974 psychological report suggesting the possibility of organic brain damage.

*33 In ground 14, he claims that his trial attorneys were ineffective when they failed to move for an immediate mistrial and to protect the trial record, after notifying the court that certain members of the jury had been sleeping during the penalty phase of Haight's capital trial. Finally, in ground 15, Haight argues ineffective assistance of counsel resulted when his trial counsel failed to request a "no adverse inference" instruction on Haight's right to remain silent during the penalty phase of the trial.

The warden in his response to Haight's claims of ineffective assistance of counsel argues that many of these claims are either procedurally defaulted or are meritless on their face (DN 64, pp.28-63). For example, the warden points out that Haight's claim concerning juror Gaugh is now procedurally barred given the affirmative waiver by Haight's trial counsel of any objection to juror Gaugh prior to the swearing of the jury. The warden adds that even if this initial claim of ineffective assistance found in ground 5 of the petition was not procedurally barred, the actions of Haight's trial attorney were a legitimate trial strategy as the Kentucky Supreme Court determined in  *Haight III*.

Haight's counsel, the warden notes, was emphatic in his desire for juror Gaugh to remain in the jury pool and expressly told the court that the basis of his election to do so was a "tactical decision" that he declined to reveal to the trial court (V.T.R. 2, 1/11/94, 12:34:30; 14:44:10). Regardless of counsel's refusal to reveal the basis of his tactical decision, the warden points out that the reasons are obvious—(1) Gaugh agreed that he would give serious consideration to the evidence that Haight acted under the influence of alcohol at the time of the double murders (V.T.R. 2, 1/11/94, 11:53:22–53:42), and (2) Gaugh agreed that he would also give serious consideration to mitigating evidence of extreme emotional disturbance (V.T.R.

2, 1/11/94, 11:50:48–51:59). Additionally, Gaugh was the only African-American member of the jury and Haight's counsel apparently believed that his status as such would benefit the defense (V.T.R. 4, 1/14/94-15:35:00).

The warden adds in concluding on this argument that even were this Court to assume that trial counsel should have challenged juror Gaugh for cause, Haight has not shown any prejudice resulting from his attorney's decision to allow Gaugh to remain on the jury. The warden maintains that it is not at all certain that Gaugh would have been struck for cause had Haight's attorneys so moved the trial court. This is so, the warden reasons, because several other potential jurors were rehabilitated by the trial court which asked them if they could consider all of the evidence before making a decision (V.T.R. 2, 1/11/94, 14:42:10–14:46:00). *See, Adams v. Bradshaw*, 484 F.Supp.2d 753, 779 (N.D. Ohio 2007) (“We will not second-guess trial strategy decisions such as those made during voir dire.”).

The warden also challenges ground 8 of Haight's petition, his claim of ineffective assistance related to the alleged failure of trial counsel to exercise peremptory strikes against jurors Gaugh, Helton and Nichols. The warden points out that at no time prior to when the jury was sworn, immediately following the trial, or even on direct appeal in *Haight III*, did Haight bother to raise a single protest to any court that his counsel had ignored his wishes involving the three jurors. Because neither Haight nor his attorneys brought such concerns to the attention of the court, the warden claims that Haight's claims in ground 8 related to the seating of these jurors are waived by operation of *Kentucky Rule of Criminal Procedure (RCr) 9.36(3)*.

*34 Additionally, the Kentucky Supreme Court in *Haight IV* specifically noted that Haight exercised the full number of peremptory strikes afforded him under Kentucky state law so that he has no basis on which to protest either the performance of his trial counsel or the manner in which the peremptory challenges were used. Even when Haight did raise the issue in post-conviction proceedings, the same court noted in *Haight IV* that Haight had failed to provide sufficient detail to warrant post-conviction relief under *RCr 11.42*, thereby procedurally defaulting the claim yet again. Finally, the warden observes that even absent a procedural default, the claim itself is not of a constitutional magnitude, as no federal constitutional right to peremptory challenges exists. *See, McQueen v. Scroggy*, 99 F.3d 1302, 1320, 1321

(6th Cir. 1996), *overruled on other grounds, In re Abdur-Rahman*, 392 F.3d 174 (6th Cir. 2004). The warden adds that this alleged error is not, as Haight claims, a structural error; and, Haight therefore is required to establish prejudice under the *Strickland* standard of ineffective assistance of counsel in order to obtain relief. *See, Rivera v. Illinois*, 556 U.S. 148, 152-161, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009).

With respect to ground 9, the ground in which Haight focuses on the failure of his trial counsel to strike for cause Jurors Kaiser, Helton, Carnes and Cunagin, the warden maintains that these several arguments of ineffective assistance offered up by Haight are either waived or procedurally barred because (1) they were not presented to the state courts, or if presented, (2) were not fully and fairly presented in their current form. For example, as to juror Helton, the warden notes that the Kentucky Supreme Court in *Haight III* focused directly on this argument to point out that no motion was made to exclude Helton for cause and no peremptory challenge was used against him, either. Further, the trial court specifically found as a matter of fact that Helton did not display bias, a finding affirmed by the Kentucky Supreme Court on appeal. After disposing of the Helton claim on its merits on direct appeal, the Kentucky Supreme Court on post-conviction appeal in *Haight IV* concluded that Haight was procedurally barred from recasting the failed issue as one of ineffective assistance of counsel.¹⁰

As for Haight's ineffective assistance claims related to his trial counsel's alleged failure to move to strike the remaining named jurors, the warden first points out that the Kentucky Supreme Court in *Haight IV* held that these ineffective assistance of counsel claims involving Helton were procedurally barred given its prior rejection of Haight's jury selection claims on direct appeal in *Haight III*. Further, because Haight's trial counsel did not become aware that juror Helton had read the Courier-Journal article published during the trial until *after* the return of the jury's verdict, Haight's trial counsel, not being clairvoyant, can hardly be faulted now for failing to challenge Helton on a basis of which they were not aware at the time of jury selection.

The warden likewise maintains that Haight's claims regarding juror Kaiser are procedurally barred given Haight's failure to raise this claim on its merits on direct appeal in *Haight III*.

In  *Haight IV*, the Kentucky Supreme Court directly noted the failure of Haight's appellate counsel to raise jury selection issues involving juror Kaiser on direct appeal and continued to note that Kaiser indicated that he was open to consider a range of potential penalties and would consider all the evidence before facing a sentence.  *Haight IV*, 41 S.W.3d at 444-46 (Ky. 2001). Accordingly, the warden insists that this juror-related claim of ineffective assistance of counsel also is procedurally barred and, in any event, would not have resulted in juror Kaiser being removed from the jury pool had the issue been raised prior to the swearing of the jury as Kaiser testified that he could consider and give effect to evidence of alcohol consumption as a mitigating circumstances. (V.T.R. 2, 1/11/94, 16:11:35–16:11:48).

*35 As for juror Carnes, the warden similarly maintains that this claim of ineffective assistance of counsel is procedurally barred by the failure of the defense to make any motion at trial concerning Carnes' exposure to the media either prior to the swearing of the jury or on direct appeal when the issue on its merits, as a jury selection issue, could have been raised. Nor can Haight establish any prejudice even if the performance of his trial counsel were held to be deficient under the *Strickland* standard for ineffective assistance of counsel given that Carnes post-trial testimony indicates that she was not unduly influenced by the Courier-Journal newspaper article.

The warden raises essentially the same points with regard to the ineffective assistance arguments related to juror Donahue, the alternative juror who was excused and then chose to sit in the gallery allegedly near the families of the victims without objection by the defense counsel. According to the warden, Haight did not raise this issue prior to the return of the jury's verdict, but instead only in his subsequent motion for a new trial. On direct appeal, Haight argued only that the conduct of juror Donahue was the functional equivalent of a nonverbal communication to the jury reflecting Donahue's support for the prosecution. Yet, in his post-conviction proceedings Haight argued on appeal in  *Haight IV* that the issue was one of ineffective assistance of counsel, whom he claimed should have requested a mistrial based on Donahue's mere proximity to the victims' families in the gallery at trial.

Once again, the Kentucky Supreme Court in  *Haight III* held that the issue on its merits was not preserved so that in  *Haight IV* the same court found that it had already rejected the basis of Haight's claim on this point and therefore it could

not serve as the basis for an ineffective assistance claim. From this procedural history, the warden concludes that, first, this ground of ineffective assistance is procedurally barred, and second, if not barred, does not merit relief in any event. On this latter point the Warden explains that Donahue had the right to sit wherever she chose to sit in the courtroom, which was small. Just as importantly, she displayed no overt support for the prosecution's theory of the case by her mere proximity to the victims' families since she would have been equally close to Haight's own family members who were seated nearby.

As for the alleged failure of trial counsel to investigate the under representation of minorities in the jury pool, the Warden argues that the Kentucky Supreme Court in  *Haight III* specifically found that “there is no evidence upon which any impropriety can be inferred.”  *Haight III*, 938 S.W.2d at 247. In the absence of any such indication of an improper selection of the jury pool, the warden concludes that Haight absolutely cannot prevail on a claim of ineffective assistance of counsel for an alleged failure to object to the jury pool when no factual basis existed to raise such an objection. The warden adds that Haight's argument concerning the under representation of minorities in the jury pool is directly contrary to his related argument that his trial attorneys were somehow ineffective for their failure to strike juror Gaugh, the only black member of the jury pool, from the jury. Accordingly, the issue was waived at trial and is now therefore procedurally barred.

The warden next turns to grounds 6 and 16 of Haight's petition, both of which relate to the alleged failure of his trial counsel to introduce mitigating evidence in the form of a letter Haight wrote to Jean Omer acknowledging his responsibility for the murders and the 1986 plea agreement by which the Commonwealth agreed to seek only life imprisonment. The warden insists that the decision of Haight's attorneys to forego the introduction of either such document was well founded and objectively unreasonable given the contents thereof.

*36 The warden points out that the Kentucky Supreme Court directly considered the question of whether the 1986 plea bargain agreement could be introduced into evidence. The majority concluded in  *Haight IV*, 41 S.W.3d at 447-48 that the question of whether a defendant in Kentucky has the right to introduce into evidence a withdrawn plea agreement as mitigating evidence in a criminal trial is unsettled. Without clear legal guidance, Haight's trial counsel cannot be faulted,

the warden reasons, for not seeking to introduce the failed plea agreement, when even the Kentucky Supreme Court could not unanimously determine whether such agreement would have been admissible under [Kentucky Rules of Evidence \(KRE\) 408 and 410](#).

In the same opinion, the Kentucky Supreme Court also considered the possible introduction of Haight's letter to Jeanne Omer. It concluded that trial counsel made an objectively reasonable choice not to put the letter before the jury. Haight in his letter not only admitted to committing the two senseless murders, while expressing his sorrow for having caused so much pain and suffering, but then continued to express his agreement that he should die for his crimes.

 [Haight IV](#), 41 S.W.3d at 448 (“If you think I should pay with my life, then I have to agree with you....”).

 [Haight IV](#) consequently concluded that trial counsel could hardly be criticized for choosing not to emphasize Haight's earlier testimony during the guilt phase of the trial when he spontaneously acknowledged that he wished he could give his life for his involvement in killing two innocent people. (V.T.R. 8, 1/28/94, 12:03:47). The warden argues likewise that Haight's trial attorneys cannot be criticized now, many years after the fact, for their understandable decision to prevent the jury from hearing, once again during the penalty phase, that their client was willing to die for his crimes—a consideration that Haight's trial counsel expressly revealed to the court during Haight's trial. (V.T.R. 10, 2/3/94, 12:30:50–12:33:27). Had Haight's trial counsel chosen otherwise to introduce his letter to Jean Omer, the warden points out that Haight would have had to have been recalled to the witness stand during the penalty phase, thereby subjecting him to full cross-examination yet again about his expressed willingness to die for his crimes. (DN 64, pp. 50-51).

As for the 1986 plea agreement, the warden characterizes the document as a double-edged sword which does show that a prior prosecutor was willing to seek a sentence of less than death, but at the same time, shows that the judge then involved strongly believed that only death was the appropriate penalty and imposed such penalty over the very objections of the state prosecutor. Thus, while the 1986 plea agreement had the potential to have a positive impact, it also had as much, or more, potential to damage Haight's opportunity for a successful defense at trial. Finally, the warden points out that once again Haight's position as to the introduction of the 1986 plea agreement is inconsistent with his argument in ground

17 that certain jurors who during the trial became aware of the plea agreement from the newspaper article were biased against the defense, thereby confirming that even Haight's current counsel view knowledge of the 1986 plea agreement as being damaging rather than helpful to the defense.

The warden turns next to ground 13 of Haight's petition in which Haight maintains that his trial attorneys rendered ineffective assistance due to their failure to adequately investigate and present evidence of mitigation. The warden responds that Haight's arguments in this regard essentially boil down to the proposition that Haight's trial attorneys should have continued preparing for a trial even while they were pursuing litigation in a vigorous effort to obtain the specific enforcement of Haight's plea agreement. The decision of counsel to defer their preparation for trial until after the resolution of [Haight II](#) was entirely logical according to the warden, a conclusion that the Kentucky Supreme Court

likewise reached in  [Haight IV](#). [Haight IV](#), 41 S.W.3d at 446-47. Apart from the efforts of trial counsel to enforce the 1986 plea agreement, the warden argues that Haight's trial attorneys did retain multiple expert witnesses who did appear and present extensive evidence at trial favorable to Haight's position. Indeed, the warden insists that the efforts of Haight's trial counsel, one of whom, Erwin Lewis, would go on to become the head of the Kentucky Department of Public Advocacy in 1996, were so extensive that their investigative efforts were used to train trial attorneys with the Department of Public Advocacy for a number of years afterwards.

*37 Haight's current claims concerning the inadequacy of the expert testimony of Dr. Brad Fisher, according to the warden, are based upon sheer speculation related to a brief and vague reference in a 1974 psychological report to the possibility of brain damage. The warden now maintains that Haight's disappointment after the fact with Fisher's testimony is not a sufficient basis for a successful claim of ineffective assistance of counsel. See,  [Smith v. Dugger](#), 840 F.2d 787,

795-96 (11th Cir. 1988). See also,  [Lundgren v. Mitchell](#), 440 F.3d 754, 772 (6th Cir. 2006). In sum, the warden maintains that unlike the legal authority cited by Haight in support of this claim of ineffective assistance, we are not faced with a situation where counsel made virtually no preparation for the penalty phase, but rather a situation wherein counsel conducted an intensive investigation and presented extensive evidence of mitigation at trial.

In ground 14, the warden contests Haight's attempts to craft an ineffective assistance of counsel claim concerning an unidentified juror or jurors supposedly sleeping during the penalty phase of Haight's capital trial. According to the warden, no factual basis exists in the record for this argument, which appears to be created solely on a passing comment made by one defense counsel during oral argument at the bench over the penalty phase jury instructions. The warden maintains that Haight did not raise this issue on its merits on direct appeal, but only in the context of the claim of ineffective assistance of counsel on post-conviction appeal.

The warden points out that while Haight's counsel did state to the court that the jury appeared to have a short attention span and that “a couple of them [were] sleeping throughout the penalty phase, even early in the morning” (V.T.R. 9, 2/2/94, 10:45:58), the mitigation evidence favorable to Haight was presented over the course of one day and approximately 1.5 hours the following morning, the morning of Feb. 1, 1994, so that most of the morning during which the unnamed members of the jury supposedly were sleeping was occupied with presentation of the Commonwealth's case, as Haight did not begin his own presentation until later at 11 a.m. that morning. (V.T.R. 9, 2/1/94, 10:51:08). Because Haight's presentation ended on Feb. 2, 1994, after approximately 1.5 hours of testimony, the warden concludes that the jurors had little opportunity to sleep at any point during the defense presentation.

Also, the warden maintains that no allegation was raised on direct appeal that any members of the jury were sleeping during the trial; rather, Haight argued that the jury instructions improperly funneled the jury in the exercise of its discretion to imposing the most severe sentence. If that were not enough, in  *Haight IV*, 41 S.W.3d at 447, the Kentucky Supreme Court rejected Haight's claim of ineffective assistance of counsel in this regard on procedural grounds, holding that Haight failed to plea this claim with sufficient specificity to obtain relief under RCr 11.42.  *Id.* Accordingly, only if this Court were to ignore the procedural default, and also the fact findings of the state court, which held that Haight had failed to actually support his claim, would Haight be entitled to relief.

In the next claim of ineffective assistance of counsel, the alleged failure of trial counsel to request a “no adverse inference” instruction during the penalty phase, the warden again argues that the issue is procedurally barred as it was never raised on direct appeal on its merits. Further, trial

counsel logically elected not to request such an instruction, which would have only reemphasized to the jury Haight's own damaging testimony during the guilt phase of the trial that, as for his feelings about killing two innocent people, he wished that he could “redo it or give my life for it....” (V.T.R. 8, 1/28/94, 12:03:47). Because the issue was not properly put before the trial court, nor raised on direct appeal, the warden concludes similar to his earlier arguments that this Court is procedurally barred from addressing the merits of the claim. Alternatively, no ineffective assistance of counsel can be shown where Haight's trial attorneys reasonably elected not to bring to the attention of the jury through such an instruction Haight's prior damning guilt phase testimony. For all of the above reasons, the warden requests the Court to reject grounds 5, 6, 8, 9, 13-16 and their claims of ineffective assistance of trial counsel. With this overview of the parties' positions in mind, we turn first to fundamental concepts of state procedural default before moving on to address those claims of ineffective assistance of counsel that were not resolved on adequate and independent state law grounds.

Procedural Default.

*38 Before the Court may take up the substance of Haight's many claims of ineffective assistance of counsel at trial, it must first determine whether it may reach their merits. The warden insists that many of these claims simply cannot be reviewed on their merits due to Haight's procedural default, sometimes multiple defaults, during the state court proceedings. This reoccurring litigation position of the warden requires the Court to pause to survey the federal law as it relates to procedural default in the context of habeas corpus proceedings, and in light of then-existing Kentucky state procedure requirements, before turning to the Sixth Amendment standard for ineffective assistance of counsel.

The doctrine of procedural default rests on considerations of comity and federalism. See,  *Brewer v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997) (citing  *Lambrix v. Singletary*, 520 U.S. 518, 522-23, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)). It provides in essence that the federal courts “will not reach 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.”  *Beard v. Kindler*, 558 U.S. 53, 55, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009) (citing  *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Peoples v. Lafler*, 734 F.3d 502, 510 (6th Cir.

2013)(“When a state prisoner “procedurally defaults” a claim for habeas relief, meaning the prisoner lost the claim in state court by failing to raise it at the correct time, we defer to the state’s procedural ruling and refuse to consider the claim on the merits”)(citing  *Wainwright v. Sykes*, 433 U.S. at 86-87, 97 S.Ct. 2497). An “independent and adequate state ground” will bar consideration of those federal claims in a federal habeas corpus proceeding that have been defaulted under state law, unless the default is excused.  *Coleman*, 501 U.S. at 729-30, 111 S.Ct. 2546;  *Brown v. Allen*, 344 U.S. 443, 486-87, 73 S.Ct. 437, 97 L.Ed. 469 (1953). See;  *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)(discussing whether a state procedural default ruling is “independent.”);  *Lee v. Kemna*, 534 U.S. 362, 376-377, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)) (discussing whether a state procedural ruling is “adequate.”).  *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)(same).

A federal claim brought by a state prisoner in a habeas action may become procedurally defaulted in state court in several 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 v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Florida petitioner who failed to timely challenge his confession at trial as required by Florida rules of criminal procedure procedurally defaulted his *Miranda* claim absent a showing of “cause” and “prejudice.”).

If the state courts unambiguously rely on the prisoner’s procedural failure as a basis to refuse to address the merits of the same prisoner’s constitutional issue, which admittedly may be sometimes difficult to determine; and, the state procedural rule involved is an adequate and independent ground on which to preclude relief, then the federal courts will hold the prisoner’s habeas claim to be procedurally defaulted. See,  *Harris v. Reed*, 489 U.S. 255, 261, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)(if “ ‘it fairly appears that the state court rested its decisions primarily on federal law’ this Court may reach the federal question on review unless the state court’s opinion contains a ‘plain statement’ that [its] decision rests upon adequate and independent state grounds.”)(quoting

 *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983));  *Williams*, 460 F.3d at 806 (citing  *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)). This “plain statement” rule, reduced to its essence, provides that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar.”  *Harris*, 489 U.S. at 263, 109 S.Ct. 1038(citing  *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)).

*39 In applying this rule, we look to the last reasoned state judgment to determine its basis.  *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)(If “the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.”). Merely because such a reasoned state court decision goes on to discuss, in the alternative, the merits of a claim that it otherwise has held to be barred based on an adequate and independent procedural ground, however, does not remove the procedural default. See  *Baze*, 371 F.3d at 319(citing  *Clifford v. Chandler*, 333 F.3d 724, 728-29 (6th Cir. 2003) *overruled in part on other grounds*,  *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

The federal courts consequently will not reach the merits of the procedurally defaulted claim rejected on adequate and independent state law grounds, unless the Petitioner is able to demonstrate cause for the default and prejudice resulting therefrom, or alternatively, that manifest injustice will result from the conviction of one who is factually innocent if the claim is not addressed.  *Sutton v. Carpenter*, 745 F.3d 787, 790-91 (6th Cir. 2014); *Henderson v. Palmer*, 730 F.3d 554, 559 (6th Cir. 2013)(“[a] petitioner may avoid this procedural default [] by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner’s case.”)(citing  *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000)) See gen,  *House v. Bell*, 547 U.S. 518, 536-37, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006)(discussing innocence as a gateway to defaulted claims).

The Sixth Circuit will apply the 4-prong test first announced in   *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) to determine when a procedurally defaulted claim may receive federal review. 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.* See also, *Peoples v. Lafler*, 734 F.3d 502, 510-11 (6th Cir. 2013)(discussing the four elements of the procedural default doctrine)(citing *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010))(en banc). See *gen*, *Bowling v. Parker*, 344 F.3d 487, 498-99 (6th Cir. 2003), cert. denied, 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004) (discussing   *Maupin*).

*40 The second manner in which a state prisoner may procedurally default a claim is by failing to raise the claim in the state court, or to pursue the same claim through the state's "ordinary appellate review procedures." *Id.* (citing  *O'Sullivan v. Boerckel*, 526 U.S. 838, 848-49, 119 S.Ct.

1728, 144 L.Ed.2d 1 (1999)). Any such claim will be held to be procedurally defaulted if, at the time the prisoner's habeas petition is filed, state law does not permit the prisoner to further pursue the claim.  *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991);  *Engle v. Issac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). In such instances, the problem with the claim is one of procedural default, not failure to exhaust available state remedies. See *gen*,  *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996)(discussing the full and fair presentation requirements of the exhaustion doctrine);  *Castille v. Peoples*, 489 U.S. 346, 351(, 109 S.Ct. 1056, 103 L.Ed.2d 380 1989)(same);  *Engle v. Isaac*, 456 U.S. 107, 125, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982);  *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)(claim must include reference to specific federal constitutional right and statement of facts entitling petitioner to relief).

As  *Williams* explains, the two concepts, exhaustion and procedural default, are frequently confused, yet are distinct concepts.  *Williams*, 460 F.3d at 806. The requirement of exhaustion relates only to those state remedies that remain available at the time the federal habeas petition is filed.  *Engle*, 456 U.S. at 125 n. 28, 102 S.Ct. 1558. If no state remedies remain available because a state prisoner failed to pursue them within the time allotted by state law, then procedural default will bar federal court review—not a failure to exhaust available remedies since none remain available.  *Id.*

Several important qualifications must be added when one discusses procedural default in either of its variations. First, neither the exhaustion doctrine nor procedural default are jurisdictional limitations on the federal courts. See  *Pudelski v. Wilson*, 576 F.3d 595, 605-606 (6th Cir. 2009)(citing *Cain v. Redman*, 947 F.2d 817, 820 (6th cir. 1991)). In other words, exhaustion and procedural default may be waived,  *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004), cert. denied, 544 U.S. 391 (2005)("The state may waive the defense by not asserting it.")(citing  *Scott v. Collins*, 286 F.3d 923, 927-28(6th Cir. 2002)), or even in the case of procedural default, simply be ignored by the federal courts when to do so would not affect the resolution of the

outcome and would simplify the analysis of a petitioner's § 2254 claims. See *Babick v. Berghuis*, 620 F.3d 571, 576 (6th Cir. 2010) (“We cut to the merits here, since the cause-and-prejudice analysis adds nothing but complexity to the case.”) (citing *Hudson v. Jones*, 351 F.3d 292 215 (6th Cir. 2003)).

Second, the state procedural default, whether it occurs in either fashion discussed above, may be avoided by the petitioner only if he or she is able to make the aforementioned showing of cause and prejudice, or more rarely, manifest injustice. See, *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (cause and prejudice standard apply “whether the default in question occurred at trial, on appeal or on state collateral attack.”). The first requirement, “cause” originates from *Davis v. United States*, 411 U.S. 233, 236, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973) and was applied to § 2254 petitioners in *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). *Reed v. Ross*, 468 U.S. 1, 14, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

A showing of cause ordinarily requires that the petitioner demonstrate that some event external to the defense prevented the state prisoner from complying with the affected state procedure. See *Maples v. Thomas*, 565 U.S. 266, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012) (“ ‘Cause for a procedural default exists where ‘something external to the petitioner, something that cannot fairly be attributed to him ...’ impeded [his] efforts to comply with the State’s procedural rule.’ ”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). See *gen.*, *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012), *cert. denied*, 568 U.S. 902, 133 S.Ct. 311, 184 L.Ed.2d 185 (2012) (discussing the external factors that may constitute cause). Attorney error, when it rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment, may also satisfy the cause requirement. See *Murray v. Carrier*, 477 U.S. at 488-89 (“So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 ... (1984)] , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.”). Mere ignorance or inadvertent attorney error of itself will not be sufficient to establish cause unless constitutionally

inadequate. *Murray v. Carrier*, 477 U.S. at 486-87 (citing *Engle*, 456 U.S. at 133-34, 102 S.Ct. 1558). See *gen.*, *Jones v. Bagley*, 696 F.3d 475, 484 (6th Cir. 2012), *cert. den’d*, — U.S. —, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013) (Ineffective assistance of counsel is considered to be “the legal theory most commonly used to attempt to circumvent the procedural default rule.”).

*41 An attorney’s abandonment of his client, as evidenced by a near total failure to communicate or to respond to the petitioner’s inquiries of a period of years, also may constitute cause for a procedural default where the attorney has severed the principal-agent relationship. *Maples*, 132 S.Ct. at 922-23 (“We agree that, under agency principles, a client cannot be charged with the acts of omissions of an attorney who has abandoned him.”). See, *Holland v. Florida*, 560 U.S. 631, 659, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense.”) (Alito, J., concurring).

Further, a claim of ineffective assistance of counsel that a petitioner hopes to rely on to establish cause must itself be exhausted by full and fair presentation at all applicable levels of the state courts before the petitioner may rely on it in his habeas corpus proceeding in an effort to avoid the procedural default. *Murray v. Carrier*, 477 U.S. at 489 (“[W]e think that the exhaustion doctrine, which is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings ... generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.”).

See also, *Edwards v. Carpenter*, 529 U.S. 446, 451-52, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (ineffective assistance to establish cause is itself an independent constitutional claim that like all others must be raised and exhausted in state court) (citing *Stewart v. LaGrand*, 526 U.S. 115, 120, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999)).

Prejudice, the second half of the cause and prejudice test, requires that a petitioner who has procedurally defaulted a potential federal claim show actual prejudice. *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976) (citing *Davis*, 411 U.S. at 245, 93 S.Ct. 1577)

(discussing the *Henderson-Davis* rule). Actual prejudice in this context is such prejudice as to establish a reasonable probability that the outcome of the judicial proceedings would have been different. See,  *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (“Prejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions.”)(quoting  *United States v. Frady*, 456 U.S. 152, 170-71, 102 S.Ct. 1584, 71 (L.Ed.2d 816 1982)). See  *Harbison v. Bell*, 408 F.3d 823, 834 (6th Cir. 2005)(actual prejudice sufficient to excuse procedural default requires “a reasonable probability that the result of the trial would have been different.”);  *Mason v. Mitchell*, 320 F.3d 604, 629 (6th Cir. 2003) (“To obtain relief, Mason “must convince us that ‘there is a reasonable probability’ that the result of the trial would have been different...”).

Until recently, the alleged ineffective assistance of counsel in an initial state post-conviction proceeding could not serve to establish cause for a procedural default because no federal constitutional right to the assistance of counsel exists in such a proceeding. See,  *Coleman*, 501 U.S. at 755, 111 S.Ct. 2546; *Wallace v. Sexton*, 2014 WL 2782009 at *10-12, 570 Fed.Appx. 443 (6th Cir. June 2014) (“Generally, an attorney’s ineffective assistance in post-conviction proceedings does not qualify as “cause” to excuse procedural default of his constitutional claims.”). In 2012, however, the U.S. Supreme Court carved out a limited, equitable exception for claims of ineffective assistance of trial counsel that could be raised for the first time only in an initial state post-conviction proceeding. See  *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 1320, 182 L.Ed.2d 272 (2012) (“[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.”).

*42 This limited exception was subsequently expanded by the Supreme Court in  *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). See, *Wallace*, 2014 WL 2782009 at * 12, 570 Fed.Appx. 443 (“In  *Trevino*, the Supreme Court extended the  *Martinez*

rule to states whose procedural structure makes it “virtually impossible” for a defendant to present an ineffective-assistance claim on direct appeal, even if there is no outright requirement that a defendant refrain from doing so.”); *Morris v. Parker*, 2014 WL 2956422 at * 10-11 (W. D. Tenn. June 30 2014)(discussing  *Martinez* and  *Trevino*). Ineffective assistance of counsel in an initial post-conviction proceeding, however, remains restricted to otherwise procedurally defaulted claims of ineffective assistance of trial counsel, not ineffective assistance of appellate counsel. *Morris v. Parker*, 2014 WL 2956422 at *11 (“The holding of  *Martinez* does not encompass claims that post-conviction appellate counsel was ineffective.”). See also,  *Hodges*, 727 F.3d at 521(same). Further,  *Martinez* did not announce a new rule of constitutional law, or any rule of constitutional law per se, that could be made applicable retroactively on collateral review to cases that became final prior to its rendition. See, *Chavez v. Secretary, Florida Dep’t. of Corr.*, 742 F.3d 940, 945-46 (11th Cir. 2014) (“ *Martinez* did not announce a new rule of constitutional law. See  28 U.S.C. § 2244(d)(1)(C);  *Arthur*, 739 F.3d at 629 (“The  *Martinez* rule is not a constitutional rule but an equitable principle.”). See also  *Buenrostro v. United States*, 697 F.3d 1137, 1139 (9th Cir. 2012) (holding that  *Martinez* “did not announce a new rule of constitutional law”)).

At this juncture of our procedural default review, Kentucky law requires some discussion, due to the unique manner in which the Kentucky courts once treated claims of ineffective assistance of counsel, both at trial and on appeal at the time of Haight’s decades-long journey through those same courts and afterwards. Historically, for many years, a convicted criminal defendant in Kentucky could not successfully raise a claim of ineffective assistance of trial counsel on state post-conviction review via RCr 11.42 if the defendant had (1) either failed to raise the underlying substantive error on direct appeal, or (2) had previously raised the underlying error on direct appeal only to have it rejected on its merits. See, *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972) (“It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court.”)

Kentucky courts faithfully adhered to this rule over the next thirty years holding claims of ineffective assistance of trial counsel to be procedurally barred when the underlying claim had not been presented on direct appeal, while holding similar such claims to be subject to collateral estoppel, or issue preclusion, when the underlying substantive claim had been previously considered and rejected on its merits on direct appeal before being asserted as the basis for an ineffective assistance claim on post-conviction review. See *Sanborn v. Commonwealth*, 975 S.W.2d 90, 908-09 (Ky. 1998) (“An issue raised and rejected on direct appeal may not be relitigated in ... [RCr 11.42] proceedings by claiming that it amounts to ineffective assistance of counsel.”). See *Haight v. Commonwealth*, 41 S.W.3d at 441; *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002); *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003); *Mills v. Commonwealth*, 170 S.W.3d 310, 326 (Ky. 2005); *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006).

Matters changed dramatically, however, in 2006 with the rendition of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). In *Martin*, a defendant convicted of first-degree burglary and being a persistent felony offender unsuccessfully argued on direct appeal, pursuant to Kentucky's standard for palpable error, that the previously unchallenged comments of the prosecutor in closing argument at his trial denied him due process. *Id.* at 2. The Supreme Court of Kentucky agreed that the prosecutor's comments were clearly improper, but held that they were not sufficiently so to result in manifest injustice as required by the palpable error standard. *Id.* The defendant then raised the same underlying issue of prosecutorial misconduct in the context of a claim of ineffective assistance in his RCr 11.42 based on the failure of his trial counsel to object to the prosecutor's closing argument *Id.*

*43 The trial court and the Kentucky Court of Appeals both predictably rejected this ineffective assistance argument as being procedurally barred based *Sanborn* and the above-cited cases. *Id.* On discretionary review, the Kentucky Supreme Court reversed the Court of Appeals, holding that the defendant could present his claims of ineffective assistance of counsel in his RCr 11.42 even though the

underlying claims of error had been denied on direct appeal, reasoning that the standards for palpable error review on direct appeal and claims of ineffective assistance of counsel were substantially different. *Martin*, 207 S.W.3d at 4-5. (“[A]s a matter of law, a failure to prevail on a palpable error claim does not obviate a proper ineffective assistance claim.”).

Three years later in *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009) the Kentucky Supreme Court substantially expanded *Martin*, while explicitly rejecting the entire *Sanborn* line of cases, to hold that “While such an ineffective assistance claim is certainly related to the direct error, it simply is not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.” *Id.* at 158 (discussing *Martin*). See *Bowman v. Commonwealth*, No. 2007-CA-000993-MR, 2010 WL 1814811 at *7 (Ky. App. May 7, 2010) (“Reading *Leonard* as a whole, we believe that the Supreme Court extended the holding in *Martin* to encompass all cases where an ineffective assistance of counsel claim is related to a claim of direct error. The Supreme Court did not limit *Martin*'s application only to those ineffective assistance of counsel claims related to direct error claims involving issues of palpable error.”)

In so holding, the *Leonard* Court further determined, based on *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), that *Martin* established a new rule that would not be applied retroactively to those cases in which the defendant's RCr 11.42 proceedings had previously become final by the conclusion of review on appeal of the order that denied RCr 11.42 relief. *Leonard*, 279 S.W.3d at 160-62 (“Because *Martin* announced a new rule of procedure to be applied in RCr 11.42 proceedings, it cannot be applied retroactively to such collateral attacks that were final when it was decided.”). See *Foley v. Commonwealth*, no. 2007-SC-000754, 2009 WL 1110333 (Ky. 2009) (“Because this Court has recently held that *Martin* is not to be retroactively applied if the judgment on the collateral attack was final before *Martin* was rendered, *Leonard*

v. Commonwealth, 2007-SC-000531-MR, the lower court properly denied the CR 60.02 motion in this case.”). As will be seen below the question of whether *Martin* and now *Leonard* can be applied to Haight's own otherwise procedurally defaulted, post-conviction claims of ineffective assistance is an issue much in dispute.

The second unique aspect of Kentucky law that requires mention involves the treatment of claims of ineffective assistance of appellate counsel prior to and after 2010. Before 2010, claims of ineffective assistance of appellate counsel could not be raised once the defendant's appeal had been considered on the merits. See *Hicks v Commonwealth*, 825 S.W.2d 280,281 (Ky. 1992)(interpreting *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). In other words, in Kentucky, only those appeals which had been forfeited or dismissed due to alleged attorney error could serve as a basis of a claim of ineffective assistance of appellate counsel, which was required to be raised by motion for a belated appeal rather than by post-conviction attack via RCr 11.42. See *Hollon v. Commonwealth*, 334 S.W.3d 431, 434-35 (Ky. 2010)(“The *Hicks* Court concluded that we would not “examine anew an appeal reviewed, considered and decided by this Court.”). This refusal of Kentucky's courts to consider substantive claims of ineffective assistance of appellate counsel, where an appeal had been taken and resolved on the merits, was upheld in a number of state court decisions. *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1998)(declining to reconsider its decision in *Hicks* while reemphasizing that “RCr 11.42 cannot be used as a vehicle for relief from ineffective assistance of appellate counsel.”)(citing *Vunetich v. Commonwealth*, 847 S.W.2d 51 (Ky. 1992) and *Commonwealth v. Wine*, 694 S.W.2d 689 (Ky. 1985)).

*44 In 2010, the Supreme Court of Kentucky in *Hollon* “granted ... discretionary review to reexamine whether IAAC [ineffective assistance of appellate counsel] claims may be prosecuted in the Commonwealth and, if so, how such claims shall be pursued.” *Hollon*, 334 S.W.3d at 434. In so doing, the court noted that various judicial panels of both the Sixth Circuit and the Kentucky Court of Appeals had urged the court “to reconsider our *Hicks* policy as incompatible with, or at least as out of harmony with,

United States Supreme Court precedent.” *Id.* at 434(citing *Boykin v. Webb*, 541 F.3d 638 (6th Cir. 2008); *Lofton v. Commonwealth*, no. 2002-CA-001550-MR, 2004 WL 178388 (Ky. App. Jan. 30, 2004); *Payne v. Commonwealth*, no. 2003-CA-000380-MR, 2004 WL 691208 (Ky. App. Apr. 2, 2004)).

The court in *Hollon* upon reflection agreed that its reading of *Evitts* as being limited only to attorney errors on appeal that resulted in dismissal of an appeal was unsupportable. *Hollon*, 334 S.W.3d at 435. Based on reexamination of the *Evitts* decision and *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court of Kentucky concluded that “it is time, indeed past time, to overrule *Hicks* and the cases relying upon it and to recognize IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal.” *Id.* at 436. The Kentucky Supreme Court, however, in recognizing such IAAC claims emphasized that “IAAC claims will not be premised on inartful arguments or missed case citations; rather counsel must have omitted completely an issue that should have been presented on direct appeal.” *Id.* at 437 (citing *Smith* 528 U.S. at 288, 120 S.Ct. 746). It further emphasized that IAAC claims are limited to counsel's performance on direct appeal, not in pursuing RCr 11.42 relief. *Id.*

As for how such claims must now be pursued, the court, contrary to its prior reasoning in *Wine*, 694 S.W.2d at 694, concluded “that sort of [IAAC] claim, we are persuaded, may appropriately be addressed to the trial court pursuant to RCr 11.42, and hence we depart from and overrule *Wine*.” *Hollon*, 334 S.W.3d at 439 (“We hold, therefore, that *Hicks*-type IAAC claims may henceforth be pursued by motion in the trial court of conviction under RCr 11.42.”). See *Haddix v. Commonwealth*, Nos 2010-CA-001190-MR/2011-CA_000191-MR, 2012 WL 246273 at *2 (Ky. App. Jan. 29, 2012)(“In *Hollon v. Commonwealth*, the Supreme Court announced for the first time that criminal defendants may collaterally attack their convictions on the grounds that they received ineffective assistance of appellate counsel.”).

Similar to [Leonard](#), the Kentucky Supreme Court in [Hollon](#) declared its ruling to have prospective effect only. *Hollon*, 334 S.W.2d at 439 (“Our ruling is to have prospective effect only. It applies to this case, to cases pending on appeal in which the issue has been raised and preserved, and to cases currently in or hereafter brought in the trial court in which the issue is raised.”). See *Sanders v. Commonwealth*, 339 S.W.3d 427, 434-35 (Ky. 2011) (“As noted in [Hollon](#), however, Appellant may not retroactively assert his claim of ineffective assistance of appellate counsel in state court.”): *Brown v. Commonwealth*, no. 2012-CA-001060-MR, 2013 WL 4710432 at *3 (Ky. App. Aug. 30, 2013) (“[Hollon](#) may not be wielded retroactively.”) (citing *Sanders*, 339 S.W.3d at 435). Haight has also raised the question of whether he may have the benefit of [Hollon](#) to reach the merits of his own otherwise possibly defaulted IAAC claims that the Kentucky courts did not address.

Ineffective Assistance Standard.

*45 If the Court determines that any or all of Haight's claims of ineffective assistance of trial counsel are not procedurally defaulted, or that the default has been removed by a showing of cause and prejudice, then it will become necessary to address the merits of his Sixth Amendment ineffective assistance claims. Before the Court may address the merits, however, an overview of the applicable constitutional standard for such claims both at trial and on appeal is necessary at this point.¹¹ This general discussion of the standard is followed by a specific, issue-by-issue analysis of grounds 5, 6, 8, 9, 13-16 of Haight's petition.

The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense. U.S. Const. Amend VI. In [McMann v. Richardson](#), 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), the Supreme Court set out the derivative principle that all “defendants facing felony charges are entitled to the effective assistance of competent counsel.” See [McElrath v. Simpson](#), 595 F.3d 624, 630 (6th Cir. 2010). Subsequently, in [Strickland v. Washington](#), 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established the often-cited, two-part, benchmark test for evaluating a claim of ineffective assistance of counsel. [Id.](#) First, the defendant, or petitioner in this

case, must show that the performance of his or her attorney was deficient, or objectively unreasonable, in light of the then prevailing professional norms. [Hodges](#), 727 F.3d at 545 (“The Supreme Court has explicitly approved using ABA Guidelines on attorney performance in effect at the time of a defendant's trial as “guides to determining what is reasonable” performance by counsel.”) (citing [Padilla v. Kentucky](#), 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). Put differently, an attorney's performance will be deficient if “counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” [Strickland](#), 466 U.S. at 687, 104 S.Ct. 2052. See *Howard v. United States*, 743 F.3d 459, 464 (6th Cir. 2014) (discussing [Strickland](#)).

The second part of the two-part test of [Strickland](#) requires that the defendant establish that the deficient performance of his or her attorney prejudiced the defense. *Id.* When a claim of ineffective assistance is raised in the context of trial, this second part of the [Strickland](#) test requires the Petitioner to show that “a reasonable probability existed that but for counsel's unprofessional errors, the result of the proceeding would have been different.” [Id.](#) at 694, 104 S.Ct. 2052. See also, [Wong v. Belmontes](#), 558 U.S. 15, 27, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam) (“But [Strickland](#) does not require the State to ‘rule out’ “a more favorable outcome to prevail. “Rather, [Strickland](#) places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different”), *reh'g denied*, 558 U.S. 1138, 130 S.Ct. 1122, 175 L.Ed.2d 931 (Jan. 11, 2010).

A reasonable probability in that context is defined by [Strickland](#) to be a probability sufficient to undermine the confidence of the court in the outcome of the proceedings. *Id.* In the words of [Strickland](#), “the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result.” [Strickland](#), 466 U.S. at 686, 104 S.Ct. 2052; [Bigelow v. Haviland](#), 576 F.3d 284, 287 (6th Cir. 2009) (“To prevail on an ineffective-assistance claim under the Sixth Amendment, a plaintiff must show that his

counsel's performance was constitutionally deficient and that it prejudiced him 'render[ing] the trial unfair and the result unreliable.' ") (citing [Hall v. Vasvinder](#), 563 F.3d 222, 237 (6th Cir. 2009)).

*46 Courts are directed by [Strickland](#) to be highly deferential in their scrutiny of the performance of counsel. [Strickland](#), 466 U.S. at 689, 104 S.Ct. 2052. In fact, [Strickland](#) cautions directly that "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." [Id.](#) at 690, 104 S.Ct. 2052; [Stumpf v. Robinson](#), 722 F.3d 739, 753 (6th Cir. 2013), *cert denied*, — U.S. —, 134 S.Ct. 905, 187 L.Ed.2d 789 (2014)(discussing deference under [Strickland](#)). Review of an attorney's performance, therefore, should not be made from the perspective of hindsight, but instead should evaluate the objective reasonableness of the challenged attorney's performance in the circumstances as they existed at the time of the alleged error. [Hanna v. Ishee](#), 694 F.3d 596, 612 (6th Cir. 2012)("Counsel's performance must be assessed according to the time of representation, rather than viewed with the benefit of hindsight.") *cert denied* 124 S.Ct. 101 (2013)(citing [Strickland](#)). The tactical decisions of a defendant's trial counsel are presumed to be part of sound trial strategy and therefore will not be subject to successful attack absent a defendant overcoming such presumption. [Varden v. Wainwright](#), 477 U.S. 168, 185-87, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); [O'Hara v. Wigginton](#), 24 F.3d 823, 828 (6th Cir. 2006)([T]he standard to which an attorney is held is not that of the most astute counsel, but rather that of "reasonably effective assistance.") (citing [Strickland](#)).

The same standard that governs a Sixth Amendment claim for ineffective assistance of counsel at trial under [Strickland](#) applies to determine the adequacy of counsel on direct appeal. [Mapes](#), 388 F.3d 187, 191 (6th Cir. 2004)(citing [Strickland](#), 466 U.S. at 687, 104 S.Ct. 2052). To prevail, a defendant ordinarily must show that: (1) his appellate counsel was deficient in the performance of his professional duties; and (2) the deficient performance prejudiced the defense so that a reasonable probability exists that but for

counsel's errors, the result of the proceeding, in this case the appeal, would have been different. [Strickland](#), 466 U.S. at 694, 104 S.Ct. 2052; [Nichols](#), 501 F.3d at 547 (citing [Strickland](#)).

Not every non-frivolous issue must be raised by counsel on direct appeal in order to avoid a claim of ineffective assistance. [Jones v. Barnes](#), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); [Monzo v. Edwards](#), 281 F.3d 568, 579 (6th Cir. 2002). Ordinarily, the presumption that counsel has rendered effective assistance on appeal will be overcome only if the ignored issue was clearly stronger than the issues presented. [Smith v. Robbins](#), 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); [Hoffner v. Bradshaw](#), 622 F.3d 487, 505 (6th Cir. 2010), *cert denied*, 563 U.S. 947, 131 S.Ct. 2117, 179 L.Ed.2d 910 (2011). The task of winnowing out less persuasive arguments on appeal is otherwise the hallmark of an effective appellate advocate. [Smith v. Murray](#), 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting [Barnes](#), 463 U.S. at 751-72, 103 S.Ct. 3308).

The Sixth Circuit in [Mapes](#) identified a number of questions to be considered when a court attempts to determine under the deficient performance prong of [Strickland](#) whether an attorney has satisfied the objective standard of reasonableness on direct appeal. Such factors include whether: (1) the omitted issue was significant and obvious; (2) there existed contrary authority to the Defendant's position on the omitted issue; (3) the omitted issue was clearly stronger than the issues presented on direct appeal; (4) the omitted issue was raised at the trial level; (5) the ruling of the trial court, if any, on the omitted issue, was subject to deference on appeal; (6) appellate counsel testified in a collateral proceeding as to his appeal strategy; (7) appellate counsel's level of expertise and experience was sufficient; (8) appellate counsel and the petitioner conferred about possible issues for appeal; (9) evidence indicated that counsel reviewed all of the material facts and issues; (10) the omitted issue dealt with another assignment of error; and (11) the decision to omit the issue was an unreasonable one that only an incompetent attorney would make. *Id.* at 427-28. See gen [Goff v. Bagley](#), 601 F.3d 445, 472-73 (6th Cir. 2010)(discussing [Mapes](#)). A defendant who raises a claim of ineffective assistance

pursuant to  *Strickland* ordinarily must make a showing that a reasonable probability existed, sufficient to undermine the confidence in the outcome, that but for the errors of counsel on appeal, the result of the proceedings would have been different.  *Nichols*, 501 F.3d at 547 (citing  *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

*47 In *Wilson v. Parker*, 515 F.3d 682, 706-07 (6th Cir. 2008), the Sixth Circuit renewed its discussion of the method courts use to analyze a claim of ineffective assistance of appellate counsel. To quote *Wilson*:

To evaluate a claim of ineffective assistance of appellate counsel, we assess the strength of the claim appellate counsel failed to raise. ‘Counsel’s failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.’  *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). ‘If there is a reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, we can then consider whether the claim’s merit was so compelling that appellate counsel’s failure to raise it amounted to ineffective assistance of appellate counsel.’  *Id.* at 700.

Wilson, 513 F.3d at 707. See also,  *Smith v. Robbins*, 528 U.S. at 285, 120 S.Ct. 746 (2000) (when confronting a claim of ineffective assistance of appellate counsel,  *Strickland* requires the court to ask whether a reasonable probability exists that the prisoner would have prevailed on appeal had the omitted issue or issues been timely raised).

In 2011, two important decisions the U.S. Supreme Court emphasized yet again the strict nature of the standard created under  *Strickland*. See,  *Premo v. Moore*, 562 U.S. 115, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) and  *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Both of these cases express in plain terms the imposing challenge that  *Strickland* creates for a defendant who hopes to upend his state conviction based on a claim of ineffective assistance of counsel. The following quote from  *Premo* leaves little doubt about the high court’s view on such matters.

“ ‘Surmounting  *Strickland*’s high bar is never an easy task.’ ”  *Padilla v. Kentucky*, 559 U.S. 356, 371 [130 S.Ct. 1473, 176 L.Ed.2d 284] (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the  *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversarial process the right to counsel is meant to serve.  *Strickland*, 466 U.S. at 689-90, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’  *Id.* at 689, 104 S.Ct. 2052; see also,  *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002);  *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.  *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

“Establishing that a state court’s application of  *Strickland* was unreasonable under  § 2254(b) is all the more difficult. The standard created by  *Strickland* and  § 2254(b) are both ‘highly deferential,’ ( *Id.* at 689, 104 S.Ct. 2052);  *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 (S.Ct. 2059, 138 L.Ed.2d 481 1997), and when the two apply in tandem, review is ‘doubly’ so.  *Knowles [v. Mirzayance]*, 556 U.S. [111] at 123, 529 [129] S.Ct. [1411] at 1420 [173 L.Ed.2d 251 (2009)] (slip op., at 11). See also,  *Harrington*, 131 S.Ct. at 788 (same). The  *Strickland* standard is a general one, so the range of reasonable applications is substantial.  556 [U.S.] at 123 [129 S.Ct. 1411] (slip op. at 11). Federal habeas courts must guard against the danger of equating unreasonableness under  *Strickland* with unreasonableness under 2254(d). When  § 2254(d) applies, the question is not whether

counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied

 *Strickland's* deferential standard.”

*48  *Premo*, 131 S.Ct. at 731-40. See *Bray v. Andrews*, 640 F.3d 731, 738 (6th Cir. 2011)(discussing  *Harrington's* double deference standard); *Morris v. Parker* 2014 WL 2956422 at *13 (same). With this cautionary language in mind, the Court turns now to Haight's individual claims of ineffective assistance of trial counsel.

5. Failure to Strike Juror Leroy Gaugh for Cause.

Haight argues in this first claim of ineffective assistance of trial counsel that his attorney violated Haight's Sixth Amendment rights when he refused to strike for cause a juror, Mr. Leroy Gaugh, who Haight claims revealed during voir dire that he would not consider Haight's deprived family background as mitigation evidence.¹² During voir dire, defense counsel asked potential jurors, including Gaugh, whether they could give serious consideration, as a mitigating circumstance, that Haight had come from “a deprived background, from a poor home, from a broken home, that kind of evidence.” (V.T. 2, 1/11/94, 11:52:03-11:53:16).

Gaugh responded initially that he could not do so. Specifically, Gaugh responded that “I don't see how that to me, would have any effect on him, this person doing what they had to do, did what they did, being from a deprived home or background.” (*Id.*). Gaugh reiterated that if evidence were presented to him that the Defendant was taken from his parents, put in an orphanage, that his mother was mentally ill—if that type of evidence were presented to him during the penalty phase, he would not give it any effect in arriving at a penalty decision. (*Id.*). Once again, in Gaugh's own words, “I really can't explain it. I just wouldn't consider it, you know this person coming from a deprived home, mother mentally ill, I don't know.” (V.T. 2, 1/11/94, 11:53:49-11:55:06). When defense counsel asked Gaugh if he thought that [such circumstances] have anything to do with arriving at a penalty from 20 to life, life without parole or death, Gaugh responded, “No.” (*Id.*). Gaugh, however, did later upon further questioning by defense counsel, indicate that he was somewhat sympathetic to people that come from poor backgrounds, broken homes, and that kind of thing. (V.T. 2, 1/11/94, 11:59:16-12:00:06). Nevertheless, despite his sympathy, Gaugh continued to affirm upon questioning

that he did not think that such information would have any place in a penalty hearing. (*Id.*).

The prosecutor then took up the same issue with juror Gaugh. In this regard, the prosecutor asked Gaugh if he was telling the court that he would have a mindset against evidence of that kind in deliberating the penalty, that he wouldn't consider it at all. Gaugh again responded, “No,” that he would not listen to it. (V.T. 2, 1/11/94, 12:00:11-12:00:48). The trial court then inquired whether either party had any motions relating to juror Gaugh. (V.T. 2, 1/11/94, 12:01:00). Defense counsel responded that the defense had no motion. (V.T. 2, 1/11/94, 12:01:30).

*49 The prosecutor then specifically requested that the Defendant be required to waive any objection for cause to Gaugh, juror 96, given “there is an inconsistency in the solicitation of response regarding the ability to consider mitigating circumstances.” (V.T. 2, 1/11/94, 12:35:08). The prosecutor continued to explain:

Specifically, the evidence of deprived childhood ... juror Gaugh stated unequivocally that he could not, would not consider evidence of deprived childhood. We ask that the objection to him be waived rather than mere silence. That, for the purposes of further proceedings, we ask for an affirmative waiver of the objection. There is an inconsistency in that prior objections they made where persons have not been willing to consider mitigating circumstances. They have objected and now this one they didn't. We just simply ask for that objection to be waived so there's no confusion, so that it's clear that they're waiving objection.

(*Id.*). Defense counsel then advised the court that as a “tactical decision” he waived any motion to strike juror Gaugh for cause (V.T. 2, 1/11/94, 12:36:03). Juror Gaugh subsequently sat on Haight's jury, the sole African-American to do so.

Haight now argues that Gaugh clearly was not qualified to sit on the jury in a capital case because of his ongoing refusal

to give effect to mitigating evidence. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also, *Buchanan v. Angeloni*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) (sentencer in a capital case may not refuse to consider any constitutionally relevant mitigating evidence). Haight insists that both the trial court and the prosecutor were well aware that juror Gaugh as not qualified as confirmed by the trial court's invitation for motions and the prosecutor's insistence upon a waiver.

Citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Burger v. Kemp*, 483 U.S. 776, 789 n. 7, 107 (S.Ct. 3114, 97 L.Ed.2d 638 1987), Haight points out that it is beyond dispute that a turbulent family history that includes physical abuse and an unhappy and unstable childhood are all relevant to the question of mitigation, as the Sixth Circuit has repeatedly confirmed in its own decisions. See, *Hamblin v. Mitchell* 354 F.3d 482, 490 (6th Cir. 2002) (family violence and instability are evidence in mitigation); *Haliym v. Mitchell*, 492 F.3d 680, 713 (6th Cir. 2007). Such mitigation played an important role in Haight's trial, according to him, and was the essential focus during the penalty phase with his mother and sister both testifying about the extraordinarily difficult conditions of abuse and neglect he endured. (V.T. 9, 2/1/94, 10:51:33-11:47:10). The extraordinary nature of this background is independently confirmed Haight argues by the expert testimony of associate professor Carol Goode, who testified based on her review of Haight's welfare, school, court and psychological records that the level of abuse and neglect suffered by Haight rank[ed] up there with the most extreme" she had ever seen. (V.T. 9, 2/1/94, 15:02:48).

In light of these circumstances, Haight now argues that his trial counsel entirely failed to ensure that his guarantee to an impartial and unbiased jury under the Sixth and Fourteenth Amendments was protected. See, *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Mu-Min v. Virginia*, 500 U.S. 415, 431, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). Haight maintains that the failure of his trial counsel to challenge juror Gaugh, a juror who in effect conceded his bias repeatedly, is undoubtedly an objectively deficient performance under the *Strickland* test for ineffective assistance of counsel. In fact, the ABA

Guidelines, 10.10-2 on voir dire and jury selection instruct that counsel should conduct a voir dire exactly to expose such jurors and remove them due to their inability to fairly consider all of the relevant sentencing evidence.

*50 Haight rejects outright the notion that an attorney can ever make a tactical or strategic decision that seats a biased juror in a capital criminal case. See, *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004) (citing *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001)) ("The decision whether to seat a biased juror cannot be a discretionary or strategic decision."). See also, *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (reversal of conviction required where biased juror subject to dismissal for cause was improperly seated). Therefore, Haight concludes that despite the express statement by his trial counsel that the decision not to move to strike Gaugh was a "tactical" decision, no decision to seat a biased juror, tactical or otherwise, can be objectively reasonable. Rather, prejudice under *Strickland* must be presumed and a new trial is automatically required. *Hughes*, 258 F.3d at 457.

The first question for the Court to now address is whether it is procedurally barred from addressing the merits of Haight's first claim of ineffective assistance of trial counsel. Haight did not preserve the underlying bias claim involving juror Gaugh for review on direct appeal. In fact, Haight in his brief on direct appeal conceded that he had not preserved the issue of Gaugh's alleged refusal to consider mitigation evidence. (Brief for Appellant, App. No. 94-SC-288, p. 34). While Haight made passing reference in his brief on direct appeal to the consideration of mitigation evidence and Gaugh's responses on voir dire, the bulk of Haight's argument on direct appeal involving juror Gaugh centered upon Gaugh's alleged extrajudicial knowledge of the death of Officer Mardis, a police dog-handler inadvertently shot by a fellow officer during the cornfield search for the fleeing Haight immediately following the murders. (Appellant's Brief, App. No. 94-SC-288, pp. 20-24).

Haight argued on direct appeal only that Gaugh had withheld his alleged extrajudicial knowledge of Officer Mardis's death during voir dire; and subsequently, during a post-trial proceeding to explore the exposure of various members of the jury to extrajudicial knowledge, he had unpersuasively denied his awareness of this information, information not made privy to the jury at trial. (*Id.*). The Kentucky Supreme Court in

its 1996 opinion on direct appeal in  *Haight III* wrote as follows:

As to juror Gaugh, much is made of his apparent knowledge that a police officer had been killed when, in fact, he was properly informed only that a police officer had been fired upon. We are told that this is more than enough to compel the inference that Gaugh concealed vital information. As the evidence in this regard was ambiguous, as it is likewise with respect to each of these jurors, we will rely upon the trial court for the reasons stated herein and as follows: “It is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions.”

 *Haight III*, 938 S.W.2d at 247.

Haight did directly address juror Gaugh's voir dire questioning on family background as mitigation evidence in his post-conviction proceedings pursuant to *RCr 11.42*. In his brief on post-conviction appeal, Haight raised this argument in ground 6 at pp. 44-46, 49-50 of his brief (Appellant's Brief in App. No. 98-SC-931-MR, pp. 44-46, 49-50). The Kentucky Supreme Court in its opinion on post-conviction appeal in  *Haight IV* did not address the merits of Haight's “failure to strike” argument involving juror Gaugh. Instead, the court began its opinion in  *Haight IV* with a reminder of its procedural rules related to claims of ineffective assistance of counsel on post-conviction review.  *Haight IV*, 41 S.W.3d at 441. In the words of the court,

*51 We believe it is valuable to again set out the standard of review of claims raised in a collateral attack under *RCr 11.42*, alleging ineffective assistance of counsel at the original trial. Such a motion is limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel.

 *Haight IV*, 41 S.W.3d at 441 (citing  *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998); *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990) and *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993)).

Subsequently, in section VI of the same opinion, the court held as follows:

The trial judge acted correctly in denying the *RCr 11.42* motion with respect to the allegations concerning individual jurors in the jury pool. The petition presented failed to state with particularity facts which, if true, would warrant relief and that defense trial counsel was constitutionally ineffective. There is no reason to believe that but for trial defense counsel's errors, there is any reasonable probability that the result of the trial would have been any different or that Haight did not receive a fair trial and a sentence that was reliable.

The questions relating to an African-American juror [juror Gaugh] were rejected on direct appeal by this court.

 *Haight*, 938 S.W.2d 243 (1996), when it held that the defense decision to reject objections to the juror was legitimate trial strategy.

 *Haight IV*, 41 S.W.3d at 446.

The immediate problem with this statement in  *Haight IV* is that examination of  *Haight III* fails to reveal any portion of the opinion in which the state supreme court holds that the decision of trial counsel to consciously elect not to move to strike juror Gaugh was a legitimate trial strategy. Indeed, the Court cannot find the phrase “legitimate trial strategy” used in direct connection with juror Gaugh anywhere in  *Haight III*. As noted, the focus of  *Haight III* fell on whether juror Gaugh had extrajudicial knowledge, not whether he was biased due to his alleged inability to consider Haight's family circumstances as mitigation evidence.

At most, the Court is able to find only one other reference to juror Gaugh in  *Haight III*. This reference occurs when the Kentucky Supreme Court makes passing reference to “questions concerning jurors Hanson, Ireland, Huffman, Nessman and Gaugh.”  *Haight III*, 938 S.W.2d at 247. All that the court in  *Haight III* says regarding these other

questions is that it “has carefully considered each of these claims averred and determined that as to each there was no preservation of the question or that the ruling was within the sound discretion of the trial court.” *Id.*

This highly ambiguous statement gives no indication of whether the Kentucky Supreme Court considered Gaugh's bias related to his refusal to consider evidence of Haight's family background. As noted earlier in this opinion, a procedural default will not occur, even when a state petitioner violates a well-established rule of state procedure, if the final state court to address the matter does not expressly rely upon the procedural deficiency to decline to reach the merits of the question raised. *Ylst*, 501 U.S. at 801, 111 S.Ct. 2590; *Baze*, 371 F.3d at 320. *See also*, *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (mere existence of a state procedural bar does not deprive the federal courts of jurisdiction if the state courts did not rely upon it as an independent basis for disposition of the case).

*52 To the extent that the Kentucky Supreme Court in *Haight IV* attempted to apply the preexisting procedural rule that any issue raised and rejected on direct appeal may not be re-litigated in the context of an ineffective assistance of counsel claim on post-conviction review, the Kentucky Supreme Court erred in its conclusion that this issue involving Gaugh had previously been litigated on direct appeal. It had not, and therefore the former procedural bar of *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), subsequently overruled by *Leonard v. Kentucky*, 279 S.W.3d 151, 159 (Ky. 2009) did not apply to the present issue. *See gen.*, *Hodge v. Haeberlin*, 579 F.3d 627, 643 (6th Cir. 2009), *cert. denied*, 559 U.S. 1075, 130 S.Ct. 2107, 176 L.Ed.2d 736 (2010) (discussing Kentucky's former procedural bar under *Sanford* and its subsequent demise in *Leonard*).

The warden therefore cannot prevail on his argument that Haight's ground 5 involving juror Gaugh and trial counsel's election not to move to strike Gaugh is procedurally defaulted, at least not on the grounds asserted. Nonetheless, the language of *Haight IV* does indicate to the Court that the Kentucky Supreme Court concluded that Haight's trial counsel made an appropriate strategic decision in electing not to move to strike juror Gaugh for cause based on his responses concerning mitigation evidence. In other words, the court

obviously considered such decision to be sound under the *Strickland* standard, but simply believed, erroneously as it turned out, that it had already reached the same conclusion on the underlying claim in its prior opinion. The question therefore becomes whether the Kentucky Supreme Court reasonably applied *Strickland* to reject this particular claim of ineffective assistance of counsel.

To answer this question within the confines of the AEDPA, we must first explore the clearly established precedent of the Supreme Court as it relates to the alleged impanelment of a supposedly biased juror. One of the fundamental rights under the Sixth and Fourteenth Amendments is the right of a criminal defendant to an impartial and unbiased jury. *See*, *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Defense counsel is required to protect this right of his client during voir dire by careful questioning to identify those members of the jury pool who may be biased against the defendant or the defense. *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001); *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973). Voir dire in this respect acts to ensure that the trial court seats an impartial jury while enabling counsel to intelligently exercise peremptory challenges. *See*, *Mu-min*, 500 U.S. at 431, 111 S.Ct. 1899; *Rosales-Lopez*, 451 U.S. at 188, 101 S.Ct. 1629 (“Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”).

When counsel or the court conducts voir dire, each is granted “particular deference.” *Keith v. Mitchell*, 455 F.3d 662, 676 (6th Cir. 2006) (citing *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001)). Consequently, the actions of an attorney during voir dire are ordinarily considered to be matters of trial strategy, which may not be the basis for a claim of ineffective assistance unless the challenged decisions of trial counsel are shown to be so objectively unreasonable that as a result the entire trial of the defendant are permeated with obvious unfairness. *Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004) (quoting *Hughes*, 258 F.3d at 457). Despite this well-established deference to trial counsel, his or her trial strategy may nonetheless be the basis of a successful claim of ineffective assistance of counsel if the strategy itself is objectively unreasonable. *Miller*, 385 F.3d at 673 (citing

📄 *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001)). See also, 📄 *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997).

*53 It is now beyond dispute that a criminal defendant may be entitled to a new trial if an empaneled member of the jury was seated without objection by counsel despite giving honest responses to voir dire questions that established a valid challenge for cause due to the actual or implied bias of the juror. 📄 *Hughes*, 258 F.3d at 457 (citing 📄 *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)).

When a defendant's claim of ineffective assistance of counsel rests on the alleged failure of his attorney to strike for cause a biased juror, the defendant cannot prevail on such a Sixth Amendment argument unless the defendant establishes that the seated juror actually was biased against him. 📄 *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); 📄 *Hughes*, 258 F.3d at 458. Actual bias will not be established merely because a juror may express a doubt as to his or her impartiality during voir dire. See, 📄 *Patton v. Yount*, 467 U.S. 1025, 1032, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (jury found to be impartial despite 8 of 14 jurors admitting that due to pretrial publicity they had at one time formed an opinion as to the defendant's guilt prior to trial). Likewise, a juror's mere extrajudicial knowledge about the circumstances of the charged offenses in and of itself, is not sufficient to establish actual bias. 📄 *Mu-Men*, 500 U.S. at 421, 111 S.Ct. 1899; 📄 *Patton*, 467 U.S. at 1036, 102 S.Ct. 2777 (“The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant.”) (citing 📄 *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639).

As explained in 📄 *Miller*, 385 F.3d at 673, actual bias is bias in fact—“the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” 📄 *Id.* (citing 📄 *Hughes*, 258 F.3d at 463; see also, 📄 *United States v. Wood*, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed. 78 (1936)). Thus, for Haight to prevail on his claim of ineffective assistance based on the failure to strike juror Gaugh for cause, Haight must initially demonstrate that juror Gaugh was actually biased against him so that the election of Haight's trial

counsel as a “tactical decision” not to move to strike Gaugh was objectively unreasonable even if the result of a conscious, strategic decision by counsel.

Such a showing is not an easy one to make as prospective jurors are presumed to be impartial and the mere existence of a preconceived notion by the juror concerning the guilt or innocence of an accused, without more, is not sufficient to overcome the presumption so long as the affected juror is able to set aside his or her challenged impression or opinion and render a verdict based on the evidence presented. 📄 *Irvin v. Dow*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); 📄 *Hughes*, 258 F.3d at 459. An absolute, unequivocal statement of partiality by a juror, however, without any subsequent assurance of impartiality or rehabilitation by counsel through follow-up questions has been found by the Sixth Circuit in several cases to establish the actual bias of a juror so as to support a successful ineffective assistance of counsel claim. 📄 *Hughes*, 258 F.3d at 459-60; 📄 *Miller*, 385 F.3d at 674-75.

A failure by counsel to remove an actually biased juror has been held to taint the fairness of a defendant's entire trial so as to justify setting aside his or her conviction. 📄 *Hughes*, 258 F.3d at 463 (citing 📄 *Wolfe*, 232 F.3d at 503). Further, the Sixth Circuit in 📄 *Hughes* has held that “if counsel's decision not to challenge a biased venire person could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury.” 📄 *Hughes*, 258 F.3d at 463. See also, 📄 *Miller*, 385 F.3d at 675 (“Contrary to the Kentucky Court of Appeals' decision, the decision whether to seat a bias juror cannot be a discretionary or strategic decision.”) (citing 📄 *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)) (The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction). Finally, both 📄 *Miller* and 📄 *Hughes* conclude that the presence of a biased juror on the jury cannot be held to be a harmless error, but rather requires that the defendant receive a new trial without a showing of actual prejudice. 📄 *Miller*, 385 F.3d at 677; 📄 *Hughes*, 258 F.3d at 453 (citing 📄 *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000)). Thus, if a trial attorney consciously elects as a matter of trial

strategy to permit the seating of a juror who is actually biased against his or her client, prejudice will be presumed under the  *Strickland* standard.  *Miller*, 385 F.3d at 676.

***54** Haight argues that this scenario is exactly what happened in his case—his trial counsel specifically chose not to challenge juror Gaugh for cause, even though Gaugh unequivocally indicated that he would not consider as mitigation evidence testimony concerning Haight's difficult childhood family circumstances. Haight is correct at least to the extent that the record confirms that his trial counsel consciously chose not to move to strike juror Gaugh. In fact, his attorney at the request of the Commonwealth specifically waived any objection to having juror Gaugh seated on the jury, explaining that this choice was a “tactical decision” that he did not have to reveal to the trial court. (V.T. 2, 1/11/94, 12:34:30).

While counsel may have declined to put on the record the basis for his choice, Gaugh's other statements during voir dire clearly reveal the basis for counsel's conscious election not to challenge Gaugh for cause. First, Gaugh agreed that he would consider the entire range of potential penalties for intentional aggravated murder depending upon the facts of the case. (V.T. 2, 1/11/94, 11:55:28). This response alone seriously undercuts the claim that juror Gaugh was actually biased since he obviously was willing to consider the entire range of penalties available based on the facts of the case. Additionally, but just as importantly, Gaugh indicated that he would give serious consideration to extreme emotional disturbance as mitigating evidence. (V.T. 2, 1/11/94, 11:50:48-11:51:59).

Extreme emotional disturbance was a vital part of Haight's case both during the guilt phase and the penalty phase. If Haight could persuade the jury during the guilt phase that he was acting under extreme emotional disturbance, then the degree of homicide would be reduced from intentional murder to first degree manslaughter as the Kentucky Supreme Court explained at length in  *Haight III*, 938 S.W.2d at 248-49.¹³ The benefit to Haight from the presence of juror Gaugh therefore was clear. Had Gaugh chosen to accept Haight's claim that he was acting under extreme emotional disturbance aggravated by binge drinking at the time of the murders, then Gaugh would have logically chosen the lesser degree of homicide, first degree manslaughter, a non-capital offense.

Because Gaugh also agreed during voir dire that he was willing to give serious consideration to evidence that Haight

acted under the influence of alcohol at the time of the shootings, this favorable disposition played right into the primary theory of the defense for the guilt phase of trial, as well as mitigation during the penalty phase. (V.T. 2, 1/11/94, 11:53:22-11:53:42). It is therefore readily clear from these circumstances alone why Haight's attorney did not want to remove Gaugh from the jury for while Gaugh might have some reservations about evidence of Haight's childhood, his willingness to give full consideration to the key aspects of the theory of defense in both the guilt and penalty phases far outweighed any potential downside based on his attitude concerning family history as evidence of mitigation.

One more extremely important factor supports the strategic decision of Haight's attorney. Juror Gaugh was the only African-American member of the jury. Defense counsel undoubtedly believed, and continues in his current petition to support the view, that African-American jurors are far less likely to sentence a defendant to death than Caucasian jurors. Indeed, Haight in his memorandum of law in support of his  § 2254 petition directly points this fact out. Haight's trial counsel also had this powerful incentive to keep juror Gaugh as a potential juror given that Gaugh was much less likely, statistically speaking, to impose a death penalty on counsel's client.

***55** Obviously, trial counsel could not publicly express such a sentiment before the jury pool without the risk that his remarks would be perceived as being racist. His refusal to put his reasoning on the record for his “tactical decision” is entirely understandable given the delicate nature of the issue of race as it affects the probability of capital punishment. Nevertheless, the result of that “tactical decision” was that the defense obtained a juror who was expressly willing to consider the primary defense raised in both the guilt and penalty phases and who was significantly less likely statistically to vote to impose the death penalty. Thus, trial counsel had not only a reasonable, but compelling reason, not to move to strike juror Gaugh.

The Court is well aware that the  *Hughes* and  *Miller* decisions of the Sixth Circuit appear to hold that a defense attorney's decision to seek a juror who is actually biased against the defendant cannot be an objectively reasonable trial strategy. See,  *Hughes*, 258 F.3d at 463 (“If counsel's decision not to challenge a biased venire person could constitute sound trial strategy, then sound trial strategy could include counsel's decision to waive, in effect, a criminal

defendant's right to an impartial jury.”); [Miller](#), 385 F.3d at 675 (“[T]he decision whether to seat a biased juror cannot be a discretionary or strategic decision.”). Further, the Court also is cognizant that the presence of an actually biased juror cannot be forgiven under the harmless error doctrine, but requires instead a new trial. [Miller](#), 385 F.3d at 676 (“The ‘presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.’ ”) (quoting [Hughes](#), 258 F.3d at 453). See also, [United States v. Gonzalez](#), 214 F.3d 1109, 1111 (9th Cir. 2000).

Here, we do not have the situation in which an actually biased juror was seated. In this respect, Haight's case stands in marked contrast from both [Hughes](#) and [Miller](#). In both of these decisions, the juror plainly stated that she could not be fair. In [Hughes](#), the juror, juror Orman, sat on the trial of a defendant accused of stealing a firearm from a deputy U.S. marshal. [Hughes](#), 258 F.3d at 455. During the voir dire, Orman revealed that she had a nephew on the police force and that she knew several detectives whom she was “quite close to ...”. [Id.](#) at 456. When asked if she could be fair, Orman responded, “No.” [Id.](#) Neither the trial court nor defense counsel made any immediate follow-up questions to Orman's declaration that would have called into doubt her lack of fairness. [Id.](#) at 458-59.

In [Miller](#), the juror, Yvonne Bell, admitted that she would be partial to one of the surviving victims in a prosecution for murder, attempted murder and burglary because she had known the female victim through her prison ministry work. [Miller](#), 385 F.3d at 668-69. Bell advised the court that she would be “kind of partial” to the victim, Linda Klein, and added that “I kind of have sympathy for her in this case and with her being the victim.” [Id.](#) at 668. While Bell later expressed her opinion that she thought she could be fair when asked the court, defense counsel asked no questions and made no motion to strike. [Id.](#) at 669. Thus, in both cases the juror at issue either had a direct relationship with the victim, as in [Miller](#), or a relationship with members of the victim's profession, as in [Hughes](#). Also, in both cases, defense counsel did absolutely nothing, but instead remained silent despite the existence of the aforementioned relationships, and

in [Hughes](#), an express declaration that the juror could not be fair. We do not have these circumstances in Haight's case.

Here, juror Gaugh had no familial or other relationships with the victims. He did not expressly declare, without contradiction, that he could not be fair. To the contrary, Gaugh indicated that he would fully consider the Defendant's alcoholism and his EED defense, both key components of Haight's strategy at trial. As for Gaugh's reluctance to consider Haight's family history, one must bear in mind the nature of the questions asked by defense counsel of Gaugh. Gaugh was asked by counsel repeatedly if he could give “substantial” or “serious” consideration to such evidence. Thus, the very nature of the question itself runs to the weight to which Gaugh would afford such evidence.

***56** One must also note that Gaugh was not unequivocal during the questioning. He acknowledged that he had “some sympathy” for Haight. He further expressed some uncertainty after initially indicating that he would not consider such evidence by adding at the end of his statement, “I don't know.” (V.T. 2, 1/11/94, 11:53:49-11:55:06). This type of statement, along with his expression of sympathy, is exactly the type of ambiguity or equivocation that negates a finding of intentional bias. Just as importantly, it underscores the type of rapidly developing situation that faces counsel, who must make immediate decisions in less than ideal circumstances while weighing the benefits and the potential negatives of each of the members of the jury pool. Haight's lead counsel, a highly experienced attorney, clearly considered the benefits of Gaugh's participation on the jury to far outweigh the potential downside and this Court can find nothing objectively unreasonable in such a calculation, or in the Kentucky Supreme Court's conclusion that counsel's tactical decision was objectively reasonable.

For this Court now to hold otherwise is to engage exactly in the type of 20/20 hindsight that [Strickland](#) and more recent decisions such as [Premo](#) and [Harrington](#) directly caution against. Additionally, such a result gives direct rise to the distinct possibility of sandbagging by defense counsel, who would only have to sit silent in the face of a juror's professed bias in order to virtually guarantee a re-trial should matters go against the defendant at trial. See, [Hughes](#), 258 F.3d at 465 (Siler, J., dissenting). Juror Gaugh, as the only African-American juror, and a juror willing to consider Haight's primary defenses, particularly Haight's EED and alcoholism, was a valuable asset to the defense and a

tactical decision to keep Gaugh on the jury can hardly be characterized as being ineffective assistance of counsel, particularly in the absence of unequivocal evidence of actual bias. Because the decision of the Kentucky Supreme Court is a reasonable application of [Strickland](#), Haight is not entitled to relief on this argument.

8. Peremptory Strikes for Jurors Gaugh, Helton and Nichols.

In ground 8 of his petition, Haight argues that he received ineffective assistance of trial counsel when his attorney ignored Haight's express instruction during voir dire to use peremptory strikes to remove jurors Gaugh, Helton and Nichols.¹⁴ Haight maintains that he desired to remove these three potential jurors because Gaugh could not consider evidence of his family background in mitigation, because Helton, a jewelry store owner, had been robbed at gunpoint, and because Nichols' father was a retired Louisville police officer. Haight claims that trial counsel refused his direction and consequently all three of these jurors sat on the jury that sentenced him to death.

Haight claims that under Kentucky law the right to exercise a peremptory challenge is considered to be a substantial or substantive right. See, [Bowling Green Municipal Utilities v. Atmos Energy Corp.](#), 989 S.W.2d 577, 580 (Ky. 1999); [Thomas v. Commonwealth](#), 864 S.W.2d 252, 259 (Ky. 1993). As such, the right to exercise peremptory challenges in Kentucky belongs to the defendant and not his attorney, as the defendant rather than counsel holds the substantive right, which counsel may not compromise or surrender absent express authority from the client. [DeLong v. Owsley's Executrix](#), 308 Ky. 128, 213 S.W.2d 806 (Ky. 1948). Haight maintains that he directly asked counsel to eliminate all three of these jurors and therefore trial counsel had no authority to refuse his instruction to use peremptory strikes on Gaugh, Nichols or Helton.

Continuing his focus on Kentucky law, Haight argues that the denial of his substantive right to exercise peremptory challenges is automatically reversible error that is not subject to harmless error analysis. [Shane v. Commonwealth](#), 243 S.W.3d 336 (Ky. 2007); [Thomas v. Commonwealth](#), 864 S.W.2d 252 (Ky. 1993). Indeed, Haight claims based on [Needer v. United States](#), 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), that this error is not merely trial error, but

rather is a structural error, a defect that affected the framework of the trial and necessarily rendered it fundamentally unfair by depriving him of the basic protections without which “a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence....” [Id.](#)

*57 Haight acknowledges that the federal Constitution itself confers no right to peremptory challenges. See, [Batson v. Kentucky](#), 476 U.S. 79, 91, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Nevertheless, he maintains that the denial of his state statutory right to peremptory challenges violates the due process of law and his right to an impartial jury. In raising this argument, Haight distinguishes [Ross v. Oklahoma](#), 487 U.S. 81, 89, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) which requires that a defendant exhaust all of his peremptory challenges and show that an incompetent juror sat on his trial in order to establish grounds for reversal. [Ross](#), 487 U.S. at 89, 108 S.Ct. 2273.

Haight maintains that Kentucky has no requirement that a defendant show that an incompetent juror sat on his case; rather, the mere denial of the full use of peremptory challenges will mandate reversal. [Bowling Green Municipal Utilities](#), 989 S.W.2d at 580; [Thomas](#), 864 S.W.2d at 259. Haight insists that the alleged refusal of his trial counsel to honor his explicit request to use peremptory strikes to remove Gaugh, Helton and Nichols denied him his substantial right to the full use of peremptory challenges and further constituted a constructive and complete denial of assistance of counsel which under [Strickland](#), 466 U.S. at 692, 104 S.Ct. 2052 is legally presumed to be prejudicial.

Haight raised this particular claim of ineffective assistance of counsel as argument II on post-conviction appeal from the decision of the trial court that denied his RCr 11.42 motion to vacate the judgment of conviction. (Brief for Appellant, App. No. 98-SC-931-MR, pp. 22-29). Haight raised the same arguments in his post-conviction brief on appeal that he now brings before this Court—that he had a state-created substantive right to the exercise of his peremptory challenges which his counsel unreasonably denied him by ignoring his express instructions to strike the three named jurors above, a refusal that Haight claimed was structural error that mandated reversal. Alternatively, Haight argued on post-conviction appeal that if he was required to show prejudice in order to prevail under [Strickland](#) on this peremptory-based

claim, then he did so by Gaugh's admitted disqualification due to his refusal to consider mitigating evidence and juror Helton's concession during the post-trial hearing that he had made up his mind to impose the death penalty during closing argument, before receiving the Court's instructions or participating in jury deliberations. (V.T. 10, 3/7/94, 11:38:56, 11:39:49). Accordingly, Haight concludes that he is entitled to relief on this particular peremptory-based claim of ineffective assistance of counsel.

The Kentucky Supreme Court in its opinion in  *Haight IV* discussed Haight's various peremptory challenge arguments at length in section II of the opinion,  *Haight IV*, 41 S.W.3d at 443-444. In its opinion, the court explained that

The trial court allowed Haight to exercise the full number of peremptory challenges pursuant to RCr 9.40. Haight argues that the right to exercise peremptory challenges has been deemed to be a substantial right and cites  *Thomas v. Commonwealth, Ky.*, 864 S.W.2d 252 (1993) or a substantive right citing  *Bowling Green Municipal Utilities v. Atmos Energy Corp., Ky.*, 989 S.W.2d 577 (1999). He claims that it was his defense counsel who prevented him from freely exercising his peremptory challenges.

An analysis of the authority cited by Haight indicates that  *Thomas, supra.*, stated that “the rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced.” Here, Haight received the full number of peremptory challenges and his attempt to characterize this claim as ineffective assistance is unpersuasive.

*58 We must observe that his peremptory challenge claims were waived when the jury was sworn at trial. RCr 9.36(3). His allegation of error is not proper in an RCr 11.42 proceeding. Haight now asserts that he wanted to peremptory strike two jurors but the motion does not indicate whether he desired to strike those jurors who were peremptorily challenged or any reason that Haight gave to counsel in support of his alleged desire. The allegations with respect to a juror as “being a woman whose father had been a police officer” does not satisfy the requirement of specificity required in RCr 11.42(2).

Haight's reliance on  *Needer v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), is without merit.

Invoking the doctrine of structural error does not persuade us that the errors claimed here are of the nature which deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence. There was no structural error in providing Haight the number of peremptory challenges provided by the rule and this court rejected the allegations of juror bias on direct appeal. Haight cannot show prejudice by simply alleging ineffective assistance of counsel. There is no reasonable probability that the result of his trial would have been any different under the standards provided in  *Strickland*.

There is no constitutional right to peremptory challenges.

 *McQueen*, citing  *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). See also,  *United States v. Boyd*, 86 F.3d 719 (7th Cir. 1996), for a review of a situation where a criminal defendant makes a post-verdict challenge to the exercise of peremptory strikes by defense counsel. The conduct of trial counsel did not deprive Haight of this right to use peremptory challenges. Counsel was not ineffective.

 *Haight IV*, 41 S.W.3d at 443-44 (parallel citations omitted).

The warden argues in light of the above quotation that the Kentucky Supreme Court rejected Haight's peremptory challenge-based claim of ineffective assistance on state procedural grounds. The District Court dealt directly with this claim of procedural default in its memorandum opinion and order that rejected Haight's objections to the Magistrate Judge's prior order denying discovery. (DN 85, pp. 5-7). The District Court concluded that the Kentucky Supreme

Court opinion in  *Haight IV* was ambiguous in this regard. The state court opinion, according to the District Court, “did not clearly state that it relied on the procedural bar

for its decision.”  *Id.* at 6, 119 S.Ct. 1827. Instead, the District Court found that the Kentucky Supreme Court merely observed the existence of a procedural state rule as a preface before it continued to squarely address the merits of Haight's

Sixth Amendment arguments. Citing  *Harris v. Reed*, 489 U.S. 255, 258, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), the District Court found that the state supreme court had not clearly and expressly relied on a procedural bar and therefore the federal courts were empowered to reach the merits of this particular claim. We therefore cannot hold the claim to

be procedurally barred as the Respondent would have the Court do. Instead, the Court turns to the merits of Haight's ineffective assistance of counsel argument.

The Court notes that this Sixth Amendment claim, similar to other arguments raised by Haight, is presented in Haight's petition memorandum almost as if Haight were proceeding on post-conviction appeal before the state appellate courts. In other words, Haight appears merely to reargue the merits in a fashion identical to that offered in his brief on post-conviction appeal. This type of presentation misses the mark in the Court's view as we are not expressly informed of the manner in which *Haight IV* unreasonably applied the *Strickland* standard in the context of a peremptory challenge decision by trial counsel. Certainly, Haight's petition arguments of themselves are well-stated, but they fail to appreciate the procedural perspective of this Court and the unique standards of habeas corpus review arising under 28 U.S.C. § 2254(d) whereby we give double deference to state court determinations under *Strickland*. That being said, the Court turns to the initial question of whether trial counsel was deficient in failing to exercise a peremptory challenge against the three jurors.

*59 As the Court has noted, trial counsel, similar to the trial court itself, is granted “particular deference” when conducting voir dire. *Keith v. Mitchell*, 455 F.3d 662, 676-77 (6th Cir. 2006), *cert. denied*, *Keith v. Houk*, 549 U.S. 1308, 127 S.Ct. 1881, 167 L.Ed.2d 369 (2007). The decisions of a trial attorney during voir dire are considered to be matters of trial strategy that will not serve as the basis for a successful claim of ineffective assistance of counsel absent a showing that the challenged decisions of trial counsel were so ill-chosen as to permeate the entire trial of the defendant with obvious unfairness. *Id.* (citing *Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004)); *Hughes*, 258 F.3d at 457. Counsel's trial strategy, however, must itself be objectively reasonable. *Id.* (citing *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001)).

Decisions of whether to accept or to strike particular members of the jury pool are held to be matters of trial strategy. *Holder v. Palmer*, 207 WL 2050348 at *2 (E.D. Mich. July 16, 2007) (citing *LaPine v. Renico*, 2006 WL 89862 at *3 (W.D. Mich. Jan. 12, 2006)). Thus, it has been held that “it is an extremely rare case where a defense counsel's failure to challenge a juror

may form the basis for a claim of ineffective assistance of counsel.”). *Id.* To prevail on such an argument, a defendant “must show through a review of voir dire testimony that a ‘fair trial is impossible.’” *King v. United States*, 2010 WL 3769305 at *4-5 (S.D. Ohio Sept. 22, 2010) (citing *Holder v. Palmer*, 588 F.3d 328, 339 (6th Cir. 2009)). See also, *Ritchie v. Rogers*, 313 F.3d 948, 952 (6th Cir. 2002).

Once the Court has considered the deficient performance prong of the *Strickland* test, there remains to be addressed the question of whether Haight was prejudiced by the performance of trial counsel should the Court find that the failure to exercise peremptory strikes for Gaugh, Helton and Nichols was an objectively unreasonable trial strategy by counsel. Haight maintains that he need not establish prejudice, as the alleged refusal of his counsel to honor his request to strike these three jurors is a “structural error” under Kentucky state law that automatically results in the presumption of prejudice so as to entitle him to a new trial.

As the case law discussed below explains, this view is incorrect as a matter of federal constitutional law. See, *Rivera v. Illinois*, 556 U.S. 148, 157-58, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (rejecting the notion that the deprivation of a state provided peremptory challenge requires reversal as a matter of federal law based on *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). Rather, Haight must establish that, had his trial counsel successfully exercised peremptory challenges to remove the three jurors, a reasonable probability exists that the results of the trial proceedings would have been different in their outcome. *Keith*, 455 F.3d at 677. Put differently, Haight must persuade the Court that a reasonable probability existed that, for example, the jury as sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant the imposition of a death sentence. *Id.*

Much of Haight's arguments on this issue relate to whether peremptory challenges as a matter of Kentucky law are a substantial right so that such challenges may only be exercised by Haight, rather than independently by Haight's trial counsel in the exercise of his professional judgment. Haight cites several Kentucky decisions and Kentucky Rule of Criminal Procedure RCr 9.40 as support for the claim that the violation of this “substantial right” is not subject to

harmless error analysis. Haight's arguments, however, miss the mark in several significant respects.

*60 First, the Kentucky Supreme Court determined as a matter of state law that the right that arises in Kentucky under the cited cases,  *Thomas*, 864 S.W.2d at 259 and  *Bowling Green Municipal Utilities*, 989 S.W.2d at 850, is in fact the right of a party to a specific number of peremptory challenges.  *Haight IV*, 41 S.W.3d at 443 (“An analysis of the authority cited by Haight indicates that  *Thomas*, *supra.*, stated that ‘the rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced.’”). The Kentucky Supreme Court immediately continued in  *Haight IV* to correctly point out that Haight received the full number of peremptory challenges afforded to him under RCr 9.40(1).¹⁵ This holding, as a matter of state law, negates any claim by Haight that a “structural error” occurred. The structure that Haight relies on is the number of peremptories received rather than the manner in which they were exercised. Because Haight received the entire number of peremptories allowed under the state rule, he has no state claim for structural error nor does this Court sit to reevaluate determinations of state law by a state's highest court.

Second, as noted above, the violation of a state-granted right to peremptory challenges when it does occur is not a violation of the federal Constitution. The earlier mentioned  *Rivera* decision expressly holds that errors of state law do not automatically become violations of due process and that the deprivation of a state provided peremptory challenges does not require reversal as a matter of federal law.  *Rivera*, 556 U.S. 148, 129 S.Ct. 1446, 1455-56, 173 L.Ed.2d 320 (“Nothing in these decisions [ *Nguyen v. United States*, 539 U.S. 69, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003) and  *Wingo v. Wedding*, 418 U.S. 461 (1974)] suggests that federal law renders state-court judgments void whenever there is a state-law defect in a tribunal's composition.”). No doubt can exist after  *Rivera* that Haight's structural error argument as a matter of state law no longer carries any persuasive weight. Thus, even had Haight's trial counsel entirely ignored Haight's earnest request that the three jurors be removed by peremptory strikes, this decision by trial counsel would not have automatically required a retrial irrespective of the

question of whether a reasonable probability existed that the outcome would have been any different.

The Court notes at this point that the contemporaneous trial record contains little indication that events occurred as Haight now claims. Examination of the recorded trial proceedings reveals no protest by Haight that his attorney was ignoring his direction to exercise peremptory strikes on Gaugh, Helton and Nichols. Haight did not raise this matter in his motion for a new trial. He did not raise it during the post-trial hearing held to address alleged juror irregularities. He did not present this claim on direct appeal of his conviction when he was represented by new counsel.

Not until the post-conviction RCr 11.42 proceedings did Haight reveal for the first time that his trial counsel supposedly refused to honor his request concerning the three jurors. This extraordinary delay calls into question the sequence of events as represented by Haight. Nevertheless, for the purpose of Sixth Amendment analysis, the Court will now assume that Haight's trial counsel entirely ignored his earnest request that Gaugh, Helton and Nichols be removed by peremptory challenge.

Haight insists that even if he must show prejudice, he has done so by establishing that juror Gaugh was actually biased and therefore subject to disqualification due to his refusal to consider mitigating evidence of Haight's troubled family background (DN 61, Memo. of Law, p. 60 n. 15). Further, he also claims that juror Helton testified during the post-trial hearing that Helton had made up his mind to impose the death penalty during closing argument prior to instruction by the court and deliberation in violation of his oath as a juror. (V.T. 10, 3/7/94, 11:38:56, 11:39:40). Based on these two arguments, which include no mention of juror Nichols, Haight concludes that he has met the prejudice prong of  *Strickland* and therefore presumably the decision of the Kentucky Supreme Court in  *Haight IV*, which incidentally found no proof of juror bias, was an unreasonable application of  *Strickland* in this regard.¹⁶

*61 Neither of these arguments is persuasive when one examines the trial record. Juror Gaugh was not actually biased against Haight or any of Haight's mitigation evidence at trial. The Kentucky Supreme Court in  *Haight III* made a specific finding that Gaugh and the other challenged jurors whose impartiality was raised on direct appeal, had no information that would cause the court to believe that

“ ‘they were in any way partial in their deliberations or their final conclusions.’ ”  *Haight III*, 938 S.W.2d at 247 (adopting the findings of the trial court). Additionally, this Court has concluded, based on its own review of voir dire, that juror Gaugh was not unequivocal in his expressed skepticism of Haight's mitigation evidence. To the contrary, Gaugh indicated during questioning that he felt somewhat sympathetic to Haight. He additionally indicated that he would consider Haight's claim of extreme emotional disturbance along with Haight's alcoholism, which this Court has noted was the primary focus of Haight's defense in both the guilt and penalty phases of trial. Finally, Gaugh indicated along with the other jurors that he could consider all of the evidence and render a verdict in accordance with the law. Gaugh's hesitancy to give substantial consideration to Haight's family background as mitigation evidence, in light of the above, is little different than a juror who may hold an opinion concerning a defendant's guilt or possess extrajudicial information, but yet is not actually biased given the ability of the juror to act in accordance with the law to consider all the evidence and the instructions in rendering a verdict. Because Gaugh was not actually biased, Haight cannot establish prejudice by his mere presence on the jury.

The same is true when one considers the post-trial testimony of juror Helton. At a post-trial hearing held on March 7, 1994, Helton was extensively questioned by both the prosecution and defense concerning his knowledge of a newspaper article published in the Louisville Courier-Journal on the third day of the trial. (Appx., pp. 180-188, Appellant's Brief on direct appeal in 94-SC-288). Helton had joined the jury pool after the trial court gave its media admonition on Jan. 12, 1994 (*Id.* at 189, media admonition). Helton, who had at that time been participating as a juror in another trial, joined the jury pool after having briefly scanned an article entitled, “Murder Trial Begins for Man Once Sentenced to Death in Case.” Cary B. Willis, *Murder Trial Begins for Man Once Sentenced to Death in Case*, Louisville Courier-Journal, Jan. 12, 1994 at B3.

Following the jury trial and return of the verdict, a post-trial hearing was held. One of the issues raised was the impact of this article on juror Helton, who during voir dire had fully acknowledged his actions in reading the article. During the hearing, Helton was extensively questioned by counsel concerning what if any impact the article had on his decision. Throughout the questioning, Helton maintained that the article had no impact on his decision, and that he did not even fully recall the article until during deliberations in the jury room. In response to his questioning, Helton

explained that the article “just jumped up and hit me in the face. But we had already, we had uh, already been deliberating and my mind was already made up.” (*Id.* at A181). In fact, Helton explained that he had already voted for the death penalty at that point when he recalled the article. (*Id.*). Helton again testified on examination by the defense that during the deliberations, when he had his mind made up, the memory of the article came back to him. (*Id.* at A183). During this portion of the examination, defense counsel was attempting to determine exactly when juror Helton recalled the Courier-Journal article when the following exchange occurred.

Q: [Lewis] And then on the morning before the jury was reached, the verdict was reached in the afternoon, the whole article came back to you as if reading it.

A: [Helton] Yeah. Because by that time my mind had already been made up.

 *Id.* at A186-187]. The prosecutor then on redirect examination questioned Helton along the same lines as to when he had already made up his mind.

Q: [Whaley] Do you remember when you recalled that [about the dog handler being killed].

A: [Helton] When I made my mind up. Uh, it was pretty much during closing arguments. Uh, it just seemed, everything just seemed overwhelming to me that this is the way it was because I know when we took the first vote back in the jury room.

Q: [Whaley] So that did not, what you recall from the article did not affect your decision.

A: [Helton] Didn't sway me one way or the other.

[Appx., direct appeal in Case 94-SC-288 at p. 188].

*62 Review of this exchange between Helton and counsel, first, does not conclusively establish that Helton had decided the case prior to instructions from the court or deliberations. Helton's answers in this respect more logically tend to indicate that Helton did not have a final decision concerning the nature of the verdict until after deliberations had begun. This conclusion is confirmed by the nature of his initial answers regarding deliberations as well as his qualification that his mind was “pretty much” made up during closing arguments. In other words, Helton obviously had not reached the final

decision, although he apparently had some inclination as to what his vote would be.

Nevertheless, his testimony does not unequivocally establish that he refused to consider the trial court's instructions or to participate earnestly in deliberations. Just the opposite appears to be true to the Court. Helton did participate in deliberations, albeit with an inclination that the evidence against Haight was overwhelming, a conclusion also reached by the Kentucky Supreme Court on its review of the trial record. Certainly, nothing in the transcript of the post-trial hearing leads the Court to believe that Haight's trial counsel rendered ineffective assistance by his refusal to peremptorily strike Helton from the jury.

The presence or absence of Helton on the jury in the Court's mind had no reasonable probability of affecting the outcome in this case. Haight was not prejudiced in any regard by the decision of his trial counsel to decline to remove Gaugh, Helton or Nichols from the jury pool. One must remember that the evidence of guilt in this case was entirely overwhelming. Haight admitted his commission of the shootings. The proof at trial established that he repeatedly shot the unarmed, partially clad victims in the face and head at a time when neither victim presented any threat of harm to Haight. Haight not only admitted his involvement in the shootings from the witness stand, he further expressed to the jury, in effect, his willingness to die for his crimes. Given such grim circumstances, no reasonable probability existed that the outcome of the sentencing phase would have varied one iota had the composition of the jury differed by three members.

See,  *Keith*, 455 F.3d at 676-77. Given the brutal and callous circumstances of the multiple murders charged, no reasonable probability of a different outcome existed based solely on the possible seating of one or more different jurors as the Defendant's hypothetical jury would also have imposed the death penalty on him. The decision of the Kentucky Supreme Court is not contrary to nor an unreasonable application of  *Strickland* or any established precedent of the U.S. Supreme Court.

9. Failure to Question Prospective Jurors, Raise Issues and Exercise Challenges for Cause.

Ground 9 of Haight's petition is a catchall collection of juror selection-related claims of ineffective assistance of counsel.¹⁷ This diverse group of arguments again is presented in the petition memorandum as if Haight were

before the state appellate courts with no mention of how those same courts may, or may not, have reasonably applied the

clearly established precedent of the  *Strickland* decision. Instead, Haight argues that his trial counsel failed to render effective assistance when he did not move to strike for cause: (1) juror Kaiser, who he claims could not consider alcoholism as a mitigating factor; (2) juror Helton, who admittedly had read a newspaper article discussing the pretrial procedural history of Haight's case; (3) juror Carnes, who also had read the same newspaper article; and (4) juror Cunagin, who allegedly could not consider imposing a 20-year sentence of Defendant were found guilty of murder.

***63** Haight also criticizes trial counsel for failing to reexamine those jurors who previously had been preliminarily qualified during the first two days of individual voir dire prior to the publication of the Courier-Journal news article. He criticizes counsel for failing to ask five jurors (Helton, Adams, Donahue, Netherton and Cunagin) if they could consider as a mitigating factor evidence that Haight was acting under the influence of alcohol at the time of the killings. Haight continues to claim that his trial counsel was ineffective when during individual voir dire questioning he allegedly misadvised the affected jurors that extreme emotional disturbance (EED) under the law of Kentucky is akin to the concept of "heat of passion" under prior common law. Haight then claims that counsel was ineffective when he failed to move for a mistrial during the penalty phase when the alternative juror, Bonnie Donahue, was excused and proceeded to sit in the courtroom throughout the penalty phase near the surviving family members of the victims. Finally, Haight maintains that his trial counsel rendered ineffective assistance when counsel failed to investigate why so few members of the jury pool were African-Americans.

The Kentucky Supreme Court in  *Haight III* addressed at length the underlying jury selection issues involving jurors Helton, Nichols and Gaugh in relation to their extrajudicial knowledge of events not presented at trial due to their exposure to the Courier-Journal newspaper article of Jan.

12, 1994.  *Haight III*, 938 S.W.2d at 245-47. The court reviewed in depth the post-trial testimony offered by juror Helton, which this Court has already summarized in the preceding section of this recommendation. The Kentucky Supreme Court concluded upon review that the findings of the trial court were neither clearly erroneous nor an abuse of discretion.  *Haight III*, 938 S.W.2d at 246. The trial court expressly found Helton to be a credible witness who

had truthfully answered questions on voir dire concerning his knowledge of the contents of the newspaper article he had scanned.  *Id.* at 246.

The trial court found no reason to believe that Helton recalled any of the details of the article, other than the headline and the names of the two victims, David Omer and Patricia Vance.

 *Id.* Accordingly, the trial court specifically found Helton's testimony to be credible and that “he did not display a bias.”

 *Id.* After noting its substantial deference to these findings, the Kentucky Supreme Court continued to opine that the mere exposure to newspaper accounts during a trial does not automatically require reversal of a defendant's conviction absent substantial proof that such exposure prejudiced the defendant to the extent that he did not receive a fair trial.  *Id.*

(citing  *Byrd v. Commonwealth*, 825 S.W.2d 272, 274-75 (Ky. 1992)).

The Kentucky Supreme Court then continued to find Haight's arguments regarding juror Nichols to be “insubstantial” as the transcript revealed “no misunderstanding concerning the death of the police officer or disclosure to other jurors.”  *Id.* at 247. The court likewise found that juror Gaugh had been properly informed only that state trooper Yates had been fired on by Haight as Haight was fleeing from the murder scene.

 *Id.* The court found that testimony regarding Gaugh's possible knowledge of information in the newspaper article was ambiguous and therefore the court again adopted the findings of the trial court that, “ ‘it is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions.’ ”  *Id.* at 247.

As for the remaining juror-related claims raised on direct appeal, the Kentucky Supreme Court wrote only as follows:

In addition to the jury issues discussed hereinabove, appellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann, and Gaugh. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced a penalty phase verdict. This court has carefully considered each of

this claims averred and determine that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court.

*64  *Haight III*, 938 S.W.2d at 247.

The Kentucky Supreme Court addressed many of the same arguments again in the context of ineffective assistance of counsel in  *Haight IV* in section VI of the decision.  *Haight IV*, 41 S.W.3d at 445-446. The entire discussion of the court in section VI of the opinion provides:

Haight now complains that defense counsel failed to render effective assistance when he made no motions to strike for cause unqualified jurors when he did not question certain jurors about publicity of mitigating factors, when he incorrectly defined extreme emotional disturbance, when he failed to move for a mistrial, and when he did not investigate the under representation of African-Americans in the jury pool.

The trial judge acted correctly in denying the [RCr 11.42](#) motion with respect to the allegations concerning individual jurors and the jury pool. The petition presented failed to state with particularity facts which, if true, would warrant relief and that defense trial counsel was constitutionally ineffective. There is no reason to believe that but for trial defense counsel's errors, there is any reasonable probability that the result of the trial would have been any different, or that Haight did not receive a fair trial and a sentence that was reliable.

The questions relating to an African-American juror were rejected on direct appeal by this Court.  *Haight*, 938 S.W.2d 243 (1996), when it held that defense decision to reject objections to the juror was a legitimate trial strategy.

The complaint about juror Kaiser was not raised on direct appeal. Our review of the juror's answers indicate that he was open to a range of potential penalties and willing to consider all the evidence before fixing a sentence, if any. Allegations regarding juror Helton were rejected in the direct appeal in regard to his exposure to a newspaper article. Nothing in the record indicates that juror Carnes would have been disqualified even if a motion had been

properly made. The same is true of juror Cunagin. The complaints about the voir dire of the two jurors regarding extreme emotional disturbance do not require RCr 11.42 relief. The allegation with respect to juror Donahue was rejected in the direct appeal of this case. Defense counsel was not ineffective and Haight received a fundamentally fair trial by an impartial jury.

 *Haight IV*, 1 S.W.3d at 445-46.

Haight now offers no explanation in his petition memorandum why he believes that the quoted portions from  *Haight IV* that rejected his ineffective assistance claim are either clearly contrary to or an unreasonable application of  *Strickland* or any other clearly established precedent of the U.S. Supreme Court. On that basis alone, the Court would be well within its role as a habeas corpus court in rejecting all of these many Sixth Amendment claims based solely on the standard of  28 U.S.C. § 2254(d). This is so because our role is not to decide whether the Sixth Amendment claims have merit themselves, but rather whether the state appellate court was reasonable under then-existing federal constitutional case law in rejecting those same claims, given  *Strickland*.

*65 The Court begins first with Haight's claim regarding juror Kaiser, whom Haight claims advised during voir dire that he could not consider alcohol as a mitigating factor. Apart from whether or not this claim is properly preserved due to the failure of Haight's appellate counsel to raise the claim on direct appeal,¹⁸ the claim on its merits is unpersuasive. Review of the record of voir dire confirms the Kentucky Supreme Court's conclusion in  *Haight IV* that Kaiser was willing to consider all of the evidence presented at trial. In fact, Kaiser stated that he could consider and give effect to evidence of alcohol as a mitigating circumstance. (V.T. 2, 1/11/94, 16:11:35-16:11:48). Kaiser simply did not consider alcohol to be the same thing as a "mental strain" due to his own life experiences with alcohol and also did not believe that the mere use of alcohol by an individual could take control of that person. (V.T. 2, 1/11/94, 16:10:45). He agreed that he could consider such evidence and would not disregard it although he declined to characterize his consideration with the term "seriously" as used by defense counsel. (V.T. 1/11/94, 16:11:30). Haight's trial counsel simply was not deficient in failing to remove Kaiser from the jury under these circumstances so that Haight has failed to satisfy the

first prong of the  *Strickland* test as the Kentucky Supreme Court reasonably concluded in  *Haight IV*.

The next two jurors include juror Helton and juror Carnes, whom Haight maintains should have been stricken from the jury but for the ineffective assistance rendered by his trial counsel. Both of these jurors were exposed to the Courier-Journal newspaper article published on the third day of the trial, which this Court has previously described. The article itself is relatively brief, contains no expression of opinion and is merely a factual recitation of the procedural history of the case prior to trial without any colorful characterization or sensationalism.

Haight did address his concerns regarding Helton's extrajudicial knowledge on direct appeal and the Kentucky Supreme Court addressed the underlying issue in  *Haight III* at section I.A of its opinion.  *Haight III*, 938 S.W.2d at 245. As noted, the Kentucky Supreme Court extensively discussed Helton's exposure to the newspaper article, which trial counsel was aware of during voir dire. Based on its own appellate review, the Kentucky Supreme Court adopted the findings of the trial court to hold that Helton's testimony that he merely skimmed the article and did not remember the headline was entirely credible and that Helton did not display a bias toward the Defendant.  *Haight III*, 938 S.W.2d at 246. The Kentucky Supreme Court consequently refused to again consider Haight's arguments regarding Helton in the context of a Sixth Amendment claim of ineffective assistance of counsel in  *Haight IV* based on the then-existing procedural bar of the  *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) line of cases, which held that "an issue raised and rejected on direct appeal may not be re-litigated in [collateral] proceedings by claiming that it amounts to ineffective assistance of counsel."¹⁹

*66 Haight consequently is procedurally barred from now pursuing this claim given the nonretroactivity of  *Leonard*. The plain statement of the Kentucky Supreme Court makes this conclusion unavoidable. Moreover, we see no clear error or unreasonable application of  *Strickland* with regard to Haight's claims concerning pretrial publicity and jurors Helton or Carnes, even if they were not procedurally barred.

The U.S. Supreme Court has stressed that with regard to pretrial publicity “primary reliance on the judgment of the trial court makes good sense.”  *Mu'Min v. Virginia*, 500 U.S. 415, 427-28, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). This deference is substantial and “a trial court's findings of juror impartiality may ‘be overturned only for manifest error.’ ”  *Id.* at 429, 111 S.Ct. 1899 (citing  *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). See also,  *Irvin v. Doud*, 366 U.S. at 723, 81 S.Ct. 1639. Given the specific findings of the trial court concerning juror Helton's impartiality, which Haight has not to be shown clearly erroneous, along with Helton's limited exposure to the article, the Kentucky Supreme Court in  *Haight IV* reasonably, and in the Court's view correctly, rejected Haight's ineffective assistance of counsel claim with regard to Helton.

The same conclusion holds for juror Carnes. Juror Carnes testified on voir dire only that he had skimmed through the article before reporting for jury duty. (V.T. 4, 1/14/94, 10:29:00-10:30:39, 10:32:20-10:34:19). All that Carnes could remember from his brief examination was that two people had been killed. *Id.* Critically, Carnes stated that he had formed no opinion concerning the guilt or innocence of Defendant Haight based on his exposure to the news article. *Id.* Thus, the Kentucky Supreme Court could hardly be held to have unreasonable applied  *Strickland* for rejecting this particular claim when it held in  *Haight IV* that “nothing in the record indicates that juror Carnes would have been disqualified if a motion had been properly made.”  *Haight IV*, 41 S.W.3d at 444. Because the Kentucky Supreme Court reasonably applied  *Strickland* in  *Haight IV* as to juror Carnes, Haight is not entitled to relief on this claim.

Haight also insists that his trial counsel was ineffective when he failed to ask five jurors (Helton, Adams, Donahue, Netherton and Cunagin) whether each of the jurors would consider evidence of alcohol abuse in mitigation. Haight, however, does not allege, or offer any proof, that any of the named jurors would have or did refuse to consider Haight's lengthy history of alcohol abuse during the penalty phase of the trial. Only if Haight could establish actual bias on the part of one or more of these jurors, and further that such bias would have been revealed by his trial counsel during voir dire questioning, would Haight have been able to successfully present a Sixth Amendment claim on this particular issue.²⁰ Because Haight cannot show that any of the jurors harbor

an actual bias against such mitigation evidence, he cannot satisfy the prejudice prong of  *Strickland*, and therefore the Kentucky Supreme Court reasonably rejected this argument in  *Haight IV*.

Haight's argument concerning juror Cunagin also falls short on its merits and therefore was reasonably rejected by the Kentucky Supreme Court. Haight maintains that Cunagin stated during voir dire questioning that he would not consider a 20-year sentence, the minimum sentence for murder, as an appropriate punishment. (V.T. 1/10/94, 16:14:48). Accordingly, Haight concludes that Cunagin was not qualified to sit as a member of the jury and therefore his counsel was ineffective for failing to move to strike Cunagin for cause.²¹ Despite his initial concern with the imposition of a minimum sentence for a conviction of murder, Cunagin continued to testify during voir dire that he remained capable of considering the full range of penalties available. (V.T. 1, 1/10/94, 16:27:19-16:30:35). Thus, had Haight's trial counsel moved to strike Cunagin for cause, such efforts would have come to naught. Haight has not shown any prejudice in this regard and therefore the decision of the Kentucky Supreme Court in  *Haight IV* cannot be considered clearly contrary to, nor an unreasonable application of  *Strickland* in this regard.

^{*67} The same reasoning holds true with respect to Haight's argument that during voir dire his trial attorneys misadvised potential jurors Larch and Carnes about the nature of extreme emotional disturbance, falsely equating it with the common law concept of “heat of passion.” Haight reasons that because EED as mitigation evidence has no requirement of a “heat of passion” component, and no such evidence was introduced at trial, Larch and Carnes consequently gave no consideration to Haight's EED mitigation evidence. This argument, however, ignores the fact that the jury was provided with an instruction on extreme emotional disturbance in instruction no. 9 during the guilt phase of the trial and that extreme emotional disturbance was specifically included as a mitigating circumstance in instruction no. 3 during the penalty phase of the trial. (Appx., Appellant's brief in Appeal No. 94-SC-288, pp. A64, A97). Haight therefore cannot establish prejudice and the Kentucky Supreme Court also reasonably rejected this Sixth Amendment claim.

As for alternate juror Donahue, Haight maintains that after she was excused following the guilt phase of Haight's trial,

Donahue remained in the courtroom throughout the entire penalty phase of the trial. Because Donahue was seated in the courtroom near the surviving family members of the victims, Haight maintains that she associated herself with them, thereby making a nonverbal statement of support for the prosecution that could not have been overlooked by the jury.

Haight raised this issue in both his motion for a new trial and on direct appeal in section I.G of his brief in Appeal No. 94-SC-288. He again asserted the claim in the context of a Sixth Amendment violation of ineffective assistance of counsel for the alleged failure of his trial counsel to move for a mistrial on this basis. The Kentucky Supreme Court in [Haight III](#) included this particular issue among those juror-related issues that either was not preserved or the ruling of the trial court was within its sound discretion. [Haight III](#), 938 S.W.2d at 247. Later, in [Haight IV](#), the Kentucky Supreme Court wrote that “the allegation with respect to juror Donahue was rejected in the direct appeal of this case. Defense counsel was not ineffective and Haight received a fundamentally fair trial by an impartial jury.” [Haight IV](#), 41 S.W.3d at 446.

This Court agrees entirely with the quoted portion of [Haight IV](#). The Kentucky Supreme Court reasonably concluded that the mere proximity of the juror to surviving members of the victims' family was not a nonverbal declaration of support and therefore trial counsel was not ineffective for failing to make a motion for a mistrial based on those grounds. Further, as Respondent points out, examination of the videotape records reveals the courtroom to be modest in its dimensions so that Donahue was necessarily required by the circumstances to be in the general proximity of the surviving members of the Omer and Vance families who were seated in the courtroom with various members of Haight's family as well. Consequently, Haight has not established that the decision of the Kentucky Supreme Court in [Haight IV](#) unreasonably applied the [Strickland](#) standard.

The final jury-related claim of ineffective assistance of counsel raised by Haight involves the alleged failure of counsel to investigate the under-represented status of African-Americans in the jury pool. In his post-conviction brief on appeal, Haight argues that if African-Americans had been in some fashion deliberately excluded from the jury pool a structural error would have occurred that would require a

retrial. Haight had argued earlier on direct appeal in [Haight III](#) that the results of the drawing of the jury were statistically improbable, thereby suggesting that the Commonwealth in some unstated fashion had excluded African-Americans from jury service. (Appellant's brief in Appeal No. 94-SC-288, p.30).

The Kentucky Supreme Court in [Haight III](#), 938 S.W.2d at 247 specifically found this claim to be baseless, adding that “conditionally we must state that there is no evidence upon which any impropriety may be inferred.” [Id.](#) This conclusion remains just as valid now, some 18 years later. No facts of record indicate any efforts by the prosecution to exclude African-Americans from the jury pool such as would necessitate action by trial counsel to investigate or challenge the composition of the jury pool. In this regard, the Court must agree with the Respondent that the argument itself is a curious one in light of Haight's earlier claim that his trial counsel was ineffective for failing to remove juror Gaugh, the sole African-American member of the jury, for cause.

Accordingly, the Kentucky Supreme Court in [Haight IV](#) reasonably rejected this argument as well.²²

6. Introduction of the Jeanne Omer Letter.

*68 Haight also claims as ineffective assistance of counsel the decision of his trial counsel not to move to admit a handwritten letter sent by Haight to Jeanne Omer, the surviving sister of victim David Omer.²³ (Appellant's brief in Appeal No. 94-SC-288, Appx. p. A152-154). Haight argues that this letter, which was written well prior to trial, was relevant, admissible and favorable to him during the penalty phase of the trial when the jury was considering the possibility of a potential death sentence. Haight claims that the decision of his trial counsel to omit the letter from evidence denied him potentially mitigating evidence that showed Haight's complete acceptance of responsibility for the murders, along with his own sorrow and distress at the pain and suffering he had inflicted on the victims.

Citing [KRS 532.025\(1\)\(a\) and \(b\)](#) along with *Foley v. Commonwealth*, 935 S.W.2d 924, 941 (Ky. 1997) (citing [Johnson v. Texas](#), 509 U.S. 350, 361, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)), Haight argues that the jury in his capital case was entitled to consider *all* mitigating and extenuating evidence, which he had a constitutional right to introduce.

Because evidence of his remorse has been held by at least one federal appellate court to be “substantial non-statutory mitigating evidence,”  *Delap v. Dugger*, 890 F.2d 285, 306 (11th Cir. 1989), *cert denied*, 496 U.S. 929, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990), Haight concludes that there was no strategic or tactical advantage obtained from the errant decision of his trial counsel to omit the letter, particularly when Haight had not been permitted to introduce evidence of his remorse during the guilt phase of the trial when his trial counsel on direct examination unsuccessfully attempted to elicit a response to the question of whether Haight had anything to say to the surviving family members (V.T. 8, 1/28/94, 12:04:12).

The Kentucky Supreme Court addressed the argument on its merits in  *Haight IV*, 41 S.W.3d at 448. In its opinion, the court explained as follows:

Haight argues that defense counsel was ineffective when he did not introduce into mitigation evidence a letter which Haight had written to one victim's family. In the letter, Haight admitted committing the murders, expressed sorrow at having caused so much pain and suffering, and further expressed a desire to die for having done so. Defense counsel clearly stated a desire not to reemphasize Haight's guilt phase testimony to the jury when it considered mitigating evidence in the penalty phase. The letter stated in part, “If you think I should pay with my life, then I'd have to agree with you....” Defense counsel was not ineffective for not introducing the letter into mitigation.

 *Id.*

This decision of the Kentucky Supreme Court in  *Haight IV* appears to the Court to be imminently reasonable in its application of the  *Strickland* standard. At a minimum, Haight does not explain why such a conclusion would be unjustified. The decision of trial counsel not to rely upon Haight's letter to Jeanne Omer is a classic example of the type of reasonable judgment that appellate court's will not second guess on post-conviction review. Haight had already informed the jury during his testimony on direct examination in the guilt phase of the trial that he wished he could “give my life” for, in the words of his trial counsel, “killing two innocent people.” (V.T. 8, 1/28/94, 12:03:47). The jury hardly needed a second reminder through the introduction of Haight's letter that counsel's client was more than willing to pay with his life for his violent crimes.

*69 Further, as the Respondent points out, to introduce the letter during the penalty phase would have required the defense to put Haight back on the witness stand, a highly risky proposition at best. Haight would then potentially be confronted not only with his “pay with my life” statement in the letter, he conceivably also could be confronted with his earlier testimony during the guilt phase that he wished he could give his life for his crimes. The prosecutor on cross-examination would only have to ask Haight if he genuinely meant it when he so testified under oath and when he wrote to Jeanne Omer for the jury's recollection to be refreshed on this highly damaging testimony and written pretrial statement. The decision of Haight's trial counsel not to open up this can of worms is a classic example of the type of judgment call that trial counsel is required to make in the heat of trial weighing the advantages and disadvantages of a particular course of action.²⁴

Because Haight's counsel reasonably chose not to remind the jury of his client's death wish, and because Haight has offered no reason to suggest that the Kentucky Supreme Court unreasonably applied  *Strickland* in rejecting this argument, Haight is not entitled to relief thereon.

16. Introduction of the 1986 Plea Agreement.

Haight further challenges the decision of his trial counsel not to introduce into evidence the 1986 plea agreement by which Haight agreed to plead guilty to both murders in return for a recommendation from the Garrard County prosecutor of concurrent sentences of life without parole for 25 years on the murder charges.²⁵ Haight maintains that the plea agreement was powerful mitigation evidence, not only of Haight's acceptance of responsibility, but also the decision of the prosecutor that Haight did not deserve the death penalty for his crimes. Haight now insists that he had a constitutional right to have the jury consider the 1986 plea agreement which his counsel failed to enforce by his decision not to attempt to introduce the agreement at trial. Haight adds that introduction of the plea agreement was critical given the course of jury deliberations which went over 13 hours during the course of two days with the jury reporting initially that they were at a standstill. (Appellant's brief in Appeal No. 94-SC-288, Appx. at p. A1).

The Kentucky Supreme Court in  *Haight IV* addressed this argument on its merits at Section X of its opinion.  *Haight*

IV, 41 S.W.3d at 447-48. In its opinion, the majority noted that Kentucky had not yet decided whether a criminal defendant has a right to introduce evidence of a withdrawn guilty plea as mitigation evidence in a capital trial. *Id.* at 447. The court then continued to recognize a “split of authority on the issue.” *Id.* at 448. After noting the potential conflict between [Kentucky Rule of Evidence 410](#) and [Kentucky Rule of Evidence 408](#), the Kentucky Supreme Court ultimately held under the *Strickland* standard that it was “at a loss to see how failure to move to admit evidence—the admissibility of which is still an open question—can even sink below sufficient performance into deficiency.” *Id.* Accordingly, the Kentucky Supreme Court concluded that “while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will.” *Id.*

*70 We can find nothing unreasonable, much less wrong, with this reasoning. Kentucky law regarding the admission of a withdrawn plea agreement was not clearly established at the time of Haight’s trial, as the Kentucky Supreme Court correctly noted. A strong argument existed that [KRE 408](#) worked to prohibit the introduction of just such a document. To have required Haight’s trial counsel to press for the introduction of Haight’s 1986 plea agreement would be to have required counsel under the Sixth Amendment to anticipate new law as a part of his duty of effective representation.

Haight’s trial attorney had no such duty. *See*, [Sasser v. Norris](#), 553 F.3d 1121, 1127 (8th Cir. 2009) (“Trial counsel’s failure to anticipate new law does not constitute ineffective assistance of counsel.”); *see also*, [Parker v. Bowersox](#), 188 F.3d 293, 298 (8th Cir. 1999) (“We have repeatedly held that such a failure does not constitute ineffective assistance.”); [United States v. Dodds](#), 2011 WL 17624 at *2 (E.D. Ark. Jan. 4, 2011) (“Trial counsel was not ineffective for failing to anticipate later decisions or developments of the law.”); [United States v. Davis](#), 2010 WL 5191926 at *2-3, 406 Fed.Appx. 268 (10th Cir. Dec. 23, 2010) (reasonable jurists could not debate whether the defendant’s trial counsel was ineffective for failing to advance a novel argument and therefore defendant was not entitled to a certificate of appealability on his claim of ineffective assistance of counsel).

The Respondent also points out another important matter. Introduction of the plea agreement may well have backfired at trial. In a sense, the plea agreement was a double-edged sword for Haight. While it did show that at least one state prosecutor concluded that Haight should receive less than death if he agreed to plead guilty, the very same plea agreement was rejected outright, over the protest of that prosecutor, by a state trial court that firmly believed that death was the only fair punishment, notwithstanding the plea agreement. Under such circumstances, the Kentucky Supreme Court reasonably concluded that Haight’s counsel could not be faulted under the Sixth Amendment for his decision not to introduce the plea agreement. This conclusion is not an unreasonable application of *Strickland* and because reasonable jurists could debate the matter, Haight is not entitled to relief on this claim either.

13. Failure to Adequately Investigate and Present Mitigation Evidence.

In ground 13, Haight continues his Sixth Amendment claims to assert that trial counsel rendered a deficient performance by failing to obtain appropriate expert assistance to evaluate his mental status as early as possible in preparation for trial.²⁶ Haight claims that his counsel did not seek a neurological evaluation of him at any time prior to his conviction even though counsel should have known that such an evaluation was crucial to Haight’s case given his lifelong drug and alcohol abuse, which included binge drinking over several days immediately prior to the double homicide. This same information, according to Haight, should have led his trial counsel also to obtain the expert services of a psychopharmacologist given his decades-long history of drug and alcohol abuse.²⁷

*71 Further, Haight claims that the evaluation performed by clinical psychologist Brad Fisher, and Fisher’s expert trial testimony, was totally incompetent, insufficient and ineffective. (DN 61, pp. 67-68). Haight argues that a review of the pretrial history of his case beginning in December of 1985, until his trial in 1994, shows that after making an initial unsuccessful effort to obtain funds for an expert witness in December of 1985, no further such efforts were made during the resulting appeals in *Haight I* or *Haight II*. Indeed, defense counsel consciously elected not to pursue such efforts while they were attempting to obtain specific enforcement of the plea agreement as reflected in an order of Gerrard Circuit Court entered in April of 1991, in which the court stated that “the parties shall not incur further expert witness fees until

questions raised in a petition for a writ of prohibition are finally resolved.” (DN 61, p 70) (citing JRT 172).

Later, when defense counsel in September of 1992, pleaded to obtain an additional year to prepare for trial, the special judge who had entered the order of April 23, 1991, reminded defense counsel that the decision not to pursue funding for expert witnesses during the outcome of the appeal in *Haight II*, was made by “consensus.” (DN 61, p. 71) (citing JTR 174). Consequently, not until December 1993, one month prior to the start of trial, did defense counsel obtain the services of expert witness Carol Goodee, an associate professor of social work, who prepared a social history on Haight's family.

The defense during the same time period obtained the expert services of the aforementioned Dr. Fisher, a clinical forensic psychologist, who reviewed Dr. Goodee's report on December 17, 1993, and conducted two interviews with Defendant Haight one each on December 27 and 28, two weeks prior to the start of trial. (V.T. 9, 2/2/94, 09:37:34, 09:36:44, 09:55:02). Thus, after the passage of more than 8 years following the commission of the charged offenses, defense expert investigation and preparation occurred less than one month prior to trial.

If that delay were not bad enough, Haight continues to point out that during the trial recess of Jan. 13-24, 1994, due to inclement weather, his attorneys became aware of a prior 1974 psychological evaluation that suggested the possibility of organic brain damage. Despite this critical newly discovered evidence, Haight's trial counsel made no motion or any other efforts to put the matter before the trial court so that an additional evaluation could be performed. Instead, following the conclusion of the trial on Feb. 3, 1994, defense counsel merely made a motion to continue the scheduled sentencing date of March 3, 1994, so that the unobtained neuropsychological evaluation could be finally produced. (V.T. 10, 3/7/94, 10:56:20). Haight concludes that the need for neuropsychological and psychopharmacological evaluation should have been obvious to the defense given the information that was available to them concerning Haight's deplorable family situation which included evidence of prenatal alcoholism, tobacco and drug abuse by Haight's mother, along with Haight's own lifelong history of drug and alcohol abuse dating to his early teenage years.

Haight maintains by their failure to obtain such expert evaluations, defense counsel violated their duty under the [ABA Standards For Criminal Justice 4-4.1 \(Second Ed. 1982](#)

[Supp.\)](#) to conduct a prompt and thorough investigation of their client's emotional and psychological makeup. Instead of satisfying this professional duty, Haight's counsel allegedly delayed until the last moment and to make matters worse, failed to adequately prepare either Goodee or Fisher to testify at trial. As a result, at most, Dr. Fisher testified merely that Haight's chronic drug and alcohol abuse were simply “coping mechanisms” without making mention of the altered state of consciousness, personality, and self-control that results from such drug and alcohol abuse. As a result of the professional failure of trial counsel to obtain expert testimony from a neuropsychologist and a psychopharmacologist, crucial mitigation evidence went missing during the penalty phase.

*72 Worse still, incorrect evidence was offered up by Dr. Fisher. Because no adequate investigation was performed, Dr. Fisher remained unaware of Haight's diagnosed possibility of brain damage included in the 1974 psychological report prepared by the Ohio Cabinet of Corrections even though counsel themselves had a copy of the report in their possession during the trial. (DN 61, p. 75) (citing JTR 1333). Consequently, Haight concludes that the failure of counsel to perform an adequate investigation and obtain vital experts in view of the information available to them, plainly constituted ineffective assistance of counsel under [Rompilla v. Beard](#), 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), [Wiggins v. Smith](#), 539 U.S. 510, 553, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) and [Jacobs v. Horn](#), 395 F.3d 92 (3rd Cir. 2005). See also, [Glenn v. Tate](#), 71 F.3d 1204, 1207 (6th Cir. 1995).

Before the Court takes up an examination of these decisions, it pauses briefly to review the Sixth Amendment duty of counsel to investigate. No doubt exists that a defense attorney engaged in the representation of one accused of a crime has a well-established duty to “make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary.” [Strickland](#), 466 U.S. at 691, 104 S.Ct. 2052; [Cauthern v. Colson](#), 736 F.3d 465, 485 (6th Cir. 2013)(discussing the failure of counsel to investigate potential mitigation evidence under [Wiggins](#), 539 U.S. at 521-22, 123 S.Ct. 2527 and [Strickland](#)). Such a duty is fundamental to the basic purpose of counsel, which is “ ‘to make the adversarial testing process work in a particular case.’ ” [Kimmelman v. Morrison](#), 477 U.S. 365, 384, 106

S.Ct. 2574, 91 L.Ed.2d 305 (1986) (quoting  *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

When a defendant maintains that this duty to investigate has been violated by the failure of counsel to conduct an adequate investigation, the decision of counsel not to continue to investigate “must be directly assessed for reasonableness in all of the circumstances applying a heavy measure of deference to counsel's judgments.”  *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. See also,  *Towns v. Smith*, 395 F.3d 251, 258-59 (6th Cir. 2005) (discussing the duty of investigation under  *Strickland*). As  *Towns* points out, “courts have not hesitated to find ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client.”  *Towns*, 395 F.3d at 258 (citing  *Wiggins v. Smith*, 539 U.S. at 524-29, 123 S.Ct. 2527). See also,  *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (discussing the need for a comprehensive investigation of a criminal defendant's background and character in the context of a death penalty case).

The controlling inquiry in such instances is not whether the choices made by counsel were strategic ones, but more fundamentally whether they were objectively reasonable.  *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000);  *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013) (“Counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.”) (quoting,  *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). A convicted defendant's mere dissatisfaction with the degree of his attorney's investigation into a particular defense, however, stands in a different light than an attorney's failure to investigate. See, *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998) (“a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”) (quoting  *Strickland*).

The Sixth Amendment does not require or adopt a standard that assumes both unlimited time and money available to perform a flawless investigation rather than a reasonable one. See,  *Owens v. Guida*, 549 F.3d 399, 409 (6th Cir. 2008),

cert. denied, 558 U.S. 879, 130 S.Ct. 281, 175 L.Ed.2d 135 (2009) (the amount of time spent preparing for trial is not per se dispositive absent the showing of a specific error that prejudiced the defendant at trial). Neither is the reviewing court to examine the reasonableness of counsel's investigative efforts in hindsight, but rather must view matters from the perspective of counsel as they stood at the time that counsel decided to discontinue investigation.  *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052. With these fundamental principles in mind we turn to the state court treatment of the claim.

*73 The Supreme Court of Kentucky in  *Haight IV* rejected the ineffective assistance of counsel claims based on the failure of Haight's trial counsel to obtain a neurological examination after the start of Haight's jury trial in early 1994.

In part IV of its opinion in  *Haight IV*, the court ruled as follows:

Haight argues that he wanted funds during the post-conviction proceedings to hire a neuropsychologist to examine him for organic brain damage. Trial counsel had claimed that he did not know of a need for a neurological examination until after the trial had started.

.....

Haight contends that he wanted to ask for funding for expert assistance in neuropsychology in order to prove ineffective assistance of counsel at trial ... This court has already found that Haight had the full benefit of mental health evaluations and experts during his trial.  *Haight, supra*.

The expert offered by Haight said that there was a high degree of certainty that it's possible that Haight may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance. This is mere speculation. An RCr 11.42 proceeding does not provide for a relitigation of the performance of trial counsel. It should be recalled that the report by the expert was not filed until after the circuit court denied the RCr 11.42 motion. We find that Haight has not demonstrated any prejudice in this regard. He was not denied fundamental due process under either the federal or state constitution.

 *Haight v. Commonwealth*, 41 S.W.3d 436, 444-45 (Ky.), *cert. denied*, 534 U.S. 98 (2001) ( *Haight IV*).

 *Haight IV* supports its rejection of the Petitioner's ineffective assistance of counsel claim with a reference to its earlier decision in  *Haight III*.²⁸ In  *Haight III*, the Kentucky Supreme Court directly addressed the impact of the Petitioner's 1974 mental health evaluation performed by the Southwest Community Mental Health Center in Columbus, Ohio. In so doing, the court rejected the notion that the mid-trial revelation of the 1974 evaluation required further neuropsychological examination prior to sentencing. On this point, the court held that

Appellant's claim that a 20-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

 *Haight III*, 938 S.W.2d at 249.

The Court considers the above quotations from  *Haight III* and  *Haight IV* to be significant in several respects. The primary significance in the Court's view is that the Supreme Court of Kentucky was well aware that Haight had obtained a post-conviction opinion of a mental health expert, Dr. Eric Engum, a forensic psychologist and clinical neuropsychologist, who concluded that a substantial possibility existed that Haight suffered from organic brain damage. Thus, the Kentucky Supreme Court was not unaware when it rejected Haight's ineffective assistance of counsel claim that other experts held out a possible diagnosis of brain damage. The anticipated opinions of Haight's requested experts concerning his brain damage and brain dysfunction therefore are not potential new evidence. Rather, their testimony is potential expert opinion known to the state courts at the time that the decisions rejecting such arguments were entered.

*74 Additionally, the Kentucky Supreme Court in  *Haight III* acknowledged the benefit obtained from the testimony of the two trial experts that Haight's attorneys employed, forensic social worker Carol Goodee and psychologist Brad Fisher, both of whom testified in the penalty phase of Haight's trial. With the benefit of their testimony, the court in  *Haight IV* concluded that Haight had failed to demonstrate any prejudice due to the absence of further expert opinion that he suffered from brain damage. These conclusions appear to this Court to be entirely reasonable and neither the  *Wiggins* decision nor the  *Jacobs* decision contradicts this view.²⁹

In  *Wiggins*, the U.S. Supreme Court held that two Maryland public defenders rendered ineffective assistance of counsel when they failed to investigate and present mitigating evidence of their client's "unfortunate life history," during capital sentencing proceedings held after the defendant was convicted of first degree murder and robbery of a 77-year-old victim found drowned in her apartment bathtub.  *Wiggins*, 539 U.S. at 514-15, 123 S.Ct. 2527.

Counsel in  *Wiggins* elected during the capital sentencing phase to request bifurcation of the proceedings with the objective of first re-litigating the extent of their client's involvement in the murder, then, if necessary, putting on evidence of mitigation.  *Id.* The trial court, however, denied the bifurcation motion. Subsequently, the public defenders at most made only a passing reference to their client's "difficult life" and his absence of prior convictions for crimes of violence. Otherwise they introduced absolutely no evidence of their client's life history nor did they request that a social history be prepared by a forensic social worker, even though funds were available for such a request.

All that the public defenders did in terms of investigating their client's background was review a pre-sentence investigation report and social service records, then arrange for a psychologist to conduct a number of tests on their client, which revealed an IQ of 79, features of a personality disorder and difficulty coping with demanding situations. Subsequent investigation by a licensed social worker during state post-conviction proceedings revealed a theretofore unknown history of severe physical and sexual abuse of the defendant at the hands of his biological mother and foster parents.

 *Wiggins*, 539 U.S. at 516-17, 123 S.Ct. 2527.

Faced with these facts, the Supreme Court determined that the decision of the Maryland public defenders not to expand their investigation beyond the PSI and social service records fell short of prevailing professional standards, which in Maryland capital cases routinely included funds for retention of a forensic social worker. Because they also abandoned their efforts at investigation of their client's background after only obtaining a “rudimentary knowledge of his history from a narrow set of sources,” the Supreme Court concluded that counsel acted in an objectively unreasonable fashion. Given the severity of their client's childhood abuse, this deficient performance of counsel created a reasonable probability that the jury would have returned a sentence other than death “had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale.”  *Id.* at 537, 123 S.Ct. 2527.

The  *Jacobs* decision cited above arose from the murder prosecution of Daniel Jacobs, a Pennsylvania defendant who drowned his 7-month-old daughter after stabbing his girlfriend 200 times in the bathroom of the couple's apartment in York, Pennsylvania.  *Jacobs*, 395 F.3d at 98. Prior to trial, attorneys for Jacobs consulted with a psychiatrist, Dr. Davis, who conducted a mental health evaluation of their client to determine his criminal responsibility and competency to stand trial.  *Id.* Jacobs's attorneys, however, neglected to inform Dr. Davis that Jacobs was facing the possibility of the death penalty. They also did not provide the doctor with *any* information concerning their client's background or the extreme nature in which the offenses were committed. After evaluating the defendant, Dr. Davis reported back to counsel that he found no evidence of any major mental illness. Consequently, trial counsel declined to obtain a written report and did not call Davis to testify at trial, despite their presentation of a diminished capacity defense that their client was acting under extreme emotional disturbance at the time of the double homicide.  *Id.* at 98.

*75 During state post-conviction proceedings, expert testimony from a forensic psychiatrist and neuropsychologist revealed that Jacobs suffered from mild [mental retardation](#), organic brain damage and [schizoid personality disorder](#), along with cognitive and emotional impairments.  *Id.* at 101. It was further developed that Jacobs was a victim of abuse, neglect and drug and alcohol abuse, all of which significantly diminished his capacity to premeditate and

to form the specific intent to kill according to the two experts.  *Id.* at 101-02. Faced with these facts, the Third Circuit concluded that Jacobs' counsel acted unreasonably when, despite presenting a defense of diminished capacity, which under Pennsylvania law requires extensive psychiatric testimony, they failed to adequately discover evidence of their client's mental retardation, brain damage and other impairments.

Specifically, the court found fault in the failure of counsel to even make Dr. Jacobs aware of the nature of the charges, their circumstances and the possibility of the death penalty—circumstances that Jacobs later advised would have caused him to automatically seek testing for brain damage or other impairments.  *Id.* at 103. The court additionally noted with respect to the deficient performance of counsel that while they interviewed their client's mother before the trial, they did not ask her any questions concerning her son's mental health history, childhood or background. The Third Circuit then concluded that the circumstances satisfied *Strickland*'s prejudice prong given the nature of the post-conviction testimony of Drs. Julie Kressel and Patricia Fleming, the psychiatrist and neuropsychologist mentioned above.

The problem with Haight's reliance on both  *Wiggins* and  *Jacobs* in his petition memorandum is a fundamental one. Examination of both of these decisions repeatedly reveals that neither is similar in its essential facts to what occurred in Haight's own prosecution at trial. Haight's two attorneys, unlike the Maryland public defenders in  *Wiggins*, did not forego the presentation of mitigation evidence in an effort to re-litigate Haight's guilt during the penalty phase of his trial; nor did Haight's attorneys stop their mitigation investigation with merely a cursory review of a PSI report or social service records. To the contrary, the two attorneys representing Haight, one of whom later became the Chief Public Advocate in Kentucky, performed an exhaustive mitigation investigation of Haight's background, family, social, educational and medical history. Their investigation, in fact, was so thorough and professional that the Ky. Dept. of Public Advocacy later used it as a training example of how to conduct such an investigation.

The same stark contrasts appear when one considers the circumstances of the mitigation investigation in Haight's case with that performed in the  *Jacobs* case. The attorneys

in  *Jacobs* presented no psychological evidence related to their client's mental status at the time of the charged murders of his girlfriend and infant daughter. In fact, trial counsel in  *Jacobs* did not even advise the psychologist they retained prior to trial of the extreme circumstances of the deaths or that their client faced the prospect of the death penalty so that Dr. Davis in  *Jacobs* had absolutely no background information on which to begin his evaluation. After learning that Davis concluded that their client was not mentally retarded or otherwise mentally ill, trial counsel nevertheless proceeded to trial with a diminished capacity defense that under Pennsylvania law routinely requires extensive psychiatric testimony when counsel knew they had none to offer. Further, trial counsel in  *Jacobs* declined to question their client's family members and friends concerning his mental health history and obtained no medical records.

*76 As the above discussion demonstrates such lack of investigation and preparation stands in stark contrast to what occurred in Haight's own case where his trial counsel conducted extensive investigation, obtained multiple expert witnesses who offered their testimony during the penalty phase of Haight's trial. Indeed, if anything,  *Wiggins* and  *Jacobs*, by contrast serve to underscore the objective reasonableness of the efforts of Haight's trial counsel in their mitigation investigation and presentation.

Neither of the above decisions is in any fashion representative on its facts of what occurred in Haight's own case. Haight's attorneys did not, as he now claims, simply sit on their hands until immediately prior to the start of trial. Counsel instead conducted a thorough and extensive investigation into Haight's background, an investigation considered to be a model for mitigation investigation by the Ky. Dept. of Public Advocacy. Counsel obtained expert witnesses who met with their client repeatedly and provided favorable reports as the result of their interviews in addition to testifying for the defense during the penalty phase of the trial. Given these circumstances, the Court concludes that all of the authorities cited by Haight, and discussed above, are easily distinguishable from the circumstances of Haight's own trial and the efforts made by his trial counsel on his behalf to produce evidence and mitigation.

The case law cited by the Respondent falls far closer to what occurred in Haight's own case. For example, in *Walls v. Bowersox*, 151 F.3d 827, 831-32, 834-36 (8th Cir. 1998),

defense counsel representing a Missouri defendant charged with the brutal murder of an 88-year-old victim who had been beaten and left to die locked in a home freezer, conducted a pretrial investigation in preparation for the penalty phase of trial. The pre-trial investigation included retaining a social worker to investigate the defendant's family background and a psychiatric review which determined that the defendant did not suffer from any mental disease or defect sufficient to constitute a defense at trial. *Id.* at 831. A second such exam obtained by defense counsel likewise revealed no mental disease or defect, finding only that the defendant was alcohol-dependent. *Id.*

After the Missouri jury found defendant Walls guilty of first-degree murder, robbery and burglary and imposed the death penalty, and after his conviction and sentence were affirmed in the state courts, Walls proceeded to federal court by way of habeas corpus. Walls argued in part in federal court that his trial attorneys rendered ineffective assistance during the penalty phase by their decision not to seek additional psychiatric testing or to present the testimony of one of the two mental health doctors who had examined him. *Id.* at 832. The Eighth Circuit rejected all of these claims of ineffective assistance of counsel. The court in *Walls* found that the failure of defendant Walls' attorneys to seek further neurological or other mental testing was within the range of competent representation as "it was entirely reasonable for counsel to rely on the conclusion of two trained psychiatrists that no additional testing was warranted." *Id.* at 836 ( *Six v. Delo*, 94 F.3d 469, 474 (6th Cir. 1996), *cert. denied*, 520 U.S. 1255, 117 S.Ct. 2418, 138 L.Ed.2d 182 (1997)). Further, the Eighth Circuit observed that trial counsel were "not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.'"  *Id.* (citing  *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995)).

*77 This view is reflected in our federal circuit in *Lewis v. Alexander*, 11 F.3d 1349 (6th Cir. 1993), wherein the Sixth Circuit held in rejecting a claim of ineffective assistance of counsel for failure to investigate that "an attorney is entitled to rely on a professional with established skill and reputation in formulating judgments necessary to trial preparation." *Id.* at 1353. In *Lewis*, the professional was a deputy coroner who offered the expert opinion that the victim did not die secondary to improper medical treatment, but rather as a result of the shooting wound that he received eight days prior to his death. *Id.* at 1351. The defendant in *Lewis* had argued that his trial attorney was ineffective for his failure to obtain a

second expert medical opinion on the cause of the victim's death as a prelude to asserting the defense of gross medical maltreatment as being the true cause of the victim's death. *Id.* at 1353-54. The Sixth Circuit rejected the notion that the Sixth Amendment imposes a duty on trial counsel to continue to shop around for other experts under such circumstances. *See Wong v. Money*, 142 F.3d 313, 320-21 (6th Cir. 1998)(citing *Lewis*).

Other federal courts facing similar claims of ineffective assistance of counsel have also reached the same conclusion as *Lewis*. *See*,  *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (“The mere fact that ... counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorder simply does not constitute ineffective assistance.”);  *Horsley v. Alabama*, 45 F.3d 1486, 1495 (11th Cir. 1995) (“That experts were found who would testify favorably almost 20 years later is irrelevant.”); *Beans v. Black*, 757 F.2d 933, 936 (8th Cir. 1985) (Actions of counsel were not objectively unreasonable for failing to obtain a second expert opinion on the petitioner's competence when the first expert found the petitioner competent to stand trial); *Woodall*, 2009 WL 464941 at *3 (“Counsel cannot be held responsible for procuring a second expert simply because one expert reached the result that Woodall now asserts is inaccurate.”). *See also*,  *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001) (where trial counsel interviewed family members, had the defendant evaluated by a clinical psychologist and consulted two mitigation specialists, trial counsel were not ineffective for their decision not to pursue a defense based upon post-traumatic stress disorder or brain damage, particularly where the defendant's childhood medical records did not point to PTSD or some form of brain damage).³⁰

The primary basis for Haight's request for habeas corpus relief in ground 13 is the 1974 psychological evaluation performed in Columbus, Ohio, at the Southwest Community Mental Health Center. Haight focuses on that portion of the report that refers to the “possibility of brain damage” as being highly material information that should have placed his trial attorneys on notice of their duty to make further investigation into Haight's mental state to establish once and for all whether their client suffered from organic brain damage or dysfunction. Haight's trial attorneys received the 1974 report mid-trial during a January recess for inclement weather. Haight now faults them for not immediately moving

the trial court for an additional mental evaluation based on this “possibility of brain damage” language.

*78 The problem with this argument is that it overlooks not only the prior psychological evaluation of Dr. Fisher, but also the vague nature of the reference to brain damage in the 1974 report. The report apparently contained no specific neurological testing or other objective basis on which to suggest the “possibility” of brain damage. The report certainly did not find brain damage. This absence of specific testing and findings undercuts Haight's current view that the report should have compelled his trial counsel to take immediate action.

Here, Haight's two trial attorneys obtained interviews of the Haight family members, Haight's medical and school records, and arranged to have two expert witnesses, a forensic social worker and forensic psychologist both examine Haight prior to trial. Haight does not compellingly argue that psychologist Fisher was incompetent, negligent or otherwise deficient in his psychological examination and his conclusions concerning Haight's lack of organic brain defect or dysfunction, although he does insist Fisher was the wrong type of expert. Haight also acknowledges that no constitutional claim for ineffective assistance of expert witnesses is recognized by the federal courts.

For the above reasons, the Court concludes that the Kentucky Supreme Court in both  *Haight III* and  *Haight IV* reasonably applied the clearly established precedent of the United States Supreme Court, and in particular the  *Strickland* decision, to reject Haight's claim that his attorneys failed to adequately investigate for mitigation evidence prior to trial or that they were deficient in their failure to request the services of a neuropsychiatrist or psychopharmacologist in addition to the clinical forensic psychologist and clinical social worker they had already obtained to assist in Haight's defense. Haight's arguments to the contrary are, in the Court's view, merely an effort, albeit an elaborate one, to second-guess the trial decisions of counsel with the benefit of hindsight now more than 20 years after the fact. Whether trial counsel might have obtained marginally more favorable testimony from different mental health experts is not the question at this point. The bottom line in this matter is that the challenged state appellate court decisions were objectively reasonable on this Sixth Amendment issue of ineffective assistance of counsel and therefore Haight's arguments to the contrary must fail.

14. Sleeping Juror Problem.

In ground 14, Haight argues that his trial counsel rendered ineffective assistance when counsel failed to make an adequate record and request a mistrial after alerting the trial court during a bench conference that several of the jurors appeared to be asleep during the penalty phase portion of the trial on or about February 2, 1994.³¹ (V.T. 9, 2/2/94, 10:46:09). Haight maintains that his trial counsel did not identify the allegedly sleeping jurors, did not provide the trial court with any details concerning when or how long the jurors involved had been asleep, and did not make a motion for a mistrial or request other relief at the time. Consequently, the trial court took no action and the alleged error was not preserved for direct review on appeal under Kentucky law.

 *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998).

Haight contrasts the facts of this situation in his case with those of  *Tanner v. United States*, 483 U.S. 107, 113-14, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) in which defense counsel filed a post-trial motion to set aside a jury verdict based in part on a sleeping juror-related problem.  *Id.* Unlike Haight's case, when the trial court in  *Tanner* was advised of the situation during trial, the trial court instructed defense counsel to advise the court immediately if counsel saw any juror sleeping so that the court could take corrective action.  *Id.* at 114, 107 S.Ct. 2739. Despite the admonition, trial counsel did nothing to alert the court thereafter.

*79 Here, Haight maintains that neither his trial counsel nor the court took any action to protect Haight's right to a fair and reliable trial by fact-finders who are both impartial and mentally competent to decide the case based solely on the evidence, and *all* the evidence before it. *See*,  *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912). Unfortunately, the affected jurors in this instance were sleeping, according to counsel, during the critical portion of the penalty phase, when the Defendant was putting forward his critical mitigation evidence. Because trial counsel failed to properly preserve this issue by identifying the sleeping jurors to the trial court and requesting immediate relief, the verdict reached by the jury cannot be considered to be reliable. To the contrary, Haight contends that he was deprived of his right both to due

process and to effective assistance of counsel, as well as a fair penalty phase during his capital case.

Haight did not raise the underlying claim on direct appeal. Rather, he raised the present claim of ineffective assistance of counsel in Section 9 of his brief on post-conviction appeal in Appeal No. 89-SC-931-MR. (Appellant's brief, pp. 62-64).

In  *Haight IV*, the Kentucky Supreme Court concluded that Haight had failed to plead sufficient facts under RCr 11.42(2) to state a Sixth Amendment claim for ineffective assistance of counsel under  *Strickland*. In the words of the court:

Haight argues that trial court was ineffective because he failed to move for a mistrial or make any effort to get factual details into the record regarding the alleged sleeping of jurors during part of the penalty phase. He also contends that the trial judge committed error when he took no action on his own initiative.

Haight does not plead this claim with the specificity required by RCr 11.42(2). He does not state which jurors were alleged to be sleeping and he does not indicate when the event occurred, if it actually took place. Haight is not entitled to the requested relief.  *Sanborn* at 911.

Haight does not indicate what information the jurors supposedly missed and how that would have changed the outcome of his trial. If defense counsel did see jurors with their eyes closed, there is no evidence that they were sleeping. In addition, there is no evidence that the trial judge ever observed the alleged sleeping.

 *Haight IV*, 41 S.W.3d at 447.

Review of Kentucky law interpreting RCr 11.42(2) under the   *Maupin* standard for procedural default persuades the Court that Haight has failed to comply with a well-established, regularly followed rule of state procedure that was explicitly relied upon by the state's highest court to decline to reach the merits of this Sixth Amendment claim. Under RCr 11.42(2),

the motion [to vacate] shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies

in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

RCr 11.42(2).

A number of published and unpublished Kentucky judicial opinions have interpreted the language of this provision. *Brown v. Commonwealth*, 2010 WL 323146 at *3-4 (Ky. App. Jan. 29, 2010); *Gribbons v. Commonwealth*, 2004 WL 2674492 at *3 (Ky. App. Nov. 24, 2004); *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds*, *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983). The above decisions uniformly hold that a criminal defendant who seeks to pursue post-conviction relief by way of RCr 11.42 may not rely upon vague allegations without offering specific facts to support his or her claims of ineffective assistance of counsel. *Sanders*, 89 S.W.3d at 380 (vague allegation insufficient to support RCr 11.42 motion); *Gilliam*, 652 S.W.2d at 858 (The purpose of Rule 11.42 “is to provide a forum for known grievances, not to provide an opportunity to research for grievances.”). *See also*, *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (2000) (same).

*80 As the Kentucky Supreme Court correctly points out, Haight's post-conviction motion fails to provide any meaningful detail concerning the circumstances of the alleged sleeping juror problem. We are not told how many jurors allegedly slept during the trial, nor are we advised when these jurors slept or how long they appeared to be unaware of the ongoing proceedings. We do not know what particular testimony or other evidence was being offered during this time, either. All of these facts were readily available to Haight's trial counsel who could have easily offered an affidavit in support of the post-conviction motion as to the factual circumstances of the sleeping jurors so as to clarify what occurred. Given the casual nature of the conversation that occurred at the bench, and the almost offhand manner in which the subject was momentarily broached, the Court must agree with Respondent that Haight appears to have made the proverbial mountain out of a molehill on this particular issue. Because the state court declined to address the merits of the claim based on Haight's clear procedural default, the Court declines to further the merits of the Sixth Amendment claim.

On this final point the Court notes that Haight cannot successfully establish cause and prejudice based on a claim of ineffective assistance of initial post-conviction counsel under *Martinez* and *Trevino*. Both of these decisions were rendered well after Haight's state court proceedings were entirely concluded and could not now be retroactively applied to his case in an effort to salvage this procedurally defaulted issue. The *Leonard* decision for the same reason cannot be applied retroactively to permit Haight to avoid the procedural default as his conviction and post-conviction proceedings became final well prior to all three of the mentioned decisions. Further, the Court notes that to the extent Haight would hope to assert a claim of ineffective assistance of his initial post-conviction counsel based on their alleged conflict of interest, a conflict never timely disclosed during the original RCr 11.42 proceedings, such a claim would itself be required to be timely exhausted in the state courts before it could be considered in a cause and prejudice analysis. For these reasons, Haight cannot rely on *Martinez*, *Trevino* or *Leonard* to reach the merits of this particular claim of ineffective assistance which was clearly resolved on adequate and independent state law grounds based on then existent law.

15. “No Adverse Inference” Instruction.

Haight in his final claim of ineffective assistance of trial counsel focuses on the failure of his counsel to request a “no adverse inference” instruction during the penalty phase of Haight's trial.³² During the guilt phase of the trial, Haight admitted to killing both of the victims. He also expressed his remorse and, as previously noted, volunteered his willingness to die for his crimes. Haight did not take the witness stand during the penalty phase. His attorney did not tender an instruction to advise the jury that no adverse inference could be drawn from Haight's decision not to testify again at trial.

Haight now argues in his petition memorandum that under *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), a defendant in a state criminal trial has a constitutional right to request a no adverse inference instruction, a right that applies equally to both the guilt and to the punishment of a bifurcated trial. *See*, *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Bank One v. Abbe*, 916 F.2d 1067,

1076 (6th Cir. 1990) (“Fifth Amendment self-incrimination rights continue in force until sentencing.”) Citing to several state court decisions, Haight argues that the failure of his trial counsel to request such instruction, combined with the failure of the trial court to *sua sponte* give such an instruction during the penalty phase of his capital murder trial, violated not only his Fifth Amendment right, but also his Sixth Amendment right to effective assistance of counsel. See,  *People v. Ramirez*, 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31 (Ill. 1983); *Brown v. State*, 617 S.W.2d 237, 238 (Tex. Crim. App. 1981). But see,  *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 1703, 188 L.Ed.2d 698 (2014) (Kentucky Supreme Court determination was not objectively unreasonable that the failure of the trial court to give a “no adverse inference” instruction following the defendant’s failure to testify during the penalty phase of a capital murder trial did not violate the Fifth Amendment privilege against self-incrimination).

*81 Haight maintains that the critical importance of such instruction is underscored by the fact that during its penalty phase deliberations, the jury specifically requested to review Haight’s prior trial testimony from the guilt phase of the trial. (V.T. 10, 2/3/94, 09:52:33). The trial court declined the jury’s request and advised them that matters relating to the previously determined guilt of the Defendant had nothing to do with the penalty phase. (V.T. 10, 2/3/94, 09:53:23). From this sequence of events, Haight argues that the jury obviously was vitally concerned with what Haight previously had to say, and under the circumstances could easily have drawn the exact adverse inference to be avoided based on Haight’s failure to testify again during the penalty phase. Accordingly, Haight concludes that not only did the trial court violate his Fifth Amendment rights by its own failure to so instruct the jury, but his trial counsel violated his Sixth Amendment rights to effective assistance by his own failure to request such an instruction.

Once again, Haight did not raise the underlying Fifth Amendment issue on direct appeal. He did not argue in  *Haight III* that his right to freedom from self-incrimination was unconstitutionally infringed by the trial court’s own failure to offer a no adverse inference instruction following the jury’s request to reexamine Haight’s guilt phase testimony; nor would such an argument have proved to be successful had he done so. See,  *White v. Woodall*, — U.S. —, 134 S.Ct. at 1704, 188 L.Ed.2d 698 (2014) (“[I]f  *Mitchell* suggests that some actual inferences might be permissible

at the penalty phase, it certainly cannot be read to require a blanket no-adverse-inference instruction at every penalty-phase trial.”). Haight did, however, timely raise the Sixth Amendment ineffective assistance claim based on his own attorney’s failure to request such instruction.

The Kentucky Supreme Court in  *Haight IV* resolved the matter as follows:

Haight complains that trial counsel was ineffective by not requesting a “no adverse inference” instruction relating to the defendant’s right to remain silent be given at the penalty phase. Haight testified at the guilt phase of this trial, but he did not testify during the penalty phase. His counsel did not tender a “no adverse inference” instruction, did not request such an instruction or object to the failure of the court to give one. He asserts that it was incumbent upon the trial judge to instruct the jury that the defendant did not have an obligation to testify in mitigation and no adverse inference could be drawn from his failure to do so.

This claim does not amount to ineffective assistance of counsel. The allegation is not properly presented on this appeal because it was an issue on direct appeal of the case. Haight did testify during the guilt phase of his trial and admitted killing the two victims.  *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), is not applicable.

 *Haight IV*, 41 S.W.3d at 448.

The Court concludes that the above quotation by the Kentucky Supreme Court in  *Haight IV* is inherently ambiguous. To the extent the Supreme Court appears to suggest that the issue was addressed on direct appeal, it is incorrect. The absence of a no adverse inference instruction during the penalty phase of Haight’s trial was *not* raised as a Fifth Amendment issue on direct appeal in  *Haight III*. The Kentucky Supreme Court did not reject the claim on its merits so as to procedurally bar consideration of Haight’s later Sixth Amendment claim of ineffective assistance based on Kentucky’s pre- *Leonard* treatment of ineffective assistance claims involving issues previously rejected on direct appeal. Haight is entirely correct in this respect in his reply wherein he contends the Kentucky Supreme Court factually erred. (DN 142, p. 49).

The Kentucky Supreme Court, however, does appear to have reached the merits of the ineffective assistance of trial counsel claim based on its statement that “this claim does not amount to ineffective assistance of counsel” followed by its observation that “*Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), is not applicable.” *Haight IV*, 41 S.W.3d at 448. Based on this portion of the quoted language above, the Court concludes contrary to Haight’s reply that a reasonable application of the *Strickland* standard for ineffective assistance of counsel occurred, particularly in light of the recent *Woodall* decision of the U.S. Supreme Court cited above. *Woodall*, 134 S.Ct. 1697, 1702-1704, (2014) (Kentucky Supreme Court did not unreasonably apply *Carter*, *Estelle* and *Mitchell* to conclude that a no adverse inference instruction was not required in the penalty phase of defendant’s trial given the standard of § 2254(d) as interpreted by *Harrington v. Richter* 131 S.Ct. at 787).

*82 Haight’s trial counsel did not render a deficient performance by his conscious election not to put before the jury again Haight’s highly damaging guilt phase trial testimony by requesting a no adverse inference instruction. Trial counsel understandably wished to limit the damaging impact of that testimony by keeping references to it from the jury if possible. A no adverse inference instruction in the penalty phase would merely have reminded the jury that Haight did testify, much to his own detriment, during the guilt phase of the trial. The jury obviously was concerned enough about that damaging testimony to unsuccessfully request to hear it again. This merely confirms that trial counsel was correct in his evaluation of the situation.

Moreover, even if we were to assume that trial counsel was deficient in his decision not to request a “no adverse inference” instruction, Haight has not established any prejudice whatsoever, nor could he, given the overwhelming proof of his guilt for the murders of both victims. *See, Vargo v. United States*, 309 Fed.Appx. 485, 486 (2nd Cir. 2009) (failure of defense counsel to request a “no adverse inference” instruction did not prejudice the defendant, so as to establish ineffective assistance of counsel, where the evidence of the defendant’s guilt of the charged offenses was overwhelming). Accordingly, this final claim of ineffective assistance of trial counsel fares no better than Haight’s earlier ones as the

decision of the Kentucky Supreme Court in *Haight IV* was neither contrary to, nor an unreasonable application of, the *Strickland* standard. Indeed, if this Court were to have considered the claim *de novo*, the result would not have varied given *Woodall* and the overwhelming nature of the proof of guilt.

Jury Issues

Haight devotes grounds 17, 18, 19, 20, 21, 22, 27, 29 and 30 to claims that involve alleged constitutional violations related to jury matters.³³ In ground 17, he maintains that he was denied a fair trial by an impartial jury where various members of the jury were aware of extrajudicial prejudicial facts not introduced at trial. In ground 18, Haight argues that the jury was unfairly selected in violation of Kentucky Rule of Criminal Procedure RCr 9.36 and the due process clause. He continues to argue in ground 19 that the trial court wrongfully excluded jurors under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) who were not substantially impaired in their ability to consider death as a possible punishment. Ground 20 raises a claim that the trial court failed to exclude jurors who were substantially impaired in their willingness to consider mitigation evidence in violation of Haight’s right to a fair and impartial jury. In ground 21, Haight argues that he was unduly prejudiced and deprived of a fair trial when the alternate juror, after being excused, sat near the surviving family members of the victims and the trial court declined to instruct the jurors not to be influenced by passion and prejudice.

Haight in ground 22 argues that the trial court forced the jurors to resume deliberations after the jury became deadlocked and failed to give the required instruction under RCr 9.57, thereby depriving him of a fair trial, due process and a reliable sentencing result. Ground 27 of the petition is Haight’s claim that he was deprived of a reliable verdict on punishment by the refusal of the trial court to inform the jurors that their decision on mitigation did not have to be unanimous. In grounds 29 and 30, Haight argues that the judge impermissibly “funneled” the decision making of the jury by the order of instructions, thereby resulting in an unreliable verdict of guilt on the murder charges. Haight continues in the related argument of ground 30 to claim that the verdict forms also funneled the jurors to fix an aggravated penalty and prevented the full consideration of mitigation.

*83 The warden argues in response that many of the jury-related issues that Haight now raises are redundant. These same issues, according to the warden, were all essentially raised in the context of Haight's prior claims of ineffective assistance of trial counsel. Additionally, the warden points out that in at least several of the jury arguments, Haight takes positions that are directly contrary to other arguments raised in his petition, a contention Haight denies. For example, the warden maintains that Haight's argument in ground 17, regarding the seated jurors awareness of the Courier-Journal article is contrary to Haight's separate argument of ineffective assistance of counsel in ground 8 of his petition.

The warden further argues, based on the findings of the Kentucky Supreme Court in [Haight III](#), 938 S.W.2d at 245-246, 247, that Haight has failed to show that any of the jurors were not impartial or that any jurors had dishonestly failed to disclose any extrajudicial knowledge. Once again, the warden points out that Haight's claim that the jurors who allegedly learned of his 1986 plea agreement were biased against him is directly contrary to Haight's Sixth Amendment argument in ground 16 that Haight's counsel was ineffective for failing to introduce the exact same plea agreement in mitigation. As for ground 18, the jury selection process, the warden maintains, first, that the re-selection of the jury was done at the request of Haight's own counsel, and second, that the alleged failure of that process to comply with a state rule of procedure, is inherently a state issue that is not the proper basis for habeas corpus relief so long as the jury consisted of a fair cross-section of the community as required by the Sixth Amendment.

The warden argues with respect to ground 19 that not only is the issue as to the exclusion of jurors Hansen and Ireland not preserved for review, but the decision of the Kentucky Supreme Court was clearly reasonable under existing U.S. Supreme Court precedent where both Hansen and Ireland testified after extended examination that they did not think that they could enter a sentence of death as they each were individually opposed to the death penalty.

Procedural bar is again relied on by the warden in response to ground 20, the jury issue concerning the alleged inability of jurors Huffman, Nestmann and Gaugh to consider certain mitigation evidence. The warden points out in this respect that Haight admitted on direct appeal that his objection concerning Gaugh was not preserved and juror Huffman did not sit on the jury, having been removed by a peremptory challenge.

Because Haight's trial counsel did not make a peremptory strike against Gaugh or Nestmann, and in fact strongly desired that Gaugh, the sole African-American, sit on the jury, the warden concludes that Haight's argument is procedurally barred as to both of these individuals.

With respect to ground 21, alternate juror Donohue's presence in the courtroom during the penalty phase, the warden maintains that the issue was rejected on procedural grounds in [Haight III](#), 938 S.W.2d at 247, when the Kentucky Supreme Court indicated that it had carefully considered all of Haight's jury related claims of error and determined as to each of them that either there was no preservation of the question, or that the ruling of the trial court was within its sound discretion.

[Id.](#) Alternatively, the warden argues that the facts at trial do not support any inference that Donohue's mere presence in the courtroom, seated near the family of the victims, was a nonverbal statement of support.

The warden argues as to ground 22, the claim that the trial court forced jurors to resume deliberations, that the issue was not preserved for appellate review in the state courts, which the Kentucky Supreme Court confirmed in [Haight III](#), 938 S.W.2d at 247. Alternatively, the warden argues that the decision in [Haight III](#) was consistent with clearly established precedent announced in [Lowenfeld v. Phelps](#), 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), and [Allen v. United States](#), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). On ground 27, the warden argues that the Kentucky Supreme Court properly rejected Haight's claim that the jury instructions failed to advise the jury that their decision on mitigating factors did not have to be unanimous. The warden cites as support [Bowling v. Commonwealth](#), 873 S.W.2d 175, 180 (Ky. 1993) (citing [Mills v. Maryland](#), 486 U.S. 367 (1988)) as support for its argument. Finally, with regard to grounds 29 and 30 of Haight's petition, the claim that the jury instructions improperly funneled the jurors' decision making process, the warden argues that the state jury instructions as presented properly took into account Kentucky's homicide statutes, which distinguish between murder and first degree manslaughter based on the absence or presence of EED. Likewise, the same court considered and rejected Haight's similar argument regarding the penalty phase verdict forms, which the court concluded to be adequate when read in the context of the accompanying penalty phase jury instruction. See, [Estelle v. McGuire](#), 502 U.S. 62, 72,

112 S.Ct. 475, 116 L.Ed.2d 385 (1991);  *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977);  *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

17. Extrajudicial Knowledge.

*84 With ground 17, Haight returns to the subject of allegedly prejudicial information obtained by certain jury members from their exposure to the Courier-Journal article entitled, “Murder Trial Begins for Man Once Sentenced to Death.”³⁴ As noted, the article was published in a local newspaper on the third day after judicial proceedings began. The article itself revealed that Haight had previously pled guilty to the murders of Vance and Omer and had been sentenced to death with his death sentence being overturned on appeal. It further mentioned that a police officer, a Lexington dog-handler, was accidentally shot to death by a Kentucky state trooper during Haight's arrest. This final information was not introduced into evidence at trial. During voir dire, eight jurors were excused after they acknowledged their exposure to the Courier-Journal article. Three jurors, Helton, Nichols and Gaugh, apparently were aware of the article. Following trial, a post-verdict hearing was held after the prosecutor interviewed members of the jury about their verdict.

Haight now claims that the same three members of the jury were biased by their exposure to the article so that their impartiality was fatally compromised. Citing  *Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) and  *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979), in his petition memorandum, Haight concludes that the extrajudicial information obtained by these jurors, his prior guilty plea and the death of the police officer killed during his arrest, could not be more prejudicial. As a result, Haight concludes he had no chance of a fair trial and that due process requires that his conviction be set aside.

The Kentucky Supreme Court in  *Haight III* directly addressed this question on its merits. In its lengthy discussion of the issue, the Kentucky Supreme Court wrote in material part as follows:

Appellant claims entitlement to a new trial on grounds that juror Helton engaged in misconduct by failing to make full disclosure during voir dire, by prematurely deciding

contested issues, and by possibly furnishing proscribed information of the jurors. This claim arises from the fact that prospective juror Helton read a newspaper article concerning the case prior to reporting for jury duty. According to his testimony, this juror scanned the article but did not remember the headline which revealed that appellant had been previously sentenced to death.

Initially it should be observed that during voir dire the prospective juror [Helton] acknowledged that he had seen the article, recalled the names of the victims, and indicated that he had little recollection otherwise about what was contained in the article and in the headline. In addition, this prospective juror indicated an independence of thought and a determination to fairly try the case. No motion was made to exclude the juror for cause and no peremptory challenge was used to remove him. He was seated and participated in the verdict.

In response to appellant's motion for a new trial, the trial court held a hearing relating to this juror and allegations he had withheld critical information. At the conclusion of the hearing, the trial court rendered findings of fact that are not clearly erroneous and which reveal no abuse of discretion ... We deem it appropriate to quote the trial court at length.

As to juror Helton, the court finds specifically that juror Helton answered questions truthfully both on voir dire and at the March 7 [post-trial] hearing when he was called subsequent to the juror's verdict. A finding that he answered questions truthfully leads the court to the conclusion that evidence certainly is credible. The juror says:

I scanned the article. I do not remember the headline ...

This is voir dire examination: I do not remember the headline. I do not remember the details except that two people—there were two murders and robberies and I remember the names Omer and Vance as being the names of the parties involved.

*85 The court has no reason to believe that at any time Mr. Helton recalled anything else.

....

With that in mind, I specifically find that Mr. Helton's testimony is credible. He did not display a bias, and for that reason, overrule that portion of the motion for a new trial dealing with that testimony. There was no deliberate concealment on his part of information which

would compel this court to reach a conclusion that he was partial.

We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. It is appropriate to recall that the trial judge personally conducted much of the voir dire examination and presided over all of it. He presided over the trial and likewise presided over the post-trial hearing on the motion for a new trial. The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as the questions of candor and impartiality of a juror.

....

We have examined the appellant's contingents with respect to juror Nichols and find them to be insubstantial. The transcript reveals no misunderstanding concerning the death of the police officer or disclosure to other jurors. This juror was given enough information during voir dire to have led to a mistaken belief on her part. Her post-trial testimony is without any hint of dishonesty.

As to juror Gaugh, much is made of his apparent knowledge of the police officer having been killed when, in fact, he was properly informed only that a police officer had been fired upon. We are told that this is more than enough to compel the inference that Gaugh concealed vital information. As the evidence in this regard was ambiguous, as it is likewise with respect to each of these jurors, we will rely on the trial court for the reasons stated herein and as follows: "It is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions."

Haight, 938 S.W.2d 245-47.

Haight does little to explain in his petition memorandum why this reasoning by the Kentucky Supreme Court represents either an unreasonable application of the facts of record or is an unreasonable application of the existing U.S. Supreme Court precedent. The Kentucky Supreme Court obviously relied directly on the factual findings of the trial court, which were based on that court's direct observation of the credibility of the witnesses obtained following a post-trial hearing. Nothing in the trial court record appears to contradict or otherwise undermine the findings of the trial court as adopted in  *Haight III*.

Juror Helton was aware of the Courier-Journal article, a rather brief one-column article that contained no editorial comments or otherwise sensational characterizations of the procedural history of Haight's case. Rather, the article appears to the Court to be entirely factual and consists primarily of a summary of the procedural history of Haight's prosecution prior to the time of trial. Helton obviously remembered little about the article at the time of voir dire and only afterwards during the testimony at trial was his recollection partially refreshed.

*86 As for jurors Nichols and Gaugh, the Kentucky Supreme Court expressly found based on its own review of the transcript that Nichols had no misunderstanding about the death of the police dog handler and further that her post-trial testimony gave no hint whatsoever of dishonesty.

 *Haight III*, 938 S.W.2d at 247. As for Gaugh, the Supreme Court's factual conclusion that he was informed only that a police officer [Yates] had been fired on is adequately supported in the record of the trial court proceedings such that Haight gives this Court no reason to disagree in any respect with the challenged factual determinations of both the trial and appellate state courts including the trial court's ultimate factual conclusion—that it was pretty clear that the three jurors had no information that would cause the trial court to believe in any way that they were partial in their deliberations or their final conclusions.  *Haight III*, 938 S.W.2d at 247.

It is now well-established that the findings of a trial court concerning juror credibility are to be given substantial deference on appeal. *United States v. Corrado*, 304 F.3d 593, 604 (6th Cir. 2002). Further, "a trial court's finding that a juror was impartial is entitled to a presumption of correctness, rebuttable only if on a showing of clear and convincing evidence." *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir.

2003). See also,  *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (A trial court's findings of juror impartiality may be overturned over for "manifest error.").

Two standards exist to assess claims of jury partiality—a presumed prejudice standard and an actual prejudice standard.

 *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Presumed prejudice will exist in that narrow range of cases where adverse pretrial publicity creates a presumption of prejudice in the community such that the

jurors' claims of impartiality cannot be accepted.  *Patton*, 467 U.S. at 1031, 104 S.Ct. 2885. As the Sixth Circuit has noted in  *DeLisle v. Rivers*, 161 F.3d 370,382 (6th Cir. 1998) (*en banc*), this standard is reserved by the U.S. Supreme for those cases that are truly “extraordinary” so that even if pretrial publicity is pervasive and adverse, such publicity does not inevitably lead to an unfair trial. *See*,  *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

The highly limited nature of the presumed prejudice standard is underscored by the realization that since the  *Murphy* decision, the U.S. Supreme Court has not applied the inherent or presumed prejudice standard used in  *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963);  *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) and  *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Accordingly, the Sixth Circuit has held that the holdings of  *Rideau*,  *Estes* and  *Sheppard* are effectively limited to their facts. *See*,  *Nevers v. Killinger*, 169 F.3d 352, 363 (6th Cir. 1999), *reversed in part on other grounds*,  *Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000).

The actual prejudice standard involves no presumption of prejudice such as that in  *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), which was itself based on the supervisory power of the Supreme Court over the lower federal courts, rather than being a constitutionally compelled standard.  *Gall v. Parker*, 231 F.3d 265, 308-09 (6th Cir. 2000), *cert. denied*, 533 U.S. 941, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001). Under the actual prejudice standard, which is applied when a habeas petitioner is attacking a state court conviction, the federal courts will not presume unfairness of constitutional magnitude absent truly egregious circumstances. A potential juror may be qualified even if he or she is *not* totally ignorant of the facts or the legal issues involved so long as the same juror or jurors are able to set aside such impressions or opinions and render a verdict based on the evidence presented in court.  *Id.* (citing  *Murphy*, 421 U.S. at 799-900, 95 S.Ct. 2031). Only if a juror exhibits such hostility towards a defendant during the

voir dire examination as to suggest partiality that cannot be set aside will the juror be held to be improperly seated.  *Id.*

*87 Further, the Supreme Court has shown itself to be remarkably tolerant of juror exposure to extrajudicial sources of information such as newspaper articles in its prior decisions so long as the trial court is supported in its finding that the affected jurors remain capable of setting aside any such knowledge and rendering an impartial verdict based upon consideration of all the evidence and the law as instructed by the trial court. *See*,  *Mu-Min v. Virginia*, 500 U.S. 415, 420-422, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (Sixteen of twenty-six prospective jurors acknowledged having acquired information from a total of 47 newspaper articles that discussed the details of the charged murder and included information concerning the petitioner's prior criminal record, repeated rejections for parole, prior murder conviction and length of his current sentence; eight of the twelve jurors seated had read something about the case, but all denied having formed an opinion or being biased in any way);  *Patton v. Yount*, 467 U.S. at 1027-1031, 104 S.Ct. 2885 (upholding conviction of Pennsylvania murder defendant convicted of killing a high school student following a retrial during which eight of fourteen seated jury members admitted that they had been exposed to newspaper article prior to defendant's retrial that revealed his prior conviction, his confession and his prior plea of temporary insanity—all of which was not introduced as evidence upon retrial where defendant did not take the witness stand).

Thus, in  *Mu-Min* and  *Patton*, the circumstances were far more extreme than the present case, yet the Supreme Court upheld the finding of the trial court that the affected jurors could set aside the extensive extrajudicial information to render a fair verdict based on the evidence presented at trial. If the Supreme Court can uphold a jury verdict under such circumstances based on the substantial deference owed to the fact findings of the trial court on the credibility and demeanor of the jurors, then this Court certainly cannot find any reason, and none has been stated, to hold that the Supreme Court of Kentucky in  *Haight III*, unreasonably applied any established U.S. Supreme Court precedent.

The  *Sheppard* case relied on by Haight falls within that category of truly extraordinary cases that are limited to their facts—a carnival, or circus-like, trial atmosphere created by a massive intrusion of the press—facts that in no fashion

occurred in the present case. Here, a single, brief, fact-based article located on an interior section of the Courier-Journal newspaper was published near the outset of trial. The affected jurors convinced the trial court they could set aside their knowledge to reach an impartial verdict.  *Sheppard* is therefor clearly distinguishable. Likewise  *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979), which Haight characterizes as being “on point” is equally unavailing.  *Goins* is not the clearly established precedent of the U.S. Supreme Court and appears to errantly expand the presumed prejudice standard contrary to subsequent Sixth Circuit authority such as  *Nevers* and  *Harris* that confine *Sheppard*, *Rideau*, and  *Estes* to their facts. See  *Williams v. Griswald*, 743 F.2d 1533, 1538 n. 6 (11th Cir. 1984)(observing that  *Goins* cited no authority nor offered any reasons for extending the doctrine of presumed prejudice while declining to adopt  *Goins*).

Haight is not entitled to habeas corpus relief on this argument as he has not show that the decision of the Kentucky Supreme Court in  *Haight III* was contrary to or an unreasonable application of the then-existent precedent of the U.S. Supreme Court, nor that the findings of the same court on this issue are clearly erroneous.³⁵

18. Unfair Jury Selection Procedure.

*88 Haight argues in ground 18 that he was deprived of due process of law and an impartial jury when the jury selection procedures used in his trial “violated well established Kentucky rules for jury selection.”³⁶ Haight maintains that these state procedures under RCr 9.36 were violated in several respects. First, the trial court instead of qualifying 30 jurors as required by RCr 9.36(2), qualified 32 jurors. This initial error resulted in 17 jurors remaining after the exercise of peremptory challenges. Next, in the second error, because the trial court had permitted too many jurors to be qualified, the judge's courtroom clerk drew the names of three jurors from the wheel containing the 17 remaining jurors instead of pulling the names of the 14 members of the jury to be seated as required by RCr 9.36.

All of three jurors selected to be stricken were women with one of the three being an African-American. After this second mistake occurred, the trial judge, according to Haight, ordered

the incorrect remedy when he directed the courtroom clerk to redraw the 14 jurors' names rather than telling the clerk merely to continue to draw another 11 names in addition to the 3 names already removed from the jury wheel. Finally, when the clerk did redraw the 14 jurors' names by some statistically improbable coincidence, the same three female jurors (Elmore, Miles and Watkins) were excluded again from sitting on the trial jury. Later, during subsequent proceedings the courtroom clerk testified concerning these irregularities. When she was asked specifically if she remembered re-mixing the names of the 17 jurors for the second selection, the clerk responded only, “pretty much so.”

Haight now insists that these circumstances constituted not only a violation of RCr 9.36 and its requirements for jury selection, but also a violation of due process. His argument in this respect is that when the state bestows a right to a fair jury selection procedure in a capital case, the right bestowed by statute must be administered in accordance with due process.

Haight cites as support for this argument  *Evitts v. Lucy*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) and  *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

Haight raised this issue on direct appeal in section I.D. of his brief. (Appellant's brief in App. No. 94-SC-288-MR, pp. 24-30). The Kentucky Supreme Court addressed this issue on the merits in  *Haight III*. In its opinion the court, after setting out the claimed procedure errors under RCr 9.36, continued to hold:

Initially, we must state that there is no evidence upon which any impropriety may be inferred. Moreover, the procedure initially employed, *i.e.*, drawing a sufficient number to reduce the jury to the number required by law, is permitted by RCr 9.36(2). As such, the re-draw, which produced a jury consisting of the same persons, was merely redundant. Finally, our review of the claims in this regard reveals substantial compliance with the rules relating to jury selection and certainly no error of sufficient gravity

to overcome the trial court's discretion with respect to a new trial.

 *Haight*, 938 S.W.2d at 247.

Once again, we are not shown how this outcome in  *Haight III* is the result of reasoning clearly contrary to or unreasonable application of the established precedent of the U.S. Supreme Court. Under that same precedent, a state court's own interpretation of its state law is held to be binding on a federal court sitting as a habeas corpus court.

 *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005);  *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (The views of a state's highest court on its own law are binding on the federal courts). In the same vein, one must bear in mind that not every violation of a state rule of procedure can be elevated to a matter of due process under the U.S. Constitution. To do so would constitutionalize the rules of state procedure of each of the 50 states, thereby creating a morass of conflicting constitutionalized state procedures.

*89 What is important from the perspective of the federal Constitution is that, whatever state procedures may be employed, the jury ultimately chosen represents a fair cross-section of the community under the Sixth Amendment. *See*,  *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979);  *United States v. Allen*, 160 F.3d 1096, 1103 (6th Cir. 1998). *See also*, *Salters v. Palmer*, 271 F.Supp.2d 980, 991 (E.D. Mich. 2003) (rejecting habeas petitioner's claim that a state court's violation of its state jury selection procedures resulted in a due process violation where the prisoner failed to show that the empaneled jury was biased against him or otherwise unable to render a fair and impartial verdict). Accordingly, Haight is not entitled to relief on the present ground as the Kentucky Supreme Court decision in  *Haight III* does not run afoul of the standard of  28 U.S.C. § 2254(d).

19. Improper Exclusion of Jurors Hansen and Ireland.

Ground 19 of Haight's petition focuses on the exclusion of two jurors, Hansen and Ireland, who were excused for cause after the trial court concluded that neither juror could give adequate consideration to death as a potential penalty.³⁷ Haight

now claims that while both jurors expressed opposition to imposition of the death penalty, their answers during voir dire did not disqualify either juror under the applicable standard established in  *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and subsequent cases such as  *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) and  *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Specifically, Haight claims that Hansen advised that she could set aside her views about the death penalty and give serious consideration to death as a potential punishment once she had considered the evidence of aggravation and mitigation. Juror Ireland similarly advised the trial court that while he did not think he could sentence a defendant to death, it was nonetheless "possible" that he could in an "extreme" case, but that he would have to consider the aggravating and mitigating circumstances and seriously consider all the potential penalties.

Based on these responses, Haight maintains that neither of these jurors made it unmistakably clear that they automatically would vote against the imposition of capital punishment, irrespective of the evidence at trial, nor did they suggest that their attitude concerning the death penalty would prevent them from impartially deciding Haight's guilt. *See*,  *Witherspoon*, 391 U.S. at 522-23 n.21, 88 S.Ct. 1770. Haight contends that the responses of Hansen and Ireland establish that their views about capital punishment did not prevent either individual or substantially impair them in the performance of their duties as set forth in the court's instructions and the oath taken by the jury.  *Adams*, 448 U.S. at 45, 100 S.Ct. 2521;  *Wainwright*, 469 U.S. at 424, 105 S.Ct. 844 ("The standard 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.'").

Because the two jurors were merely affected by the gravity of a potential death sentence, and were not shown to be substantially impaired in the performance of their duties, Haight maintains that they were not rendered ineligible for jury duty and should not have been struck for cause.  *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987);  *Gall v. Parker*, 231 F.3d 265, 331 (6th Cir. 2000), *overruled on other grounds*, *Bowling v. Parker*, 344 F.3d 487, 501 n.3 (6th Cir. 2003) (mere discomfort with the death penalty that does not prevent or substantially impair

the performance of a potential juror's duties will not justify removal of the juror under the  *Witherspoon* line of cases).

***90** Haight raised this issue concerning jurors Hansen and Ireland as argument I.E in his brief on direct appeal. (Appellant's brief in App. No. 94-SC-288-MR, pp. 31-34).

The Kentucky Supreme Court in  *Haight III* stated only the following as to this argument:

In addition to the jury issues discussed hereinabove, appellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestman and Gough. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced a penalty phase verdict. This court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court.

 *Haight III*, 938 S.W.2d at 247.

Unfortunately, the Court cannot determine from the quoted language which of the two categories this particular argument falls within. The Commonwealth on direct appeal in its brief went directly to the merits of the arguments quoting from the trial court's response to juror Ireland's statements at one point. (Appellee's brief in case no. 94-SC-288-MR, pp. 39-40). In view of the inability of the Court to determine whether the Kentucky Supreme Court considered this argument to be procedurally barred, and taking into account the response on the merits, this Court concludes that no procedural bar was unambiguously relied upon. Absent such a plain statement we address the merits.

Examination of the exchange during voir dire between Ms. Hansen, Mr. Ireland and the court reveals that each juror was examined for approximately 20 minutes. (V.T. 3, 1/13/94, 12:25:58-12:27:37; V.T. 4, 1/13/94, 15:51:04-15:51:15). During her examination, juror Hansen acknowledged that she was opposed to the death penalty, would not seriously consider death as a sentence, admitted she could not

consider the full range of penalties, and stated that it was wrong to decide if someone should live or die. (V.T. 3, 1/13/94, 12:08:25-12:31:23). During his own examination, juror Ireland indicated at least seven times that he would not consider a sentence of death. On four occasions, he stated that he did not believe in the death penalty. (V.T. 3, 1/13/94, 15:40:49; V.T. 4, 1/13/94, 14:51:37). Only after these extended exchanges did the trial court strike both jurors for cause.

In  *Witherspoon*, the Supreme Court held that the Sixth and Fourteenth Amendment rights of a defendant to an impartial jury forbid a trial court to exclude members from the jury pool merely because they voiced general objections to the death penalty or expressed conscientious or religious scruples against imposing it.  *Witherspoon*, 391 U.S. at 519-20, 88 S.Ct. 1770. See also,  *Gray v. Mississippi*, 481 U.S. at 657, 107 S.Ct. 2045. The holding of  *Witherspoon* was clarified in  *Wainwright v. Witt*, 469 U.S. at 424, 105 S.Ct. 844, wherein the court explained that the proper standard to determine whether to exclude a prospective juror based on his or her views on capital punishment is whether such views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”  *Id.* In clarifying this standard, the U.S. Supreme Court specifically acknowledged the impossibility of obtaining a juror's “unmistakably clear views on such matters during voir dire.”  *Id.* at 424-25, 105 S.Ct. 844. So long as the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law, then the decision of the trial court to exclude such juror will be paid substantial deference based on the ability of the trial court to observe the demeanor of the juror and assess his or her credibility.  *Id.* See,  *Uttecht v. Brown*, 551 (U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 2007) (“[A] juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.”);  *Morales v. Mitchell*, 507 F.3d 916, 940-41 (6th Cir. 2007) (discussing  *Witherspoon*,  *Wainwright* and  *Uttecht*).

***91** Examination of the state court record persuades the Court that both jurors Hansen and Ireland were properly stricken from the jury. Their responses, while not absolutely

unequivocal, were decidedly in opposition to the imposition of the death penalty, so much as to substantially impair both of their abilities' to impose the death penalty under the law. The decision of the trial court in this respect is entitled to substantial deference, which the Kentucky Supreme Court in  *Haight III* properly extended in a reasonable application of the above cited U.S. Supreme Court precedent.  *Haight III*, 938 S.W.2d at 247.

20. Failure to Exclude Huffman, Nestmann and Gaugh.

Haight argues in this ground of his petition that the trial court erred in failing to exclude three jurors who were each substantially impaired in their respective ability to consider mitigation evidence.³⁸ Haight claims with respect to juror Huffman that the juror “had a problem” with Haight's deprived family background as mitigation evidence, as well as Haight's mitigation evidence of extreme emotional disturbance. Juror Nestmann, according to Haight, confessed that he would have personal difficulty in giving full effect to these areas of mitigation so that he did not “put a lot of stock” in the notion that one's upbringing influenced their adult behavior later in life. Finally, as for juror Gaugh, Haight again points out that Gaugh candidly confessed that he would not consider evidence that Haight came from a deprived background as evidence in mitigation during the penalty phase.

Haight insists that he was entitled to a jury that would give full consideration to relevant mitigating evidence, such as a defendant's unhappy or unstable childhood. *See, Eddings v. Oklahoma*, 455 U.S. 105, 115 (1982), or to a defendant's emotional or mental problems. *See,  California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Haight cites   *Parker v. Dugger*, 498 U.S. 308, 314, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) in his petition memorandum for the proposition that a criminal defendant has an absolute right to present such evidence of a difficult childhood and abusive parenting. *See also,  Penry v. Lynaugh*, 492 U.S. 302, 322, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (jurors must be allowed to consider evidence of childhood abuse in assessing a capital defendant's punishment).

Based on this case law, Haight concludes that it was unconstitutional for the trial court to empanel a jury any

of whose members will not consider relevant mitigating evidence. Consequently, the trial court, according to Haight, should have stricken all three of the named jurors given their refusal to consider constitutionally relevant mitigating evidence. *See,  Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). *See also,  Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (the Constitution guarantees a capital defendant that evidence presented in mitigation against imposition of the death penalty will be considered by the jury) (citing  *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). Accordingly, because Huffman, Nestmann and Gaugh were allowed to remain on the jury in violation of the above clearly established case law of the U.S. Supreme Court, Haight concludes that he is entitled to a new trial, or at a minimum, a new sentencing proceeding.

Haight raised the issues involving jurors Huffman, Nestmann and Gaugh as argument in his brief on direct appeal (Appellant's brief in App. No. 94-SC-288-MR at pp. 34-36).

As noted earlier, the Kentucky Supreme Court in  *Haight III* responded to the issue as follows:

***92** In addition to the jury issues discussed hereinabove, appellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann and Gaugh. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced the penalty phase verdict. This Court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court.

 *Haight III*, 938 S.W.2d at 247.

We can find nothing in the above treatment of this issue that is clearly contrary to, nor an unreasonable application of, the clearly established precedent of the Supreme Court. First, it is clear that Haight's claims regarding juror Huffman

are without substantial merit under existing federal law. Huffman did not sit on the jury that convicted Haight of the murders and fixed his penalty at death. Huffman was removed by peremptory challenge. Consequently, Haight cannot successfully argue that his constitutional rights were in any fashion violated given the absence of this allegedly biased juror. See,  *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 120 S.Ct. 774, 145 L.Ed.2d 792 (2002) (If defendant makes use of a peremptory strike to cure the failure of the district court to excuse a juror for cause, and such defendant is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any constitutional right);  *McQueen v. Scroggy*, 99 F.3d 1302, 1321 (6th Cir. 1996) (“It is insufficient simply to claim that, had there been another peremptory available, a different juror would have been excluded, and the result might have been a more favorable jury.”). See also,  *United States v. Lanham*, 617 F.3d 873, 882-83 (6th Cir. 2010) *cert. denied*, 563 U.S. 1002, 131 S.Ct. 2443, 179 L.Ed.2d 1235 (2011) (where biased jurors were excluded from the final jury by the defendants' exercise of peremptory challenges no constitutional violation resulted from the impanelment of the jury). See  *United States v. Lawrence*, 735 F.3d 385, 444-45 (6th Cir. 2013) (same) *cert. denied*, — U.S. —, 135 S.Ct. 753, 190 L.Ed.2d 641 (2014).

The Court reaches the same conclusion as to juror Gaugh. Gaugh, as noted earlier in this report, was not determined to be biased. To the contrary, the trial court, as noted in  *Haight III*, found that Gaugh, along with his fellow jurors Helton and Nichols, were not “in any way partial in their deliberations or their final conclusions.”  *Haight III*, 938 S.W.2d at 247. This finding by the trial court was properly accorded substantial deference by the Kentucky Supreme Court in  *Haight III*. See,  *Patton*, 467 U.S. at 1037-38, 104 S.Ct. 2885 (The question of juror bias is one of historical fact and is a determination of credibility of which the trial court's resolution is entitled on direct appeal and habeas corpus to “special deference”).

Further, the Court already has reviewed the record of the voir dire proceedings involving juror Gaugh and has discussed the same earlier herein. As noted, Gaugh while skeptical of Haight's intended mitigation evidence involving his difficult upbringing, nonetheless stated along with the other members of the jury panel that he could consider all of the evidence

and follow the instructions of the court. Gaugh also went so far as to acknowledge that he was somewhat sympathetic to such evidence, although he obviously would not commit to accord it substantial weight as defense counsel had attempted to obtain a commitment by the form of his questioning on this matter. While Gaugh at one point did appear to express the opinion that he would not give consideration to such evidence, his remaining responses considered in toto do not justify a departure from the “special deference” standard of  *Patton*.

*93 This being said, a serious question exists as to whether this particular portion of ground 20 was procedurally defaulted in the state courts. Haight's counsel on direct appeal acknowledged that the issue was not preserved for review. The record of the voir dire shows that Haight's counsel expressly waived any objection to Gaugh's presence on the jury, a presence that counsel obviously desired, given Gaugh's willingness to fully consider Haight's chronic alcoholism and the defense theory of extreme emotional disturbance. Additionally, Gaugh was the only African-American on the jury, which was highly significant to the defense, as noted at page 30 in its brief on direct appeal, in that African-Americans are 18% less inclined to impose the death penalty than Caucasian jurors.

The conscious election of Haight's trial counsel to expressly waive any objection with respect to juror Gaugh, along with the acknowledgment on appeal that the issue concerning Gaugh was not preserved for appellate review, stands as a separate and independent basis on which to reject habeas corpus relief based on this portion of ground 20.³⁹ See *Murray v. Carrier*, 477 U.S. at 485-86 (“At a minimum, then,  *Wainwright v. Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim.”)

As for juror Nestmann, the trial record of voir dire plainly refutes Haight's claim that Nestmann would not consider mitigation evidence. It is true that Nestmann was skeptical of both EEG and deprived background mitigation evidence. While he acknowledged that he would have difficulty in considering such evidence, Nestmann agreed that he would consider such evidence and would not reject it outright (V.T. 2, 1/12/94, 10:10:44, 10:20:14). Indeed, as Respondent points out, Haight's own counsel during oral argument before the trial court acknowledged that Nestmann remained capable of

considering mitigating evidence. (V.T. 2, 1/12/94, 10:20:50–10:21:12). That being so, no basis has been shown on which to conclude that the Kentucky Supreme Court's resolution of the matter was in any respect clearly contrary to, nor an unreasonable application of clearly established U.S. Supreme Court precedent.

21. Juror Donohue's Presence in the Courtroom.

*94 The next ground raised by Haight, ground 21, focuses on the presence of alternative juror Bonnie Donohue in the courtroom after Donohue was excused from the jury following the guilt phase of the trial.⁴⁰ Haight maintains that upon being released from jury service Donohue sat in the courtroom throughout the 2-day long penalty phase of the trial near the surviving members of the two victims' families. Haight argues that her nonverbal show of support for the victims, through her mere presence near their families, was not only extraneous to the evidence presented, but inherently prejudicial in that her silent show of support resulted in bias, passion and prejudice to the defense. *See gen.*,  *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (right to fair trial includes the right to a verdict based solely on the evidence and not extraneous prejudicial events in and around the courtroom). Consequently, Haight maintains that he was denied his right to trial by an impartial jury in violation of due process.  *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976);  *Ristiano v. Ross*, 424 U.S. 589, 595 n. 6, 96 (S.Ct. 1017, 47 L.Ed.2d 258 1976).

Haight insists that Donohue's proximity to the victims' family members in the courtroom was the nonverbal equivalent of an external cause that tended to disturb the jury's unbiased judgment and deliberations sufficient to warrant a new trial on his behalf.  *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892);  *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). Haight therefore requests that he be afforded habeas corpus relief based on juror Donohue's personal identification with the survivors, which he contends was an inappropriate communication that influenced the jury. *See*,  *Estelle v. Williams*, 425 U.S. 501, (96 S.Ct. 1691, 48 L.Ed.2d 126, 1976) (defendant who was compelled to attend trial while dressed in prison uniform was denied his presumption of innocence in violation of due process).

Haight raised the present issue on direct appeal as argument I.G in his appellate brief. (Appellant's brief in App. No. 94-SC-288-MR, pp. 36-37). Once again, the Kentucky Supreme Court in  *Haight III* included this issue among others that it found “there was no preservation of the question or that the ruling was within the sound discretion of the trial court.”

 *Haight III*, 938 S.W.2d at 247. Although the Respondent maintains that the issue is procedurally barred, as trial counsel did not raise the matter until filing a motion for a new trial following the conclusion of the penalty phase, this Court has already addressed the underlying merits in that portion of the report that deals with Haight's claim of ineffective assistance of counsel based on these events.

As noted, the record does not support Haight's claim that alternate juror Donohue engaged in any nonverbal expression of support for the victims through her mere proximity in the courtroom to their surviving family members. The trial court found no indication of such an expression of support and review of the videotape recorded proceedings, to the extent they are helpful, does nothing to call into question the conclusion of the trial court. Certainly, the trial court was far and away in the best position to observe any potentially improper conduct, nonverbal or otherwise. Haight gives this Court no reason to call into question the trial court's determination of this matter.

Further, Haight cites no clearly established precedent of the U.S. Supreme court remotely similar to the question of whether the mere presence of a former juror in the courtroom can, by proximity alone, be considered to be an improper nonverbal expression of support. *See*,  *Carey v. Musladin*, 549 U.S. 70, 76, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) (“This court has never addressed a claim that such private act or courtroom conduct was so inherently prejudicial that it deprived the defendant of a fair trial.”) The present circumstances indeed are a far cry from the prison garb scenario relied on by Haight and addressed in  *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Respondent in this regard correctly points out that far more questionable circumstances, such as an alternative juror wearing a t-shirt emblazoned “no mercy, no limits” have been rejected as grounds for constitutional relief. *See*,  *Billings v. Polk*, 441 F.3d 238, 246-247 (4th Cir. 2006).

*95 Finally, the Court notes that Haight's entire argument implicitly rests upon several assumed, but unproven, facts

nowhere in evidence. First, juror Donohue would have to be shown to have been consciously aware of the status of the individuals she was seated near, as would the jury itself; second, and more importantly, Haight would have to factually establish that the remaining members of the jury not only were aware of Donohue's presence near the family members, but also that they equated that presence as a demonstrable show of support. None of these critical underlying facts have been established. Thus, Haight's argument fails both factually and legally. The decision of the Kentucky Supreme Court in  *Haight III* is neither clearly contrary to nor an unreasonable application of any of the constitutional decisions cited by Haight, most of which are clearly inapplicable to the circumstances that gave rise to the issue.

22. The Trial Court Coerced a Jury Verdict.

In ground 22, Haight turns to the jury penalty deliberations, which began on Wednesday, Feb. 2, 1994, at 3:17 p.m. (V.T. 10, 2/2/94; 13:17:24).⁴¹ Haight maintains that the jury became deadlocked that evening at 9:04 p.m., when the jurors reported to the court in a handwritten note signed by the jury foreman that, “We are at a standstill.” (Appellant's brief on direct appeal, Appx. in App. No. 94-SC-288-MR, p. A1). The court then directly asked the jury foreman, “Does that mean Ms. Benford that you have been unable thus far to reach a verdict?” (*Id.*). Juror Benford responded, “Yes, Your Honor.” (V.T. 10, 2/2/94, 21:04:13).

The trial court then advised the jurors, “Alright, you've been deliberating a considerable length of time and I'm sure that you're tired as all of us probably are, so we will adjourn for the evening. You will be sequestered for the evening and brought back to court tomorrow at 9 a.m. to continue your deliberations. In the meantime, it is my duty to advise you that you should not discuss the case among yourselves because you are not deliberating while you are being sequestered. Don't converse among yourselves on any subject connected with the trial. And avoid any news articles if you happen to come in contact with any whatever the medium may happen to be. And keep an open mind. You will be in charge of the sheriff and be returned to court tomorrow at 9 o'clock to continue your deliberations. That's all for this evening.” (V.T. 10, 2/2/94, 09:53:21–09:54:17).

The following morning the jury returned and promptly resumed its deliberations without complaint or other indication that such deliberations would be unproductive.

During these resumed deliberations the jury sent three handwritten notes to the court seeking to obtain the legal definition of the terms “wanton” and “reckless” as well as to review Haight's guilt phase testimony and a request for a report on a wanton endangerment charge introduced into evidence. (Appellant's brief, Appx. on App. No. 94-SC-288-MR, p. A2). Subsequently, at 4:13 p.m. that same afternoon the jury returned with a finding of aggravating circumstances listed in the instructions on the verdict forms that fixed a sentence of death. The signature line below the sentence, however, had been left blank on the verdict forms.

When the trial court discovered this omission, as it began to read the verdict, the court advised the jury, “If you have reached a verdict ... you need to go back to your jury room and complete it ... the verdict which you have reached.” (V.T. 10, 2/3/94, 14:16:45). The jury again retired. It returned momentarily thereafter with a signed verdict for a sentence of death. (V.T. 10, 2/3/94, 14:41:20).

Haight maintains that the trial court in its response to the written note tendered by the foreman on Wednesday evening,

Feb. 2, failed to give the required charge pursuant to  *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896) as now incorporated in RCr 9.57 in Kentucky.⁴² Haight maintains that when the jury foreman reported by handwritten note that “We are at a standstill,” the jury, in effect, was notifying the trial court that it had become deadlocked. At that point, Haight maintains that the trial court was required by operation of RCr 9.57 to give the equivalent  *Allen* charge. Instead, the trial court re-characterized the report with the qualification, “thus far,” thereby giving the equivalent of a verdict-urging charge that improperly pressured the holdout jurors to continue deliberations despite their individual views.

^{*96} Haight argues that this sequence of events is contrary to  *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), wherein the court involved, unlike Haight's trial court, was careful to instruct the jurors with the equivalent of an  *Allen* charge. Unfortunately, the comment of the trial court, in the view of Haight, contained none of the safeguards identified in the  *Lowenfield* decision and therefore was coercive contrary to Haight's Fifth, Sixth, Eighth and Fourteenth Amendment rights, as well as  *United States v. Scott*, 547 F.2d 334 (6th Cir. 1984).

Haight raised the issue of jury coercion at pp. 38-43 of his brief on direct appeal as argument I.H (Appellant's brief in App. No. 94-SC-288-MR, pp. 38-43). At the outset of his argument, Haight briefly conceded that the issue was “not preserved.” (*Id.* at 38). The Kentucky Supreme Court in

 *Haight III* resolved the issue as follows:

On the unpreserved claim that a verdict was coerced, the record simply fails to bear out such an assertion. At no time did the jury report that it was deadlocked. In view of the gravity of the decision before the jury, the time spent in deliberation was not excessive and we discern no violations of those decisions which proscribe coercion of jurors into reaching a verdict.

 *Haight III*, 938 S.W.2d at 247.

Here, no dispute exists that this question was not preserved for appellate review. Haight's trial counsel raised no objection to the court's comments at the conclusion of deliberations on Wed., Feb. 2, 1994. No request was made for a mistrial. The claim was clearly designated as being unpreserved, although the Kentucky Supreme Court did in the alternative conclude that the claim was in no fashion factually supported by what occurred at trial. Thus, as can be seen, the state plainly relied upon an adequate and independent state law ground to resolve this issue, although it factually rejected it in the alternative.

See,  *Michigan v. Long*, 463 U.S. 1032, 1038-39, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). We therefore appear to be procedurally barred from reaching the merits of this claim, which in any event, as the Kentucky Supreme Court correctly noted, finds no factual support whatsoever in the record.

Certainly, Haight has not shown the findings of the Kentucky Supreme Court to be clearly erroneous in this regard. For these reasons, Haight is not entitled to relief on ground 22. See  *Hardaway v. Robinson*, 655 F.3d 445, 447-48 (6th Cir. 2011)(state court determination that partial  *Allen* charge was not coercive was not an unreasonable application of existing U.S. Supreme Court precedent, and, in any event, “This court has also generally upheld “verdict-urging”

charges, even when they contain flaws.”)(citing, *Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984)).

27. Refusal to Instruct on Individual Determination of Mitigation

Haight argues in ground 27 that the refusal of the trial court to instruct the jury that each juror may individually determine, weigh and consider evidence of mitigation deprived Haight of a reliable verdict on punishment in violation of the Sixth, Eighth and Fourteenth Amendments.⁴³ Haight argues that when one considers the jury instructions and verdict forms as rendered, such instructions created the misimpression to the jury that mitigating circumstances must be found unanimously. In particular, Haight focuses on penalty phase jury instruction no. 5, entitled “unanimous verdict,” which advises the jurors:

Each verdict of the jury must be unanimous and must be designated by one of you as foreperson. You must use the forms at the end of these instructions in writing your verdict.

*97 (Brief on appeal in App. No. 94-SC-288-MR, Appx. p. A100).

Haight reads this instruction in conjunction with penalty phase instruction no. 3(c) found in the instruction on mitigating circumstances. Specifically, the instruction advised the jury:

In fixing punishment for the defendant, you shall consider such mitigation or extenuating facts and circumstances as they have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true:

....

(c) any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

 *Id.* at A-97).

Haight argues that these two instructions when read together run afoul of *Mills v. Maryland*, 486 U.S. 367, 383, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), wherein the Supreme Court concluded that the failure of the trial court to render an instruction on individual consideration of mitigating evidence created an unconstitutional risk that the jurors, as sentencers, were kept from considering all mitigation with the result that the high degree of reliability required in capital punishment cases was violated. *Id.* See also, *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (reaffirming *Mills*).

Haight also cites the Court to *Davis v. Mitchell*, 318 F.3d 682, 685 (6th Cir. 2003), cert. denied 542 U.S. 945, 124 S.Ct. 2902, 159 L.Ed.2d 827 (2004), a Sixth Circuit opinion in which jury instructions allegedly similar to those rendered at Haight's trial were held to be unconstitutional due to the impression created that juror unanimity was required in order to mitigate punishment from death to life imprisonment. See also, *Spisak v. Hudson*, 512 F.3d 852, 853 (6th Cir. 2008) (reaffirming its earlier conclusion that the challenged mitigation instruction “impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of federal law as announced in *Mills* and *McKoy*”), cert. granted, *Smith v. Spisak*, 555 U.S. 1159 (2009) reversed *Smith v. Spisak*, 558 U.S. 139, 149, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010) (“state court's decision upholding [jury] forms and instructions [that required a unanimous finding of aggravating circumstances without specifying that findings of mitigating circumstances need not be unanimous] was not “contrary to, or ... an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States” in *Mills*. 28 U.S.C. § 2254(d)(1)”).

Haight now insists that the challenged instructions in his case suffer from the exact same unconstitutional flaw when considered cumulatively. Haight raised the present issue on direct appeal in section II.E of his brief at p. 59. (Appellant's brief in App. No. 94-SC-288-MR, pp. 59-62). The Kentucky Supreme Court in *Haight III* rejected Haight's argument stating that “Appellant's claim of trial court error in failing to inform the jury that its decision with respect to mitigation did not have to be unanimous was fully resolved in *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175, 180 (1994). We discern

nothing about this case which differs materially in that respect from *Bowling*.” *Haight III*, 938 S.W.2d at 249.

*98 Upon consideration, the Court must agree albeit for different reasons. The question of an improper requirement for unanimity in jury instructions in violation of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) has been addressed in a number of Sixth Circuit decisions, as well as at least one federal district court decision from this district. See, *Davis v. Mitchell*, 318 F.3d 682, 694-96 (6th Cir. 2003), cert. denied, 542 U.S. 945, 124 S.Ct. 2902, 159 L.Ed.2d 827 (2004); *Coe v. Bell*, 161 F.3d 320, 336-39 (6th Cir. 1998), cert. denied, 528 U.S. 842, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-21 (6th Cir. 1990), cert. denied, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991); *Woodall v. Simpson*, 2009 WL 464939 at *26-28 (W.D. Ky. 2009) aff'd by *Woodall v. Simpson*, 685 F.3d 574 (6th Cir. 2012) cert. granted by *White v. Woodall*, — U.S. —, 133 S.Ct. 2886, 186 L.Ed.2d 931 (U.S. 2013) reversed and remanded by *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 188 L.Ed.2d 698 (U.S. 2014). All of the cited cases considered and rejected the same sort of unanimity challenge now advanced by Haight pursuant to the decision announced in *Mills*.

Mills flows from the prior decisions of the U.S. Supreme Court in *Lockett*, 438 U.S. at 586, 98 S.Ct. 2954 and *Eddings*, 455 U.S. at 104, 102 S.Ct. 869. See, *Hartman v. Bagley*, 492 F.3d 347, 378 (6th Cir. 2007), cert. denied, 128 S.Ct. 1271 (2008) (“ *Mills* follows from *Lockett* and *Eddings*.”). In *Mills*, the Supreme Court held that the Eighth and Fourteenth Amendment rights of a defendant are violated if

there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in the case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on

the existence of a particular such circumstance.

 *Mills*, 486 U.S. at 384, 108 S.Ct. 1860.

Along these same lines, the Supreme Court later held in  *McKoy v. North Carolina*, 494 U.S. 433–435, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) that unanimity requirements in capital sentencing schemes “‘prevent ... the jury from considering ... any mitigating factor that the jury does not unanimously find’ prior to imposing a sentence of death and therefore violate the Eighth and Fourteenth Amendments.”

 *Hartman*, 492 F.3d at 378 (citing  *McKoy v. North Carolina*, 494 U.S. 433, 435, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). See also,  *Slaughter v. Parker*, 450 F.3d 224, 239–40 n.4 (6th Cir. 2006)(discussing  *Mills*, 486 U.S. at 375, 108 S.Ct. 1860), cert. denied, *Leonard v. Simpson*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007).

When one examines the challenged jury instructions in this instance, it is readily apparent that the Kentucky Supreme Court reasonably concluded that such instructions did not run afoul of  *Mills*,  *McKoy* or any other clearly established precedent of the U.S. Supreme Court. The penalty phase instructions rendered at Haight's trial could not reasonably be misread to infer a requirement that mitigating circumstances be unanimously found by the jury before such circumstances could be considered. Unlike  *Kubat v. Thieret*, 679 F.Supp. 788, 813 (N.D. Ill. 1988), affirmed,  867 F.2d 351 (7th Cir.), cert. denied, 493 U.S. 874, 110 S.Ct. 206, 107 L.Ed.2d 159 (1989), a decision cited by Haight in his petition memorandum, the present instructions contained no language such as “if ... you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence, you should sign the form which so indicates.”  *Id.* In fact, in the present case, as the warden notes, the only reference to unanimity is to be found in instruction 8, which requires that the jury verdict be unanimous and signed by the foreperson. In contrast, the instruction on mitigating circumstances, instruction no. 2, contains no express requirement of unanimity.

*99 At most subsection three of this instruction makes a single passing reference to “you, the Jury,” which Haight

seizes on in isolation to insist that the remaining seven references to “you” in the same instruction must be construed to be a reference to the second person plural. Nowhere in instruction 2 is such an interpretation of the language mandated, nor is it the only reasonable one that a juror might make particularly in the absence of a more explicit requirement for unanimity. This final circumstance alone would seem to materially distinguish Haight's case from the circumstances that existed in  *Mills*,  *McKoy* or  *Kubat*.

Certainly, no constitutional violation resulted merely because the trial court refused to grant the tendered mitigation instruction offered by the defense that advised the jury it did not have to be unanimous in its agreement to the existence of any mitigating circumstance. As *Woodall* notes, “Kentucky has chosen not to require the trial judge to instruct the jury that its findings on the existence of any particular mitigating factor does not have to be unanimous.”  *Woodall*, 2009 WL 464939 at *27 (citing *Stopher v. Commonwealth*, 47 F.3d 787, 803 (Ky. 2001)). Because the Constitution does not require a state to adopt a specific standard for instructing the jury on the consideration of mitigating factors under a death penalty scheme, Kentucky's election to decline such instructions is not a basis on which a petitioner may obtain habeas corpus relief. See,  *Woodall*, 2009 WL 464939 at *27 (citing  *Zant v. Stephens*, 462 U.S. 862, 884–91, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

The Constitution does undoubtedly forbid jury instructions from being structured in such a fashion as to imply that mitigation must be found unanimously.  *Henley v. Bell*, 487 F.3d 379, 390 (6th Cir. 2007)(“[A] state may not, consistent with the Eighth Amendment, require that the jury be unanimous in determining that a mitigating factor exists.”)(citing,  *McKoy v. North Carolina*, 494 U.S. 433, 443–44, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990);  *Mills v. Maryland*, 486 U.S. 367, 373–75, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)). No reasonable likelihood existed that the jury in Haight's case could have applied the challenged instructions in such a fashion, however. See,  *Boyd v. California*, 494 U.S. 370, 379–80, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Haight has not shown the existence of such a reasonable probability and cannot do so given the language and structure of the challenged instructions.

The Sixth Circuit decision announced in  *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which Haight claims rejected similarly-worded jury instructions, does not persuade the Court otherwise.  *Davis* is not the clearly established precedent of the U.S. Supreme Court. That alone would put and end to Haight's successful reliance on it. Also,  *Davis* was rendered well after Haight's conviction became final on direct appeal in October of 1997. Aside from these two material considerations, the decision has been legitimately criticized by several district courts in the Sixth Circuit as being contrary to the Sixth Circuit decisions of  *Roe v. Baker*, 316 F.3d 557 (6th Cir. 2002),  *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000) and  *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998) in its treatment of this issue. See *Sheppard v. Bagley*, 604 F.Supp.2d 1003, 1020-21 (S.D. Ohio 2009), *aff'd* 657 F.3d 338 (6th Cir. 2011), *cert. den'd*, *Sheppard v. Robinson*, 567 U.S. 910, 132 S.Ct. 2751, 183 L.Ed.2d 623 (2012);  *Madrigal v Bagley*, 276 F.Supp.2d 744, 783-85 (N.D. Ohio 2003), *aff'd*, 413 F.3d 548 (6th Cir. 2005). Accordingly we place little if any weight on  *Davis*.

We note additionally that even in those cases in which the jury has been instructed that it must unanimously find the existence of aggravating circumstances, the federal courts have not held that such a unanimity requirement as to aggravators implies a similar requirement as to mitigating circumstances when the instructions at issue have no express requirement of unanimity in the language of the instructions relating to mitigation. See,   *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1108-10, 1120-21 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).  *Coe v. Bell*, 161 F.3d at 336-39 (No  *Mills* violation where the “problematic language did not appear in the section of the instructions on finding mitigating factors.”).

*100 Indeed, Haight's argument on this ground was recently rejected in a separate case from this very district that involved identically structured jury instructions. See  *Thompson v. Parker*, 2012 WL 6201203 at * 28-34 (W.D. Ky. 2012). (“The instructions and verdict form in the instant case did not directly state that the jury's finding of any mitigating factor had to be unanimous but were in fact silent as to whether the mitigating factors had to found unanimously.”)(applying  *Smith v. Spisak*, 130 S.Ct. at 683–84). The same can be said

of the challenged instructions in Haight's case. Accordingly, the Supreme Court of Kentucky properly rejected Haight's argument in this respect and was not in violation of any clearly established precedent of the Supreme Court in doing so nor did it unreasonably apply such precedent.

29/30. Impermissible Funneling of the Jurors' Discretion.

Haight in grounds 29 and 30 of his petition raises two related arguments that involve the order of the jury instructions rendered at the conclusion of both the guilt and penalty phases of his capital murder trial.⁴⁴ Ground 29 involves the guilt phase instructions. Haight argues that the trial court, contrary to his request, refused to render an instruction on manslaughter prior to the instruction on murder, but instead instructed on the two offenses in reverse order with the murder instruction being given first in accordance with the instructions tendered by the prosecution (V.T. 8, 1/31/95, 9:44:42-9:49:00). Likewise, the trial court during the penalty phase of Haight's trial rejected Haight's request that the court first instruct on mitigating circumstances before instructing on the aggravating ones. Once again, the trial court adopted the tendered instructions of the prosecution, which instructed first on the aggravating circumstances.

Haight argues that to effectuate the presumption of innocence, and ensure a reliable consideration of the defense of extreme emotional disturbance, manslaughter, rather than murder, should have been the initial instruction during the guilt phase of trial. Haight cites in his petition memorandum as support for this view only  *Falconer v. Lane*, 905 F.2d 1129, 1136-37 (7th Cir. 1990). Thus, Haight concludes that the mere order of the instructions on the charged offenses, and lesser included ones, channeled the consideration of the jurors, contrary to the Sixth, Eighth and Fourteenth Amendments.

In his related argument, Haight turns to the structure of the verdict forms. Three verdict forms labeled A, B and C were supplied to the jury during the penalty phase along with the court's other instructions. Only verdict forms B and C contain the two aggravating circumstances put at issue. Verdict form A did not. When the jury ultimately returned its verdict in the penalty phase, it only found the aggravating circumstances on verdict forms C and F (V.T. 10, 2/3/94, 14:16:27-59). The jurors, however, had not completed the verdict forms by having them signed by the jury foreman.

Haight now claims that these verdict forms violated not only Kentucky law, but also prevented the jury from giving full consideration to his mitigation evidence. Haight maintains that the structure of the verdict forms, which contained the aggravating circumstances findings only on those verdict forms that provided for life without parole for 25 years or the death sentence, denied the jury any meaningful opportunity to find the existence of one or more aggravating circumstances while imposing a punishment less than LWOP 25 or death, such as a term of imprisonment for 20 years.

*101 Haight points out that the structure of the verdict forms has previously been criticized by the courts in Kentucky.

See,  *Thomas v. Commonwealth*, 864 S.W.2d 252, 264 (Ky. 1993) (Leibson, J. dissenting) (“There was no way to complete and sign either of the verdict forms finding an aggravating circumstance without fixing an aggravated penalty.”). Haight suggests that the use of these allegedly flawed verdict forms may well have led the jury in his case not to fully consider all of the mitigation evidence, but rather “funneled” the jury into fixing an aggravated penalty in lieu of a lesser one. Haight cites  *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) and  *Brewer v. Quarterman*, 550 U.S. 286, 127 S.Ct. 1706, 167 L.Ed.2d 622 (2007) as recent U.S. Supreme Court decisions that emphasize the importance of jurors being able to give effect to all mitigating circumstances that may justify the imposition of a life sentence rather than a death sentence.

 *Id.* Because the structure of the jury verdict forms in the penalty phase improperly channeled the jurors' discretion so as to impede their ability to give full consideration to Haight's mitigation evidence, he concludes again that his Sixth, Eighth and Fourteenth Amendment rights were violated.

Haight raised grounds 29 and 30 in sections II.G and II.H of his brief on direct appeal. (Appellant's brief in App. No. 94-SC-288-MR, pp. 65-66, 66-67). The Kentucky Supreme Court in  *Haight III* made only passing reference to Haight's argument II.G on direct appeal.  *Haight III*, 938 S.W.2d at 249. In this regard, the court wrote only “Appellant's additional claims of error with respect to the instructions have been reviewed and found to be without merit.”  *Id.* Nevertheless, the court did discuss at length the distinction in Kentucky between the statutory offenses of murder and first degree manslaughter.  *Haight III*, 938 S.W.2d at 248-49. In so doing, the court explained that the

two statutes co-exist in conjunction with one another, the key distinction being the existence or nonexistence of extreme emotional disturbance.

If a defendant kills another while *not* under the influence of EED, he may be found guilty of murder.  *Id.* When a defendant kills another while acting under the influence of EED, he may be found guilty of manslaughter in the first degree.  *Id.* Ultimately, the court concluded that based on the evidence presented at trial, the trial court properly instructed on both offenses.  *Id.* It continued to note that the instructions tendered by Haight failed to include any EED instruction, thereby omitting any reference to the mental state that distinguishes first degree manslaughter from murder.  *Id.* at 248-49. The Kentucky Supreme Court accordingly concluded that had the instructions tendered by Haight been given to the jury, the jury may well have been misled to the false conclusion that Haight's acts could only constitute manslaughter in the first degree. Because the jury found Haight guilty of murder, in other words that he acted while not under the influence of EED, the court noted that any alleged error with regard to the manslaughter instruction was rendered harmless by the jury's verdict.  *Id.*

The Kentucky Supreme Court also continued in  *Haight III* to address the merits of Haight's challenge to the penalty phase verdict forms. On this issue the court wrote as follows:

Appellant next complains that the structure of the verdict forms “funneled” the jury toward imposing an enhanced punishment, i.e., life without parole for 25 years or death upon its findings of aggravating circumstances, thereby effectively precluding the jury from imposing a punishment of 20 years to life. While we understand appellant's contention in this regard and believe better practice would dictate a modification of the standard verdict forms, in this case there was no prejudice.

First, the authorized punishments unmistakably inform the jury that a term of 20 years to life was available as to each count of murder. Second, in the reasonable doubt instruction, the jury was told that if it had such a doubt as to whether the defendant should be sentenced to death, then it should sentence him to imprisonment. Third, and most significantly, the jury passed over the verdict form which authorized it to find aggravating circumstances and then impose a punishment of life without parole for 25

years. Instead, the jury went to the death verdict form and, after finding aggravating circumstances, imposed the death penalty.

***102** It would be irrational to suggest that the jury would have sentenced appellant to a term of 20 years to life, but on the mistaken belief that it could not so sentence him, disregarded the option of sentencing him to life without parole for 25 years, and then gave him the death penalty.

The dissenting opinion in  *Thomas v. Commonwealth, Ky.*, 864 S.W.2d 252 (1993), is critical of the structure of the verdict forms used here. However, the majority opinion saw no reversible error and, while we now believe better practice would dictate modification of the verdict form to more forthrightly tell the jury that it may find aggravating circumstances but still impose punishment of 20 years to life, there was no reversible error in this aspect of the instructions in this case.

 *Haight III*, 938 S.W.2d at 249.

Once again, the question put before this Court is whether the Kentucky Supreme Court in  *Haight III* rendered an opinion on either issue that was clearly contrary to or an unreasonable application of the then established precedent of the United States Supreme Court. Haight's petition memorandum offers us little in the way of such a precedent with regard to ground 29, the guilt phase instruction argument. He cites no Supreme Court decision in his petition memorandum that establishes a constitutional basis on which to argue that lesser offenses must be given priority of order before more serious criminal offenses in a jury instruction.

The U.S. Supreme Court historically has taken a broad view of the adequacy of jury instructions in state criminal trials, as Respondent correctly notes, and recent decisions of that court unambiguously confirm that no clearly established precedent existed then or now to support Haight's current position. See,  *Smith v. Spisak*, 558 U.S. 139, 130 S.Ct. 676, 682, 175 L.Ed.2d 595 (2010)(rejecting the “acquittal-first” doctrine for habeas cases employed in the Sixth Circuit.). See also,  *Raglin v. Mitchell*, 2013 WL 5468227 at *21-22 (S.D. Ohio Sep 29, 2013)(directly rejecting the  *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003) in light of  *Spisak*)⁴⁵.

***103** Here, the guilt phase instructions violated no clearly established constitutional right of Petitioner Haight. In fact, the trial court wisely avoided the instructions tendered by Haight, which incorrectly instructed on the offense of manslaughter in the first degree as explained above. Haight's argument that the trial court was required to order the sequence of offenses so that the manslaughter instruction occurred prior to the murder instruction finds no support in the clearly established precedent of the U.S. Supreme Court and Haight cites none. The Kentucky Supreme Court therefore resolved ground 29 without violating the standard of  28 U.S.C. § 2254(d).

The same conclusion applies with equal force to ground 30 of Haight's petition. When the verdict forms are considered in conjunction with the instructions, it becomes immediately clear that the jury was plainly advised in the very first instruction, no. 1, that “even though you may find that the aggravating circumstance or circumstances exist(s), you do not have to impose the death penalty or life imprisonment without probation or parole for 25 years. (Appellant's brief on direct appeal in App. No. 94-SC-288-MR, Appx. p. A95). Further, as the Kentucky Supreme Court noted instruction no. 4 on reasonable doubt further advised the jury that if it had a reasonable doubt upon the whole case whether Haight should be sentenced to death, the jury should sentence him to imprisonment instead. (*Id.* at A99).

These instructions, of themselves, eliminated any possible confusion arising from the location of the aggravating circumstance blank lines on the verdict forms for the more serious punishments of LWOP 25 and death. Finally, as the Kentucky Supreme Court again correctly noted, the jury deliberately bypassed the verdict form for the punishment of LWOP 25 years, which did include the aggravating circumstance portion also found on the verdict forms for the death penalty. (*Id.* at A103, A106). Consequently, it can hardly be argued that the jury was somehow misled to believing that it had no option but to sentence Haight to death once it found the existence of the aggravating circumstances. Because Haight has failed to demonstrate how the decision of the Kentucky Supreme Court in *Haight III* is in any respect contrary to or an unreasonable application of clearly established Supreme Court precedent, which is directly against him in this regard, his request for relief on grounds 29 and 30 must be denied.

Death Penalty Issues

Haight turns to issues involving the death penalty in grounds 36, 37, 38, 39 and 40 of his petition.⁴⁶ In ground 40 Haight argues that the death by electrocution is cruel and unusual punishment contrary to *In re Kemmler*, 136 U.S. 136 (1890). In grounds 36 and 38, Haight argues he was denied a reliable sentencing in violation of the Eighth and Fourteenth Amendments where the trial judge predetermined his death sentence and merely adopted the jury's recommendation without fulfilling his state statutory obligation to perform a separate and independent sentencing hearing as required by  [KRS 532.075\(1\)](#). In ground 37, Haight argues that Kentucky's death penalty scheme under  [KRS 532.025](#) fails to provide any meaningful standard to the jury in determining when mitigation exists or as to the role of such mitigation so that the statute is unconstitutionally vague in violation of  *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and  *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Finally, Haight argues in ground 39 that the proportionality review process in Kentucky is unconstitutional due to a violation of procedural due process.

40. Electrocution is Cruel and Unusual Punishment.

***104** Haight challenges electrocution as a form of punishment under  [KRS 431.220](#).⁴⁷ The statute as it read at the time of Haight's death sentence in 1994 provided for electrocution as the means of execution in Kentucky. Subsequently, in 1998, the statute was amended to provide that every death sentence imposed thereafter would be executed by lethal injection. See,  [KRS 431.220\(1\)\(a\)](#). As for those prisoners who were sentenced to death prior to March 31, 1998, the statute additionally allowed the affected individuals to choose the method of their execution, either by electrocution or lethal injection, with the default method of execution being lethal injection should the prisoner refuse to make a choice. In  *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the Supreme Court determined that lethal injection pursuant to  [KRS 431.220](#) is constitutional under the Eighth Amendment and is not cruel and unusual punishment. Additionally, the Sixth Circuit in  *Stanford v. Parker*, 266 F.3d 442, 461-62 (6th Cir.) cert.

denied, 537 U.S. 831, 123 S.Ct. 136, 154 L.Ed.2d 47 (2002) rejected exactly the same argument based on the provisions of  [KRS 431.220\(b\)](#), holding that:

Stanford's argument ignores the fact that he need not be electrocuted.  [KRS 432.220\(b\)](#) provides that those persons sentenced to death prior to March 31, 1998, such as Stanford, have a chance of lethal injection or electrocution. For a prisoner who refuses to choose his or her method of execution, the default method is lethal injection. Stanford does not challenge the constitutionality of lethal injection.

Because Stanford is given the option of electrocution and lethal injection, we need not evaluate the constitutionality of electrocution.

 *Id.* See also,  *Stewart v. LaGrande*, 526 U.S. 115, 119, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999) (rejecting Arizona inmate's constitutional challenge to execution by lethal gas where Arizona law permitted inmate to elect execution by gas or lethal injection such that inmate's election to die by lethal gas constituted a waiver of his habeas claim). See also, *Cone v. Bell*, 492 F.3d 734, 757 (6th Cir. 2007), vacated and remanded on other grounds by  *Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (Tennessee prisoner waived claim that electrocution is cruel and unusual punishment where Tennessee statutes permitted prisoner to choose between electrocution and lethal injection and prisoner elected for electrocution). Haight therefor is not entitled to relief on this particular ground on its merits.

36/38. Lack of Separate and Independent Sentencing

Hearing Under [KRS 532.075\(1\)](#).

Grounds 36 and 38 of Haight's petition center upon Haight's final sentencing and the requirements of  [KRS 532.075\(1\)](#).⁴⁸ Haight raised the arguments herein in section IX.A through C of his brief on direct appeal in App. No. 94-SC-288-MR. ( *Id.* at 139-144, 130 S.Ct. 676). Under  [KRS 532.075\(1\)](#), whenever a death penalty is imposed for a capital offense, upon the judgment becoming final in the trial court, the sentence is to be reviewed on the record by the Kentucky Supreme Court.  *Id.* The circuit court clerk is required to transmit to the Kentucky Supreme Court the entire record and transcript, along with a notice prepared by the clerk and a separate report prepared by the trial judge. The report

prepared by the trial judge is to be submitted on a standard form questionnaire supplied by the Kentucky Supreme Court.

 *Id.* This standard form, then designated AOC Form OA5, is described in detail in  *Slaughter v. Parker*, 187 F.Supp.2d 755, 824-27 (W.D. Ky. 2001), *affirmed in part and reversed in part*,  *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006), *cert. denied*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007).

*105 On direct appeal, Haight argued that the trial judge failed to prepare the required report. Consequently, Haight had no means of determining whether the court had considered the evidence of non-statutory mitigation he presented, or whether the trial court erroneously considered evidence in mitigation to be aggravating. Haight consequently argued that the Kentucky Supreme Court could not perform the statutorily required proportionality review under  KRS 532.075 without the trial judge's report.

Additionally, Haight argued that the trial court declined to put into the final judgment how the mitigation evidence was considered, thereby rendering the entire sentencing suspect. Haight accordingly maintained that his death sentence was predetermined by the trial court given the expedited nature of the final sentencing hearing without the chance for Haight's counsel to make argument or offer explanation as required by the statute. (Appellant's brief in App. No. 94-SC-288-MR at pp. 139-144).

Haight now reiterates the same arguments as grounds 36 and 38 of his current petition. He insists in his petition memorandum that the trial court declined to put into the final judgment the fact that the Commonwealth had once offered Haight a life sentence. It also refused to make any specific findings how the trial court weighed the mitigation evidence. Instead, the trial court, in Haight's view, rushed to impose final judgment upon him without examining the victim impact statements or affording his counsel any opportunity to give reasons why a death sentence should not be imposed upon him.

Haight maintains that due process requires more than the expedited sentencing hearing that he received from the trial court. In his view, the court obviously had already made up its mind to follow the recommendation of the jury. Haight protests that in this respect, his case is just like all prior death penalty cases in Kentucky—not once has a trial court ever rejected a jury's recommendation of death in a capital

murder prosecution. As a result of this unfortunate sequence of events, the trial court allegedly abandoned its role as an independent determiner in sentencing with the ultimate responsibility to fix the penalty as prescribed by the statute.

See,  *Grooms v. Commonwealth*, 756 S.W.2d 131, 142 (Ky. 1988);  *Matthews v. Commonwealth*, 709 S.W.2d 414, 423 (Ky. 1986) (“The statutory scheme not only permits, but anticipates, that the trial court will play a separate and different role in sentencing.”).

On direct appeal, the Kentucky Supreme Court in  *Haight III* addressed the above arguments as follows:

Appellant's complaint concerning the trial court's failure to timely file a judge's report as required by  KRS 532.075(1) fails to reveal grounds for a reversal. As appellant has acknowledged, the report was filed. It appears that the court gave appropriate consideration to the aggravating and mitigating evidence and otherwise complied with the statute. *Epperson v. Commonwealth*, Ky., 809 S.W.2d 835 (1991) and  *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990).

 *Haight III*, 938 S.W.2d at 253-54.

The court then continued in its opinion in  *Haight III* to perform the proportionality review required by the statute, despite Haight's “failure to preserve his right to proportionality review.”  *Id.* Based on its review of Haight's case in contrast with a number of prior death penalty cases specifically identified in the opinion, the Kentucky Supreme Court concluded that “the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence of record clearly supports the jury's finding of statutory aggravating circumstances as enumerated in  KRS 532.025(2) and we have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the

crime and the defendant.”  *Id.* (collecting Kentucky capital punishment cases). Accordingly, the Kentucky Supreme Court then continued to affirm the conviction and death sentences imposed.  *Id.*

***106** Haight now provides us with little basis on which to upset this determination. Haight's petition memorandum cites no U.S. Supreme Court precedent in support of grounds 36 and 38. Instead, he provides only citation to various state court decisions along with the ultimate conclusion that his “rights to a fair sentencing hearing and due process” were violated by the trial court's predetermination of sentence. Several important points should be kept in mind with regards to Haight's conclusion.

First, the Kentucky Supreme Court factually determined that the trial court “gave appropriate consideration to the aggravating and mitigating evidence and otherwise complied with the statute.”  *Haight III*, 938 S.W.2d at 253. Haight offers up nothing that would show this factual determination to be clearly erroneous or otherwise unsupported in the trial record. Our own review of that record reveals no indication that the trial court abandoned its statutory role under  *KRS 532.075*.

Further, the trial judge's report, an administrative document intended for the convenience of the Kentucky Supreme Court in performing its proportionality review, was provided in a timely fashion so that the proportionality review could be performed. Next, as Respondent points out, Haight's own counsel requested that the trial court not consider the victim impact letters provided by the surviving members of the victims' families and their friends. Thus, if the sentencing proceedings appear to be abridged, it was at least in part because Haight's counsel sought to prevent the trial court from consideration of the letters, rather than the trial court's disinclination to consider them. (V.T. 10, 3/21/94, 11:18:18).

The trial court, however, did consider the letters provided by Haight's own family members and others as well as the pre-sentence investigation report prior to imposing sentence. (V.T. 10, 3/21/94, 11:17:10). Accordingly, the trial record gives no indication that any of Haight's constitutional rights were violated by the final sentencing proceedings held on March 21, 1994, nor have we shown how  *Haight III* violates or unreasonably applies any clearly established Supreme Court precedent in this regard. Haight consequently cannot

obtain relief on grounds 36 and 38 of his petition. *See*,  *Slaughter v. Parker*, 187 F.Supp.2d 755, 824-826 (W.D. Ky. 2001) (rejecting the same argument in the context of a capital habeas case), *aff'd in part, rev'd in part on other grounds by*,  *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006) *cert. den. by Leonard v. Simpson*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (U.S. 2007).

37. *KRS 532.025*, Kentucky's Death Penalty Statute, is Facially Unconstitutional.

Haight in ground 37 argues that Kentucky's death penalty statute,  *KRS 532.025*, is facially unconstitutional.⁴⁹ He maintains that the statute provides no standards to guide the jury in the exercise of imposing a potential death penalty contrary to  *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). According to Haight, the statute fails to contain a standard to determine when mitigation exists, nor does it provide the court or jury with guidance on the role of mitigation, or evidence in aggravation for that matter.

Further, he contends that the statute violates  *Mills v. Maryland* because it does not provide that each juror may consider mitigation evidence separate and apart from his or her fellow jurors. Haight also contends that the same statute violates  *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) because it does not indicate whether the aggravating circumstances must outweigh the mitigating ones beyond a reasonable doubt, or that before imposing a death sentence, the court must determine death to be an appropriate sentence beyond a reasonable doubt, as well. Finally, Haight maintains that  *KRS 532.025* violates the constitutional requirements of  *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) because the statute does not place on the jury or the judge the ultimate responsibility to determine who will live or die.

***107** The Kentucky Supreme Court addressed the substance of Haight's arguments in  *Haight III*, wherein the court held:

For his final claims of error, appellant has attacked various aspects of

the Kentucky death penalty statute and asserted, among other things, that the Act is unconstitutional. We have answered appellant's contentions in this regard on numerous occasions including [Sanders v. Commonwealth](#), Ky., 801 S.W.2d 665 (1990); [Smith v. Commonwealth](#), Ky., 734 S.W.2d 437 (1987); and [Gall v. Commonwealth](#), Ky., 607 S.W.2d 97 (1980). As such, we will not reiterate those discussions.

[Haight III](#), 938 S.W.2d at 253-54.

The Respondent warden in his memorandum of law correctly points out that the Sixth Circuit has upheld [KRS 532.025](#) in the face of the exact same challenge in [McQueen v. Scroggy](#), 99 F.3d 1302, 1333 (6th Cir. 1996). More recently, a number of district courts also have turned back identical challenges to the constitutionality of the same statute. *See, Wood v. Pancake*, 207 WL 2874442 at *8-9 (W.D. Ky. Sept. 26, 2007) (“Clearly, the Supreme Court of Kentucky applied U.S. Supreme Court precedent in reaching its well-reasoned determination that [KRS 532.025\(2\)\(a\)](#) (1) is constitutional.”); [Hodge v. Haeberlin](#), 2006 WL 1895526 at *67-70 (E.D. Ky. July 10, 2006), *affirmed*, 579 F.3d 627 (6th Cir. 2009), *cert. denied*, 559 U.S. 1075, 130 S.Ct. 2107, 176 L.Ed.2d 736 (2010) (“The United States Supreme Court has consistently ruled that the Georgia death penalty statute, upon which the Kentucky statute is modeled, is constitutional.”) (citing [McClesky v. Kemp](#), 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); [Zant v. Stephens](#), 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)); [Slaughter v. Parker](#), 187 F.Supp.2d 755, 717-18 (W.D. Ky. 2001), *affirmed in part, reversed in part*, [450 F.3d 224](#) (6th Cir. 2006), *cert. denied*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007) (“A lengthy discussion of [petitioner's challenge to [KRS 532.025](#)] ..., however, is not necessary. Petitioner has not cited any clearly established authority which would support any of the above arguments. In fact, all of these arguments have previously been rejected

by the federal courts in this circuit.”) (citing [McQueen](#), 99 F.3d at 1333); [Skaggs v. Parker](#), 27 F.Supp.2d 952 (W.D. Ky. 1989), *reversed on other grounds*, 230 F.3d 876 (6th Cir. 2000), *opinion superseded*, [Skaggs v. Parker](#), 235 F.3d 261 (6th Cir. 2000), *cert. denied*, [Parker v. Skaggs](#), 534 U.S. 943, 122 S.Ct. 322, 151 L.Ed.2d 241 (2001) (same).

Haight has not shown that the opinion of the Kentucky Supreme Court in [Haight III](#) was in any fashion contrary to or an unreasonable application of any of the above cited authority of the U.S. Supreme Court. The overwhelming weight of the established case law in this circuit runs directly contrary to his position, so much so that a reasonable jurist could not disagree. Accordingly, Haight is not only unable to obtain relief on this ground of his petition, but he is not in the Court's opinion entitled to a certificate of appealability under 28 U.S.C. § 2253(c) on this ground.

39. Unconstitutional Proportionality Review Under

[KRS 532.075\(3\)\(e\)](#).

Haight next turns to [KRS 532.075\(3\)\(e\)](#) and its provision for a proportionality review to determine “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”⁵⁰ [Id.](#) Haight argues that because Kentucky has by statute elected to perform a proportionality review in death penalty cases, such statute must be administered in accordance with due process. [Evitts v. Lucy](#), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); [Hicks v. Oklahoma](#), 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Thus, while Haight concedes that the U.S. Constitution does not mandate proportionality review, [Pulley v. Harris](#), 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), because [KRS 532.075](#) expressly provides for just that, the state in his view must apply the statute in a meaningful and rational manner or risk the denial of due process under the Fourteenth Amendment. As support for this view, Haight cites [Wilkins v. Bowersox](#), 933 F.Supp. 1496 (W.D. Mo. 1996) and [Harris v. Blodgett](#), 853 F.Supp. 1239 (W.D. Wash. 1994) in his petition memorandum.

***108** Haight maintains that he received no meaningful notice of the procedure followed by the Kentucky Supreme

Court in its proportionality review, where no specific rules govern the review, the statute establishes no adequate standard or guidelines and defendants are given no opportunity for input into the process of review, which itself is limited to only those published prior death penalty cases in which a sentence of death has been upheld rather than “similar cases,” as used in the statute, wherein the death penalty was not imposed. Such limited proportionality review in Haight’s own mind is irrational, contrary to the statute and violative of due process. This is so, according to Haight, because the Kentucky Supreme Court is always able to find prior capital case law that involves similar aggravating circumstances in which the death penalty has been upheld, thereby rendering proportionality review essentially meaningless, nothing more than a judicial rubber stamp. Finally, and most importantly, Haight argues that the statute provides no means of proportionality review when no prior capital cases are factually similar to the case under review.

Haight reiterates that his death sentence is entirely unique in that the Commonwealth “broke” its promise not to seek the death penalty. Accordingly, his own death sentence is an aberration that cannot be treated similarly to prior capital cases under [KRS 532.075\(3\)\(e\)](#). Merely listing all of the prior published death penalty cases since 1970 is in no fashion a meaningful proportionality review, but rather Haight argues is an entirely arbitrary and capricious rote exercise that violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by failure of procedural due process.

The Kentucky Supreme Court in [Haight III](#) addressed this issue as follows:

Notwithstanding appellant’s failure to preserve his right to a proportionality review, we will address this issue in obedience to the requirements of [KRS 532.075](#). In [Stanford v. Commonwealth](#), Ky. 734 S.W.2d 781, 793 (1987) ... we recognize the difficulty of comparing one murder case to another, but declared that death for the crime committed in [Stanford](#) was neither excessive nor disproportionate to the penalty imposed in similar cases. Here, we have determined that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence of record clearly supports the jury’s finding of statutory aggravating circumstances as enumerated in [KRS 532.025\(2\)](#) and we have determined that the sentence of death in this case

is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.¹ In addition to the cases cited in [Sanders v. Commonwealth](#), Ky., 801 S.W.2d 665 (1990), we have also considered [Epperson v. Commonwealth](#), Ky., 809 S.W.2d 835 (1991); [Sanders v. Commonwealth](#), Ky., 801 S.W.2d 665 (1990); [Wilson v. Commonwealth](#), Ky., 836 S.W.2d 872 (1992); [Bowling v. Commonwealth](#), Ky., 873 S.W.2d 175 (1994); [Sanborn v. Commonwealth](#), Ky., 892 S.W.2d 542 (1995) and [Bussell v. Commonwealth](#), Ky., 882 S.W.2d 111 (1994), decisions rendered since 1990. We have reviewed all claims of legal error identified by appellant and concluded that no error or accumulation of error substantially prejudiced appellant’s rights. From the evidence, there is no doubt that appellant committed the crimes of which he has been convicted and for those crimes, the punishment imposed was entirely appropriate.

In [Sanders v. Commonwealth](#), Ky., 801 S.W.2d 665 (1990), n. 10, this court listed all cases in which the death penalty was imposed after January 1, 1970. We incorporate that list herein by reference and further state that we have noted a particular similarity between this case and [McQueen v. Commonwealth](#), Ky., 669 S.W.2d 519 (1984), [Sanders v. Commonwealth](#), Ky., 801 S.W.2d 665 (1990) and [Epperson v. Commonwealth](#), Ky., 809 S.W.2d 835 (1991), cases in which the death penalty was imposed and which have been affirmed on appeal.

Accordingly, we affirm the convictions and sentences including the sentences of death.

[Haight III](#), 938 S.W.2d at 253-54.

^{*109} To the extent that Haight would hope now to successfully establish that the conclusions of the Kentucky Supreme Court in [Haight III](#) were contrary to, or an unreasonable application of, the clearly established precedent of the U. S. Supreme Court, Haight faces a torrent of contrary federal case law from both the U.S. Supreme Court and the Sixth Circuit. The U.S. Supreme Court has held in [Pulley v. Harris](#), 465 U.S. 37, 50, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) that the federal Constitution does not require comparative proportionality review. See, [Bowling v. Parker](#), 344 F.3d 487, 521-22 (6th Cir. 2003), cert. denied,

Bowling v. Haeberlin, 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004) (“The Supreme Court has held that the Constitution does not require proportionality review, but that it only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases.”). See also, *McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996), cert. denied, 521 U.S. 1130 (1997) (“There is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review.”).

Undoubtedly, *KRS 532.075(3)* does require that the Kentucky Supreme Court engage in comparative proportionality review. *Bowling*, 344 F.3d at 521. It is therefore possible, although doubtful, as the *Bowling* decision recognizes, that an error in the manner in which *KRS 532.075(3)* is applied by the Kentucky Supreme Court may be so egregious as to constitute a denial of equal protection or due process guaranteed by the Fourteenth Amendment. *Id.* (citing *Harris*, 465 U.S. at 41, 104 S.Ct. 871). Nevertheless, the Sixth Circuit in *Bowling*, and this district in *Matthews v. Simpson*, 603 F.Supp.2d 960, 1087-88 (W.D. Ky. 2009) have expressed significant reservations about whether the statute has created a protectable due process interest. To quote from *Bowling*,

As an initial matter, we question whether Kentucky law has created a due-process interest here. Kentucky requires that its Supreme Court assess “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant,” and also requires it to “include in its decision a reference to those similar cases which it took into consideration. *KRS § 532.075(3)(c)* and *(5)*. This circuit recently held that Tennessee’s proportionality statute, which is similar to the statute here, did not create a liberty interest because “the statute only tells the Supreme Court what questions it must ask. It does not tell the Supreme Court how it must do so, and it does not even define the terms (e.g., arbitrariness) of these questions. As a result [the defendant] has no federal due-process right that was violated. *Coe*, 161 F.3d at 352 ... Similarly here, the statute only explains that the Kentucky Supreme Court needs to consider—similar cases, the crime, and the defendant—it does not tell the court how to make this

decision. This suggests under *Coe* that no type of due process right exists.

Bowling, 344 F.3d at 521-522 (additional citation omitted).

See also, *Matthews*, 603 F.Supp.2d at 1087 (“[T]he Sixth Circuit has expressed grave doubts regarding whether the statute even creates a liberty interest giving rise to a federal due process claim for alleged procedural lapses by the state Supreme Court in its review.”) (citing *Bowling*, 344 F.3d at 521-22). Accordingly, to the extent that Haight would hope to rely upon the Fourteenth Amendment, a serious question exists whether he has even raised a constitutional issue at all, much less demonstrated that the Kentucky Supreme Court opinion in *Haight III* is contrary to or an unreasonable application of existing U.S. Supreme Court law.

Additionally, the Sixth Circuit repeatedly has expressed the view that the state courts which do conduct proportionality review within the circuit are to be accorded great latitude in that exercise. See, *Williams v. Bagley*, 380 F.3d 932, 961-63 (6th Cir. 2004), cert. denied, *Williams v. Bradshaw*, 544 U.S. 1003, 125 S.Ct. 1939, 161 L.Ed.2d 779 (2005) (“ ‘Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison.’ ”) (citing *Buell v. Mitchell*, 274 F.3d 337, 368-69 (2001)). This latitude, as recognized by the Sixth Circuit in several cases, includes the discretion to limit proportionality review to only those state cases in which the death penalty has been imposed. *Williams*, 380 F.3d at 963 (“[T]his court has held consistently that, in ‘limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed.’ ”) (citing *Buell*, 274 F.3d at 369) (“By limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed.”).

***110** Haight’s effort to condemn the manner in which the Kentucky Supreme Court conducted its proportionality review, by pointing out that the court does not consider those cases in which the death penalty was sought but not imposed, must necessarily fail in light of the above case law. Additionally, the fact that certain other states may take such matters into consideration in conducting their own proportionality review raises no federal constitutional issue

with Kentucky's own system. Each state is free to craft its own manner of proportionality review. Kentucky has chosen, similar to Ohio, to exclude those cases in which the death penalty was sought but not imposed. This approach is an entirely valid and constitutional choice.

Haight, in the context of his due process challenge to [KRS 532.075](#), also argues that the statute violates due process in the manner applied because the Supreme Court of Kentucky supposedly has denied capital defendants access to the data compiled pursuant to [KRS 532.075\(6\)](#) that the court uses in conducting its proportionality review. This argument also has been repeatedly rejected by the federal courts of this circuit. Indeed, in [Slaughter v. Parker](#), 187 F.Supp.2d 755, 820 (W.D. Ky. 2001), *affirmed in part and reversed in part*, [450 F.3d 224](#) (6th Cir. 2006), *cert. denied*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007), the district court characterized the exact same argument as bordering upon being specious. [Id.](#) The language of the [Slaughter](#) opinion is quite telling on this point.

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

[Id.](#) at 820.

More recently, in [Matthews v. Simpson](#), 603 F.Supp.2d 960, 1086-88 (W.D. Ky. 2009) *affirmed in part, reversed in part on other grounds by* [Matthews v. Parker](#), 651 F.3d 489 (6th Cir. 2011) *cert. granted, judgment rev'd on other grounds by* [Parker v. Matthews](#), 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32, (U.S. 2012), this district court rejected the identical argument in a separate capital habeas case wherein the petitioner had complained that the Kentucky Supreme Court refused to share its underlying data and therefore prevented him from properly assessing the adequacy of the court's proportionality review. In responding to this argument, the district court in [Matthews](#) wrote as follows:

Matthews overlooks the fact that in determining that Matthews' sentence was not excessive or disproportionate, the Kentucky Supreme Court did list the twenty-one cases it examined as part of its proportionality review ... Those cases are all reported. Matthews was free to examine the cases himself and make any arguments he deemed appropriate from the examination.

There is no constitutional requirement that the Court must share its legal research with an appellant, and Matthews has failed to show that the Kentucky Supreme Court did not engage in a good faith proportionality review. Accordingly, this claim should be denied.

[Matthews](#), 603 F.Supp.2d at 1087-88.

The same conclusion is true with equal force in this case. The Kentucky Supreme Court in [Haight III](#) identified by citation each of the cases that it considered in conducting its proportionality review. Haight was free to examine those cases, and did in fact examine them, as his habeas petition and the arguments therein confirm. He consequently cannot show that he is entitled to habeas corpus relief on any of the arguments raised in ground 39 of his petition as the decision of the Kentucky Supreme Court is not contrary to nor an unreasonable application of any clearly established precedent of the United States Supreme Court.

State Post-Conviction Proceedings

*111 Grounds 7, 10, 11 and 12 of Haight's petition challenge the adequacy of the state post-conviction proceedings held in his case pursuant to [RCr 11.42](#).⁵¹ Haight argues in

ground 7 that he was denied a full and fair post-conviction hearing when the trial court declined his request for an evidentiary hearing and the Kentucky Supreme Court “failed to follow its own precedent” in assuming the truth of the factual allegations contained in his [RCr 11.42](#) motion. Haight continues in ground 10 to argue that the trial court denied him due process in the post-conviction proceedings when it declined to permit him to amend his motion to vacate prior to denying the motion on Sept. 9, 1998. He similarly claims in ground 11 that the trial court denied him a fair opportunity to develop and present his claims in the post-conviction proceedings when it failed to afford him a chance to file a motion for expert funding to pursue claims of ineffective assistance of counsel related to his mental status. Finally, Haight argues in ground 12 that he was denied due process in the same post-conviction proceedings when his request for post-conviction discovery was denied.

Haight in his petition memorandum of law and his reply goes to some length to set forth the post-conviction procedural history of his case. He explains that his [RCr 11.42](#) post-conviction motion to vacate was hurriedly filed in October of 1997, so as to invoke the jurisdiction of the trial court to hear his motion for a stay of execution, which the trial court granted on Oct. 22, 1997, over the objection of the prosecution. (V.T. 12, 10/22/97, 10:21:12). The case was then set for an evidentiary hearing scheduled for March 16, 1988. After the prosecution filed a motion for Haight to clarify what issues he intended to pursue at the evidentiary hearing, the trial court entered an amended order on March 2, 1998. The order stated that “the hearing set for March 16, 1998, shall be for the purpose of determining whether matters referred to in the Appellant's [RCr 11.42](#) motion require an evidentiary hearing.”

At the March 16, 1998 hearing, the court and counsel for the parties addressed the issues of whether Haight was entitled to discovery of certain documents, whether he could proceed *ex parte* on his expert funding request, and whether he would be granted leave to amend his [RCr 11.42](#) motion. (V.T. 12, 3/16/98, 11:00:00, 11:02:42, 11:10:29, 11:34:40). The trial court at the conclusion of the March 16 hearing scheduled another hearing for April 20, 1998, so that the trial court could rule on Haight's discovery motion and the motion of the prosecution to prohibit *ex parte* communications regarding the Defendant's intended request for funds for expert witnesses. (V.T. 12, 3/16/98, 11:39:50). The trial court further sustained the motion of the prosecution for Haight to

identify those issues that would be addressed at any future evidentiary hearing. (V.T. 12, 3/16/98, 11:42:00).

Haight explains that the trial court held no hearing on April 20, 1988. Instead, the trial court, without first addressing the pending motions, entered an order on Sept. 9, 1998, that denied Haight's motion for [RCr 11.42](#) relief. Haight maintains that during the interim between April 20, 1988, and Sept. 9, 1988, he and his counsel were awaiting rulings on the pending motions to amend, for discovery, and to proceed *ex parte* on Haight's motion for expert witness funds. Haight now argues that the manner in which the post-conviction proceedings unfolded in state court denied him any meaningful opportunity to advance additional claims before the trial court, develop evidence in support of his present and intended claims, and obtain vital expert witness testimony related to issues concerning his possible organic brain damage and other mental deficits.

On post-conviction appeal in [Haight IV](#), the Kentucky Supreme Court rejected all of Haight's procedural claims related to the above arguments. The Kentucky Supreme Court concluded that no evidentiary hearing was required as the issues raised by Haight were already refuted by the trial record. [Haight IV](#), 41 S.W.3d at 442. The court continued in [Haight IV](#) to hold that Haight was not denied a full and fair opportunity to present his post-conviction claims. [Id.](#) As for Haight's argument concerning his need to amend his [RCr 11.42](#) motion, the court held that Haight had ample time to investigate the potential grounds for his motion to vacate, which under Kentucky law is intended to be used by a convicted defendant to present known grievances rather than as an opportunity to “research potential grievances.” [Haight IV](#), 41 S.W.3d at 444. Because Haight never identified to the trial court any specific additional issues that he intended to raise via amended motion, the Kentucky Supreme Court concluded that Haight had merely solicited from the trial court an open-ended approval to amend, the denial of which worked no due process violation.

*112 The Kentucky Supreme Court also rejected Haight's arguments regarding expert funding. [Haight IV](#), 41 S.W.3d at 445. The court first noted that it had already determined in [Haight III](#) that Haight had the full benefit of mental health evaluations and experts during his jury trial. [Id.](#) As for the mental health expert opinion obtained by Haight *after* his [RCr](#)

11.42 post-conviction motion was denied, the Supreme Court concluded that this opinion that Haight may suffer from brain damage, was merely belated speculation. *Id.* Further, the court determined that Haight had failed to show that he had suffered any prejudice as a result of the denial of his request for expert witness funds. *Id.*

The question that we are now faced with in light of the above events is whether Haight's grounds 7, 10, 11 and 12 raise any cognizable federal constitutional issue that this Court may address. Haight appears to acknowledge in his petition memorandum, at least implicitly, albeit without citation to controlling authority, and again in his reply, that the Sixth Circuit has determined that such challenges to the adequacy of post-conviction proceedings are not matters that may be addressed by way of habeas corpus. This proposition is entirely correct and is widely known in this circuit as the *Kirby* Rule.

The rule arises from *Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986). *Kirby* is the leading case in the Sixth Circuit in this area. *Payne v. Bell*, 194 F.Supp.2d 739, 740-41 (W.D. Tenn. 2002), *reversed in part*, 399 F.3d 768 (6th Cir. 2005), *rehearing granted in part*, 122 Fed.Appx. 844 (6th Cir. 2005), *opinion superseded on rehearing by Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005) (“The Sixth Circuit has regularly applied *Kirby* to summarily reject similar challenges to procedures used in state collateral proceedings.”) (collecting cases). Consequently, a petition for habeas corpus relief is “not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings.” *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001), *cert. denied*, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). This is so because habeas corpus review is not available where a successful challenge to such post-conviction proceedings is not directly related to the petitioner's detention. *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007); *Alley v. Bell*, 307 F.3d 380, 387 (6th Cir. 2002).

The claim of a habeas petitioner “must directly dispute the fact or duration of the confinement.” *Kirby*, 794 F.2d at 248. Because the result of habeas review of the adequacy of a post-conviction challenge will not result in a release

from confinement, the scope of the writ does not include such grounds involving the adequacy of state post-conviction proceedings. *See, Wright v. Lazaroff*, 643 F.Supp.2d 971, 990 (S.D. Ohio 2009); *Simpson v. Warren*, 662 F.Supp.2d 835, 847 (E.D. Mich. 2009); *Rockwell v. Palmer*, 559 F.Supp.2d 817, 831 (W.D. Mich. 2008); *Huffman v. Brunsman*, 650 F.Supp.2d 725, 736 (S.D. Ohio 2008). Accordingly, for the reasons set forth above, Haight's grounds 7, 10, 11 and 12 are beyond the scope of habeas corpus review.

Instructions and Verdict Form

Haight raises seven claims of instructional error in this portion of his petition. The arguments are contained in grounds 23-26, 28, 31 and 32. ⁵² In ground 23, ⁵³ Haight argues that the trial court deprived him of his rights under the Sixth, Eighth and Fourteenth Amendments when it refused to give the jury Haight's tendered mitigation instruction during the penalty phase of the trial. The court instead provided the jury with a mitigation instruction no. 3 that in addition to the mitigating circumstances of extreme emotional disturbance and mental illness or intoxication, contained only a reference to “any other circumstances or circumstances arising from the evidence which you the jury deem to have mitigating value.” (Appellant's brief on direct appeal in App. No. 94-SC-288-MR, App. p. A97-A98).

*113 Haight had requested a jury instruction that specifically identified the mitigating circumstances that “Haight grew up in a broken and deprived family where he was emotionally and physically neglected and abused;” that “Haight was taken from his parents by the state of Ohio and placed in children's homes and foster homes from [the age of] 5 until ... 12;” that “Haight has limited intelligence, [that he] had to repeat two grades in school, was hyperactive with attention deficit disorder and eventually dropped out of school in the eighth grade.” (Appellant's brief on appeal in App. No. 94-SC-288-MR, App. p. A73-74).

The trial court declined Haight's instruction. Haight raised the mitigation instruction issue on direct appeal in argument II.A at pp. 43-73 of his brief on appeal. Haight now argues that the penalty phase instructions on mitigation rendered by the trial court run afoul of *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) in that they, by omission, precluded the sentencer from giving substantial effect to Haight's critical mitigation evidence concerning his

deprived family background, foster care history and neglect. See,  *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Haight reasons that without an instruction that specifically identified these additional factors of mitigation, the jury could not give effect to them as the “catchall” mitigation provision found in subsection (c) of penalty instruction no. 3 was not sufficient to alert the jury to its obligation to give effect to such evidence.

As support for his position, Haight cites *State v. Cummings*, 389 S.E.3d 66, 80 (N.C. 1990) in his petition memorandum for its holding that “where defendant makes a timely written request for a listing in writing on the form of possible non-statutory mitigating circumstances that are supported by the evidence, which the jury could reasonably deem to have mitigating value, the trial court must put such instructions in writing on the form.”  *Id.* *Cummings* continued to caution that when the non-statutory circumstances are not presented on equal footing with the statutory ones, “the jury could easily believe that the unwritten circumstances were not as worthy as those in writing.”  *Id.* at 81, 127 S.Ct. 649. Haight concludes that this scenario is exactly what happened in his own case. The jury was never informed in writing of the specific mitigation evidence he desired to emphasize, *i.e.*, his family background, abuse, neglect and institutionalization history and therefore was unconstitutionally prevented from giving effect to it.

On appeal, the Kentucky Supreme Court rejected Haight's ground 23 on its merits, holding that:

Appellant claims error in the trial court's failure to give a specific instruction directing the jury to consider evidence of his childhood abuse and neglect and deprived family background. While appellant was permitted to introduce extensive evidence in this vein, the instruction by which the jury could give effect to such evidence was general and authorized the jury to consider “any other circumstances arising from the evidence which you the jury deem to have mitigating value.” Appellant maintains that this instruction fails to meet the requirements of  *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In  *Penry*, the court reviewed the Texas capital punishment statute and, with regard to non-statute mitigating factors, determined the statute to be insufficient. The court observed that despite evidence and argument relating to the appellant's mental retardation and abuse

background, the jury was given no vehicle by which it could express the view that a sentence of less than death was appropriate. It appeared that upon giving affirmative answers to questions required to be propounded, the jury was virtually mandated to impose the death penalty and lacked a vehicle by which to give effect to the background evidence. “The jury was never instructed that it could consider the evidence offered by  *Penry* as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence.”  *Id.* 492 U.S. at 320, 109 S.Ct. 2934.

*114 The instructions given here impose no such restriction and rather invited the jury to broadly review the evidence for circumstances it deemed to have mitigating value. The admission of evidence relating to abuse and neglect, deprived background, and mental retardation, followed by argument of counsel as to the significance of such evidence and the instruction described herein above could have left no doubt in the mind of the jury that it had a right to consider such evidence in its penalty determination. A more specific instruction was not required. *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1994); *Halforsen v. Commonwealth*, Ky., 730 S.W. 921 (1987);  *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994);  *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

 *Haight III*, 938 S.W.2d at 247-48 (parallel citations omitted).

Once again, we ask whether this resolution of the instructional issue was contrary to or an unreasonable application of any clearly established precedent of the U.S. Supreme Court. Haight tells us little in this regard in his petition memorandum of law as his arguments seem more directed to presentation before the Kentucky Supreme Court than a federal habeas court. In other words, Haight does not tell us why the resolution of the Kentucky Supreme Court on this issue runs afoul of  *Penry* or either of the other two U.S. Supreme Court decisions he cites,  *Tuilaepa*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) or  *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), for that matter. At most, Haight's petition merely focuses on the North Carolina State Supreme Court in *Cummings*, which while

interesting reading, is irrelevant insofar as the standard of  28 U.S.C. § 2254(d) is concerned.

Here, the jury was not in any fashion hindered in its ability to give effect to Haight's mitigation evidence involving his difficult childhood, institutional placement and mental limitations. Defense counsel argued these matters at length, and the instruction clearly advised the jury that it could consider "any other circumstance" it "deem[ed]" to have mitigating value." Nothing in  *Penry*,  *Tuilaepa* or  *Boyde* requires that a trial court render a defendant's specific mitigation instruction enumerating each item of evidence that the defendant intends to introduce during the penalty phase of his or her trial.

So long as the jury can give effect to such evidence, and the instruction permits consideration of both statutory and non-statutory mitigating evidence, then no constitutional violation has occurred. See,  *Ayers v. Belmontes*, 549 U.S. 7, 15, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006) (California jury instruction (K), which permitted the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," did not run afoul of  *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) or  *Brown v. Payton*, 544 U.S. 133, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005) so as to prevent the consideration of constitutionally relevant evidence."). See also, *Bowling v. Parker*, 344 F.3d 487, 502-03 (6th Cir. 2003) ("The Kentucky Supreme Court is correct. The United States Supreme Court rejected Bowling's claim in  *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), where the Court held that a catch-all instruction on mitigation was constitutionally sufficient unless the instructions as a whole created "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."  *Id.* at 380, 110 S.Ct. 1190), cert. denied, *Bowling v. Haeberlin*, 543 U.S. 842, (125 S.Ct. 281, 160 L.Ed.2d 68, U.S. 2004).

Certainly, nothing in the opinion in  *Haight III* is unreasonable or contrary to this fundamental principle. See gen.,  *Smith v. Spisak*, 558 U.S. 139, 144-48, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010) (Ohio jury instruction which advised the jury that it could take into account

"any other" mitigating consideration relevant to the issue of whether defendant should be sentenced to death did not violate  *Mills* or  *McKoy*);  *Smith v. Mullin*, 379 F.3d 919, 936-938 (10th Cir. 2004) (Mitigation instructions in Oklahoma capital trial did not preclude consideration of the defendant's mental retardation where the instructions did not specifically mention mental retardation, but nonetheless broadly defined mitigation so as to permit the jury to include the defendant's mental impairment within that category of mitigation evidence to be given effect).

*115 Because the Kentucky Supreme Court reasonably concluded that the challenged mitigation instruction herein did not deprive the jury of giving meaningful consideration and effect to all of the mitigating evidence offered by the defense that might provide a basis on which to refuse to impose the death penalty, Haight is not entitled to relief on this claim. See,  *Abdul-Kabir*, 550 U.S. 233, 246, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) ("A careful review of our jurisprudence in this area makes clear that well before our decision in  *Penry I*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual....")

24. Extreme Emotional Disturbance Instruction.

Haight in ground 24 of his petition challenges the guilt phase instruction of the trial court on extreme emotional disturbance.⁵⁴ Haight had requested that the term "uncontrollably" be excluded from the definition of EED (V.T. 8, 1/31/94, 9:47:14). This request was overruled by the trial court, which rendered the definition of EED approved in  *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky., 1986). Haight maintains that the term "uncontrollably" is more applicable to a mental state associated with temporary insanity than one of EED.

To support this view, Haight cites to the concurring opinion of the late Justice Liebson in the  *McClellan* decision.  *McClellan*, 715 S.W.2d at 474. He additionally cites to the definition of uncontrollable as set forth in Black's Law Dictionary (6th Ed. 1990), which he maintains supports his view on the extreme nature of the term. Use of the term by the trial court in its definition of EED, according to

Haight, undermines the intent of the model penal code and its development of the concept of EED.

Haight argues that EED as currently explained in the 1974 commentary to  [KRS 507.030](#) is intended to be a substantial change from the common law that expands the traditional concept of “sudden heat of passion” to broaden the type of sufficient provocation to include any event, or even words, to arouse extreme mental or emotional disturbance while adding a subjective element to the test that requires the fact finder to put themselves in the position of the defendant as he believed it at the time of his actions thereby giving fact finders substantial flexibility in assessing mitigating circumstances.  *Id.* See *gen.*  [Sanborn v. Parker](#), 629 F.3d 554, 565 (6th Cir. 2010), *cert. denied*, [Sanborn v. Parker](#), 565 U.S. 980, 132 S.Ct. 498, 181 L.Ed.2d 353, (2011)(discussing EED under Kentucky law);  [Baze v. Parker](#), 371 F.3d 310, 324-25 (6th Cir. 2004), *cert. denied*, 544 U.S. 931, 125 S.Ct. 1670, 161 L.Ed.2d 495 (2005)(discussing EED and subsequent Kentucky case law that modified  [McClellan v. Comm.](#), 715 S.W.2d at 464 in  [Foster v. Commonwealth](#), 827 S.W.2d 670, 678 (Ky. 1991)).

This approach, Haight reasons, is entirely contrary to the very concept of “uncontrollably” which involves a “dethronement of all reason” that simply is not required to establish EED as it currently is defined in Kentucky. To show the significance of this distinction, Haight points out that the prosecutor in her closing argument used the term “uncontrollably” or a variation of that term some 24 times to argue that Haight was not acting uncontrollably when he intentionally killed Vance and Omer with the result that he is guilty of murder rather than manslaughter (V.T. 8, 1/31/94, 12:24:09-13:23:00).

Haight raised this argument in section 2.B of his brief on direct appeal at pages 50-52. The Kentucky Supreme Court in  [Haight III](#) disposed of the matter, stating only that “Appellant’s additional claims of error with respect to the instructions have been reviewed and found to be without merit.”  [Haight III](#), 938 S.W.2d at 249.

*116 Once again, Haight offers us nothing to establish that this determination is contrary to or an unreasonable application of any clearly established precedent of the U.S. Supreme Court. See *gen.*,  [Parker v. Matthews](#), 567 U.S. 37, 132 S.Ct. 2148, 2153, 183 L.Ed.2d 32 (2012)(Kentucky

Supreme Court made no objectively unreasonable error in concluding that the question of EED was properly submitted to the jury for resolution.). Indeed, Haight does not cite a single Supreme Court case in the memorandum filed in support of his petition. His argument appears to rest only upon Kentucky common law, the Model Penal Code and a learned treatise.

Because Haight raised this claim purely as a matter of state law, and the Kentucky Supreme Court determined state law adversely to him in this respect, we may not reach the substance of his particular state claim.  [Estelle v. McGuire](#), 502 U.S. 62, 67-68, (112 S.Ct. 475, 116 L.Ed.2d 385, 1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”); [Bowling v. Parker](#), 138 F.Supp.2d 821, 905-06 (E.D. Ky. 2001)(concluding that habeas petitioner’s arguments related to refusal of trial court to instruct on EED in a capital murder trial involved merely matters of state law that could not be reviewed by a federal habeas corpus court since they were not of a constitutional magnitude.), *aff’d*, 344 F.3d 487 (6th Cir. 2003), *cert. denied*, [Bowling v. Haeberlin](#) 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004).

25. EMED Mitigation Instruction.

Haight turns to the penalty phase instruction on EED as a mitigating factor in ground 25 of his petition.⁵⁵ The trial court rejected Haight’s definition of EMED under  [KRS 532.025\(b\)\(2\)](#) as a statutory mitigator. Haight had tendered an instruction that distinguished EMED from the guilt phase definition of EED. After restating the definition of extreme emotional disturbance from the guilt phase, Haight’s tendered penalty phase instruction on EMED continued to provide that:

“Extreme mental or emotional disturbance” for purposes of this mitigating circumstance, is much broader than it was during the guilt phase. It includes the concept of extreme emotional disturbance given during the guilt phase. However, it is not limited by that definition. It is not limited to emotional disturbance and can include a mental disturbance. There is no requirement that a

reasonable explanation or excuse be present.

(Appellant's brief on appeal in App. No. 94-SC-288-MR, App. p. A73-A74). Instead, the trial court instructed the jury in the penalty phase as follows:

(a) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime.

(*Id.* at A97).

Haight now argues that the term “extreme emotional disturbance” as contained in  KRS 507.020(1)(a) is not a common term that the average juror can be expected to understand. The problem is even more aggravated Haight contends when this concept of EED is contrasted with the significantly broader concept of extreme mental or emotional disturbance (EMED) found in  KRS 532.025(2)(b). This broader statutory concept, Haight explains, was a vital part of his theory of the case during the penalty phase. EMED was undeniably included as a mitigating factor. Unfortunately, the court failed to tell the jury anything more than this critical mitigator was somehow less than the concept of EED as a defense to a charge of murder in  KRS 507.020.

***117** In Haight's view, jurors simply cannot be expected to understand the distinction or to appreciate the breadth of the mitigation concept of EMED. Consequently, without some meaningful standard to define the term EMED, the jury was left to speculate what, if any, differences existed. Because the jury had already received a detailed definition of EED during the guilt phase, as defined in  *McClellan*, Haight maintains that their memory of the more restrictive concept of EED would naturally prevail so that the jurors could not give adequate consideration to this critical mitigation evidence.

Haight contends that the situation in his case is similar to that which occurred in  *Godfrey v. Georgia*, 446 U.S. 420,

100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), wherein the U.S. Supreme Court granted a Georgia defendant habeas corpus relief from a capital sentence because the aggravating factor of “outrageously or wantonly vile, horrible and inhuman,” was not defined in the instructions to the jury. Consequently, the jurors in  *Godfrey* had no guidance as to the meaning of its terms. The jury therefore was left with sheer speculation, just as Haight's jury was left with sheer speculation as to the term “EMED.”

Haight raised this issue in section II.C of his brief on direct appeal. The Kentucky Supreme Court rejected the argument on its merits, holding that:

Appellant's claim with respect to the alleged failure of the instructions to give guidance on the application of extreme mental or emotional disturbance is without merit. The penalty phase instruction as given on this point was clear that the extent of such disturbance need not rise to the level of that which would constitute a defense to the crime. This was sufficient to inform the jury that the definition of extreme emotional disturbance given during the guilt phase had no application to the extreme mental or emotional disturbance instruction in the penalty phase. The instruction given came directly from the statute,  KRS 532.025(2)(b)(2).

 *Haight III*, 938 S.W.2d at 248.

Here, we find no portion of the quoted language from  *Haight III* to be contrary to nor an unreasonable application of any of the federal case law cited by Haight in his petition. First, the opinion in  *Haight III* on this point interprets a state statute. The instruction was found not to be erroneous. For Haight to prevail, he must establish not only that the instruction was erroneous, undesirable or even “universally condemned” but must establish the violation of

a right guaranteed by the Fourteenth Amendment. *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

As the Respondent points out, Haight's argument essentially is that the instruction was erroneous because it failed to contain an explanation beyond the statutory language itself.

Under *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977), it has been held that “an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of law.” *Id.* Further, the Court again agrees with the Respondent that Haight's argument is analytically similar to the argument rejected in *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) wherein the court held that the jury has the ability to weigh mitigating factors, including EED, against aggravating ones when determining whether a death sentence will be appropriate. Thus, the plain language of the instruction on EMED tendered by the trial court during the penalty phase was sufficient to advise the jury that this mitigation factor is not the equivalent of the defense of EED so as to sufficiently guide the jurors' exercise of discretion in evaluating mitigation evidence of this nature. Because Haight has failed to show that the Kentucky Supreme Court opinion in *Haight III* is contrary to or an unreasonable application of any cited U.S. Supreme Court opinion, Haight is not entitled to relief. *See gen.* *Sanborn v. Parker*, 629 F.3d at 565 (briefly discussing EED and EMED).

26. First Degree Manslaughter Instruction.

*118 Haight argues in ground 26 that the trial court, in adopting the tendered instruction of the prosecution on manslaughter in the first degree, unconstitutionally instructed the jury that it could only find Haight guilty of first-degree manslaughter if it found beyond a reasonable doubt that he acted under extreme emotional disturbance.⁵⁶ (V.T. 8, 1/31/94, 09:46:30). Haight contends under *Brown v. Commonwealth*, 555 S.W.2d 252, 257 (Ky. 1977) that the “burden of proof to negate the [EED] defense is cast on the Commonwealth ...” *Id.* In other words, in his view, EED is not a traditional “defense” within the technical meaning of that term under the Kentucky penal code. The burden instead rests upon the Commonwealth to prove the *absence* of EED if “the evidence raising the issue is of such probative force that otherwise the defendant would be entitled as a matter

of law to an acquittal on the higher charge.” *See*, *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980).

Haight reasons that for the trial court to instruct the jury that he could only be found guilty of first degree manslaughter, if it was proven that he acted under EED beyond a reasonable doubt, ran contrary to the principle that his substantial evidence of EED shifted the burden under KRS 500.070 to the prosecutor to disprove EED—not for Haight to prove its existence beyond reasonable doubt. Haight therefore concludes that the first degree manslaughter instruction as tendered violated his rights under the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution by improperly placing the additional requirement of EED in the manslaughter instruction. *See*, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Haight raised this issue in section II.D of his brief on direct appeal at p. 57. The Kentucky Supreme Court considered and rejected the arguments on its merits in *Haight III*, writing that:

Appellant next contends that the trial court improperly required proof beyond a reasonable doubt that he acted under extreme emotional disturbance (EED) in its first degree manslaughter instruction. Appellant claims that upon failure of the Commonwealth to prove the absence of EED in connection with the murder charge, the law results in a determination of guilt of first degree manslaughter. His argument is as follows:

Not acting under EED is a negative essential element of murder. KRS 507.020. If the prosecution fails to prove that negative essential element, a defendant is guilty of first degree manslaughter.

The murder and first degree manslaughter statutes go hand-in-hand. Under the murder statute, if one commits the act while not under the influence of EED, he is guilty of murder. Under the manslaughter statute, if he does the same act while under the influence of EED, he is guilty of manslaughter in the first degree. Thus, depending on the finding of the jury with respect to the absence or presence of EED, the same act may justify a conviction of murder or a conviction of manslaughter. While the murder statute includes EED as a positive element, i.e., “... because he [positively] acts under the influence of extreme emotional disturbance....,” in circumstances where there is evidence

from which the jury could find EED but would not be required to so find, it is entirely reasonable to submit both offenses to the jury for its finding. That was precisely what happened here. Conviction of murder was authorized if there was no EED and a conviction of manslaughter was authorized if there was EED. As the absence or presence of EED is an element of both statutes, there was no error in the inclusion of such and requiring its determination beyond a reasonable doubt.

*119 The instructions tendered by the appellant omit the mention of EED with respect to first degree manslaughter. These tendered instructions set forth the elements but lack any mention of the mental state which distinguishes it from murder. If the instructions tendered by the appellant had been given, the jury might well have been misled to the absurd conclusion that appellant's acts could constitute only manslaughter in the first degree. In any event, however, when the jury found the appellant committed the acts while not under the influence of EED, a conviction of first degree manslaughter was precluded. A person cannot at once be not under the influence of EED and under the influence of EED. Such mental states are utterly inconsistent and a finding of one precludes the other. As such, if there was error with respect to the manslaughter instruction, it was rendered harmless by the jury verdict.

 *Haight III*, 938 S.W.2d at 948-49.

The Court has carefully examined Haight's arguments concerning the first degree manslaughter instruction of the trial court and its inclusion of extreme emotional disturbance. It appears to the Court that Haight's claim essentially has been raised as a matter of state law in that the primary focus of his arguments falls not upon the federal Constitution, which finds only passing mention in the final sentence of his brief on direct appeal at p. 59, rather Haight focuses on various state decisions such as  *Brown* and  *Gall* cited above. Given that Haight did cite one Sixth Circuit decision in his argument before the Kentucky Supreme Court,  *Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995), the Court shall in an abundance of caution treat the matter as a federal claim, although the bulk of Haight's arguments before the Kentucky Supreme Court rested entirely on state law.

Here, the Kentucky Supreme Court interpreted Kentucky's murder statute,  KRS 507.020, which essentially advises that a defendant will not be guilty of murder in Kentucky

if he or she acted under the influence of extreme emotional disturbance in committing the charged homicide(s). Kentucky courts ultimately have concluded that the absence of EED is not an element of murder. See, *Halvorsen v. Commonwealth*, 258 S.W.3d 1 (Ky. 2007);  *Spears v. Commonwealth*, 30 S.W.3d 152 (Ky. 2000). While Kentucky at one time, well prior to Haight's conviction in 1994, did in fact hold the absence of EED to be a negative element of the crime of murder, that position was *not* the law at the time of Haight's trial in 1994. *Wellman v. Commonwealth*, 964 S.W.2d 696 (Ky. 1985) (holding that EED is not a negative element of murder but rather "a matter of evidence").

The Kentucky Supreme Court, interpreting state law, concluded that the challenged guilt phase manslaughter instructions comported with the above-cited decisions as a matter of state law. Such an interpretation by a state's highest court is binding on this Court.  *Estelle*, 502 U.S. at 67-68, 112 S.Ct. 475;  *Wainwright v. Goodee*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983);  *Israfil v. Russell*, 276 F.3d 768 (6th Cir. 2001);  *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). Respondent correctly notes in this regard that we do not sit to render a second opinion on the meaning of state law as determined by its highest court.

The Kentucky Supreme Court in  *Haight III* approved of the trial court's instructions on this issue, which essentially placed the burden of production on Haight while leaving the burden of persuasion as to the absence of EED with the Commonwealth.

Nothing in this resolution calls into question the clearly established precedent of the U.S. Supreme Court. Haight has not adequately explained how the decision in  *Haight III* violated *Standstrom* or any other U.S. Supreme Court case for that matter. We do not have a situation under  *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) where a due process violation occurred by improperly shifting the burden of proof on the element of EED. Cf.  *Gall v. Parker*, 231 F.3d 265, 286-306 (6th Cir. 2000), cert. denied, 533 U.S. 941, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001) overruled on other grounds by *Bowling v. Parker*, 344 F.3d 487, 501 n.3 (6th Cir. 2003). Accordingly, he is not entitled to relief merely because the challenged manslaughter instruction did not comport with his understanding of state law. See gen.  *Parker v. Matthews*, 567 U.S. 37, 132 S.Ct.

2148, 183 L.Ed.2d 32 (2012)(Kentucky Supreme Court made no objectively unreasonable error in concluding the question of EED was properly committed to the jury for resolution):

28. Evidence of Parole Eligibility.

*120 In this section of his petition, Haight raises two related claims in ground 28.⁵⁷ First, he argues that the trial court erred during the guilt phase of his criminal trial in refusing to permit him to testify as to his parole eligibility on a prior conviction. Haight testified during the guilt phase that he received a 17-year deferment or “setback” by the Kentucky Parole Board when he was last considered for parole so that he would have an additional 17 years to serve on his prior offenses before being considered again. (V.T. 8, 1/28/94, 11:24:58-11:25:45).

At that point in the trial, the prosecutor interjected an objection on the basis of relevance. (*Id.*). The trial court ultimately sustained the objection based on its conclusion that Haight's parole eligibility on the prior convictions had nothing to do with the events that occurred in August of 1985, when the victims were shot. (*Id.*). Accordingly, the trial court instructed the jury from the bench not to consider Haight's testimony on parole eligibility for any purpose. (*Id.*). Haight maintains that this testimony was in essence mitigation evidence that the jury could have, and should have been allowed, to consider as a basis for a sentence of less than death.  *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Second, Haight maintains that the trial court erred to his substantial prejudice when it declined to accept Haight's tendered instruction on parole eligibility, instruction no. 15 (Appellant's brief in App. No. 94-SC-288-MR, App. p. A87). The instruction specifically set forth the minimum parole eligibility for the sentences of life without parole for 25 years, life, and a term of years. The same tendered instruction additionally provided, in accordance with Kentucky law, that while the jury had been informed as to parole eligibility, “you are now instructed, however, that the matter of parole is absolutely not to be considered in any way by you in fixing the punishment for Randy Haight.” (*Id.*).

Haight argues pursuant to  *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) that it was error for the trial court to refuse to instruct the jury on minimum terms of parole eligibility given the prosecutor's

repeated emphasis on Haight's future dangerousness upon possible release to the community. If future dangerousness is relevant, Haight reasons pursuant to  *Simmons* that the actual duration of any prison sentence he might receive is also indisputably relevant.  *Simmons*, 512 U.S. at 163-64, 114 S.Ct. 2187 (requiring that a capital defendant be permitted to inform his sentencing jury that he is ineligible for parole if the state argues that he presents a “future danger”).

Haight maintains in accordance with  *Simmons* that even his tendered instruction, which admittedly advised the jury to disregard its terms in determining Haight's punishment, is better than no instruction at all, and more importantly, would have neutralized the speculation of various jurors, who during voir dire were candid in their concerns that prisoners did not serve a sufficient portion of their imposed sentences prior to being released on parole. Haight therefore concludes that the decision of the trial court to reject his guilt phase testimony concerning parole eligibility, and likewise to reject his tendered parole instruction, violated the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution by unreliably reducing the decision of the jurors to a “false choice” contrary to  *Simmons*, 512 U.S. at 163-64, 114 S.Ct. 2187.

*121 Haight raised this ground at section II.F of his brief on direct appeal. The Supreme Court of Kentucky rejected the arguments on its merits stating only that, “appellant's claims concerning the exclusion of evidence relating to his parole eligibility upon a previous criminal conviction was irrelevant and properly excluded.”  *Haight III*, 938 S.W.2d at 249.

To the extent that Haight challenges the evidentiary decision of the trial court in the guilt phase, we do not sit to second-guess the admissibility of evidence under a state's rule of evidence unless an error in the admission or exclusion of evidence is so egregious as to deny the petitioner a fundamentally fair trial.  *Roe v. Baker*, 316 F.3d 557, 567-68 (6th Cir. 2002); *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994). Only when an alleged error of state law denies a petitioner fundamental fairness in the trial process will such error serve as a basis for habeas corpus relief.  *Estelle v. McGuire*, 502 U.S. at 67-68, 112 S.Ct. 475;  *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003);  *Olsen v. McFaul*, 843 F.2d 918, 933 (6th Cir. 1988).

Rulings of a state's highest court with respect to state law are binding on this Court.  *Wainwright v. Goode*, 464 U.S. at 84, 104 S.Ct. 378. Here, the Kentucky Supreme Court found in reliance on state law that the trial court properly excluded testimony by Haight concerning his parole eligibility during the guilt phase of trial as such testimony was not relevant to whether Haight committed the charged murder and robbery offenses. As Respondent points out, this ruling as a matter of state law was entirely in accordance with Kentucky case law.  *Payne v. Commonwealth*, 623 S.W.2d 867, 870 (1981). This determination by the Kentucky Supreme Court in  *Haight III* therefore is binding on this Court. Haight's disagreement with the same is not a basis for relief under  § 2254. See  *Gall v. Parker*, 231 F.3d at 334 n. 33 (“Gall's argument that Kentucky law prohibits a jury from considering parole is not cognizable on habeas review.”)

Haight's challenge to the trial court's decision concerning his tendered instruction on parole eligibility under the  *Simmons* decision is another matter.  *Simmons*, which was rendered on June 17, 1994, after Haight's conviction, but during the pendency of his direct appeal, does indeed hold that “in assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant.”  *Simmons*, 512 U.S. at 163-64, 114 S.Ct. 2187. See *gen.*,  *Kelly v. South Carolina*, 534 U.S. 246, (122 S.Ct. 726, 151 L.Ed.2d 670, 2002)(where prosecutor's proof and argument in penalty phase of capital murder trial put at issue defendant's future dangerousness, due process as announced in  *Simmons* required the trial court to instruct on defendant's ineligibility for parole upon conviction);  *Shafer v. South Carolina*, 532 U.S. 36, 48-49, 121 S.Ct. 1263, 149 (L.Ed.2d 178 2001)(“whenever future dangerousness is at issue in capital sentencing proceeding under South Carolina's amended sentencing scheme, due process requires that jury must be informed that life sentence carries no possibility of parole.”);  *Calderon v. Coleman*, 525 U.S. 141, 150 n.2(, 119 S.Ct. 500, 142 L.Ed.2d 521 1998)(same).

The problem for Haight, however, is that the very nature of the instruction that he tendered absolutely precluded the possibility of any prejudice from the failure of the trial court to grant the tendered parole instruction, Haight's instruction

no. 15. The concluding language of the tendered instruction bluntly tells the jury to ignore the preceding portion of the instruction by advising the jury that “the matter of parole is absolutely not to be considered in any way by you in fixing the punishment for Randy Haight.” (Appellant's brief in App. No. 94S-SC-288-MR, App. p. A87). Thus, Haight cannot make a meaningful claim of prejudice from the refusal of the trial court to give an instruction, which on its very face tells the jury to disregard the material portion of the same instruction. Any other reasoning would strain logic to the breaking point.⁵⁸

*122 For these reasons, Haight is not entitled to relief on this claim, as his first argument was rejected purely as a matter of state law, which this Court does not sit to reexamine, and his second argument, even accepted as being correct on its face as to the penalty phase instruction, simply could not have resulted in any prejudice to Haight whatsoever given the nature of the tendered instruction itself. See, *Wilkerson v. Bell*, case no. 3:03-1223, 2006 WL 572319 at *4 (M.D. Tenn. 2006)(erroneous instruction on parole eligibility challenged in a  § 2254 proceeding by a Tennessee defendant convicted of murder properly was held to be harmless error in light of the substantial evidence presented at trial).

31. Examination by Neuropsychologist.

Haight in ground 31 of his petition argues that the trial court erred when it refused to permit the defense to have Haight examined by a neuropsychologist during the time after the jury returned its penalty phase verdicts in early February and before his sentencing the following March.⁵⁹ Haight maintains that mid-trial his defense counsel received a 1974 mental health evaluation that concluded, based on discrepancies in Haight's test performance results, that there existed “a possibility of brain damage which is interfering selectively with [Haight's] verbal expression.” (T.R. Vol. VII, p. 1008). The same report noted discrepancies in Haight's testing performance “which is not infrequently noted in persons who have some cortical dysfunctioning.” (T.R. Vol. VII, pp. 1006-1017). Also, in the report was a childhood social history that included a prior [head injury](#), a high fever of 105 degrees for several days and physical abuse by Haight's father who frequently hit the child in the head. (*Id.*).

Haight explains that this report was only located “after protracted attempts by the defense's investigator to find all previous social history and psychological and other evaluations.” (Appellant's brief on direct appeal in App. No.

94-SC-288-MR, p. 68 n.31). The 1974 report ultimately was found only on microfiche and turned over to defense mid-trial, 12 days after trial had started. Defense counsel were not apparently able to find a neuropsychologist or neurologist on short notice to prepare an evaluation, nor did defense counsel request a continuance to accomplish this in the trial. (*Id.* at 68, n. 32).

Instead, after the jury returned its verdicts of death in the penalty phase, and before Haight's scheduled sentencing, Haight's counsel moved the trial court to continue the sentencing so that a new, neuropsychological evaluation could be performed by Dr. Engum of Knoxville, Tennessee. Defense counsel additionally requested funds for such evaluation so that the trial court would have this additional mitigating evidence before it for consideration in fulfilling its role as the ultimate sentencer under [KRS 532.025\(1\)\(b\)](#). The trial court, however, denied Haight's motion for funds and his request for a continuance of the sentencing and instead sentenced him to death in accordance with the recommendation of the jury.

Haight maintains that the trial court had ample discretion under [KRS 532.050\(3\)](#) to order a neuropsychological evaluation to assist it in its sentencing decision, particularly in view of the jury's recommendation of death. *See*, [Marlow v. Commonwealth](#), 709 S.W.2d 424, 432 (Ky. 1986). He now argues that he cannot be sentenced to death constitutionally if his ultimate sentencer declined to consider evidence in mitigation such as the type of information contained in the 1974 psychological report that revealed the distinct possibility of brain damage. He therefore maintains that the trial court's refusal to permit him to obtain a neuropsychological evaluation was, in effect, a refusal to give weight to non-statutory evidence of mitigation contrary to [Lockett v. Ohio](#), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and [Eddings v. Oklahoma](#), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), which collectively hold that the sentencer in a capital case must give consideration and effect to all mitigation evidence. *Id.*

*123 Haight also cites [Hitchcock v. Dugger](#), 481 U.S. 393, 394-99, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1978), wherein the exclusion of non-statutory mitigating evidence rendered the death sentence therein invalid. *Id.* at 399, 107 S.Ct. 1821. Haight reasons in reliance on these decisions that when

the trial court, as a matter of law, refused to consider whether he had brain damage and other neurological deficiencies based on the 1974 psychological report, it violated his constitutional rights under [Lockett](#), [Eddings](#), and [Hitchcock](#).

Haight raised this argument in section II.I of his brief on direct appeal at pp. 68-72. The Kentucky Supreme Court in [Haight III](#) rejected the argument on its merits holding that:

Appellant's claim that a 20-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

[Haight III](#), 938 S.W.2d at 249.

Nothing in Haight's petition calls into question the above conclusions in [Haight III](#). Haight had the benefit of a forensic psychologist, Dr. Brad Fisher, who evaluated Haight on two occasions in December of 1993 prior to the beginning of Haight's trial in January of 1994. Dr. Fisher based on his evaluation found no evidence that Haight was psychotic, retarded or suffering from serious psychological deficits. (V.T. 9, 2/2/94, 9:30:22, 9:36:29-9:40:00, 10:09:10-10:09:28). Additionally, Haight himself testified during the guilt phase of the trial thereby affording the trial court an opportunity to observe his cognitive abilities and his skills at verbal expression.

As Respondent points out, the 1974 psychological evaluation reflects only the mere "possibility" of brain damage. (T.V. VII, p. 108). Just as importantly, this possibility of brain damage was linked by the evaluators only to a selective interference with Haight's verbal expression. (*Id.*). Finally, despite the above findings, the same evaluators in the 1974 report continued to conclude that Haight is a psychopathic

offender, possibly drug dependent and one only interested in the welfare of himself. (*Id.*). This report was put before the trial court along with Haight's motion for expert funds to arrange an additional neuropsychological evaluation by Dr. Engum. Consequently, the trial court had before it the mitigation evidence that Haight sought to rely upon in avoiding the death penalty. Haight is unable therefore to persuasively argue that the trial court refused to consider evidence of mitigation.

The trial court did refuse to permit Haight to further supplement such evidence with an additional neuropsychological evaluation by Dr. Engum. This distinction is not unimportant, as it differentiates Haight's case from the U. S. Supreme Court decisions he cites, such as [Eddings](#), [Hitchcock](#), and [Lockett](#). Under such circumstances, we can find no manner in which the decision in [Haight III](#) is contrary to or an unreasonable application of any of the decisions cited immediately above.

Haight's 1974 mental health evaluation was put before the trial court prior to his March, 1994 sentencing. The apparent decision of the trial court to give more weight to the evaluation of Haight's own trial expert in adopting the recommendation of the jury for the death penalty was not a refusal to consider mitigating evidence, but rather an appropriate exercise of the trial court's own judgment in evaluating such evidence in light of the other mental health testimony offered at trial. Accordingly, Haight is not entitled to relief on this claim as nothing in the decision of the Kentucky Supreme Court in [Haight III](#) is contrary to or represents an unreasonable application of [Eddings](#), [Hitchcock](#) or [Lockett](#).

32. Instruction on Proof Beyond Reasonable Doubt.

*124 In his final claim of instructional error, Haight initially challenges the trial court's instruction on reasonable doubt in both the guilt and penalty phases of his trial.⁶⁰ Haight maintains that the trial court's refusal to define reasonable doubt by adoption of the tendered defense instruction relieved the prosecution of its burden of proof in violation of *In re Winship*, 397 U.S. 357 (1970). See also, [Cage v. Louisiana](#), 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); [Sandoval v. California](#), 511 (U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 1994); *Rickman v. Dutton*, 864 F.Supp.

636 (M.D. Tenn. 1994), *affirmed on other grounds*, [131 F.3d 1150 \(6th Cir. 1997\)](#).

Haight insists that he was entitled to have the trial court define the concept of reasonable doubt in its instructions. Haight tendered to the court during the guilt phase of his trial instruction no. 10, which defined the term "reasonable doubt" to be "a real doubt, based on reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt is proof of such a convincing character that you will be willing to rely and act upon it without hesitation in the most important of your own affairs. Only if you're convinced beyond a reasonable doubt may you find the defendant guilty." (Appellant's brief on direct appeal in App. No. 94-SC-288-MR, App. p. A50-51).

Haight also complains that the trial court did not instruct the jury as he requested in his tendered instruction that the Commonwealth had the burden to prove the accused guilty, the existence of any aggravating factors, that death was an appropriate sentence, and that evidence of aggravation outweighed mitigation evidence beyond a reasonable doubt. He also argues that the trial court erred in failing to instruct the jurors that they could not consider any aggravating factor not listed in the instructions. Haight's tendered instruction in these respects was rejected by the trial court.

Haight claims now that such an instruction, as well as his tendered instruction on reasonable doubt, was vital because the existing law at the time, [KRS 532.025\(2\)](#), limited the number of potential aggravators to the seven then listed in the statute. Yet, during the guilt phase of his trial, Haight's attempted shooting of Trooper Yates and his many prior convictions were introduced into evidence, but were not themselves proper statutory aggravating factors under [KRS 532.025\(2\)](#), which the jury should have been advised of during its penalty phase deliberations. Absent Haight's tendered instruction, the jury was left to rely on any fact as being potentially aggravating despite the statute's limitation to seven enumerated aggravators.

Haight continues to focus on the failure of the trial court to render his tendered presumption of life instruction during the penalty phase. While the trial court did give a presumption of innocence instruction during the guilt phase of the jury's deliberations, it declined Haight's presumption of life instruction. Haight now maintains that the trial court's rejection of his tendered jury instructions in the

above respects violated his Sixth, Eighth and Fourteenth Amendment guarantees as “a reasonably likelihood [exists] that the jury has applied the challenged instruction in a way” that violates the Constitution. *Boyd v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

*125 The above arguments appeared at pp. 72-73 of Haight's brief on direct appeal in section II.J of the brief. As earlier noted in this report, the Kentucky Supreme Court in *Haight III*, rejected all of these arguments generally stating that “Appellant's additional claims of error with respect to the instructions have been reviewed and found to be without merit.” *Haight III*, 938 S.W.2d at 249.

Once again, nothing in Haight's arguments in support of ground 32 calls into question the reasonableness of the Kentucky Supreme Court's decision under existing precedent. Various courts of the Sixth Circuit have rejected the argument that a failure to define “reasonable doubt” is a violation of the U.S. Constitution. This exact argument was rejected in *Whiteside v. Parke*, 705 F.2d 869, 871-73 (6th Cir. 1982), *cert. denied*, 464 U.S. 843, 104 S.Ct. 141, 78 L.Ed.2d 133 (1983); *Slaughter v. Parker*, 187 F.Supp.2d 755, 811-12 (W.D. Ky. 2001), *affirmed in part and reversed in part*, 450 F.3d 224 (6th Cir. 2006), *cert. denied*, *Leonard v. Simpson*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007). As both *Whiteside* and *Slaughter* explain, “Kentucky courts have long followed the rule that the failure to define reasonable doubt is not error, and Kentucky RCr 9.56 appears to be a codification of that rule.” *Whiteside*, 705 F.2d at 871 (citing *Swopshire v. Commonwealth*, 246 Ky. 593, 55 S.W.2d 356, 358 (1932)).

Haight cites no clearly established precedent of the U.S. Supreme Court that would require a definition of reasonable doubt, contrary to the longstanding state law of Kentucky. Further, even if there appeared to be some infirmity in the jury instructions in any of the various manners set forth by Haight in ground 32, Haight would nonetheless have to establish under the totality of the circumstances as explained in *Whiteside* that he received an unfair and unreliable jury verdict. This task is beyond Haight's ability to accomplish. The evidence of Haight's guilt was entirely overwhelming, as correctly noted by the Kentucky Supreme Court.

Haight did not deny repeatedly shooting both victims, but instead maintained merely that his mental state of

extreme emotional disturbance required the entry of the lesser included offense of first degree manslaughter. Accordingly, similar to the Sixth Circuit in *Whiteside*, we reject Haight's challenge based on the failure of the trial court to define reasonable doubt, or any of the other alleged deficiencies generally asserted by Haight without elaboration. For these reasons, he is not entitled to relief under § 2254(d). *Blandford v. Sowders*, 1989 WL 67967 at *2, 878 F.2d 381 (6th Cir. 1989) (alleged failure of trial court to allow definition of the term “reasonable doubt” was not a due process violation under the *Whiteside* totality of the circumstances test); *Rose v. Scroggy*, 1986 WL 16131 at *1, 810 F.2d 203 (6th Cir. 1986) (“Kentucky's practice of prohibiting such an instruction [on reasonable doubt] (RCr § 9.56(2)) has passed muster in this Court.”); *Slaughter*, 187 F.Supp.2d at 811, 815 (capital defendant properly denied “presumption of life” instruction where no clearly established precedent required such an instruction); *Kordenbrock v. Scroggy*, 680 F.Supp. at 893 (same), *rev'd on other grounds*, 919 F.2d 1091 (6th Cir. 1990) (en banc).

Prosecutorial Misconduct

34. Prejudicial Bad Acts Evidence.

Haight in ground 34 of his petition memorandum maintains that the prosecution engaged in prosecutorial misconduct when it relentlessly “polluted” his trial with evidence of “irrelevant and immaterial collateral bad acts.”⁶¹ (DN 61, p. 177). Haight contends that the following examples of irrelevant other crimes evidence had a “devastating effect” upon his opportunity to present his EED defense at trial. As examples of such inadmissible evidence intentionally introduced by the prosecutor, Haight points to the testimony concerning: his attempt to shoot Trooper Yates after being stopped by the officer following the murders (V.T. 4, 1/24/94, 11:20:14-13:35:54, V.T. 8, 1/28/94, 14:37:35); events related to his guilty plea to the attempted murder of Trooper Yates (V.T. 5, 1/25/94, 10:35:04-10:44:02); his theft of a Camaro automobile from Buford Powell and Powell's ensuing chase (V.T. 5, 1/24/94, 10:47:43, 10:54:40); his burglary of the Shuffett home and resulting theft of the .38 handgun used two days later in the murders (V.T. 5, 1/24/94, 14:43:14-14:44:07); his fellow escapee, Tony Minnix's, fear of him (V.T. 6, 1/26/94, 10:00:37, 10:04:37); his theft of Joe Sasser's GMC truck (V.T. 4, 1/24/94, 10:47:49-10:59:05); the improper cross-examination of attorney Randall Wheeler concerning

charges pending against Haight in Johnson County and efforts by Wheeler to obtain a belated appeal for him (V.T. 1/28/94, 09:23:57-09:24:35, 09:32:52-09:34:46); the improper rebuttal testimony by Pamela Marcum about her relationship with Haight; and the prosecutor's intentional introduction of allegedly irrelevant photos of the victims' bodies to unfairly inflame the jury (V.T. 5, 11/25/94, 13:32:08-13:41:05).

***126** Haight insists that this “deluge” of prior bad acts evidence “submerged the trial in a quagmire of collateral issue(s)” that had the legal effect of distracting the jury from its duty to assess his mental state at the time the offenses were committed, thereby denying him a “meaningful opportunity to present a complete defense” in violation of the Sixth, Eighth and Fourteenth Amendments, along with  *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) and  *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1984).

Haight continues to insist that the prosecution had no need whatsoever to introduce this irrelevant prior bad acts evidence, other than to unfairly prejudice his case, as Haight had admitted from opening statement onward that he killed Vance and Omer, but contended that he was acting under the influence of extreme emotional disturbance at the time of his crimes. Accordingly, the only task the jury faced was to decide whether he was acting under EED when he repeatedly shot both victims and took their personal possessions (V.T. 4, 1/14/94, 16:56:06-16:56:23, 16:58:35-16:58:59). Because this was the only relevant question during the guilt phase of the trial, Haight maintains that the prosecutor, by repeatedly introducing evidence of events that occurred two and three days earlier, well prior to the killings, was engaged in nothing more than a transparent effort to unfairly prejudice Haight while simultaneously distracting the jury with a flood of irrelevant, or at best minimally relevant, prior bad acts.

Haight raised the above arguments in section VII of his brief on direct appeal at pp. 117-133 (Appellant's brief in App. NO. 94-SC-288-MR, pp. 117-133). The Kentucky Supreme Court in  *Haight III* rejected all of Haight's arguments raised in ground 34 on their merits, explaining that:

Appellant next attacks the judgment on grounds that his trial was “polluted ... with irrelevant and immaterial collateral bad acts.” He contends, among other things, that such bad acts precluded a “meaningful opportunity” to

present his EED defense to an open and receptive jury. Particularly he has identified evidence of his attempted murder of Trooper Yates; evidence as to the circumstances surrounding his guilty plea to that crime; evidence as to his theft of a farmhand's Camero automobile while he was a fugitive; evidence of the burglary of the Shuffett home; evidence as to Tony Minnix's fear of appellant; and fear of appellant's theft of the Sasser vehicle.

It should be remembered that at trial appellant's defense was extreme emotional disturbance and it was the Commonwealth's burden to prove the absence of EED. While the relevant time frame for proof of appellant's mental state was the time of the murders, evidence as to his mental state shortly before and after the murders was relevant. The Commonwealth maintains that from the time of appellant's escape from the Johnson County Jail until the time of his capture, his behavior amounted to a continuing course of conduct with all events being inextricably intertwined with the crimes charged. There was a legitimate basis in evidence law for admission of each such item of evidence and it was for the trial court to determine whether the probative value outweighed the prejudicial effect.

It is difficult to ignore that after his escape from the Johnson County Jail appellant went on a crime spree and along the way murdered two victims. We have found no basis to disturb the trial court's rulings on the admission of the challenged evidence. *Caldwell v. Commonwealth, Ky.*, 503 S.W.2d 485 (1972) and  *Stanford v. Commonwealth, Ky.*, 793 S.W.2d 112 (1990). Moreover, any error in this regard would have been entirely harmless. We have carefully examined appellant's claims as set forth herein above and considered KRE 404(b) and this Court's decision in *O'Bryan v. Commonwealth, Ky.*, 634 S.W.2d 153 (1982). We are unable to find an abuse of trial court discretion in this regard.  *Dunbar v. Commonwealth, Ky.*, 809 S.W.2d 852 (1991).

***127** Appellant's complaints concerning the cross-examination of Randy Wheeler and the rebuttal testimony of Pamela Marcum are insubstantial and need not be addressed. Likewise, as to introduction of the three crime scene photographs, there was no error.  *Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 (1980).

 *Haight III*, 938 S.W.2d at 252.

Haight once again gives the Court no reason to call into question the above reasoning of the Kentucky Supreme Court in  *Haight III*. Haight does not explain in his petition memorandum in what fashion the quoted language of the decision is clearly contrary to or an unreasonable application of the existing precedent of the U.S. Supreme Court. His arguments in this respect once again sound more as if they were written for review on direct appeal in the state courts than for review by a federal habeas court. Just as importantly, the arguments themselves run not so much to prosecutorial misconduct as they do to the evidentiary rulings of the state trial and appellate courts.

Haight appears to have cloaked his evidentiary arguments with an unsupported claim of prosecutorial misconduct in order to avoid the longstanding rule that the evidentiary rulings of the state courts based on state law are not ordinarily a subject for habeas corpus relief absent a clear violation of due process. See,  *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (“It is not the providence of a federal habeas court to reexamine state-court determinations on state-law questions.”);  *Fleming v. Metrish*, 556 F.3d 520, 534 (6th Cir. 2009) (“Only if an evidentiary ruling is so egregious that it results in a denial of fundamental fairness [does] it ... violate due process and thus warrant habeas relief.”) (citing  *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004)).

The Kentucky Supreme Court, based on its review of Kentucky common law, and *Kentucky Rule of Evidence* 404(b), concluded that admission of the sequence of events in the days preceding the double homicide, and immediately thereafter during Haight's flight from capture, were all relevant and admissible. The court reasoned that these acts were admissible to challenge Haight's claim that at the time that he repeatedly shot the victims he was acting in a diminished mental state due to extreme emotional disturbance. The admission of the challenged evidence was determined proper as a matter of state evidentiary law to show a continuing course of conduct “inextricably intertwined” with the charged offenses.

Haight does not persuasively explain how this evidentiary ruling was contrary to Kentucky state law, much less a violation of the due process clause. See,  *Stanford v. Commonwealth*, 793 S.W.2d 112, 115-16 (Ky. 1990) (“Evidence that reveals an independent criminal act by

an accused is admissible if the independent crime is so interwoven with evidence of the crime charged that its mention is both necessary and appropriate.”) (citing Lawson, *Kentucky Evidence Law Handbook*, § 2.20(B) (Second Ed. 1988)); *Caldwell v. Commonwealth*, 503 S.W.2d 485, 489 (Ky. 1972) (evidence of other crimes while generally inadmissible, is subject to the exception that such testimony may be admitted if the other crime is so interwoven with the crime on trial as to make it necessary and appropriate to admit evidence of it). See also, *Smith v. Commonwealth*, 366 S.W.2d 902, 906 (Ky. 1962) (“The rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also ... tend to prove the commission of other crimes by him or to establish collateral facts.”).

***128** A claim of prosecutorial misconduct by a state prisoner will not justify habeas corpus relief unless the misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”  *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). For Haight to prevail on his claim of prosecutorial misconduct under the standard of the AEDPA he must establish that the ruling in  *Haight III* to the contrary was unreasonable or contrary to existing U.S. Supreme Court precedent involving prosecutorial misconduct. The Sixth Circuit has observed that the standard of review for a claim of prosecutorial misconduct in the context of a petition for writ of habeas corpus is “ ‘the narrow one of due process....’ ”  *West v. Bell*, 550 F.3d 542, 565 (6th Cir. 2008), cert. denied, 559 U.S. 970, 130 S.Ct. 1687, 176 L.Ed.2d 180 (2010) (citing  *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974));

Haight has failed to meet this strict standard as his petition essentially reargues the merits of the evidentiary rulings of the trial court rather than establishing the unreasonableness of the Kentucky Supreme Court's opinion in  *Haight III* as it relates to controlling U.S. Supreme Court precedent on this issue. For this reason, Haight is not entitled to relief on ground 34.

35. Prosecutorial Closing Argument.

In ground 35, Haight challenges the closing argument of the prosecutor in several respects.⁶² He claims that the prosecutor repeatedly referred to Haight's alleged “future

dangerousness” thereby creating a non-statutory aggravator used to unfairly persuade the jury to sentence him to death. Haight also protests that the prosecutor during her closing argument resorted to improper “send a message” arguments that “Kentucky law will protect innocent victims from slaughter.” Further, Haight argues that the prosecutor repeatedly referred to Haight’s 1987 wanton endangerment conviction, a conviction that occurred two years after the murders, in her efforts to unfairly seek a death penalty verdict. Finally, Haight argues along the same lines that the prosecutor unfairly denigrated the testimony of Haight’s forensic psychologist, Dr. Brad Fisher, in her penalty phase closing argument.

Haight maintains with respect to future dangerousness that it is not one of the statutory aggravators listed within [KRS 532.025\(2\)\(a\)](#). Only such statutory aggravators may be relied on by the jury, and Haight reasons that the prosecutor in her repeated references to future dangerousness, which was mentioned 15 times during closing argument, unfairly prejudiced Haight and violated his right to a fundamentally fair trial by the arbitrary and capricious infliction of the death penalty.

Haight includes repeated examples of statements by the prosecutor in her closing argument which emphasized that Haight’s lengthy history of imprisonment had done nothing to reform him or to prevent his continuing commission of criminal offenses upon release. (V.T. 10, 2/2/94, 11:18:36-11:19:18; 11:23:06-11:23:43, 11:28:48-11:29:04, 11:58:56-11:59:20). These repeated references, according to Haight, were intentionally introduced by the prosecutor to manipulate and exploit the jury’s underlying fear that if Haight were merely sentenced to prison, no matter how long the term, he might one day be released into the community possibly to commit additional heinous crimes. Haight argues that this approach is improper under both [KRS 532.025\(2\)\(a\)](#) and *Bevins v. Commonwealth*, 712 S.W.2d 932, 934-35 (Ky. 1986). The impact of the prosecutor’s ceaseless references to future dangerousness in Haight’s view was to persuade the jury to rely solely on unrestrained emotion rather than reason in violation of his guarantee against an arbitrary and unfair imposition of the death penalty.

***129** The second aspect of ground 35 is the “death as a deterrent” argument of the prosecutor. During her closing argument, the prosecutor urged the jury to “protect innocent victims from slaughter. If you don’t who else will pay the price

that Pat and David did?” (V.T. 10, 2/2/94, 12:04:08-12:05:30). Haight insists that this argument is entirely improper as it abandons the true focus of the personal moral culpability of the defendant for extraneous concerns thereby denying the defendant his or her right to a reliable, rational sentencing in violation of the Sixth, Eighth and Fourteenth Amendment.

[Enmund v. Florida](#), 458 U.S. 782, 799, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); [Lockett v. Ohio](#), 438 U.S. 586, 607, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Haight also argues that the prosecutor frequently, and improperly, referred to various offenses he allegedly committed subsequent to the charged 1985 homicides to unfairly prejudice him in closing argument. Specifically, he refers to the Yates shooting, the theft of the Camaro during his flight, and his 1987 wanton endangerment conviction arising from the Yates incident. (V.T. 9, 2/2/94, 11:23:58-11:24:32).

Haight maintains that while [KRS 532.025](#) does permit introduction of “prior” convictions during the penalty phase of a capital trial, the statute does not define whether the term “prior” is intended to mean prior to the defendant’s trial or prior to the commission of the charged capital offense.

Haight acknowledges that the Kentucky Supreme Court in [Templeman v. Commonwealth](#), 785 S.W.2d 259, 260 (Ky. 1990) held that “prior” refers to convictions that are final at the time of the defendant’s sentencing, which are to be admitted for the jury to consider in determining an appropriate sentence. ([Id.](#)). Nonetheless, he argues that the [Templeman](#) holding and KRS 532. 025 violate the constitutional prohibition against arbitrary and capricious infliction of the death penalty because neither one provides appropriate guidance to channel the jury’s deliberations.

According to Haight, the [Templeman](#) interpretation of [KRS 532.025](#) is merely a backdoor means to inject future dangerousness evidence before the jury contrary to the intent of the Kentucky legislature which did not include future dangerousness as a statutory aggravator given that consideration of such irrelevant evidence would inevitably lead to the arbitrary and capricious infliction of the death penalty in violation of [Gregg v. Georgia](#), 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and [Lockett v. Ohio](#), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Haight concludes ground 35 with his argument that the prosecutor in her closing statement unfairly denigrated the expert testimony of Haight's forensic psychologist, Dr. Brad Fisher, merely because Fisher had formed his professional opinions based on Haight's own statements during their December 1993 interview and the fact that Dr. Fisher had only administered portions of certain mental tests. Based on these circumstances, the prosecutor argued that Fisher in effect had nothing more to go on than what Haight had told him in an effort to manipulate the doctor. (V.T. 10, 2/2/94, 11:32:05-11:32:56). As a result of these improper arguments, Haight maintains that the jury was deprived of its ability to give reasoned consideration to critical mitigation evidence involving Haight's mental state in violation of  *Gregg*, 428 U.S. at 207-208, 96 S.Ct. 2909.

Haight raised his claims of prosecutorial misconduct in closing argument in section VIII.A through D of his brief on direct appeal (Appellant's brief in App. No. 94-SC-288-MR, pp. 133-139). In his argument VIII.B on death as a deterrent, Haight acknowledged that this particular argument was not preserved for review on appeal (*Id.* at 135). The Kentucky Supreme Court considered the above arguments, except for the deterrent argument, in its opinion in  *Haight III* wherein the court held:

***130** Appellant contends that the Commonwealth coaxed the jury into sentencing him to death by arguing future dangerousness. Excerpts of the prosecutor's penalty phase summation which contain ample references to appellant's other criminal convictions have been provided. The Commonwealth responds that the arguments were based upon appellant's unique individual criminal history and that they established that he had not benefitted from previous incarceration.

Contrary to appellant's argument, we do not believe this amounted to use of a non-statutory aggravator. Appellant's extraordinary history of violent criminal conduct was properly placed before the jury.  *KRS 532.025(2)(a)*. Moreover, while the "prison is doing nothing" argument by the Commonwealth is of concern, it falls short of the argument condemned in  *Perdue v. Commonwealth, Ky.*, 916 S.W.2d 148 (1996), whereby the jury was exhorted to give the death penalty as the only way to prevent the defendant from killing again. The argument here is qualitatively different from the argument condemned in  *Ice v. Commonwealth, Ky.*, 667 S.W.2d 671, 676 (1984).

This court has long observed the principle that wide latitude is permitted during closing argument. In view of this principle and upon our further belief that any error which may have occurred in this regard was harmless, there are no grounds for reversal on this issue.

Appellant's unpreserved claim of improper argument designated "death as deterrent" does not rise to the level of palpable error. The view set forth herein sufficiently answer these contentions.

 *Haight III*, 938 S.W.2d at 252-53. The question now in light of the above holding of the Kentucky Supreme Court is whether such holding is clearly contrary to or an unreasonable application of established U.S. Supreme Court decisions that address prosecutorial misconduct in closing argument.

When a petitioner challenges the fairness of his trial based on allegedly improper comment by the prosecutor in closing argument, the Court must examine the challenged remarks within the context of the entire trial to determine whether such remarks were improper, and if so, were so extensive as to infect the trial with fundamental unfairness so that the resulting conviction constituted a denial of due process. *Irick v. Bell*, 565 F.3d 315, 324 (6th Cir. 2009), *cert. denied*, 559 U.S. 942, 130 S.Ct. 1504, 176 L.Ed.2d 118 (2010) (citing  *Slagle v. Bagley*, 457 F.3d 501, 515 (6th Cir. 2005)) (quoting  *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)). As *Irick* explains, the courts use a two-part test in such situations.  *Id.* First, the court determines whether the challenged conduct of the prosecutor was improper.  *Slagle*, 457 F.3d at 516.

If the court determines that the conduct indeed was improper, then the court considers four additional factors to determine whether the improper conduct was flagrant.  *Id.* These factors include: (1) whether the evidence against the defendant was strong; (2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; (3) whether the conduct or remarks were isolated or extensive; and (4) whether the remarks were made deliberately or accidentally.  *Slagle*, 457 F.3d at 516 (quoting  *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Even in those instances in which the prosecutor has made improper comments in violation of the Constitution, the harmless error standard

established in [Brecht v. Abrahamson](#), 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) must be applied to ask “whether the error had substantial and injurious effect or influence in determining the jury's verdict.” [Id.](#) at 637, 113 S.Ct. 1710. See, [West v. Bell](#), 550 F.3d 542, 562 (6th Cir. 2008), cert. denied, 559 U.S. 970, 130 S.Ct. 1687, 176 L.Ed.2d 180 (2010).

*131 Several additional points bear mention as the Court begins its review of the prosecutor's closing arguments in the guilt and penalty phases of the trial. First, the Sixth Circuit has recognized repeatedly that a prosecutor is granted a substantial degree of latitude in summation. [Byrd v. Collins](#), 209 F.3d 486, 532 (6th Cir. 2000), cert. denied, 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2001) (citing [United States v. Barker](#), 553 F.2d 1013, 1025 (6th Cir. 1977)). In fact, the degree of latitude accorded to prosecutors, while not unlimited in any sense, is sufficiently broad that the Sixth Circuit explained in [Wilson v. Mitchell](#), 250 F.3d 388, 398 (6th Cir. 2001) that “this court has been reluctant to grant habeas petitions based on improper prosecutorial statements in closing argument.” [Id.](#) To be entitled to relief Petitioner must demonstrate that the prosecutor's comments constituted more than simply trial error under state law. [Id.](#) (citing [Kincade v. Sparkman](#), 175 F.3d 444, 445-46 (6th Cir. 1999)).

Second, a prosecutor in his or her closing comments is fully entitled to attack the credibility of the defendant to the same extent as any other witness so long as the commentary is supported by reasonable inferences from the record. [Greer v. Mitchell](#), 264 F.3d 663, 683-84 (6th Cir. 2001), cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). A prosecutor, however, may not make statements in closing argument that are designed solely to arouse the passions of prejudice of the jury. [Lorraine v. Coyle](#), 291 F.3d 416, 445 (6th Cir. 2002), cert. denied, 538 U.S. 947, 123 S.Ct. 1621, 155 L.Ed.2d 489 (2003) (citing [Viareck v. United States](#), 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943)). A prosecutor is not allowed to intentionally misstate the evidence by bringing to the attention of the jury purported facts that are not in evidence and are unfairly prejudicial to the defendant. [Macies v. Makowski](#), 291 F.3d 447, 451-52

(6th Cir. 2002) (citing [United States v. Carter](#), 236 F.3d 777, 783 (6th Cir. 2001)).

Examination of the challenged remarks of the prosecutor in closing argument persuades the Court that none of the remarks now at issue were improper, nor would such remarks, if assumed to be improper, have infected Haight's trial with fundamental unfairness so that his resulting conviction and death sentence constituted a denial of due process. [Irica](#), 565 F.3d at 324. First, commentary on Haight's extensive criminal record, and its indication of his unwillingness to conform his conduct to the dictates of the law, was entirely in accord with both [KRS 532.025](#) and Kentucky case law. Haight's prior offenses offered by the Commonwealth during the penalty phase of the trial include repeated felony convictions for burglary and theft by unlawful taking, as well as wanton endangerment and the attempted murder of Trooper Yates (Appellant's brief on appeal in App. No. 94-SC-288-MR, App. 35-36).

Haight concedes that [KRS 532.025](#) permits the introduction of such prior convictions during the penalty phase and further that the term “prior” has been held to mean those convictions that are final at the time of sentencing. [Templeman](#), 785 S.W.2d at 260. Accordingly, the prosecutor's reference to Haight's prior convictions, including those committed after the murders of Omer and Vance, was not improper comment by the prosecutor, no more so that the inference that, based on such a stark criminal history, Haight could not be expected to become a law-abiding citizen at any time in the foreseeable future. Thus, the concept of “future dangerousness” was a legitimate inference to be drawn by the jury and argued by the prosecutor.

Moreover, even were such comments to be improper, Haight has not established a reasonable probability that the outcome of the proceedings would have varied in any significant respect. The proof of Haight's guilt, as noted by the Kentucky Supreme Court, was overwhelming. Haight did not deny that he shot both of the unarmed victims as they lay in the back seat of David Omer's station wagon. Each victim was shot repeatedly in the head and face. The personal property of the victims and the murder weapons were recovered from the stolen pickup truck abandoned by Haight during his flight from police. Haight had in his possession at the time of his arrest cash in an amount identical to the amount taken from Omer. Further, Haight told the jury from the witness stand

during the guilt phase of his trial that he wished he could do things differently or give his life for his crimes.

*132 Under these circumstances, none of the remarks of the prosecutor, even if assumed to be improper, could possibly have infected Haight's trial with such fundamental unfairness that the resulting conviction and sentence constituted a denial of due process. *See*, [Cristini v. McKee](#), 526 F.3d 888 (6th Cir. 2008) cert. denied, *Cristini v. Hofbauer*, 556 U.S. 1187, (129 S.Ct. 1991, 173 L.Ed.2d 1093, U.S. 2009)(Prosecutor's improper comments in closing argument regarding defendant's prior bad acts did not rise to the level of reversible prosecutorial misconduct, in prosecution for second-degree murder, given the strong evidence of defendant's guilt, so that their admission was at worst harmless error.). *See also*, [Woodall v. Commonwealth](#), 63 S.W.3d 104, 125 (Ky. 2001) (noting that the Kentucky Supreme Court has recently approved consideration by the jury of future dangerousness in [Hodge v. Commonwealth](#), 17 S.W.3d 824, 853 (Ky. 2000), cert. denied, 531 U.S. 1018, 121 S.Ct. 581, 148 L.Ed.2d 498 (2000)) (quoting [Simmons v. South Carolina](#), 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)) (approving the jury's consideration of future dangerousness during the penalty phase of a capital trial as legitimately bearing upon the jury's sentencing determination).

As for the prosecutor's comments upon the testimony of Dr. Brad Fisher, such comments were entirely proper. The prosecutor was entitled to draw the attention of the jury to any circumstance that might legitimately undermine the persuasive force of Fisher's expert opinion. The fact that the doctor's opinion was based in part on Haight's own potentially self-serving statements is a factor for the jury to consider. The same is true of the passage of time and its possible impact on the accuracy of Dr. Fisher's opinions. In no sense did the prosecutor unfairly denigrate this testimony so as to render the prosecutor's comments improper.

Finally, Haight's "death as a deterrent" claim of improper argument was admittedly not preserved for appellate review. The Kentucky Supreme Court specifically noted in its opinion that this claim was unpreserved and that it did not rise to the level of palpable error. Haight therefore procedurally defaulted this aspect of ground 35. He has not shown cause or prejudice for such default and could not do so in the case of the prejudice prong of the test for the reasons set forth above. Haight therefore is not entitled to habeas corpus relief

on ground 35 as the decision of the Kentucky Supreme Court in [Haight III](#) is neither contrary to nor an unreasonable application of any established decision of the U.S. Supreme Court as to those claims of prosecutorial misconduct that the Court considered on their merits.

Miscellaneous Issues

The final six issues raised by Haight in grounds 39, 41-45 of his petition fall within the category of miscellaneous issues.⁶³ Haight argues in ground 39 that Kentucky's death penalty statute, [KRS 532.075\(1\)](#), which requires the Supreme Court of Kentucky to determine whether a death sentence is excessive or disproportionate, is unconstitutional under the Eighth Amendment. In ground 41, Haight maintains that he received ineffective assistance of counsel on appeal due to the inadequate nature of the videotape record of the state court proceedings, which impeded his attorney's ability to make an accurate and comprehensive review of the record. Haight in ground 43 argues that he received ineffective assistance of counsel on appeal when his appellate attorneys failed to raise as an issue the refusal of the trial court to render a jury instruction on the charge of theft by unlawful taking, a lesser included offense to the charge of robbery in the first degree.

He next argues in related fashion in ground 44 that the evidence at trial required the trial court to instruct the jury on the offense of wanton murder, so that his trial counsel were ineffective when they failed to advise him that a conviction for wanton murder would be a defense to the possible imposition of the death penalty and further failed to request such a jury instruction at trial. Haight continues to challenge the effectiveness of his trial counsel in ground 45 by his claim that they failed to act as counsel guaranteed by the Sixth Amendment, thereby depriving him of a fair trial and a reliable verdict and sentence, contrary to the Sixth, Eighth and Fourteenth Amendments. Finally, in ground 42, Haight maintains that the various errors that occurred during his trial, when taken collectively, deprived him of a fair trial by an impartial jury in violation of the same constitutional amendments.

39. Unconstitutional Proportionality Review.

*133 In this argument, which Haight raises in two separate portions of his petition memorandum⁶⁴, he returns his focus

to  KRS 532.075(1), which provides in essence that when the death penalty is imposed for a capital offense in Kentucky, the Kentucky Supreme Court will review the state court record to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar capital cases considering the nature of the crime and the defendant.

 KRS 532.075(3)(c). Haight maintains that the problem with this statutory process of review is that the Kentucky Supreme Court does not actually compare cases in which the death penalty is imposed to “the penalty imposed in similar cases.” In other words, Haight maintains that the entire universe of the Court's consideration is encompassed only by those cases in which the death penalty actually was imposed rather than “similar cases” wherein the death penalty was not imposed. Further, to make matters worse in Haight's view, the Court limits its consideration to only those capital cases in which the death sentence has been affirmed on appeal.

Haight argues in this second half of his challenge to Kentucky's proportionality review that  KRS 532.075(3)(c) provides no specific rules to dictate the standards or guidelines for such a review and does not afford death-sentenced petitioners such as himself any notice or role in the proportionality review process. Haight also points out that the statute provides no alternatives if no factually similar capital case exists for the Court to compare a petitioner's case to when conducting a proportionality review. In fact, Haight maintains that this problem occurred in his own case where no factually similar case exists given the extraordinary circumstances of his abrogated plea agreement. Finally, Haight contends that the statute contains no requirement or procedure for fact finding as a part of such proportionality review, which exponentially increases the possibility of arbitrariness and unreliability.

As an example of the arbitrary nature of the statute, Haight observes that the Kentucky Supreme Court in  *Haight III*, 938 S.W.2d at 253 claimed that Haight had failed to preserve his right to a proportionality review; yet,  KRS 532.075 contains nothing in its language that would advise a condemned prisoner what he or she must do to preserve such a right. Haight concludes his argument by noting that both North Carolina and New Jersey have considered Kentucky's approach to proportionality review in death penalty cases, and both states have determined the Kentucky approach to be inadequate. See,  *State v. Young*, 312 N.C. 669, 325

S.E.2d 181 (N.C. 1985);  *State v. Loftin*, 157 N.J. 253, 724 A.2d 129 (N.J. 1999). Haight maintains that all capital cases, not merely those in which the death penalty is imposed and affirmed on appeal, should be included in the proportionality review just as the Virginia, Nevada and Washington state courts do. See,  *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352, 360-61 (Va. 1987);  *Harvey v. State*, 100 Nev. 340, 682 P.2d 1384, 1385 (Nev. 1984); *White v. State*, 81 A.2d 201, 212-15 (Md. 1984); *State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722, 740 (Wash. 1986).

Although the Kentucky Supreme Court concluded that Haight had failed to preserve this issue for review, the court did conduct a proportionality review in  *Haight III*, 938 S.W.2d at 253, as earlier noted. In its opinion, the Kentucky Supreme Court concluded that:

*134 Here, we have determined that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence of record clearly supports the jury's finding of statutory aggravating circumstances as enumerated in  KRS 532.025(2) and we have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

 *Id.* The court then continued in  *Haight III* to list, or to incorporate by reference, all of the death penalty cases it considered in arriving at this conclusion.  *Haight III*, 938 S.W.2d at 253-54.

Upon consideration, the Court concludes that nothing in the above-quoted language, or in the manner in which the Supreme Court of Kentucky arrived at its conclusion, runs afoul of any provision of the U.S. Constitution. In fact, Haight's constitutional challenge to Kentucky's proportionality review under  KRS 532.075 has been rejected repeatedly in the Sixth Circuit, most recently, in

Bowling v. Parker, 344 F.3d 487, 521-522 (6th Cir. 2003), *cert. denied*, 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004). The Sixth Circuit also rejected arguments similar to those now raised in  *McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996), *cert. denied*, *McQueen v. Parker*, 520 U.S. 1257, 117 S.Ct. 2422, 138 L.Ed.2d 185 (1997).⁶⁵

Further, the federal district courts in Kentucky also have routinely rejected Haight's 8th and 14th Amendment positions on the constitutional inadequacy of  KRS 532.075. *See*,  *Sanders v. White*, No. 03-455-ART, 2015 WL 711262 at *10 (E.D. Ky. Feb. 18, 2015); *Halverson v. Simpson*, No. 08-484-DLB, 2014 WL 5419373 at 76-79 (E.D. Ky. Oct. 22, 2014);  *Matthews v. Simpson*, 603 F.Supp.2d 960, 1087-88 (W.D. Ky. 2009), *aff'd in part, rev'd in part on other grounds*,  *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011), *rev'd by*  *Parker v. Matthews*, 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012);  *Woodall v. Simpson*, No. 5:06CVP216-R, 2009 WL 464939 at *51-53 (W.D. Ky. 2009), *aff'd*  685 F.3d 574 (6th Cir. 2012), *rev'd and remanded on other grounds*,  *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014);  *Slaughter v. Parker*, 187 F.Supp.2d 755, 818-820 (W.D. Ky. 2001), *affirmed in part and reversed in part*,  450 F.3d 224 (Ky. 2006), *cert. denied*, *Leonard v. Simpson*, 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007); *Bowling v. Parker*, 138 F.Supp.2d 821, 917 (E.D. Ky. 2001), *affirmed*, 344 F.3d 487 (6th Cir. 2003), *cert. denied*, *Bowling v. Haeberlin*, 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004).

All of the above-cited cases, both those of the District Court and the Sixth Circuit, have directly considered one or more aspects of Haight's current constitutional challenge to Kentucky's proportionality review requirement in death penalty cases under  KRS 532.075. All of the cited decisions reject these arguments in their entirety. The Court need not lengthen an already extensive opinion by restating the holdings of each case. Cumulatively, the decisions affirm the constitutionality of the approach taken by the Kentucky Supreme Court to proportionality review as being in accordance with the due process clause and the 8th Amendment. Indeed, several of the cited decisions openly question whether the due process clause even applies to

 KRS 532.075 in this respect. Because the Court has little more to add to the above discussion on this issue, the Court merely adopts the reasoning of the above opinions as its own and rejects Haight's ground 39 as a basis on which to grant habeas corpus relief. The opinion of the Kentucky Supreme Court in  *Haight III* is neither contrary to nor an unreasonable application of any clearly established precedent of the U.S. Supreme Court in this respect.

41. Ineffective Assistance Due to Videotape Record.

*135 Haight in ground 41 raises something of a unique claim.⁶⁶ He maintains that due to the inherent inadequacies of the videotape record of his trial, his appellate counsel were unable to render effective assistance on appeal. Haight claims that as a result of the marginally audible nature of the videotape record, “many crucial arguments at the bench and in open court were lost.” Consequently, Haight claims that his appellate counsel could not make an accurate and comprehensive review of the trial record and therefore the Supreme Court of Kentucky should have reversed his conviction and ordered new trial “where a written transcript of the entire proceedings could be perfected.” (DN 61, pp. 196-97).

Haight cites several decisions from two state courts outside Kentucky for the proposition that a “videotape record is the equivalent of an incomplete record on appeal.” (*Id.*). *See*,  *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (N.C. 1990); *State v. Moss*, 332 N.C. 65, 418 S.E.2d 213, 219 (N.C. 1992);  *Sudler v. State*, 611 A.2d 945 (Del. 1992). Citing to the language of  KRS 532.075(1) which directs the circuit court clerk to “transmit the entire record and a transcript to the Supreme Court” Haight argues that this language from the statute clearly dictates that a transcript, either handwritten or typewritten, be prepared and provided to the Kentucky Supreme Court as an essential tool to ensure that capital defendants who are condemned to death have an adequate opportunity to argue for their life on appeal. Haight claims that the failure to provide a written transcript of his trial to the Kentucky Supreme Court, when prior capital defendants in Kentucky were provided such transcripts, constitutes a violation of the equal protection clause of the Fourteenth Amendment, and also made review of his case unfair and arbitrary.

Haight raised a significantly abridged version of this argument as ground X.E of his brief on direct appeal to the Supreme Court of Kentucky. In his appellate brief, however, Haight made no arguments relating to the language of  [KRS 532.075](#) as a statutory basis on which to rest a constitutional obligation to provide Kentucky defendants with a written transcript of their trials. Instead, Haight argued only that his appellate counsel could not render effective assistance due to certain unidentified “marginally audible” portions of the videotape trial record.

Haight did not identify in his brief the issues on appeal that he was unable to fully develop, or did not develop at all, due to the alleged inadequacies of the videotape trial record. He also did not identify any substantial prejudice in the sense that the outcome of the proceedings would have been in any fashion affected had a written transcript been provided so that certain unidentified issues would be either more thoroughly addressed or addressed in the first instance. Thus, Haight raised only a Sixth Amendment claim of ineffective assistance of counsel related to the alleged inadequacies of the videotape trial proceedings.

Liberally construed as a claim of ineffective assistance of counsel, Haight's argument is materially deficient in all respects. He completely fails to discuss the deficient performance and prejudice prongs of the  [Strickland](#) test for ineffective assistance of counsel. In fact, only the caption of the argument makes any direct reference to ineffective assistance of counsel with a brief mention of appellate counsel following in the first paragraph of the argument. Otherwise, the remainder of Haight's argument rests entirely on a microscopic review of the statutory language of  [KRS 532.075\(1\)](#) and  (5). Because Haight did not make this statutory argument below, and because he may not return to state court now to do so, he is therefore procedurally barred from seeking relief on this aspect of his argument, absent a showing of cause and prejudice. Haight has not attempted such a showing and certainly no manifest injustice will result if the Court does not address this particular argument.

***136** Admittedly, various courts on occasion have expressed their frustration with the time spent in review of the official videotape record required in Kentucky cases. See,  [Foster v. Kassulke](#), 898 F.2d 1144, 1147-48 n.5 (6th Cir. 1990) (“This court has previously noted the problems associated with Kentucky's policy of videotaping trials.”) (citing  [Dorsey](#)

[v. Park](#), 872 F.2d 163, 164-65 (6th Cir.), cert. denied, 493 U.S. 831 (1989)); [Adams v. Simpson](#), 2009 WL 899477 at *8 n.7 (E.D. Ky. 2009) 2009 WL 899477 at *8 n.7 (E.D. Ky. 2009) (“The production of a video transcript, rather than a written transcript produced by a court reporter is Kentucky's usual practice.”); [Pottinger v. Warden, Northpoint Training Center](#), 716 F.Supp. 1005, 1008 (W.D. Ky. 1989), affirmed, 899 F.2d 1222 (6th Cir. 1990) (characterizing Kentucky's experiment with videotape recorded trials as being a “disastrous experiment” that has raised “acute difficulties ... to the courts [in] attempting to fulfill their function of judicial review.”). That being said, nowhere in the petition memorandum do we have any citations from Haight to a specific portion of the videotape recorded trial that he maintains is inaudible, nor do we have any identification of particular arguments that Haight claims were adversely affected by the use of a videotape recorded record of his trial.

As the warden points out, Haight made no effort whatsoever in the state court proceedings to make use of  [Kentucky Civil Rule 75.13](#) that provides a procedure for the use of a narrative statement in lieu of electronic recordings when such recordings are unusable. See [Harper v. Commonwealth](#), 371 S.W.3d 763, 768-69 (Ky. App. 2011) (Under  [Rule 75.13](#) a defendant who maintains that the trial record is inadequate has a duty to “participate in the actual reconstruction of the record.”) (citing  [Chestnut v. Commonwealth](#), 250 S.W.3d 288, 303-04 (Ky. 2008)). Because Haight cites the Court to no clearly established precedent of the U.S. Supreme Court that is violated by the use of a videotape record of his trial on appeal, we cannot conclude that the decision of the Kentucky Supreme Court in  [Haight III](#) is in any fashion an unreasonable application of, or otherwise contrary to, any decision of the U.S. Supreme Court.

43. Ineffective Assistance of Counsel on Appeal.

Ground 43 of Haight's petition raises a claim of ineffective assistance of appellate counsel on direct appeal.⁶⁷ Specifically, Haight maintains that his appellate counsel failed to challenge on appeal the refusal of the trial court to give a jury instruction on the lesser included offense of theft during the guilt phase of Haight's trial. Haight's trial counsel requested a theft instruction based on Haight's testimony that he did not intend to rob either victim nor kill either victim, although he was in possession of both victims' personal property, which he conceded at trial he must have taken after he moved the car containing their bodies, before he fled in the

stolen pickup truck. This testimony, according to Haight, was evidence sufficient to warrant just such a theft instruction, and certainly was sufficient to raise the issue for appellate review of whether the trial court erred in declining to instruct on theft.

Despite the preserved issue and its importance given that a conviction of theft, rather than robbery, would have negated one of the statutory aggravating circumstances, Haight's appellate counsel failed to raise the issue on direct appeal before the Supreme Court of Kentucky. This failure occurred despite Haight's appellate counsel raising several issues otherwise related to the jury instructions at both phases of trial in their brief on appeal in Case No. 94-SC-288, pp. 43-73. Haight did not raise this particular claim of error in his RCr 11.42 motion to vacate prior to the decision of the trial court on September 9, 1998 or prior to the April 26, 2001 decision of the Kentucky Supreme Court in  *Haight IV* that affirmed the denial of post-conviction relief.

*137 Not until November 29, 2001 did Haight, in his supplement to his post-conviction motion to vacate pursuant to RCr 11.42, belatedly attempt to raise this particular claim of ineffective assistance of counsel on post-conviction appeal. The state trial court at the post-conviction status hearing held on Dec. 12, 2001, however, advised the parties that claims of ineffective assistance of appellate counsel cannot be raised in the circuit court in Kentucky (V.T. 13, 12/12/01, 13:33:44). Counsel for all parties agreed with the trial court on this point (V.T. 13, 12/12/01, 13:34:30) and Haight then withdrew his ineffective assistance of appellate claim in the circuit court.

Haight subsequently attempted to put the claim before the Kentucky Supreme Court on post-conviction appeal to address the concern of whether Kentucky provides a forum in which claims of ineffective assistance of appellate counsel may be heard. See,  *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001) ("Ineffective assistance of appellate counsel is not a cognizable issue in [Kentucky].") *rev'd* by  *Hollon v Commonwealth*, 334 S.W.3d 431, 434 (Ky. 2010) ("Today we conclude that our courts should address such claims and that generally the proper avenue for asserting them will be the one Hollon chose: a motion pursuant to RCr 11.42 to vacate or set aside the underlying judgment."). The Kentucky Supreme Court did not address the merits of Haight's claim of ineffective assistance of appellate counsel, instead making only a broad reference to those issues that either were raised in the RCr 11.42 motion and on direct appeal, or should have been raised in the RCr 11.42 motion

or on direct appeal. *Haight v. Commonwealth*, Case No. 2005-SC-344-MR, 2007 WL 2404494 (Ky. 2007) (unpublished disposition).

Haight now insists that the Kentucky courts at the time of his post-conviction proceedings provided absolutely no forum for a criminal defendant to raise a claim of ineffective assistance of appellate counsel. Yet, in this instance, the claim of ineffective assistance of appellate counsel as it related to the trial court's failure to render an instruction on theft was a vital issue in Haight's view. Had he been convicted of theft rather than robbery, one of the two statutory aggravating circumstances (robbery and intentional murder) would have been removed. Haight claims that he therefore could possibly have been saved from the death penalty, if only the jury had seized the opportunity to convict him of theft rather than robbery. See, KRS 505.020(2)(c). See also, *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002) (theft and attempted theft are lesser included offenses of robbery);  *Varney v. Commonwealth*, 690 S.W.2d 758, 759 (Ky. 1985). Haight maintains that given his testimony that he did not intend to rob either victim, the jury should have been instructed on the lesser included offense of theft as only the jury could determine Haight's credibility on this question. (V.T. 8, 1/28/94, 12:01:51, 14:10:46). See, *Medley v. Commonwealth*, 704 S.W.2d 190, 191 (Ky. 1985);  *Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977).

Haight then continues to argue that he was entitled to effective assistance of counsel on direct appeal,  *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), as well as an adequate and effective appellate review of the issues under the due process and equal protection clauses.  *Smith v. Robbins*, 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (quoting  *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S.Ct. 585, 100 L.Ed. 891 (1956)). Where a significant and obvious issue relating to the tendered theft instruction was not raised on direct appeal, and a reasonable probability existed that, had the issue been included, the result of the appeal would have been different, then Haight could have successfully established his claim of ineffective assistance of appellate counsel under  *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See,   *Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005);  *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999).

***138** The warden maintains in response to the above arguments that the federal courts may not reach their substance because Haight procedurally defaulted by his failure to present his claim in a timely fashion to the Kentucky courts. The District Court in this case previously had occasion to review the warden's argument in its order that affirmed the decision of the Magistrate Judge denying discovery (DN 85). In its opinion, the District Court wrote as follows:

Haight argues that his counsel on direct appeal in state court acted ineffectively by failing to challenge the trial court's refusal to instruct the jury on theft by unlawful taking as a lesser included offense of robbery. Respondent again argues that this claim is procedurally defaulted, and here he has a point. Petitioner failed to present this claim to the Kentucky courts in his initial state petition under [Kentucky Rule of Criminal Procedure 11.42](#), and only brought it to the attention of the Kentucky Supreme Court when he asked it to revisit a decision denying relief. (Petitioner's Memorandum, p. 202, citing brief for appellant in *Haight V*, 2007 WL 2404494). The [Kentucky Supreme] Court disposed of the instruction issue as one of several that "should have been raised in the [\[RCR\] 11.42](#) motion on direct appeal" and offered no alternative ground for its judgment. *Haight V*, 2007 WL 2404494 at ***3**. [Rule 11.42](#) provides that "[f]inal disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding," so the implication of the court's statement is clearly that those claims were procedurally defaulted. If petitioner is unable to excuse this default (by showing either "cause and prejudice" or a "fundamental miscarriage of justice," [Coleman](#), 501 U.S. at 750, 111 S.Ct. 2546), the claim necessarily fails and therefore can be no good cause for discovery.

....

The Supreme Court has advised us that "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." [Coleman](#), 501 U.S. at 753, 111 S.Ct. 2546 (quoting [Murray v. Carrier](#), 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). Haight has not provided any such cause. The best he can do is to say that Kentucky did not (and does not) recognize the constitutional claim he seeks to assert, but the Supreme Court has maintained for almost three decades that "[i]f a defendant perceives a constitutional claim and

believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." [Engle v. Issac](#), 456 U.S. 107, 130, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Accordingly, "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" [Bousley v. United States](#), 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1988) ... Haight was obligated to raise his claim in his [Rule 11.42](#) petition and argued for overturning [Lewis](#), in order to give the state court an opportunity to reconsider. See, [Engle](#), 456 U.S. at 130, 102 S.Ct. 1558. *Lewis*'s existence in the case books does not constitute cause for failing to raise this issue in the appropriate state court. Haight has provided no other explanation for his default and no reason to think that the requested discovery would supply one. Because he therefore cannot establish "cause," discovery could not uncover any material evidence, and we are without discretion to grant it.

***139** *Haight v. Parker*, Case No. 3:02CV-206 (DN 85, pp. 10-13 (footnotes omitted)).

The reasoning of the District Court is binding in this case on the Magistrate Judge. The District Court has determined that Haight procedurally defaulted ground 43 when he failed to continue to pursue his claim of ineffective assistance of appellate counsel. Accordingly, unless and until this issue is reexamined either by the District Court or the Sixth Circuit, and a contrary result determined, Haight may not obtain relief on this ground as the federal courts are procedurally barred from reaching the merits of this claim.

The subsequent decision of the Kentucky Supreme Court in [Hollon](#), which set aside [Hicks](#) to recognize such claims of ineffective assistance of appellate counsel as being appropriately, pursued by way of [RCr. 11.42](#), offers no comfort to Haight. [Hollon](#) was rendered on November 18, 2010, more than nine years after Haight's initial post-conviction appeal became final in [Haight IV](#) in 2001 and three years after his second post-conviction appeal was resolved in *Haight V* in 2007. As noted at the outset of this opinion, [Hollon](#) specifically provides that its holding is prospective only. [Hollon](#) 334 S.W.3d at 442.

Further neither [Martinez](#) nor [Trevino](#) offers Haight any consolation as these decisions do not apply to claims of ineffective assistance involving appellate counsel. Therefore, Haight cannot show cause and prejudice for the procedural default of this particular claim of ineffective assistance of appellate counsel by pointing to any allegedly deficient performance of his post-conviction counsel in the [RCr. 11.42](#) proceeding. Accordingly, his claim of ineffective assistance of appellate counsel based on the failure of his post-conviction counsel to adequately raise and pursue this particular claim cannot be considered on its merits by the federal courts absent reconsideration of the procedural bar.

44. Ineffective Assistance and the Wanton Murder Instruction.

Haight continues to raise claims of ineffective assistance of counsel, both at trial and on appeal, in ground 44 of his petition.⁶⁸ In this particular instance, Haight maintains that the evidence at trial clearly justified an instruction on wanton murder under [KRS 507.020](#), given the commentary to the statute which gives as an example of a wanton murder shooting into an occupied automobile without an intent to kill. Haight insists that his own testimony at trial that he had no intent to kill either victim, both of whom were shot repeatedly in the head and face, justified a wanton murder instruction. Nevertheless, Haight's trial counsel failed to discuss with him, according to Haight, that a conviction for wanton murder might result in Haight avoiding a death sentence given that one of the aggravating circumstance that applied under [KRS 532.025\(6\)](#) was multiple *intentional* murders.

*140 Haight now insists that his trial counsel had an ethical obligation to inform him of the implications of a conviction for wanton murder and to request such an instruction as a lesser included offense given that some evidence existed to support it. See, [Commonwealth v. Collins](#), 821 S.W.2d 488, 491 (Ky. 1991); [Ward v. Commonwealth](#), 695 S.W.2d 404, 406 (Ky. 1985). Haight points out that in [Smith v. Commonwealth](#), 737 S.W.2d 683, 688 (Ky. 1987), the Supreme Court of Kentucky upheld the rendition of a wanton murder conviction for a defendant who admitted to police that he twice shot the victim as the victim was attempting to exit his truck. [Id.](#)

Haight reasons that if such circumstances in [Smith](#) justified an instruction and conviction for wanton murder, then certainly he would have been entitled to a wanton murder instruction in his own trial if his counsel had only had the presence of mind to discuss the matter with him and request this critical instruction. A conviction for wanton murder, again in Haight's view, would have rendered him ineligible for the death penalty under the second of the two aggravating circumstances. Haight also maintains that his appellate counsel were likewise ineffective for their failure to pursue a claim of ineffective assistance of trial counsel on this particular ground.

Once again, we cannot reach the merits of these arguments. The District Court has previously decided this matter. In the same discovery order mentioned above, the District Court considered whether Haight had preserved the merits of ground 44 for habeas corpus review. The District Court reached the same conclusion that it did with regard to ground 43, Haight's claim of ineffective assistance of appellate counsel for failure to raise the theft instructional issue on appeal.

In the words of the District Court:

Haight next complains that the trial court should have instructed an issue on wanton murder as an alternative to intentional murder. He argues that both trial and appellate counsel were deficient in handling this question. Specifically, he says that his trial attorney should have requested this instruction and that his appellate attorney should have argued both that the instruction should have been included and that his trial attorney was ineffective for failing to ask for it.

All of these claims have been procedurally defaulted. The underlying instruction claim was lost after not being raised at trial. The ineffective assistance of trial counsel claim was lost after not being raised on direct appeal. And the ineffective assistance of appellate counsel claim was lost after not being raised in the [Rule 11.42](#) petition. See, [Haight V](#), 2007 WL 2404494 at *3 (holding that his complaint regarding the wanton murder claim “should have been raised in the [\[RCr\] 11.42](#) motion or on direct appeal” and was therefore procedurally defaulted.). Haight makes no serious effort to show cause and prejudice for any of these defaults, let alone all of them. He cannot obtain relief and therefore is not entitled to discovery.

Haight v. Parker, 3:02CV-206S (DN 85, p. 13 (footnotes omitted)).

Because the District Court has determined not only that Haight procedurally defaulted ground 44 of his petition in multiple respects, but also that he has failed to establish cause and prejudice for any of such defaults, this Court may not reach the merits of ground 44 as an adequate and independent state ground precludes our review for the very same reason that prevented the Court from addressing the merits of Haight's ground 43 immediately above.

45. Failure to Act as Counsel.

*141 Haight in ground 45 embarks on a broad ranging challenge to the effective assistance of his trial counsel, counsel on appeal and post-conviction counsel.⁶⁹ Haight appears to argue that virtually every attorney who represented him at any stage of the lengthy state court proceedings did not act as counsel guaranteed by the Sixth Amendment thereby depriving Haight of a fair trial, reliable verdict and sentence. His memorandum contains a lengthy recitation of counsel's many supposed failures: however, the crux of the matter centers upon an alleged conflict of interest involving the status of Haight's attorneys at trial, on direct appeal and the initial post-conviction proceedings, all of whom were employed by the Kentucky Department of Public Advocacy (DPA). Haight appears to claim that an actual conflict of interest existed, particularly as to his post-conviction counsel, Randall Wheeler and Susan Martin, Assistant Public Advocates.

Haight protests that during the entire time that Wheeler and Martin labored on his post-conviction motion to vacate pursuant to RCR 11.42, they were employed in the Frankfort office of the DPA. At that time, Haight's prior trial counsel, Erwin "Ernie" Lewis, had become the public advocate for Kentucky and therefore the ultimate supervisor of both Wheeler and Martin. According to Haight, Wheeler and Martin expressed their concern about their assignment to Haight's RCr 11.42 post-conviction motion due to the involvement of their *de facto* employer, Mr. Lewis. They were particularly concerned because the nature of the ineffective assistance of counsel claims raised by the RCr 11.42 motion would necessarily call into question the competence of their boss.

These concerns, according to Haight, were expressed to the two attorneys' immediate supervisor, Rebecca Diloreto, who

brought their concerns to the attention of Lewis. Diloreto thereafter advised Wheeler and Martin that they would remain assigned to Haight's post-conviction case per the decision of Lewis himself. Haight points out that both Wheeler and Martin were subject to evaluation and discipline by Lewis at the time they were proceeding on his post-conviction case.

Additionally, Haight brings up another matter involving a separate DPA attorney, Margaret Case, who was employed at the DPA throughout the entire proceedings. Ms. Case apparently at one time was romantically involved with the victim, David Omer, prior to his murder. Following Omer's death, attorney Case expressed her concerns that the DPA should not be representing Haight at trial given the nature of her prior relationship with the victim. Subsequently, Case represented the surviving family members of both victims in a federal civil suit, *John C. Vance, et al. v. George Wilson, et al.*, Action No. 88-CV-233, brought in the Eastern District of Kentucky. These facts, along with the fact that Case also was the direct DPA supervisor for one of the three attorneys who represented Haight on direct appeal, Bobby Simpson, led attorneys Wheeler and Martin to conclude that their involvement in Haight's post-conviction motion to vacate was inappropriate. Both attorneys, according to Haight, felt uneasy discussing his case with others in the DPA office, particularly when in close proximity to Case.

These unusual circumstances cause Haight to conclude that his post-conviction attorneys, Wheeler and Martin, both had an actual conflict of interest at the time that they represented him during the state post-conviction proceedings on Haight's RCr 11.42 motion. Haight cites to a number of state court decisions that hold similar circumstances involving post-conviction representation by the same public defender's office that acted as trial attorney to be improper.  *Hill v. State*, 263 Ark. 478, 566 S.W.2d 127 (Ark. 1978);  *Adams v. State*, 380 So.2d 421 (Fla. 1980);  *Commonwealth v. Glasco*, 481 Pa. 490, 393 A.2d 11 (Pa. 1978); *People v. Williams*, 55 A.D.2d 923, 390 N.Y.S.2d 439 (N.Y. App. Div. 1977).

*142 Haight also cites *Milsap v. Commonwealth*, 662 S.W.2d 488, 490 (Ky. App. 1984), wherein the Kentucky Court of Appeals held that an inquiry into potential conflicts of interest should be made on the record when post-conviction counsel and trial counsel for the defendant are public defenders from the same office. No such inquiry was made. Haight concedes that neither Wheeler nor Martin, Lewis nor Case, ever alerted the circuit court in which his RCr 11.42

motion remained pending for nearly a year beginning in October of 1997 to this alleged conflict of interest. In fact the asserted conflict of interest was not raised until Haight filed his amendment and supplement to the motion to vacate in November of 2001 some four years later.

Haight now insists that these circumstances violated his Sixth Amendment guarantee of conflict-free counsel under  *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) and  *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), wherein the U.S. Supreme Court acknowledged the responsibility of defense counsel to bring such a conflict to the attention of the court for a prompt inquiry.

Haight acknowledges in his petition that the federal Constitution does not guarantee the right to counsel for collateral attack nor the accompanying right to effective assistance of counsel at post-conviction proceedings.  *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). He also recognizes that the recent  *Martinez* and  *Trevino* decisions did not establish such a constitutional right, as opposed to an equitable one to show cause and prejudice based on the ineffective assistance of post-conviction counsel in order to salvage an otherwise defaulted substantial claim of ineffective assistance of trial counsel. See  *Martinez v. Ryan*, 132 S.Ct. at 1320;  *Trevino v. Thaler*, 133 S.Ct. at 1918-1919.

Nevertheless, Haight points to state judicial authority announced in  *Moore v. Commonwealth*, 199 S.W.3d 132, 137-39 (Ky. 2006), wherein the Supreme Court of Kentucky recognized that an RCr 11.42 movant has a statutory right to an appeal as well as a statutory right to counsel. Consequently, in  *Moore*, the court found that the post-conviction movant was entitled as a matter of state law to effective assistance of counsel. See also, *Coles v. Commonwealth*, 386 S.W.2d 465, 466 (Ky. 1965) (recognizing that effective assistance of counsel at the RCr 11.42 stage in circuit court is an essential part of a full and fair opportunity to litigate).

Haight concludes that given his indigency he was forced to rely upon the services of the DPA for his representation throughout all stages of the state prosecution. Consequently, unlike an individual with sufficient financial means, Haight was denied his equal protection rights to effective assistance

of conflict-free counsel. Appointment of conflicted DPA attorneys to represent him in his post-conviction proceedings in state court, in Haight's view, was not only a violation of equal protection, but contrary to fundamental principles of due process as well. See, *Evitts v. Lucey*, 49 U.S. 387, 401 (1985).

The warden in his response argues that all of the above arguments are entirely new to these proceedings. Never before had Haight argued throughout the course of the lengthy state court litigation that his DPA attorneys labored under an actual conflict of interest. Accordingly, the warden insists that ground 45 is procedurally barred in its entirety. The warden additionally points out that Haight failed at any time during the post-conviction proceedings to bring the alleged conflict to the attention of any of the courts before which he was proceeding. His own appellate counsel, according to the warden, could have raised the issue during direct appeal if any genuine doubts existed as to the independence of the three attorneys who represented Haight's interests on direct appeal of his conviction.

***143** The warden adds that while Haight now claims the existence of an actual conflict of interest, the record does not at any point indicate that any complete lack or failure of communication existed, or that irreconcilable conflict prevented Haight's counsel from pursuing any specific argument or issue at any time during the many years that DPA attorneys represented Haight. The warden concludes that Haight should not now be afforded an unearned opportunity to create a record in this Court given his complete failure to develop the factual basis of his claims in the state court proceedings contrary to the requirements of  § 2254(e)(2).

Once again, the District Court has addressed the merits of Haight's arguments in its prior memorandum opinion of April 13, 2010 (DN 85). In rejecting Haight's request for discovery concerning the alleged conflict of interest, the District Court held as follows:

Haight claims that his counsel during state post-conviction proceedings were ethically disqualified from representing him. The magistrate, however, correctly concluded that this is a state-law issue with which federal habeas corpus is unconcerned. The Constitution confers no right to any counsel whatsoever in state post-conviction proceedings.

 *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546;  *Murray v. Giarratino*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (applying this rule to capital cases). It follows

that there is no constitutional right to unconflicted counsel in such proceedings. Furthermore, whether counsel was disqualified is entirely a question of state law. This is simply not a ground for finding that Haight is “in custody in violation of the Constitution or laws or treaties of the United States.”  28 U.S.C. § 2254(a). Consequently, petitioner cannot show Goode cause for discovery.

Haight v. Parker, 3:02CV-206 (DN 85, p. 14) (footnotes omitted). In light of this decision of the District Court, Haight may not obtain relief upon ground 45. See  *Moore v. Mitchell*, 708 F.3d 760, 776-778 (6th Cir.) (habeas petitioner's undisclosed claim of an actual conflict of interest that was not raised on direct appeal or in his state post-conviction petition was procedurally defaulted, where no state remedies remained available and the petitioner could not show cause or prejudice based on ineffective assistance of counsel as he did not show how the alleged conflict affected counsel's performance), *cert. denied*, *Moore v. Robinson*, — U.S. —, 134 S.Ct. 693, 187 L.Ed.2d 559 (2013).

42. Cumulative Error.

Haight in his final ground for relief argues that the cumulative effect of the errors discussed above denied him due process of law so as to entitle him to relief.⁷⁰ Haight insists that these errors in the aggregate require reversal in that they undermine any reliability in his conviction and sentence. He maintains that otherwise harmless errors involving issues of ineffective assistance of counsel, when viewed in their entirety, may be sufficiently substantial to meet the  *Strickland* standard. See,  *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1994); *Ewing v. Williams*, 596 F.2d 391, 397 (9th Cir. 1979).

The warden responds briefly that cumulative error may not be the basis for habeas corpus relief in the Sixth Circuit given that the U.S. Supreme Court has not set forth any precedent that would establish such relief. Therefore, the decision of the state courts cannot be contrary to, nor an unreasonable application of, nonexistent precedent of the Supreme Court.

The warden cites  *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) and  *Baze v. Parker*, 371 F.3d 310, 330 (6th Cir. 2004) as support for this view.

***144** The warden is correct in this respect. The Sixth Circuit has repeatedly held that cumulative error claims are not cognizable in the setting of habeas corpus because the

Supreme Court has yet to address the issue. See,  *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) (citing *Moore v. Parker*, 25 F.3d 250, 256 (6th Cir. 2005);  *Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006);  *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002), *as amended by* 307 F.3d 459 (6th Cir. 2002), *cert. denied*, 538 U.S. 947, 123 S.Ct. 1621, 155 L.Ed.2d 489 (2003); *Anderson v. Bauman*, Case No. 2:09-cv-91, 2011 WL 4954077 at *16 (W.D. Mich. July 25, 2011); *Otte v. Houk*, Case No. 1:06CV-1698, 2008 WL 408525 at *50 (N.D. Ohio, Feb. 12, 2008)).

Further, even if the Court accepts the proposition that claims of ineffective assistance of counsel may be cumulated to determine the possible existence of prejudice under the  *Strickland* test, Haight's argument must still fail because he cannot demonstrate that any, let alone all, of his trial or appellate counsel's alleged deficiencies in any fashion prejudiced him in the outcome of the state court proceedings, given the overwhelming nature of the evidence of his guilt. See, *Stalnaker v. Bobby*, 589 F.Supp.2d 905, 915 n. 8 (N.D. Ohio 2008). See also, *Cross v. Stovall*, 238 Fed.Appx. 32, 41 (6th Cir. 2007) (same), *cert denied*, 552 U.S. 981, 128 S.Ct. 454, 169 L.Ed.2d 317 (2007).

While Haight insists that the evidence offered against him at trial was largely circumstantial, that circumstantial evidence included: his bloody hand prints on the steering wheel of Omer's automobile; the discovery of both stolen murder weapons in the truck stolen by him and abandoned during the chase that immediately followed the shootings; the discovery of the victims' personal possessions in the same truck and cash on his person at the time of his arrest equal in amount to that taken from victim Omer; as well as, Haight's own acknowledgement that he repeatedly fired the same handguns into Omer's automobile, albeit supposedly without the intent to bring about the death of either victim, whom he shot in the head and face. The Supreme Court of Kentucky reasonably characterized the above incriminating evidence as being “overwhelming” and the Court cannot disagree.⁷¹

Certificate of Appealability

The final question is whether Petitioner is entitled to a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(1)(B) on any or all of the 45 grounds raised in his petition. A state prisoner who seeks to take an appeal from the

dismissal of a habeas corpus petition must satisfy the COA requirements of 28 U.S.C. § 2253, which are jurisdictional in nature. *Gonzalez v. Thaler*, 565 U.S. 134, 132 S.Ct. 641, 647, 181 L.Ed.2d 619 (2012); *Hill v. Mitchell*, 400 F.3d 308, 329 (6th Cir. 2005). A COA will be issued only if the applicant has made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). *See gen., Meddellin v. Dretke*, 544 U.S. 660, 666, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005) (“A certificate of appealability may be granted only where there is “a substantial showing of the denial of a constitutional right.”); *Ajan v. United States*, 731 F.3d 629, 630 (6th Cir. 2013); *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010)(same).

***145** To do so, the prisoner must establish that reasonable jurists would find it debatable whether the District Court’s assessment of the constitutional claims at issue was wrong, or could conclude that the constitutional issues raised are adequate to deserve further review. *Johnson*, 605 F.3d at 339 (“an applicant must show that reasonable jurists could debate that the petition could have been resolved differently or that the claims raised deserved further review.”)(citing *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)); *Webb v. Mitchell*, 586 F.3d 383, 401 (6th Cir. 2009).

In the cases in which the issue at hand is resolved based upon a procedural ruling, without consideration of the merits of the constitutional claim, the question under the statute is whether reasonable jurists could find it debatable that the District Court was correct in its procedural ruling *and*, if so, that the petitioner stated a valid underlying constitutional claim. *See* *Gonzalez*, 132 S.Ct. at 647; *Porterfield v. Bell*, 258 F.3d 484, 485-86 (6th Cir. 2001). Review of a prisoner’s habeas petition on appeal is limited to those issues specified in the certificate of appealability. *Harris v. Haeberlin*, 526 F.3d 903, 908 n.1 (6th Cir. 2008); *Powell v. Collins*, 332 F.3d 376, 398 (6th Cir. 2003).

The Court is required to make an individual assessment of the issues and to indicate which specific issue or issues satisfy or do not satisfy the standard of § 2253(c). *See* *Hill*, 400 F.3d at 329; *Frazier v. Huffman*, 343 F.3d 780, 788-89 (6th Cir. 2003) (“It was therefore error for the district court to issue a blanket certificate of appealability without any analysis.”);

Stanford v. Parker, 266 F.3d 442, 450-51 (6th Cir. 2001), *cert. denied*, 537 U.S. 831, 123 S.Ct. 136, 154 L.Ed.2d 47 (2002)(same). *See also* *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (discussing 28 U.S.C. § 2253(c)). With the above principles in mind we begin our consideration of the grounds addressed in Haight’s petition and motion for summary judgment with our focus falling on those claims that do not satisfy the more liberal standard of § 2253(c).

The Court applies the above principles with an eye to determine first those particular grounds that clearly do not deserve further review because reasonable jurists could not debate that such grounds establish a substantial showing of the denial of a constitutional right. *Meddelline*, 544 U.S. at 666, 125 S.Ct. 2088; *Ajan*, 731 F.3d at 630. The Court proceeds in this respect to focus first on those grounds that in its own view are least likely to satisfy the standard of § 2253(c)(2). In other words, those claims that fail to raise a federal constitutional issue, or that raise such an issue when the U.S. Supreme Court has resolved it so clearly against the petitioner that the adverse resolution could not be disputed by reasonable jurists. These two examples represent the type of claims that clearly fall outside the bounds of the statute and the standard it established.

The first such category of claims includes grounds 7, 10, 11 and 12 of Haight’s petition, the state post-conviction grounds. Ground 7 contains Haight’s claim that he was denied a full and fair post-conviction evidentiary hearing. Ground 10 is Haight’s argument that he was denied due process when the trial court during the state post-conviction proceedings declined to permit him to amend his motion to vacate. Ground 11 contains the related argument that the decision of the trial court to deny his motion for expert funding to pursue claims of ineffective assistance in state post-conviction proceedings likewise denied him due process. Haight makes essentially the same argument in ground 12, wherein he asserts a denial of due process in the state post-conviction proceedings when his request for discovery was denied.

***146** The Court addressed all of the above grounds and their merits on pp. 227-231 of the present report and recommendation. The Court concluded upon such review that none of these four grounds raises a cognizable federal constitutional issue. As earlier explained, the *Kirby* Rule of *Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986),

a rule widely applied in the Sixth Circuit, establishes that a petition for habeas corpus is “not a proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings.”  *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). Haight offers the Court no opposing federal authority that would cause the Court to question the  *Kirby* Rule. The matter quite frankly is beyond legitimate dispute at this point, a fact that Haight expressly recognizes in his reply in support of his petition wherein he acknowledges “that no court has yet held that a capital petitioner has a constitutional right to post-conviction proceedings.” (DN 142, p. 72). Accordingly, the Court concludes that Haight is not entitled to a certificate of appealability on grounds 7, 10, 11 and 12. ⁷²

The next ground that the Court concludes may not be pursued on appeal, as reasonable jurists could not debate that Haight has not substantially shown the denial of a constitutional right, is ground 41. This ground contains a unique claim of ineffective assistance of counsel based on the failure of appellate counsel to provide an accurate and comprehensive trial record for review upon appeal. The claim is based solely on the alleged inadequacy of the videotape record of Haight's trial. The argument is considered at pp. 276-279 of the current report and recommendation. No clearly established case law of the U.S. Supreme Court is cited by Haight to support this claim. Haight also fails to provide the Court with any specific examples of issues on appeal adversely impacted by a supposedly inaudible, or otherwise deficient, videotape trial record. Because Haight's ground 41 focused entirely upon a state statute,  *KRS 532.075(1)* and state law from jurisdictions other than Kentucky, the claim fails to meet the standard of § 2253(c)(2), given that reasonable jurists could not debate the failure of Haight to show the denial of a constitutional right.

Haight's claim of cumulative error in ground 42 also fails to satisfy the requirements of § 2253(c)(2). This claim is considered at pp. 292-294 of the Magistrate Judge's report and recommendation. Haight cites in his reply a number of Sixth Circuit cases that he contends recognize the principle of cumulative error (DN 142, p. 90). *See*,  *United States v. Blackwell*, 459 F.3d 739, 770 (6th Cir. 2006);  *Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006); *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002). What Haight does not do, however, either in his petition memorandum or his reply, is to cite a clearly established precedent of the U.S.

Supreme Court that recognizes cumulative error as a valid  § 2254 claim. Indeed, one of the Sixth Circuit decisions relied on by Haight recognizes that “the Supreme Court has not held that constitutional claims that would not individually support habeas relief may accumulated in order to support relief.” *Scott*, 302 F.3d at 607. The Court in its report and recommendation has cited a number of Sixth Circuit decisions that, like *Scott*, plainly recognized the absence of such clearly established precedent. To this extent, Haight has failed to raise a claim that involves a substantial showing of the denial of a constitutional right in ground 42. He therefore is not entitled to a certificate of appealability on this ground.

***147** The Court turns next to that category of claims that involve death penalty issues, grounds 36, 37, 38, 39 and 40. The Magistrate Judge's discussion of these grounds is found at pp. 211-226 of his report and recommendation. Grounds 36 and 38 involve Haight's arguments that the trial judge predetermined his sentence and adopted the recommendation of the jury without fulfilling his statutory obligation under  *KRS 532.075(1)* to perform a separate and independent sentencing hearing in violation of the Eighth and Fourteenth Amendments. Ground 37 is Haight's claim that Kentucky's death penalty statute scheme as contained in  *KRS 532.025* fails to provide a meaningful standard to determine when mitigation exists in violation of  *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Ground 39 challenges the proportionality review process in Kentucky as being unconstitutional in violation of procedural due process. Ground 40 is Haight's claim that death by electrocution is cruel and unusual punishment. None of the above grounds in the view of the Magistrate Judge meets the standard of § 2253(c)(2).

Ground 40, that electrocution is cruel and unusual punishment under  *KRS 431.220*, no longer raises a substantial constitutional claim given the amendment of the statute in 1998, and the decisions of  *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Lethal injection under  *KRS 431.220* is constitutional under the Eighth Amendment) and *Stewart v. LaGrande*, 526 U.S. 113, 119 (1999) (rejecting the constitutional challenge of an Arizona inmate to execution by lethal gas where state law permitted the inmate to select either gas or lethal injection). Haight offers no contravailing authority of the U.S. Supreme Court that would put the matter at issue, and in his reply merely

reiterates the arguments of his petition memorandum (DN 142, p. 71). Because Haight need not die by electrocution, and has the option to choose lethal injection under the current version of the statute, his arguments in ground 40 fail to make a substantial showing of the denial of a constitutional right.

Haight's grounds 36 and 38, both of which deal with the adequacy of the state post-conviction sentencing proceedings under [KRS 532.075\(1\)](#) likewise fail to satisfy the requirements of the statute. Haight cites no clearly established precedent of the U.S. Supreme Court to support his arguments in grounds 36 and 38, all of which relate to statutory obligations arising under Kentucky state law. The Supreme Court of Kentucky in [Haight III](#), 938 S.W.2d at 253, determined that the trial court “gave appropriate consideration to the aggravating and mitigating evidence and otherwise complied with the statute.” Further, as the Kentucky Supreme Court also noted, the trial judge's report was appropriately provided to the state Supreme Court. As noted, similar arguments were rejected in [Slaughter v. Parker](#), 187 F.Supp.2d 755, 824-26 (W.D. Ky. 2001), *aff'd in part, reversed in part on other grounds*, 450 F.3d 224 (6th Cir. 2006), *cert. den'd* by [Leonard v. Simpson](#), 551 U.S. 1103, 127 S.Ct. 2914, 168 L.Ed.2d 243 (2007). Haight provides the Court with no U.S. Supreme Court authority to support his challenge to the application of [KRS 532.075](#) by the state trial court. Accordingly, a certificate of appealability is denied on grounds 36 and 38, as well.

Ground 37, Haight's constitutional challenge to Kentucky's death penalty statute, [KRS 532.025](#) as being facially unconstitutional likewise fails to make a substantial showing of the denial of a constitutional right. Kentucky's death penalty statute has been repeatedly upheld as being constitutional on its face. The Magistrate Judge at pp. 217-219 of this report and recommendation cites a host of decisions from both the Sixth Circuit and the district courts of Kentucky that have rejected this exact argument in [McQueen](#), [Wood](#), [Hodge](#), [Slaughter](#), [Hodges](#) and [Skaggs](#). Haight offers no contravailing Supreme Court authority by which reasonable jurists could disagree with the cited case law that rejects his argument. He therefore is not entitled to a certificate of appealability on these grounds, either.

***148** The Court reaches the same conclusion under [§ 2253\(c\)\(2\)](#) as to Haight's Fourteenth and Eighth Amendment arguments involving proportionality review under [KRS 532.075\(3\)\(e\)](#). Haight's due process challenge to Kentucky's proportionality review runs headlong into [Pulley v. Harris](#), 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), as well as [Bowling](#) and [McQueen](#) which both openly question whether Kentucky law has created an enforceable due process interest under [KRS 532.075\(3\)\(c\)](#). [Bowling](#), 344 F.3d at 521-22. *See also*, [Matthews v. Simpson](#), 603 F.Supp.2d 960, 1087-88 (W.D. Ky. 2009). Even were such a due process right to exist, the Sixth Circuit's established case law repeatedly confirms that the state courts are to be accorded substantial discretion in their proportionality review. [Williams](#), 380 F.3d at 961-63. The same reasons that compelled the Magistrate Judge to reject Haight's due process challenge to [KRS 532.075\(3\)\(c\)](#) likewise compel the Court to reject his Eighth Amendment challenge. The same decisions cited [at pp. 274-276](#), 104 S.Ct. 871 of the report and recommendation now compel the Court to deny a certificate of appealability on ground 39 given the absence of any clearly established authority by the U.S. Supreme Court that would support Haight's challenge to the constitutionality of the state statute.

The Court also concludes that ground 22, in which Haight argues that the trial court coerced the jury verdict, likewise fails to satisfy the requirements of [§ 2253\(c\)\(2\)](#). The Court reaches this conclusion essentially because the trial record contains no facts that would permit a reasonable inference that the state trial court coerced the jury to reach a verdict. Review of the facts readily demonstrates that the jury in Haight's case never specifically indicated that it was deadlocked or otherwise unable to reach a verdict. Consequently, no constitutional requirement for an [Allen](#) charge arose. The Supreme Court of Kentucky in [Haight III](#), 938 S.W.2d at 247 found, as does the Magistrate Judge, that “the record simply fails to bear out such an assertion [that a verdict was coerced].” [Id.](#) Moreover, appellate counsel conceded at the time that the issue was not adequately preserved for appellate review. Given these circumstances, reasonable jurists could not debate that Haight has failed to make a substantial showing of the denial of a constitutional right in this respect.

The above analysis brings the Court to Haight's grounds that relate to the jury instructions and verdict forms used at his trial. Included among these grounds is ground 23, 24, 25, 26, 28, 31 and 32, of Haight's petition. The Magistrate Judge discusses each ground beginning at p. 231 through 257 of the report and recommendation. Upon consideration, the Court concludes that grounds 23, 24, 26, 28 and 32 fail to establish a substantial showing of the denial of a constitutional right as required by § 2253(c)(2).

Ground 23 is Haight's claim that the refusal of the trial court to give a mitigation instruction that specifically mentioned Haight's family background and limited intelligence, as opposed to a catchall mitigation instruction on these two issues, deprived him of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Haight's arguments in this respect, however, are not supported by the clearly established precedent of the U.S. Supreme Court.

To the contrary, the Court in  *Boyd v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1998) has held that similar catchall instructions on mitigation are constitutionally sufficient unless the instructions as a whole creates a reasonable likelihood that the jury applied them in a manner to prevent it from giving consideration to constitutionally relevant evidence.

Here, the challenged instructions as explained in the report and recommendation raise no reasonable likelihood that the jury was in any way prevented from considering Haight's troubled family upbringing or his limited intelligence, both of which are certainly legitimate mitigation concerns. In this respect, we continue in the belief that  *Smith v. Spisak*, 558 U.S. 139, 144-48, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010) puts to rest any argument that a "catchall" mitigation instruction is *per se* constitutionally deficient. Because reasonable jurists could not disagree on this point, a certificate of appealability is not appropriate as to ground 23.

*149 A certificate of appealability also is not appropriate for ground 24, Haight's challenge to the guilt phase instruction on extreme emotional disturbance based on the inclusion of the term "uncontrollably" in the definition of EED. Haight's petition memorandum cites no controlling precedent of the U.S. Supreme Court on which a petitioner could reasonably contend that the challenged instruction is unconstitutional, rather than an arguable violation of state law. Because we do not sit to reexamine determinations of state law in the context of consideration of a habeas corpus petition, a proposition that

could not be reasonably debated, Haight is not entitled to a certificate of appealability on his EED instruction argument in ground 24. The same reasoning applies with equal force to preclude issuance of a COA on ground 25 as well, as Haight once again focuses merely matters of state law.

Ground 26, which is Haight's challenge to the jury instruction on first degree manslaughter, likewise fails to meet the standard of § 2253(c)(2). Haight raises ground 26 primarily as a matter of state law under  *KRS 507.020*, Kentucky's murder statute. The Supreme Court of Kentucky in  *Haight III*, 938 S.W.2d at 948-49, concluded that the challenged manslaughter instruction comports with Kentucky state law. Haight has failed in his petition or his reply to adequately articulate how the instruction violates  *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), such that reasonable jurists could disagree as to whether a substantial showing of the denial of a constitutional right has been made. For these reasons, a certificate of appealability is denied as to ground 26.

Haight's arguments in ground 28 likewise fail to justify the issuance of a certificate of appealability as well. In ground 28, Haight makes two claims: first, that the trial court improperly excluded evidence of his parole ineligibility during the guilt phase of trial; and second, that the trial court erred in refusing to give Haight's tendered instruction on parole eligibility, instruction no. 15. The first claim in the Court's view, the exclusion of guilt phase testimony involving parole eligibility, was decided purely as a matter of state law, which we do not sit to second-guess on a question of admissibility of evidence absent an error so egregious as to deny a petitioner a fundamentally fair trial.  *Estelle v. McGuire*, 502 U.S. at 67-68, 112 S.Ct. 475;  *Bugh*, 329 F.3d at 512. The adverse determination of the Kentucky Supreme Court in this respect is a determination of state law that is binding on this Court.  *Gall*, 231 F.3d at 334 n. 33 ("Gall's argument that Kentucky law prohibits a jury from considering parole is not cognizable on habeas review.").

As for the tendered instruction on parole, the decision of  *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), which was rendered while Haight's case was pending on direct appeal, might under other circumstances raise a constitutional issue on which reasonable jurists could disagree except for the fact that

the tendered instruction in Haight's case specifically advised the jury to disregard that portion of the instruction related to parole. In light of the highly unusual nature of Haight's tendered jury instruction no. 15, it appears impossible to the Court that reasonable jurists could debate whether a constitutional violation occurred under  *Simmons*, where the very instruction at issue advised the jury to disregard the information that Haight maintains he was constitutionally entitled to place before the jury—his parole eligibility or ineligibility as the case may be. Under these unusual circumstances, the issuance of a certificate of appealability is not warranted as the matter simply could not be debated by reasonable jurists as to either aspect of ground 28.

The Court reaches the same conclusion with respect to ground 32, Haight's argument that the refusal of the trial court to define reasonable doubt in both the guilt and penalty phases of his trial violated *In re Winship*, 397 U.S. 357 (1970). As the Magistrate Judge explained at pp. 255-56 of this report and recommendation, Haight's reasonable doubt instruction argument has been repeatedly rejected in decisions such as *Whiteside v. Parke*, 705 F.2d at 871-73 and  *Slaughter*, 187 F.Supp.2d at 811-12, wherein the respective courts explain that “Kentucky courts have long followed the rule that the failure to define reasonable doubt is not error, and Kentucky RCr 956 appears to be a codification of that rule.” *Whiteside*, 705 F.2d at 871. As the Sixth Circuit noted in *Rose v. Scroggy*, 1986 WL 16131 at *1, 810 F.2d 203 (6th Cir. 1986) (“Kentucky's practice of prohibiting such an instruction [on reasonable doubt] must pass muster in this court.”). The same conclusion applies with equal force to Haight's “presumption of life” instruction argument contained in ground 32. This argument likewise was rejected in both   *Kordenbrock v. Scroggy*, 680 F.Supp. at 893 and  *Slaughter*, 187 F.Supp.2d at 815, so that reasonable jurists could not debate that Haight has failed to make a substantial showing of the denial of a constitutional right in these respects.

***150** Haight likewise is not entitled to a certificate of appealability on ground 34 of his petition. Ground 34 involves a claim of prosecutorial misconduct based upon the allegedly improper admission of evidence of prior bad acts in alleged violation of the Sixth, Eighth and Fourteenth Amendments. Careful examination of Haight's arguments in ground 34 reveals that in truth he simply challenges the admission of the prior bad acts evidence under *Kentucky Rule of Evidence* 404, but in the guise of a claim of prosecutorial misconduct. The Supreme Court of Kentucky properly rejected Haight's

argument as a matter of state evidentiary law, which this Court has no authority to reexamine absent a clear violation of due process.  *Estelle*, 502 U.S. at 67-68, 112 S.Ct. 475;  *Fleming*, 556 F.3d at 534. See,  *Hill v. Mitchell*, No. 1:98-CV-452, 2013 WL 1345831 at *101 (S.D. Ohio Mar. 29, 2013).

Here, the complained of uncharged misconduct or “bad acts” all involved closely related, intertwined criminal acts that occurred immediately prior to and after the murders. Haight therefore has failed to raise a constitutional claim that reasonable jurists could debate, but rather has simply attempted to repackage arguments involving state evidence law in the context of a constitutional claim of prosecutorial misconduct that is materially deficient on its face, particularly given the extremely narrow standard of review for otherwise legitimate claims of prosecutorial misconduct under  *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The Court therefore concludes that Haight has failed to satisfy the standard of § 2253(c)(2) as to ground 34.

The Court reaches the same ultimate conclusion as to ground 35. This ground is Haight's argument that the prosecutor in her closing argument violated his Sixth, Eighth and Fourteenth Amendment rights by her repeated references to Haight's future dangerousness along with a 1987 wanton endangerment conviction that post-dated the murders. Neither of these contentions finds any support in federal or state law. Haight concedes that Kentucky law as announced in  *Timpleman v. Commonwealth*, 785 S.W.2d 259, 260 (Ky. 1990) explains that references to “prior” convictions refers to those convictions that are final at the time of a defendant's sentencing, which are properly admissible for the jury to consider. Further, the  *Simmons* decision that Haight relies upon in ground 28 regarding parole eligibility likewise holds that “this Court has approved the jury's consideration of future dangerousness during the penalty phase of the capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.”  *Simmons*, 512 U.S. at 162, 114 S.Ct. 2187. Accordingly, the state prosecutor did not engage in any misconduct, much less a violation of the federal Constitution, when she made arguments concerning Haight's future dangerousness based upon his extraordinary criminal record, or when she made reference to his 1987 wanton endangerment conviction, which arose from Haight's efforts

to shoot Kentucky State Trooper Phillip Yates after Yates pulled over Haight's stolen GMC pickup truck immediately following the murders. Because reasonable jurists could not debate that no constitutional violation resulted from the closing arguments of the prosecutor during the penalty phase of Haight's case, a certificate of appealability is not warranted on ground 35.

The final ground on which the Court concludes that a certificate of appealability is not justified is ground 45 of Haight's petition. In this ground, Haight raises a broad claim that his state counsel at trial, on direct appeal and initial post-conviction proceedings failed to act as counsel. As the Court noted in its report and recommendation, the crux of this claim rests upon Haight's view that his appointed DPA attorneys acted under an actual conflict of interest on both direct appeal and in the initial state post-conviction proceedings, where the lead trial attorney had become the head of the DPA in 1996 so that DPA counsel who represented Haight on direct appeal and in the initial post-conviction proceedings were allegedly "chilled" in their efforts to represent their client by their reluctance to call into question the decisions of their boss.

***151** The problem with this argument is that at no time did any of Haight's DPA attorneys on direct appeal or in the initial state post-conviction proceedings ever reveal the alleged conflict of interest so that the state court could take appropriate action. Consequently, this alleged actual conflict of interest cannot be used to establish cause and prejudice, nor does it afford an independent basis for relief given that at no time in these proceedings has Haight ever explained what issues were not raised, or were inadequately raised, because of the alleged conflict. The same is true with respect to Haight's arguments concerning the relationship of DPA attorney Margaret Case with the late David Omer and her representation of the surviving family members in their civil rights action against the Johnson County Jail.

Once again, nowhere does Haight set forth the alleged adverse impact of this unusual coincidence in terms of the issues raised or not raised in his criminal case. Given that the Supreme Court authority cited by Haight, [!\[\]\(a03a7eb2f4046e1d3c76772003e549ea_img.jpg\) *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 \(1981\)](#), and [!\[\]\(844169987a590ed8c7e31d5d18950e8d_img.jpg\) *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 \(2002\)](#), requires defense counsel to bring such an alleged conflict of interest to the attention of the affected court for a prompt inquiry, it appears to this Court that

Haight's argument in ground 45 fails to satisfy the standard of [!\[\]\(cbe2492b119e39e02a1dab2af4a4b296_img.jpg\) § 2253\(c\)\(2\)](#).

This conclusion is underscored by the finding of the District Court that as to Haight's alleged actual conflict of interest during state post-conviction review, Haight had no Sixth Amendment right to effective assistance of counsel that would support his claim of an actual conflict of interest even had it been timely raised in such setting (DN 85, p. 14). *See*, [!\[\]\(e474458956c9a37fbf9586ddb60a7fa1_img.jpg\) *Moore v. Mitchell*, 708 F.3d at 776-78](#) (Undisclosed claim of actual conflict of interest not raised on direct appeal or in state post-conviction proceedings by a habeas petitioner was procedurally defaulted). For the above reasons, a certificate of appealability also should be denied as to this ground.

The Court has considered each of the remaining grounds raised by Haight and concludes that sufficient arguments have been raised in light of the record of the proceedings that reasonable jurists could debate whether the substantial showing of the denial of a constitutional right was made. The Court rests in this regard on the reasoning set forth in its report and recommendation, which it does not reiterate here given the extraordinary length of the present opinion. Suffice to say that while the Court ultimately concludes that Haight is not entitled to [!\[\]\(3e2231b1ad3ca8da8658228c00dd08e0_img.jpg\) § 2254](#) relief on any of the remaining grounds, they are at least sufficiently debateable to entitle him to pursue them further.

Included among these grounds are Haight's arguments related to the disputed plea bargain in grounds 1, 2, 3, 4 and 33 of the petition; his arguments related to ineffective assistance of trial counsel raised in grounds 5, 8, 9, 6/16, 13, 14 and 15; and his jury issues contained in grounds 17, 18, 19, 20, 21, 22, 27 and 29/30. The Court also concludes that Haight's arguments of ineffective assistance of counsel on appeal raised in grounds 43 and 44, while potentially procedurally defaulted, raise substantial questions regarding the impact of the *Hollan* decision and the status of Kentucky law as an adequate and independent state ground so that further consideration on appeal is warranted particularly for the guidance not only of Haight but of other Kentucky [!\[\]\(5361750c22c4e047a52f4eac1ec2d4cc_img.jpg\) § 2254](#) petitioners who may have similar claims of ineffective assistance of appellate counsel.

For the reasons more fully set forth above, the Court recommends that Haight's request for a certificate of appealability as to grounds 7, 10, 11, 12, 22, 23, 24, 25, 26, 28, 32, 34, 35, 36, 37, 38, 39 40, 41, 42 and 45 be denied.

The Magistrate Judge recommends that Haight be granted a certificate of appealability as to grounds 1, 2, 3, 4, 33, 5, 8, 9, 6, 16, 13, 14, 15, 17, 18, 19, 20, 21, 27, 29/30, 31, 43 and 44.

CONCLUSION

*152 Nearly 30 years have passed since the shooting deaths of David Omer and Patricia Vance. In that time, the Supreme Court of Kentucky has considered Randy Haight's case on five separate occasions. Haight has been represented by four different teams of lawyers, who the record reveals have labored diligently throughout both the state and federal proceedings to ensure that his constitutional rights were fully protected. Their efforts have not been in vain. The Court's review of the extended state court proceedings that encompass Haight's 1994 trial and multiple appeals persuades it that no decision contrary to, nor unreasonable application of, any clearly established precedent of the U.S. Supreme Court occurred on any of the issues substantively resolved in the state courts, nor did Haight establish cause and prejudice or manifest injustice to avoid the procedural default of those issues resolved by the state courts on adequate and independent state law grounds.

Indeed, had this Court engaged in *de novo* review of all of the 45 issues Haight now raises, he would not be entitled to habeas corpus relief on any of them. Exhaustive review of the record, along with the controlling authority of the U.S. Supreme Court, confirms repeatedly that Randy Haight was properly convicted for the murders of Omer and Vance after a fundamentally fair trial and justly sentenced to death based on entirely overwhelming evidence of his guilt.

No extreme malfunction of the state criminal justice system occurred in Haight's case. That conclusion in the Court's view is so far beyond reasonable dispute that another 30 years of judicial review would not alter it. Accordingly, the Magistrate Judge shall recommend that summary judgment be entered for the warden on all issues and that the petition be dismissed with prejudice as no genuine issues of material fact exist and the warden is clearly entitled to judgment as a matter of law.

RECOMMENDATION

The Magistrate Judge having made findings of fact and conclusions of law recommends that summary judgment be **GRANTED** to the Respondant and that the petition be

DISMISSED WITH PREJUDICE. The Magistrate Judge further recommends that a certificate of appealability be **DENIED** as to grounds 7, 10, 11, 12, 22, 23, 24, 25, 26, 28, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 45. A certificate of appealability should be granted as to grounds 1, 2, 3, 4, 33, 5, 8, 9, 6, 16, 13, 14, 15, 17, 18, 19, 20, 21, 27, 29/30, 31, 43 and 44.

APPENDIX OF STATE COURT OPINIONS

APPENDIX OF STATE COURT OPINIONS

Supreme Court of Kentucky.
Randy Winton HAIGHT, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 86-SC-971-MR.
Sept. 8, 1988.

Defendant pled guilty in the Circuit Court, Garrard County, Robert J. Jackson, J., to two counts of murder and two counts of robbery and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) defendant's plea of guilty to two counts of murder and two counts of robbery was defective, and (2) refusal to allow defendant to withdraw his guilty plea after court sentenced defendant not in accordance with plea agreement between prosecutor and defense counsel was improper.

Vacated and remanded.

West Headnotes

[1] Criminal Law 110 ⇐ 273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. *Most Cited Cases*

Defendant's plea of guilty to two counts of murder and two counts of robbery was defective; defendant was misled at time he entered guilty plea into believing that trial court would give considerable weight to prosecutor's sentence recommendation unless it was determined that State had been deceived or some new matter of extraordinary nature was revealed, and record was without any indication that any such unforeseen circumstances occurred.

[2] Criminal Law 110 ⇐ 274(3.1)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k274 Withdrawal
110k274(3) Grounds for Allowance
110k274(3.1) k. In General. *Most Cited Cases*
(Formerly 110k274(3))

Refusal to allow defendant to withdraw his guilty plea after court sentenced defendant not in accordance with plea agreement between prosecutor and defense counsel was improper, court's comment to defense counsel that he had been defense attorney and understood situation and would protect defense counsel was reasonably subject to interpretation that withdrawal of plea would be allowed.

*85 Edward C. Monahan, Asst. Public Advocate, Frankfort, Erwin W. Lewis, Asst. Public Advocate, Richmond, Ken Taylor, Nicholasville, for appellant.

Fredric J. Cowan, Atty. Gen., Mary James Young, Asst. Atty. Gen., Frankfort, for appellee.

OPINION OF THE COURT

Upon his plea of guilty to two counts of murder and two counts of robbery, the trial court sentenced appellant to death. Claiming numerous errors and violation of his constitutional rights, appellant appeals to this Court as a matter of right.

On September 3, 1985, appellant was indicted for the robberies and murders of Pat Vance and David Omer. After arraignment and entry of a plea of not guilty, the Commonwealth gave notice of its intention to seek the death penalty.

During the following weeks and while pretrial discovery and investigation was ongoing, counsel for the Commonwealth and counsel for appellant commenced negotiations toward a plea agreement. As a result of these negotiations, in January, 1986, the Commonwealth made an offer to appellant whereby, in return for his guilty plea to two counts of murder and two counts of robbery in the first degree, it would recommend a sentence of life imprisonment without possibility of parole for a period of twenty-five years. After consultation with appellant, defense counsel informed the Commonwealth's Attorney that the offer would be accepted. A short time later, in February, 1986, counsel for the parties met with the trial court and informed him of the terms of the agreement and of the considerations which influenced the agreement. At this meeting, the court expressed no disagreement, but made no commitment as to the imposition of sentence.

Between February and April, 1986, several discussions, some of which were *ex parte*, took place between counsel and the court. These discussions and the comments made by the trial court can, at best, be described as confusing and ambiguous. On some occasions the court strongly indicated that he would follow the Commonwealth's recommendation and on other occasions reiterated that he would not be bound by any agreement. On some occasions he indicated that he would permit withdrawal of the guilty plea in the event the recommendation was not followed and on other occasions tended to say otherwise. Throughout these discussions, counsel for appellant steadfastly maintained that in the absence of a commitment from the court to follow the agreement or permit withdrawal, there would be no guilty plea.

Toward the end of March, 1986, in separate conversations with the Commonwealth's Attorney and the Assistant Commonwealth's Attorney, the trial court strongly indicated an inclination to sentence in accordance with the agreement. He told the Commonwealth's Attorney, "You know I almost always take your recommendation." This statement was understood by the Commonwealth's Attorney, who informed appellant's counsel of such, that sentence would be imposed in accordance with the plea agreement.

On April 8, 1986, two days before the scheduled guilty plea hearing, counsel for appellant took a partially executed pretrial plea agreement to the judge. He was asked if it was still his policy to follow the *86 recommendation of the Commonwealth's Attorney unless something unusual appeared in the pre-sentence investigation report. This question was answered affirmatively and the court further said, "I have been a defense attorney. I know what situation you are in and if something ever had to happen, I would protect the defense attorney." Appellant's counsel took this to be an informal commitment to sentence in accordance with the agreement or permit withdrawal of the plea.

Prior to the guilty plea hearing, counsel explained to appellant what would likely transpire. Appellant was assured that an agreement had been reached whereby he would be sentenced in accordance with the recommendation of the Commonwealth, but a meaningless ritual was required in which he would have to say that no promise had been made to him in return for his guilty plea. Based on the foregoing, appellant signed an instrument denominated "Waiver of Further Proceedings and Petition to Enter Guilty Plea."

The waiver/petition instrument is a standard form which is designed to make a written record of the identity of the defendant, that he has been informed of his constitutional rights, his representation by counsel, his understanding of the proceedings, and the voluntariness of the guilty plea. The form contains clear, unequivocal language and is not designed for amendment or modification. Despite this, the form which appellant signed contained numerous handwritten additions (appearing hereinafter in brackets) which in many respects defeat the very purpose the form is designed to accomplish. For instance paragraph 10 says:

I understand that if I plead guilty I waive/give up [some of] my constitutional rights and will permit the court without jury to impose sentence within the same punishment range a jury could impose sentence. [However, this plea is being entered as a result of plea negotiations, and it is my understanding that it is the general policy of the court to accept the recommendation of the Commonwealth.]

And paragraph 12 says:

I understand that if I elect to plead guilty I will be giving up my appeal rights [as to guilt or innocence] and the court's imposition of sentence will conclude the matter [of guilt or innocence].

Finally, the additions to paragraph 13 virtually contradict the printed portion as follows:

I understand that the Commonwealth attorney and my attorney have indicated that a recommendation would be made to the court on my behalf. I realize that this will only be a recommendation and that the court is not bound or required to accept it[*]. said recommendation being [see pretrial agreement] * But it is my understanding that it is the announced general policy of this court to accept the recommendation of the Commonwealth, otherwise I would not be pleading guilty.]

In the context of the foregoing negotiations, statements by the court and counsel, and documents, on April 10, 1986, the court undertook to hold a hearing to determine whether a guilty plea would be entered. At the outset, the Court noted that the waiver/petition instrument and the pre-trial agreement had been reviewed, inquired of appellant as to his identity and certain factual matters, and then asked the Commonwealth if it had a recommendation. In response the Commonwealth's Attorney said:

[T]he Commonwealth has recommended that the sentence be imposed of life without parole for 25 years on each of

the two counts of murder, Counts 1 and 2. And for 20 years each on Counts 3 and 4 of the indictment (the robbery charges) and all counts to run concurrently.

A discussion then ensued concerning paragraph 13 (quoted, *infra*) of the waiver/petition instrument. Repeatedly, counsel insisted that in pleading guilty, appellant was relying on the court's announced general policy to follow the recommendation of the Commonwealth. The court acknowledged that he generally followed *87 such recommendation except in unusual circumstances and unusual cases and characterized this case as such. The trial court reiterated that no commitment was being made to follow the recommendation of the Commonwealth. Upon receiving this information, appellant's counsel requested and was granted a recess to confer with their client. When the proceeding resumed, appellant's counsel stated that it was his understanding that in the absence of unforeseen and unusual circumstances, the court would abide by its normal policy of accepting the Commonwealth's recommendation. The discussion continued and finally the court said:

As a general policy because of the number of cases that you have to deal with, I follow the Commonwealth's recommendation because Mr. Veal is a confident prosecutor and his staff and they prepare these cases and they know what they feel the evidence can stand to the extent of going to a jury.

And further:

All I am saying is that that is a possibility, and the policy of the Court is to generally go along at sentencing with the Commonwealth Attorney.... The Commonwealth has recommended and I have noted it of the record so that I don't forget it.

It is in the record *and barring any unforeseen* as Mr. Taylor's statement, that is the following of the Court. But you also know that there is the possibility because I don't know what the sentencing report is going to show. That is all that I am saying.

....

And if you are advising your client based on the information that he gave you on what the Court's policy is, then you have advised him properly. *But there is a possibility that when I have access to the sentencing material that there are some things that maybe you don't even know about.* I don't know, and I just can't by law lock myself out on a possibility of punishment at a separate sentencing hearing.

....

Let the record reflect then, Mr. Haight, so there is no confusion later that the Court will note the Commonwealth's recommendation, but I cannot consider it as a promise. I am noting it as a recommendation of the Commonwealth to which this Court is a general rule or policy relies on the credibility of the Commonwealth attorneys as I do when I am Special Judge anywhere else on being able to evaluate the evidence and what they feel that they can prove *and then I as a general follow that recommendation barring any unforeseen circumstances. What I mean by that is, that if at the sentencing hearing Mr. Bill Rogers [probation and parole officer] finds things that your lawyers don't even know about, that could have a bearing on the Commonwealth's recommendation.* That is all that I am saying. I am saying no more, and if you want to proceed I will go ahead. (Emphasis added.)

Based on the foregoing, appellant's counsel informed the Court that appellant would proceed and his guilty plea was

accepted. At the conclusion of the hearing, the case was continued for sentencing.

It is unnecessary to detail all of the procedural events which transpired subsequent to entry of appellant's guilty plea. It is sufficient to note that upon learning of the trial court's determination that death was an appropriate sentence, appellant moved the court for leave to withdraw his guilty plea and this motion was overruled. By final judgment entered on September 15, 1986, the trial court ordered that appellant be executed.

[I] In his voluminous brief, appellant has alleged that the trial court committed reversible error in numerous respects. In view of our disposition of this case, however, it is unnecessary to address all of the errors alleged. We have determined that appellant's guilty plea was defective and the trial court erred in overruling his motion to withdraw it.

A plea of guilty constitutes a waiver of several fundamental constitutional rights. In view of the importance of the rights *88 being abandoned, to be valid the plea must be knowing, intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). RCr 8.08 expressly prohibits acceptance of a guilty plea without a prior determination that it is voluntary.

An examination of Kentucky case law reveals no reluctance to confront the issue when the validity of a guilty plea is challenged and, in a proper case, vacate the judgment. We have previously held that a guilty plea by a defendant who appeared to be "confused about his need for an attorney, the seriousness of the charges, the possible penalties involved, ..." was invalid. *Maxwell v. Commonwealth*, Ky., 602 S.W.2d 169 (1980). We have also held that a guilty plea entered upon the mistaken belief that a murder charge would be reduced to manslaughter "was not 'voluntary' in a constitutional sense." *Allen v. Walter*, Ky., 534 S.W.2d 453 (1966). In a very significant case, *Couch v. Commonwealth*, Ky., 528 S.W.2d 712 (1975), this Court settled the question of whether failure of the trial court to follow the recommendation of the Commonwealth's Attorney rendered the guilty plea involuntary. We held that it did not, but gave notice that if the defendant was misled by the action of the trial court, refusal to allow withdrawal of his guilty plea would amount to an abuse of discretion.

The record of these proceedings as quoted herein amply demonstrates that appellant was misled at the time he entered his guilty plea. On several occasions, the trial court indicated an inclination to give considerable weight to the recommendation of the Commonwealth's Attorney. Further, and perhaps inadvertently, the trial court imposed a severe limitation upon the circumstances which would cause him to exceed the recommended sentence. That limitation was stated as "barring any unforeseen circumstances" and the circumstances were described as the discovery of material facts about appellant which were unknown to counsel for the Commonwealth. From the trial court's remarks, it was not unreasonable for appellant to conclude that he would be sentenced in accordance with the recommendation unless it was determined that the Commonwealth had been deceived or some new matter of an extraordinary nature was revealed. The record is without any indication that any such unforeseen circumstance occurred.

Appellant contends that the remarks of the trial court are so forthright as to constitute an irrevocable commitment to sentence in accordance with the recommendation bringing this case within the purview of *Johnson v. Commonwealth*, Ky., 609 S.W.2d 360 (1980) and *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979). Accordingly, he demands enforcement of the plea agreement.

While we have no difficulty concluding that appellant was misled by the ambiguous and confusing remarks of the trial court, the record does not demonstrate the existence of an outright commitment to impose a particular sentence. Just as we will not deprive appellant of his rights based upon misleading remarks, we will not bind the hands of the trial court and require enforcement of the agreement unless an unmistakable commitment is made.

[2] On the other hand, as to appellant's contention that the trial court made a commitment to permit withdrawal of the guilty plea in the event sentence was not imposed in accordance with the agreement, we agree. The trial court's comment to defense counsel that he had been a defense attorney and understood the situation and would protect defense counsel was reasonably subject to the interpretation that withdrawal of the plea would be allowed. While the facts in this case are not so egregious as those in *Fair v. Zant*, 715 F.2d 1519 (11th Cir. 1983), *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), or *Johnson v. Commonwealth*, *supra*, appellant's counsel was assured that he would be protected. In the context of the negotiation, such assurance could only have been understood to mean that the death penalty would not be imposed *89 or that a motion to withdraw the plea would be granted.

At the time the waiver/petition instrument was presented, the trial court and the parties were surely aware of this Court's decision in *Couch v. Commonwealth*, *supra*, wherein we held that upon a plea of guilty, the trial court was not bound to sentence in accordance with the agreement nor was it bound to allow withdrawal of the plea. Under *Couch*, the trial court cannot be bound by agreements or conditions the parties may wish to impose. Nevertheless, these parties presented and the trial court accepted an instrument which expressly conditioned entry of the guilty plea upon the "understanding" that the court would sentence in accordance with the agreement. Under no circumstances should such an instrument have been accepted as it violates the clear policy of this Court with respect to the exercise of judicial discretion in sentencing.

In final analysis, we recognize that appellant's counsel and counsel for the Commonwealth pressured the trial court for a commitment. Rather than firmly resist the pressure and retain all lawful discretion, or make the commitment sought, the trial court undertook to follow a middle course. It appears he desired to accommodate the parties' wishes, but fully retain his judicial prerogative. Such came into conflict and ultimately confusion and misunderstanding resulted. Whenever a trial court becomes deeply involved in the process of plea negotiations, he risks misleading the parties and losing his right to impose sentence contrary to the agreement.

For the foregoing reasons, the final judgment of the trial court and the trial court's order of May 8, 1986, accepting appellant's guilty plea are vacated. All charges in the indictment as originally returned by the Grand Jury are reinstated and this cause is remanded to the trial court for a plea to the crimes charged.

All concur.

Ky., 1988.
Haight v. Com.
760 S.W.2d 84

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Supreme Court of Kentucky.
Randy HAIGHT, Appellant,
v.

George F. WILLIAMSON, Special Judge and Commonwealth of Kentucky, Real Party in Interest, Appellees.

No. 91-SC-578-MR.
May 14, 1992.
Rehearing Denied Aug. 26, 1992.

After direction of reinstatement of the original indictment for murder and robbery and remand to the trial court for plea to the crimes charged, 760 S.W.2d 84, defendant moved to enforce original plea agreement with the Commonwealth. The Circuit Court, Jefferson County, George F. Williamson, Special Judge, denied motion and defendant filed writ of prohibition with the Court of Appeals to specifically enforce plea agreement, or to remove death as a possible penalty. The Court of Appeals denied writ, and defendant appealed. The Supreme Court held that: (1) plea agreement was not specifically enforceable after original indictment was reinstated and cause was remanded to trial court for plea, and (2) prosecutorial vindictiveness could not be implied after original indictment was reinstated and defendant entered plea of not guilty.

Affirmed.

West Headnotes

[1] Prohibition 314 ⇌ 1

314 Prohibition
314I Nature and Grounds
314k1 k. Nature and Scope of Remedy. *Most Cited Cases*

Prohibition 314 ⇌ 9

314 Prohibition
314I Nature and Grounds
314k8 Grounds for Relief
314k9 k. In General. *Most Cited Cases*

Issuance of writ of prohibition is within sound discretion of the court and is granted only in exceptional situations where there is no other adequate remedy at law to prevent the miscarriage of justice; violations of constitutional rights in criminal conviction provide no basis for issuance of writ.

[2] Sentencing and Punishment 350H ⇌ 60

350H Sentencing and Punishment

350H Punishment in General
350H(C) Factors or Purposes in General
350Hk60 k. Plea Bargain or Other Agreement. *Most Cited Cases*
(Formerly 110k980(1))

Sentence bargained for within original plea agreement was not specifically enforceable upon retrial after final judgment of trial court was vacated and cause was remanded for plea to crimes charged, and after Commonwealth had consistently presented recommended sentence from plea agreement at initial trial.

[3] Sentencing and Punishment 350H ⇌ 60

350H Sentencing and Punishment
350H Punishment in General
350H(C) Factors or Purposes in General
350Hk60 k. Plea Bargain or Other Agreement. *Most Cited Cases*
(Formerly 110k980(1))

No prosecutorial vindictiveness was implied from Commonwealth's recommendation of harsher sentence than that found within plea agreement, where original indictment was reinstated and remanded to trial court for plea to the crime charged, after trial court refused to accept recommended sentence, and where defendant was placed in the same position as before he accepted plea bargain.

[4] Prohibition 314 ⇌ 5(4)

314 Prohibition
314I Nature and Grounds
314k5 Acts and Proceedings of Courts, Judges, and Judicial Officers
314k5(4) k. Proceedings in Criminal Prosecutions. *Most Cited Cases*

Writ of prohibition will not lie under issue, which is answerable on appeal, whether the prosecution's pursuit of death penalty at retrial violates defendant's constitutional rights against double jeopardy. *Rules Crim.Proc., Rule 9.84; U.S.C.A. Const. Amend. 5.*

*822 Allison Connelly, Asst. Public Advocate, Dept. of Public Advocacy, Frankfort, Erwin W. Lewis, Asst. Public Advocate, Dept. of Public Advocacy, Richmond, for appellant.

Barbara M. Whaley, Paul W. Richwasky, Jr., Asst. Attys. Gen., Frankfort, for appellees.

OPINION OF THE COURT

Appellant, Randy Haight, pursuant to CR 76.36(7)(a), petitions review by this Court as a matter of right. The principal issues presented are: (1) whether appellant is entitled to specific enforcement of a pretrial plea agreement at his retrial where said retrial resulted from an appellate court order to grant appellant's motion to withdraw his plea of guilty and to reinstate the original indictment, (2) whether prosecutorial vindictiveness is to be implied from the

Commonwealth's pursuit of the penalty of death upon retrial after promising at the first trial to recommend a sentence of life without parole on each of two counts of murder, and sentences of twenty years on each of two counts of first-degree robbery, (3) whether appellant was implicitly acquitted of the murder and robbery charges by wrongful sentencing of death by the trial judge according to RCr 9.84 as it was written in 1986, and thus would be subjected to a violation of his right against double jeopardy if the Commonwealth seeks the penalty of death at retrial, and (4) whether denial of appellant's petition for a writ of prohibition was proper, according to § 110 of the Kentucky Constitution.

The Court of Appeals on May 31, 1991, denied appellant's petition for issuance of a writ of prohibition in which appellant sought specific enforcement of an April 10, 1986 plea agreement or in the alternative removal of death as a possible penalty in the retrial of his case for the robberies and murders of Pat Vance and David Omer. Appellant now petitions this Court for reversal of the Court of Appeals' decision.

A procedural overview of the case is as follows: Appellant was indicted by the Garrard County Grand Jury on September 3, 1985 on two counts of murder, two counts of first-degree robbery, and possession of a handgun by a convicted felon. After arraignment and entry of a plea of not guilty, the Commonwealth on November 8, 1985 gave written notice that the death penalty would be sought. Following negotiations between counsel for the appellant and counsel for the Commonwealth concerning a plea bargain, appellant filed a "Waiver of Further Proceedings and Petition to Enter Plea of Guilty" with a pretrial plea agreement at the scheduled guilty plea hearing on April 10, 1986.

The plea agreement provided that appellant would enter a plea of guilty to two counts of murder and two counts of first-degree robbery as contained in the Garrard Circuit Indictment No. 85-CR-032. In return the Commonwealth agreed to recommend sentences of life without parole for twenty-five years on each count of murder, and sentences of twenty years on each count of first-degree robbery. All sentences were to be served concurrently. The fifth count charging possession of a handgun was dismissed pursuant to a motion by the prosecutor. Also contained within the agreement was a promise by the Commonwealth to "take no action inconsistent [with those stated] therewith."

After a discussion between the trial judge and appellant's counsel concerning whether the court had discretion to impose the death penalty in light of the previously entered plea agreement, appellant filed a motion to enter the recommended sentences or to withdraw his plea of guilty on June 24, 1986. On September 11, 1986 the *823 trial judge overruled appellant's motion to withdraw his plea of guilty and held appellant's motion to enter the recommended sentence in abeyance pending court sentencing. The next day in the final judgment the trial judge imposed the penalty of death.

Appellant on June 22, 1987 filed a motion with this court seeking enforcement of the plea agreement by requesting an order requiring the Office of the Attorney General for Kentucky to refrain from filing briefs in support of the trial court's sentence. On July 31, 1987 this Court overruled appellant's motion. Finding that appellant's plea was defective and that the trial court thus erred in overruling his motion to withdraw it, this Court in an opinion rendered September 8, 1988, vacated both the trial court's final judgment and the May 8, 1986 order accepting appellant's guilty plea. *Haight v. Commonwealth*, Ky., 760 S.W.2d 84 (1986). The opinion further directed that, "[a]ll charges in the indictment as originally returned by the Grand Jury are reinstated and this cause is remanded to the trial court for a plea to the crimes charged." *Id.*

Appellant filed a petition for rehearing on September 15, 1988 before this Court seeking removal of the original trial judge and a determination whether the trial judge's actions substantially prejudiced appellant by usurping prosecutorial discretion in deciding whether to seek the death penalty. The petition was denied.

In anticipation of the retrial, appellant filed a motion in the Garrard Circuit Court on October 18, 1989 to exclude death as a possible penalty, the trial date having been set for November 13, 1989. In a November 1, 1989 hearing considering this motion, appellant was arraigned and a plea of not guilty was entered to the charges. Following this hearing, Special Judge George F. Williamson was assigned to the case and a change of venue to Jefferson Circuit Court was made. On June 11, 1990 the Commonwealth notified appellant that it would seek the death penalty. On July 26, 1990 Judge Williamson overruled appellant's motion to exclude death as a possible sentence.

Appellant next filed a motion to enforce the original plea agreement and in the alternative to construe terms of the plea agreement. The trial judge overruled this motion on August 30, 1990. In response to this denial, appellant then filed a petition for a writ of prohibition on December 11, 1990 with the Court of Appeals seeking to prevent Judge Williamson from trying appellant on grounds that the April, 1986 plea agreement should be specifically enforced, or in the alternative that death should be removed as a possible penalty. On March 14, 1991 we denied the Court of Appeals' recommendation to transfer this original action. Appellant's petition for the writ of prohibition was then denied by the Court of Appeals on May 31, 1991.

ISSUANCE OF WRIT OF PROHIBITION

[1] Issuance of, or a refusal to issue a writ of prohibition is in the sound discretion of the court. *Rowley v. Lampe*, Ky., 331 S.W.2d 887 (1960). Basis for granting such relief lies when the petitioner shows that:

(1) the lower court is proceeding or about to proceed outside of its jurisdiction and there is no adequate remedy by appeal, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise great injustice and irreparable injury would result. *Tipton v. Commonwealth*, Ky.App., 770 S.W.2d 239 (1989); *Hobson v. Curtis*, Ky., 329 S.W.2d 565 (1959).

A writ of prohibition thus is granted only in exceptional situations where there is no other adequate remedy at law to prevent a miscarriage of justice. *Graham v. Mills*, Ky., 694 S.W.2d 698 (1985). Thus any violations of constitutional rights in a criminal conviction provide no basis for issuance of a writ. *Hobson v. Curtis*, *supra*.

SPECIFIC ENFORCEMENT OF THE PLEA AGREEMENT AND PROSECUTORIAL VINDICTIVENESS

[2] Appellant urges this Court to apply contract law principles to the 1986 plea agreement and order its specific enforcement. Because he entered a plea of guilty *824 before the trial court, appellant argues he detrimentally relied on the promise of the Commonwealth in taking no action inconsistent with the agreement, i.e., that the Commonwealth upon retrial would continue to recommend the sentence bargained for within the original plea agreement.

When this Court in *Haight*, *supra*, vacated both the final judgment of the trial court and the May 8, 1986 trial court order accepting appellant's guilty plea, all charges in the original Grand Jury indictment were reinstated and the cause was "remanded to the trial court for a plea to the crimes charged." *Id.*, at 89. In so doing, this Court granted appellant's motion proffered before the trial court requesting withdrawal of his plea.

The instant case is distinguishable from *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979) and *Commonwealth v. Reyes*, Ky., 764 S.W.2d 62 (1989) where this Court ruled that a plea agreement is binding when the defendant has either entered a plea or taken action to his detriment in reliance of the offer, and the Commonwealth attempts to disregard its part of the bargain. Unlike *Workman*, *supra*, and *Reyes*, *supra*, the Commonwealth consistently presented the recommended sentence found within the 1986 plea agreement at the initial trial. Thus the rationale underlying *Workman*, *supra*, and *Reyes*, *supra*, is inapplicable.

[3] Similarly, no prosecutorial vindictiveness may be implied. Paralleling language found in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), this Court in *Haight*, *supra*, after granting withdrawal of appellant's guilty plea and reinstating all charges in the original indictment, "remanded the case to the trial court for a plea to the crimes charged." *Id.* at 89. This language shows that in deciding *Haight*, *supra*, this Court contemplated that there could be a retrial on the original charges and that the Commonwealth might abandon the recommended sentence found within the plea agreement.

Turner v. Tennessee, 940 F.2d 1000 (6th Cir.1991), an opinion cited by appellant that involves the issue of prosecutorial vindictiveness is distinguishable from the case at bar. In *Turner*, *supra*, the Court of Appeals for the Sixth Circuit ordered that the prosecution must overcome a presumption of vindictiveness when it offered a less favorable plea bargain than one initially rejected by the defendant, following vacation of defendant's conviction as the result of ineffectiveness of counsel relating to rejection of the first plea bargain offer. In the case at bar appellant's request to withdraw his guilty plea was honored in our previous opinion. *Haight*, *supra*. With reinstatement of the original indictment and appellant's entry of a plea of not guilty to these charges, appellant returned to the place he was in before the plea agreement was entered. The Commonwealth exhibits no prosecutorial vindictiveness for there is no appearance of retaliation when a defendant is placed in the same position as he was in before he accepted the plea bargain. *United States v. Anderson*, 514 F.2d 583, 588 (7th Cir.1975).

DOUBLE JEOPARDY

[4] Whether the prosecution's pursuance of the death penalty at retrial violates appellant's constitutional rights against double jeopardy under former RCr 9.84 and *Richetts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), is answerable upon appeal. Thus prohibition will not lie under this issue. *Vinson v. Warren*, Ky., 425 S.W.2d 562 (1968).

CONCLUSION

Applying standards found in *Rowley v. Lampe*, *supra*, *Tipton v. Commonwealth*, *supra*, and *Hobson v. Curtis*, *supra*, we find the Court of Appeals exercised proper discretion in denying appellant's petition for a writ of prohibition. Specific enforcement of the plea agreement and appellant's request to remove death as a possible penalty are denied according to *Haight*, *supra*; *Santobello*, *supra*; and *United States v. Anderson*, *supra*. Appellant's double jeopardy issue is reviewable upon appeal. *825 Therefore denial of appellant's petition is affirmed.

All concur.

Ky., 1992.
Haight v. Williamson
833 S.W.2d 821
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Supreme Court of Kentucky.
Randy Winton HAIGHT, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 94-SC-288-MR.
Nov. 21, 1996.
Rehearing Denied March 3, 1997.

Defendant was convicted in the Jefferson Circuit Court, Benjamin F. Shobe, Special Judge, of two counts of murder, two counts of first-degree robbery and possession of handgun and he was sentenced to death penalty as well as to various confinement periods. Defendant appealed. The Supreme Court, Lambert, J., held that: (1) defendant was not entitled to new trial based on juror misconduct; (2) method of reducing number of prospective jurors from 17 to 14 did not violate rule related to jury selection; (3) defendant was not entitled to specific instruction in penalty phase directing juror to consider evidence of his childhood abuse and neglect and deprived family background; (4) defendant failed to show that structure of verdict forms in punishment phase of murder prosecution prejudiced him; (5) court's previous order allowing defendant to withdraw his guilty plea did not preclude imposition of death penalty after trial; (6) prior bad acts evidence was admissible; (7) prosecutor's closing arguments in penalty phase were properly before jury; (8) there was no error in prosecution's introduction of defendant's criminal convictions which occurred and became final subsequent to his commission of offenses giving rise to murder prosecution; (9) trial court's failure to timely file trial judge's report was not grounds for reversal of defendant's conviction for murder or death penalty sentence; and (10) evidence clearly supported jury's finding of statutory aggravating circumstances supporting death penalty.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇌ 956(10)

110 Criminal Law
110XXI Motions for New Trial
110k948 Application for New Trial
110k956 Affidavits and Other Proofs in General
110k956(10) k. Sufficiency of proofs as to disqualification of jurors. *Most Cited Cases*

Trial court's findings that defendant was not entitled to new trial on grounds of juror misconduct arising out of allegations that juror failed to make full disclosure at voir dire regarding fact that he had read newspaper article about murder case were not clearly erroneous; trial court found that juror answered questions truthfully at voir dire, juror gave details as to his memory about article, and fact that during trial, juror remembered some of details of article did not create bias on juror's part.

[2] Criminal Law 110 ⇌ 925.5(4)

110 Criminal Law
110XXI Motions for New Trial
110k924 Misconduct of or Affecting Jurors
110k925.5 Considering Matters Not in Evidence
110k925.5(4) k. Access to or reading newspapers. *Most Cited Cases*

Juror exposure to newspaper accounts of offenses do not automatically require reversal of convictions and true test is whether juror misconduct has prejudiced defendant to extent that he had not received fair trial.

[3] Criminal Law 110 ⇌ 923(1)

110 Criminal Law
110XXI Motions for New Trial
110k923 Competency of Jurors and Challenges
110k923(1) k. In general. *Most Cited Cases*

Fact that prior to trial juror was told that police officer had been fired upon was not sufficient to show that juror concealed vital information at voir dire or that juror had information that would cause court to believe that jury was partial in their deliberations or their final conclusions.

[4] Jury 230 ⇌ 79.1

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k78 Drawing Jurors for Trial of Cause
230k79.1 k. Manner of drawing in general. *Most Cited Cases*

Initial method of reducing number of prospective jurors from 17 to 14 in which clerk drew three names written on 17 pieces of paper did not violate rule related to jury selection such that redraw in which three names were returned to group and 14 names were drawn was redundant and fact that same three names were selected for removal was insufficient to show any impropriety. *Rules Crim.Proc.*, Rule 9.36(2).

[5] Criminal Law 110 ⇌ 808.5

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k808.5 k. Reading or quoting statutes. *Most Cited Cases*

Jury instruction in penalty phase of murder prosecution that invited jury to broadly review evidence for

circumstances it deemed to have mitigating value and that came directly from statute was correct statement of law and defendant was not entitled to specific instruction directing juror to consider evidence of his childhood abuse and neglect and deprived family background. KRS 532.025(2)(b)2.

[6] Homicide 203 ⇌ 1458

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1458 k. Degree or classification of manslaughter. *Most Cited Cases*
(Formerly 203k309(6))

Homicide 203 ⇌ 1503

203 Homicide
203XII Instructions
203XII(F) Capacity to Commit Crime
203k1503 k. Extreme emotional disturbance or distress; temporary insanity. *Most Cited Cases*
(Formerly 203k309(6), 203k294.1)

Jury instruction in liability phase of murder prosecution in which jury was required to find presence of extreme emotional disturbance (EED) to support conviction under first-degree manslaughter charge and absence of EED to support conviction of murder was entirely reasonable where defendant claimed EED as defense and there was evidence from which jury could find EED but that jury would not be required to so find. KRS 507.020.

[7] Criminal Law 110 ⇌ 823(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k823 Error in Instructions Cured by Withdrawal or Giving Other Instructions
110k823(1) k. In general. *Most Cited Cases*

Criminal Law 110 ⇌ 1172.8

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.8 k. Effect of verdict or determination. *Most Cited Cases*

Defendant failed to show that structure of verdict forms in punishment phase of murder prosecution prejudiced him where authorized punishments unmistakably informed jury that term of 20 years to life was available as to each

count of murder, jury was told that, if it had doubt as to whether defendant should be sentenced to death, it should sentence him to imprisonment, and jury passed over jury form which authorized it to find aggravating circumstances and to impose punishment of life without parole for 25 years and instead went to death verdict form and after finding aggravating circumstances, imposed death penalty.

[8] Criminal Law 110 ⇌ 1192

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and proceedings in lower court. *Most Cited Cases*

Sentencing and Punishment 350H ⇌ 1788(11)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(11) k. Determination and disposition. *Most Cited Cases*

Supreme Court's previous order allowing defendant to withdraw his guilty plea after defendant was misled into believing that trial court had committed itself to sentence him according to prosecution's recommendation for imprisonment sentence but instead sentenced him to death did not entitle defendant to specific performance of plea agreement and did not preclude imposition of death penalty after trial. *Rules Crim.Proc., Rule 8.10.*

[9] Double Jeopardy 135H ⇌ 108

135H Double Jeopardy
135HIV Effect of Proceedings After Attachment of Jeopardy
135Hk107 Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial
135Hk108 k. Particular grounds for relief. *Most Cited Cases*

Supreme Court's previous order allowing defendant to withdraw his guilty plea after defendant was misled into believing that trial court had committed itself to sentence him according to prosecution's recommendation of imprisonment sentence but instead sentenced him to death did not preclude reprosecution of defendant under double jeopardy clause; error in punishment which led to order allowing defendant to withdraw guilty plea was not type to which jeopardy attaches and did not preclude further prosecution with all lawful punishments being available. U.S.C.A. Const.Amend. 5; *Rules Crim.Proc., Rule 9.84.*

[10] Criminal Law 110 ⇌ 371.40

110 Criminal Law

110XVII Evidence
110XVII(F) Other Misconduct by Accused
110XVII(F)7 Other Misconduct Showing Intent
110k371.40 k. Homicide, mayhem, and assault with intent to kill. *Most Cited Cases*
(Formerly 110k369.2(4))

Criminal Law 110 ⇌ 372.56

110 Criminal Law
110XVII Evidence
110XVII(F) Other Misconduct by Accused
110XVII(F)11 Other Particular Theories of Admissibility
110k372.56 k. Controverting defense evidence or theory. *Most Cited Cases*
(Formerly 110k369.2(4))

There was legitimate basis in law for admission of prior bad acts evidence in murder prosecution given defendant's defense of extreme emotional disturbance (EED) and prosecution's burden to prove absence of EED and it was for trial court to determine whether probative value of evidence outweighed its prejudicial effect. *Rules of Evid., Rule 404(b).*

[11] Sentencing and Punishment 350H ⇌ 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. *Most Cited Cases*
(Formerly 110k722.5)

Prosecutor's closing arguments in penalty phase which referred to defendant's extraordinary history of violent criminal conduct was properly placed before jury and did not coax jury into death sentence. KRS 532.025(2)(a).

[12] Sentencing and Punishment 350H ⇌ 1762

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 k. Other offenses, charges, or misconduct. *Most Cited Cases*
(Formerly 203k357(5))

Defendant's criminal convictions which occurred and became final subsequent murder were admissible in penalty phase of capital murder prosecution. KRS 532.025.

[13] Criminal Law 110 ⇌ 1175

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1175 k. Verdict or findings. *Most Cited Cases*
(Formerly 203k342)

Sentencing and Punishment 350H ⇌ 1789(9)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) k. Harmless and reversible error. *Most Cited Cases*
(Formerly 203k342, 203k343)

Trial court's failure to timely file trial judge's report was not grounds for reversal of defendant's murder conviction or death penalty where report was filed and showed that court gave appropriate consideration to aggravating and mitigating evidence. KRS 532.075(1).

[14] Sentencing and Punishment 350H ⇌ 1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. *Most Cited Cases*
(Formerly 203k357(1))

Evidence clearly supported jury's finding of statutory aggravating circumstances supporting death penalty and that sentence was neither excessive nor disproportionate to penalty imposed in similar cases. KRS 532.075.

***244 Allison Connelly**, Public Advocate, **Edward C. Monahan**, **Bobby C. Simpson**, Assistant Public Advocates, Frankfort, for Appellant.

***245 A.B. Chandler III**, Attorney General, **Kent T. Young**, Assistant Attorney General, Criminal Appellate Division, Frankfort, for Appellee.

LAMBERT, Justice.

This appeal is from the final judgment of the Jefferson Circuit Court whereby appellant was sentenced to death for having murdered Patricia Vance and David Omer. He was also sentenced to concurrent terms of twenty years imprisonment for two counts of robbery in the first degree and five years imprisonment for possession of a handgun by a convicted felon.

There is no doubt that appellant committed the acts for which he has been held criminally responsible. Rather, upon numerous asserted grounds ranging from deprivation and mistreatment as a child to arbitrary application of the law, appellant claims exemption from the death penalty.

Some of appellant's contentions require thoughtful analysis while others merely urge reconsideration of settled law or are manifestly without merit. Some such issues will be addressed only briefly or not at all. *Stanford v. Commonwealth, Ky.*, 734 S.W.2d 781, 792-93 (1987).

This is the third opinion from this Court reviewing judgments and orders arising out of these crimes. In *Haight v. Commonwealth, Ky.*, 760 S.W.2d 84 (1988), appellant obtained reversal of his original death sentence on grounds that actions of the trial court had misled him into believing that there was a commitment from the court to impose a sentence other than death. Thereafter appellant came before this Court seeking an extraordinary writ to require enforcement of the original plea agreement and to prevent any effort to secure the death penalty on grounds that such would amount to prosecutorial vindictiveness. *Haight v. Williamson, Ky.*, 833 S.W.2d 821 (1992). We denied appellant's claims in this regard and other matters upon which he sought review were not addressed. As a result of our decisions arising out of appellant's previous appearances here, the law of the case doctrine will have substantial application. Such matters as have been considered and resolved in the prior cases will not be modified in this proceeding.

A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the Court of Appeals. It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.

Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325 (1989) (quoting *Martin v. Frasure, Ky.*, 352 S.W.2d 817, 818 (1961)).

The essential facts are that after having escaped from the Johnson County Jail, in the course of committing first degree robbery, appellant inflicted multiple gunshot wounds upon the victims and thereby caused them to die. After a change of venue from Garrard County to Jefferson County, appellant was tried, convicted and sentenced to death and terms of imprisonment as aforesaid. Such additional facts as may be necessary will be presented in the discussion of each claim of error.

[1] Appellant claims entitlement to a new trial on grounds that juror Helton engaged in misconduct by failing to make full disclosure during voir dire, by prematurely deciding contested issues, and by possibly furnishing proscribed information to other jurors. This claim arises from the fact that prospective juror Helton read a newspaper article concerning the case prior to reporting for jury duty. According to his testimony, this juror scanned the article but did not remember the headline which revealed that appellant had been previously sentenced to death.

Initially it should be observed that during voir dire the prospective juror acknowledged that he had seen the article, recalled the names of the victims, and indicated that he had little recollection otherwise about what was contained in the article and in the headline. In addition, this prospective juror indicated an independence of thought and a determination to fairly try the case. No motion was made to exclude the juror for cause and no peremptory challenge was used to remove him. He was seated and participated in the verdict.

*246 In response to appellant's motion for a new trial, the trial court held a hearing relating to this juror and allegations that he had withheld critical information. At the conclusion of the hearing, the trial court rendered findings of fact which are not clearly erroneous and which reveal no abuse of discretion. *Parsley v. Commonwealth, Ky.*, 321 S.W.2d 259 (1959); *Johnson v. Commonwealth, Ky.*, 892 S.W.2d 558 (1995); and *Combs v. Commonwealth, Ky.*, 356 S.W.2d 761 (1962). We deem it appropriate to quote the trial court at length:

As to juror Helton, the court finds specifically that juror Helton answered questions truthfully both on voir dire and at the March 7th hearing when he was called subsequent to the jurors' verdict. A finding that he answered questions truthfully leads the court to the conclusion that that evidence certainly is credible. The juror says: I had scanned the article. I do not remember the headline ...

This is voir dire examination: I do not remember the headline. I do not remember the details except that two people—there were two murders and some robberies and I remember the names Omer and Vance as being the names of the parties involved.

The court has no reason to believe that at that time Mr. Helton recalled anything else. He says that as the trial progressed, ... some of the article came back to him. I don't find that to be extraordinary in human experience that a repetition of some matters may cause us to remember other things by association. I'm glad that's true; otherwise, I wouldn't remember anybody's name, particularly at this stage in my life. With that in mind, I specifically find that Mr. Helton's testimony is credible. He did not display a bias, and for that reason overrule that portion of the motion for a new trial dealing with that testimony. There was no deliberate concealment on his part of information which would compel this court to reach a conclusion that he was partial.

We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. It is appropriate to recall that the trial judge personally conducted much of the voir dire examination and presided over all of it. He presided over the trial and likewise presided over the post-trial hearing on the motion for new trial. The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror. *Riley v. Commonwealth, Ky.*, 271 S.W.2d 882 (1954).

[2] On this point we accept the view expressed in *United States v. Klee*, 494 F.2d 394 (9th Cir.1974) (citing *United States v. Gohday*, 468 F.2d 170, 171 (9th Cir.1972)), that "[w]hen a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge 'was in a better position than we are to determine whether what happened was prejudicial.'" See also *McQueen v. Commonwealth, Ky.*, 721 S.W.2d 694, 698 (1986). Our decision in *Byrd v. Commonwealth, Ky.*, 825 S.W.2d 272 (1992), stands for the proposition that exposure to newspaper accounts of trials in progress does not automatically require reversal. "It was not reversible error for the trial judge to deny Byrd's motion for a mistrial because not every incident of juror misconduct requires a new trial. The true test is whether the misconduct has prejudiced the defendant to the extent

that he has not received a fair trial." *Id.* at 274-75. Numerous other cases hold that in ruling on motions of this type, great deference should be given to the views of the trial court.

This case is a far cry from *Paenitz v. Commonwealth, Ky.*, 820 S.W.2d 480 (1991), in which a prospective juror withheld the information that she had talked with a key witness for the Commonwealth about the case. This case also differs from *Randolph v. Commonwealth, Ky.*, 716 S.W.2d 253 (1986), where the juror failed to reveal that she was employed by the Commonwealth's Attorney and where we held that despite the disclaimer of bias, implied bias was shown by virtue of the relationship. There was no such error in the trial court's ruling with respect to juror Helton.

*247 We have examined appellant's contentions with respect to juror Nichols and find them to be insubstantial. The transcript reveals no misunderstanding concerning the death of the police officer or disclosure to other jurors. This juror was given enough information during voir dire to have led to a mistaken belief on her part. Her post-trial testimony is without any hint of dishonesty.

[3] As to juror Gaugh, much is made of his apparent knowledge that a police officer had been killed when, in fact, he was properly informed only that a police officer had been fired upon. We are told that this is more than enough to compel the inference that Gaugh concealed vital information. As the evidence in this regard was ambiguous, as it is likewise with respect to each of these jurors, we will rely upon the trial court for the reasons stated hereinabove and as follows: "It is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions."

[4] Appellant also claims a violation of RCr 9.36 and the doctrine of randomness of jury selection in the manner of selecting the jury and alternates who tried the case. After challenges for cause and peremptory challenges had been exercised, there remained seventeen prospective jurors. As the trial court had determined to conduct the trial with twelve jurors and two alternates, it was necessary to reduce the number from seventeen to fourteen. Initially the clerk who was charged with this duty drew three names written on pieces of paper from the seventeen. When this procedure was questioned, the three names were returned to the group and then fourteen sheets of paper were drawn. Remarkably, on both occasions the same three prospective jurors were excluded. Based on the improbability of such an occurrence, appellant cries foul and asks this Court to infer impropriety.

Initially we must state that there is no evidence upon which any impropriety may be inferred. Moreover, the procedure initially employed, i.e. drawing a sufficient number to reduce the jury to the number required by law, is permitted by RCr 9.36(2). As such, the re-draw, which produced a jury consisting of the same persons, was merely redundant. Finally, our review of the claims in this regard reveals substantial compliance with the rules relating to jury selection and certainly no error of sufficient gravity to overcome the trial court's discretion with respect to a new trial. *Williams v. Commonwealth, Ky.App.*, 734 S.W.2d 810 (1987).

In addition to the jury issues discussed hereinabove, appellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann and Gaugh. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced a penalty phase verdict. This Court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court. On the unpreserved claim that a verdict was coerced, the record simply fails to bear out such an assertion. At no time did the jury report that it was deadlocked. In view of the gravity of the

decision before the jury, the time spent in deliberation was not excessive and we discern no violation of those decisions which proscribe coercion of jurors into rendering a verdict. *Abbott v. Commonwealth, Ky.*, 352 S.W.2d 552, 554 (1961), and *Earl v. Commonwealth, Ky.App.*, 569 S.W.2d 686, 688 (1978).

[5] Appellant claims error in the trial court's failure to give a specific instruction directing the jury to consider evidence of his childhood abuse and neglect and deprived family background. While appellant was permitted to introduce extensive evidence in this vein, the instruction by which the jury could give effect to such evidence was general and authorized the jury to consider "any other circumstances arising from the evidence which you the jury deem to have mitigating value." Appellant maintains that this instruction fails to meet the requirements of *Perry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In *Perry* the Court reviewed the Texas capital punishment statute and, with regard to non-statutory mitigating factors, determined the statute to be insufficient. The *248 Court observed that despite evidence and argument relating to the appellant's mental retardation and abused background, the jury was given no vehicle by which it could express the view that a sentence of less than death was appropriate. It appeared that upon giving affirmative answers to questions required to be propounded, the jury was virtually mandated to impose the death penalty and lacked a vehicle by which to give effect to the background evidence. "The jury was never instructed that it could consider the evidence offered by Perry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.*, 492 U.S. at 320, 109 S.Ct. at 2947.

The instructions given here imposed no such restriction and rather invited the jury to broadly review the evidence for circumstances it deemed to have mitigating value. The admission of evidence relating to abuse and neglect, deprived background, and mental retardation, followed by argument of counsel as to the significance of such evidence and the instruction described hereinabove could have left no doubt in the mind of the jury that it had a right to consider such evidence in its penalty determination. A more specific instruction was not required. *Bowling v. Commonwealth, Ky.*, 873 S.W.2d 175 (1994); *Halvorsen v. Commonwealth, Ky.*, 730 S.W.2d 921 (1987); *Tulaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); *Boyd v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Appellant's claim with respect to the alleged failure of the instructions to give guidance on the application of extreme mental or emotional disturbance is without merit. The penalty phase instruction as given on this point was clear that the extent of such disturbance need not rise to the level of that which would constitute a defense to the crime. This was sufficient to inform the jury that the definition of extreme emotional disturbance given during the guilt phase had no application to the extreme mental or emotional disturbance instruction in the penalty phase. The instruction given came directly from the statute, KRS 532.025(2)(b)(2).

[6] Appellant next contends that the trial court improperly required proof beyond a reasonable doubt that he acted under extreme emotional disturbance (EED) in its first degree manslaughter instruction. Appellant claims that upon failure of the Commonwealth to prove the absence of EED in connection with the murder charge, the law results in a determination of guilt of first degree manslaughter. His argument is as follows:

Not acting under EED is a negative essential element of murder. KRS 507.020. If the prosecution fails to prove that negative essential element, a defendant is guilty of first degree manslaughter.

The murder and first degree manslaughter statutes go hand in hand. Under the murder statute, if one commits the act while not under the influence of EED, he is guilty of murder. Under the manslaughter statute, if he does the same act while under the influence of EED, he is guilty of manslaughter in the first degree. Thus, depending on the finding of the jury with respect to the absence or presence of EED, the same act may justify a conviction of murder or a conviction of manslaughter. While the murder statute includes EED as a positive element, i.e. "... because he [positively] acts under the influence of extreme emotional disturbance ...," in circumstances where there is evidence from which the jury could find EED but would not be required to so find, it is entirely reasonable to submit both offenses to the jury for its finding. That was precisely what happened here. Conviction of murder was authorized if there was no EED and a conviction of manslaughter was authorized if there was EED. As the absence or presence of EED is an element of both statutes, there was no error in the inclusion of such and requiring its determination beyond a reasonable doubt.

The instructions tendered by appellant omit the mention of EED with respect to first degree manslaughter. These tendered instructions set forth the elements but lack any mention of the mental state which distinguishes it from murder. If the instructions tendered by appellant had been given, the jury might well have been misled to the *249 absurd conclusion that appellant's acts could constitute only manslaughter in the first degree. In any event, however, when the jury found that appellant committed the acts while not under the influence of EED, a conviction of first degree manslaughter was precluded. A person cannot at once be not under the influence of EED and under the influence of EED. Such mental states are utterly inconsistent and a finding of one precludes the other. As such, if there was error with respect to the manslaughter instruction, it was rendered harmless by the jury verdict.

Appellant's claim that the trial court erred in failing to inform the jury that its decision with respect to mitigation did not have to be unanimous was fully resolved in *Bowling v. Commonwealth, Ky.*, 873 S.W.2d 175, 180 (1994). We discern nothing about this case which differs materially in that respect from *Bowling*.

Appellant's claim concerning the exclusion of evidence relating to his parole eligibility upon a previous criminal conviction was irrelevant and properly excluded.

Appellant's argument with respect to the order of presenting the instructions to the jury is utterly without merit and deserves no further comment.

[7] Appellant next complains that the structure of the verdict forms "funneled" the jury toward imposing an enhanced punishment, i.e. life without parole for twenty-five years or death upon its finding of aggravating circumstances, thereby effectively precluding the jury from imposing a punishment of twenty years to life. While we understand appellant's contention in this regard and believe better practice would dictate a modification of the standard verdict forms, in this case there was no prejudice.

First, the authorized punishments unmistakably informed the jury that a term of twenty years to life was available as to each count of murder. Second, in the reasonable doubt instruction, the jury was told that if it had such a doubt as to whether the defendant should be sentenced to death, then it should sentence him to imprisonment. Third, and most significantly, the jury passed over the verdict form which authorized it to find aggravating circumstances and then impose a punishment of life without parole for twenty-five years. Instead the jury went to the death verdict form and, after finding aggravating circumstances, imposed the death penalty.

It would be irrational to suggest that the jury would have sentenced appellant to a term of twenty years to life, but on the mistaken belief that it could not so sentence him, disregarded the option of sentencing him to life without parole for twenty-five years and then gave him the death penalty.

The dissenting opinion in *Thomas v. Commonwealth, Ky.*, 864 S.W.2d 252 (1993), is critical of the structure of the verdict forms used here. However, the majority opinion saw no reversible error and, while we now believe better practice would dictate modification of the verdict form to more forthrightly tell the jury that it may find aggravating circumstances but still impose punishment of twenty years to life, there was no reversible error in this aspect of the instructions in this case.

Appellant's claim that a twenty-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

Appellant's additional claims of error with respect to the instructions have been reviewed and found to be without merit.

[8] In a multi-faceted attack upon his conviction and death sentence, appellant claims exemption from the death penalty by virtue of the 1986 plea agreement after which he was sentenced to death but which was subsequently reversed on appeal. He claims, *inter alia*, that by virtue of actions of the state, a non-death sentence is required; that he is entitled to specific performance of the 1986 plea agreement; and that the death penalty has been imposed in an arbitrary, freakish, discriminatory and disproportionate manner. We will address the issues presented *250 by appellant to the extent we deem it to be necessary but will not respond to every minute point raised.

Any analysis of these issues must begin with *Haight v. Commonwealth, Ky.*, 760 S.W.2d 84 (1988), and it should be reiterated that the law of the case doctrine precludes relitigation of matters settled therein. In *Haight v. Commonwealth*, this Court reversed appellant's death sentence. In the opinion we detailed the negotiations between the attorney for the Commonwealth and defense counsel which led to entry of the guilty plea.

We reversed the final judgment on grounds that when he entered the guilty plea, appellant was misled into believing that the trial court had committed itself to sentence him in accordance with the Commonwealth's recommendation. We noted, however, that appellant, by counsel had pressured the trial court in the direction of making such a commitment, but that the trial court had refused. Parenthetically, we observe here that at that stage of the proceedings, any such commitment from the trial court would have been unlawful. *Commonwealth v. Corey, Ky.*, 826 S.W.2d 319 (1992). We rejected appellant's contentions, however, that the trial court had indeed made such a commitment and held *Johnson v. Commonwealth, Ky.*, 609 S.W.2d 360 (1980), and *Workman v. Commonwealth, Ky.*, 580 S.W.2d 206 (1979), to be inapplicable. However, we did find statements by the trial court sufficient to result in a commitment to permit withdrawal of the guilty plea in the event sentence was not imposed in accordance with the agreement. Effectively, we enforced the agreement to permit appellant to withdraw his guilty plea after the trial court had determined that a death sentence would be appropriate. We wiped the slate clean of the defective guilty plea negotiations and trial court sentence and restored the status quo immediately after the indictment. "For the foregoing reasons the final judgment of the trial court and the trial court's order of May 8, 1986, accepting appellant's guilty plea are vacated. All charges in the indictment as originally returned by the Grand Jury are

reinstated and this cause remanded to the trial court for a plea to the crimes charged." *Haight v. Commonwealth*, 760 S.W.2d at 89.

At this juncture, it is also appropriate to review our decision in *Haight v. Williamson, Ky.*, 833 S.W.2d 821 (1992), for it, too, is the law of the case and is also controlling. *Haight v. Williamson* rejected appellant's arguments that he was entitled to specific enforcement of the original plea agreement and that the Commonwealth acted in a vindictive manner when it sought the death penalty following reversal on appeal. The Court noted that the Commonwealth had lived up to its bargain with respect to presenting the recommended sentence throughout the initial proceeding. Thus, we held *Workman v. Commonwealth, Ky.*, 580 S.W.2d 206 (1979), and *Commonwealth v. Reyes, Ky.*, 764 S.W.2d 62 (1989), to be inapplicable. Holding that no prosecutorial vindictiveness had been shown, the Court relied on the remand language in *Haight v. Commonwealth* which directed the parties to start over. *Haight v. Williamson* resolved against appellant the contention that the Commonwealth is forever bound by the original agreement and that vindictiveness was shown by the Commonwealth when it subsequently sought the death penalty. We fully embraced the view that all prior negotiations and all prior agreements and judgments were vacated in favor of a new beginning.

We deem it unnecessary and improper to reconsider herein matters which have been so firmly settled in our previous opinions. Review of our prior decisions reveals no error which needs correction, and appellant's arguments will be considered only in light of what remains after our holdings as aforesaid are applied.

In his brief and at oral argument, appellant has vehemently contended that the fact of his death sentence following his guilty plea has placed him in a class by himself due to the subsequent change in RCr 8.10 which permitted withdrawal of guilty pleas on failure of the court to approve the agreement. Again and again we have been bombarded with the words "arbitrary, freakish, discriminatory and disproportionate," terms which have little analytical force and serve only to elevate the decibel level of the discussion.

*251 By the 1989 amendment of RCr 8.10, upon the determination of a trial court that it will not follow the plea agreement made between the prosecutor and the defendant, the defendant has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point. *Commonwealth v. Corey, Ky.*, 826 S.W.2d 319 (1992). At the time of appellant's original guilty plea there was no such rule and upon a guilty plea, the only requirement upon a trial court was to sentence within the range provided by law. In *Haight v. Commonwealth* this Court determined that the plea agreement was fundamentally flawed. We believed the trial court made statements from which the defendant could have believed a commitment to a life sentence had been made. We corrected the trial court error and directed the parties to go back to the point of beginning and start all over. While RCr 8.10 as amended, effective August 28, 1989, had not yet been promulgated, we applied legal principles which had the same effect as the post-amendment RCr 8.10. Upon rejection of the plea agreement by the trial court, we directed the parties to start over, with the result being precisely what RCr 8.10 as amended would have yielded.

Appellant's argument that his predicament is unique would be persuasive if the original judgment had been affirmed but the rule thereafter changed. Then, indeed, only he would have been subjected to a death sentence pursuant to a guilty plea where the trial court had refused to impose the agreed-upon punishment. In fact, and despite his argument to the contrary, appellant's predicament is no different than other persons who have negotiated non-death sentences but failed to obtain trial court approval and who were thereby forced to withdraw their guilty pleas and go to trial.

Appellant further contends that by virtue of the conduct of the trial court as described in *Haight v. Commonwealth*, he was denied his right to have the jury fix punishment, a right secured by RCr 9.84 and recognized in *Commonwealth v. Johnson, Ky.*, 910 S.W.2d 229 (1995). Under this theory, by virtue of having been misled, appellant's right to have a jury determine guilt and punishment, or depending on his election, punishment only, with the Commonwealth being bound by the agreement not to seek the death penalty, was irretrievably lost. Appellant reasons that if a jury had been empaneled when he asked for it, a point in time after the trial court had found death to be appropriate but prior to imposition of the death penalty, the Commonwealth would have been bound by virtue of *Workman v. Commonwealth, Ky.*, 580 S.W.2d 206 (1979), and *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), to uphold its part of the bargain and refrain from asking for the death penalty. As such, appellant maintains there was irreparable prejudice by virtue of the flawed 1986 guilty plea.

While this argument is not without appeal, it must fail for various reasons. First, it was appellant who moved for relief in the 1986 case in the form of a motion to withdraw his guilty plea. Under the former and then prevailing version of RCr 8.10, whether a guilty plea could be withdrawn was within the trial court's sound discretion. Nevertheless, on appeal this Court granted appellant exactly the relief he had sought in the trial court. Upon the belief that appellant had been misled by statements of the trial court, we vacated the final judgment and restored the status quo immediately post-indictment. Thereafter, appellant received a jury trial as to guilt and punishment. While the jury trial he received was not at the time and place and under the circumstances he now insists upon, he was accorded his rights consistent with his demand.

When all is said and done and after the over-wrought and repetitious arguments of appellant have been put in perspective, it is clear that what he really wants and believes himself entitled to is enforcement of the original agreement. On at least three prior occasions, this Court has said no to enforcement of the original agreement and in this opinion we say it again. The flaw in the Garrard Circuit Court proceeding was in the trial judge's failure to keep his distance from the plea negotiations with the result being that appellant was misled as to the trial judge's intentions. We corrected that error and restored *252 appellant to all the rights he had prior to the guilty plea.

[9] Appellant's double jeopardy claim has been reviewed and determined to be without merit. The essence of this claim is that upon the prior guilty plea and death sentence, jeopardy attached. Because RCr 9.84 precluded imposition of the death penalty, the argument goes, appellant was "implicitly acquitted."

The error of the trial court was not of the type and kind which precludes re-prosecution. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). The conduct of the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious or deliberate misleading. The trial court simply made an error which was corrected on appeal. Double jeopardy principles do not preclude further prosecution with all lawful punishments being available. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In *Simpson v. Commonwealth, Ky.*, 759 S.W.2d 224 (1988), we answered appellant's double jeopardy claim as follows:

It was appellant who moved the court to withdraw his guilty plea and his confession made during the plea proceeding. Such constitutes a waiver of his constitutional protection against double jeopardy for the purpose of trial on the charge in the indictment.

Id. at 228.

[10] Appellant next attacks the judgment on grounds that his trial was “polluted ... with irrelevant and immaterial collateral bad acts.” He contends, among other things, that such bad acts precluded a “meaningful opportunity” to present his EED defense to an open and receptive jury. Particularly he has identified evidence of his attempted murder of Trooper Yates; evidence as to the circumstances surrounding his guilty plea to that crime; evidence as to his theft of a farm hand’s Camaro automobile while he was a fugitive; evidence of the burglary of the Shufflet home; evidence as to Tony Minnie’s fear of appellant; and evidence of appellant’s theft of the Sasser vehicle.

It should be remembered that at trial appellant’s defense was extreme emotional disturbance and it was the Commonwealth’s burden to prove the absence of EED. While the relevant time frame for proof of appellant’s mental state was the time of the murders, evidence as to his mental state shortly before and after the murders was relevant. The Commonwealth maintains that from the time of appellant’s escape from the Johnson County Jail until the time of his capture, his behavior amounted to a continuing course of conduct with all events being inextricably intertwined with the crimes charged. There was a legitimate basis in evidence law for admission of each such item of evidence and it was for the trial court to determine whether the probative value outweighed the prejudicial effect.

It is difficult to ignore that after his escape from the Johnson County Jail appellant went on a crime spree and along the way murdered two victims. We have found no basis to disturb the trial court’s rulings on the admission of the challenged evidence. *Caldwell v. Commonwealth*, Ky., 503 S.W.2d 485 (1972), and *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990). Moreover, any error in this regard would have been entirely harmless. We have carefully examined appellant’s claims as set forth hereinabove and considered KRE 404(b) and this Court’s decision in *O’Bryan v. Commonwealth*, Ky., 634 S.W.2d 153 (1982). We are unable to find an abuse of trial court discretion in this regard. *Dunbar v. Commonwealth*, Ky., 809 S.W.2d 852 (1991).

Appellant’s complaints concerning the cross-examination of Randy Wheeler and the rebuttal testimony of Pamela Marcum are insubstantial and need not be addressed. Likewise, as to introduction of the three crime scene photographs, there was no error. *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980).

[11] Appellant contends that the Commonwealth coaxed the jury into sentencing him to death by arguing future dangerousness. Excerpts of the prosecutor’s penalty phase summation which contained ample references to appellant’s other criminal convictions^{*253} have been provided. The Commonwealth responds that the arguments were based upon appellant’s unique individual criminal history and that they established that he had not benefitted from previous incarceration.

Contrary to appellant’s argument, we do not believe this amounted to use of a non-statutory aggravator. Appellant’s extraordinary history of violent criminal conduct was properly placed before the jury. KRS 532.025(2)(a). Moreover, while the “prison is doing nothing” argument by the Commonwealth is of concern, it falls short of the argument condemned in *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148 (1996), whereby the jury was exhorted to give the death penalty as the only way to prevent the defendant from killing again. The argument here is qualitatively different from the argument condemned in *Ice v. Commonwealth*, Ky., 667 S.W.2d 671, 676 (1984). This Court has long observed the principle that wide latitude is permitted during closing argument. In view of this principle and upon our further belief that any error which may have occurred in this regard was harmless, there are no grounds for reversal on this issue.

Appellant’s unpreserved claim of improper argument designated “Death as Deterrent” does not rise to the level of palpable error. The views set forth hereinabove sufficiently answer these contentions.

[12] There was no error in the Commonwealth’s introduction, pursuant to KRS 532.025, of appellant’s criminal convictions which occurred and became final subsequent to his commission of the instant offenses. Our decision in *Templeman v. Commonwealth*, Ky., 785 S.W.2d 259 (1990), allows the introduction of such final convictions:

[T]he trial judge was correct in allowing the prosecution to introduce evidence of prior criminal convictions which occurred subsequent to the commission of the crime. The term prior is the status of the defendant at the time of sentencing, not at the time of the commission of the charged crime.

Id. at 260.

[13] Appellant’s complaint concerning the trial court’s failure to timely file a trial judge’s report as required by KRS 532.075(1) fails to reveal grounds for reversal. As appellant has acknowledged, the report was filed. It appears that the court gave appropriate consideration to the aggravating and mitigating evidence and otherwise complied with the statute. *Epperson v. Commonwealth*, Ky., 809 S.W.2d 835 (1991), and *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990).

For his final claims of error, appellant has attacked various aspects of the Kentucky death penalty statute and asserted, among other things, that the Act is unconstitutional. We have answered appellant’s contentions in this regard on numerous occasions including *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990); *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987); and *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980). As such, we will not reiterate those discussions.

[14] Notwithstanding appellant’s failure to preserve his right to a proportionality review, we will address this issue in obedience to the requirements of KRS 532.075. In *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781, 793 (1987) (relying on *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414, 424 (1985)), we recognized the difficulty of comparing one murder case with another, but declared that death for the crime committed in *Stanford* was neither excessive nor disproportionate to the penalty imposed in similar cases. Here, we have determined that the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence of record clearly supports the jury’s finding of statutory aggravating circumstances as enumerated in KRS 532.025(2) and we have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.^{FN1} In addition to the ^{*254}cases cited in *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), we have also considered *Epperson v. Commonwealth*, Ky., 809 S.W.2d 835 (1991); *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990); *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992); *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1994); *Sanborn v. Commonwealth*, Ky., 892 S.W.2d 542 (1995); and *Russell v. Commonwealth*, Ky., 882 S.W.2d 111 (1994), decisions rendered since 1990. We have reviewed all claims of legal error identified by appellant and concluded that no error or accumulation of error substantially prejudiced appellant’s rights. From the evidence, there is no doubt that appellant committed the crimes of which he has been convicted and for those crimes the punishment imposed was entirely appropriate.

FN1. In *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), n. 10, this Court listed all cases in which the death

penalty was imposed after January 1, 1970. We incorporate that list herein by reference and further state that we have noted a particular similarity between this case and *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984), *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), and *Epperson v. Commonwealth*, Ky., 809 S.W.2d 835 (1991), cases in which the death penalty was imposed and which have been affirmed on appeal.

Accordingly, we affirm the convictions and sentences including the sentences of death.

STEPHENS, C.J., and BAKER, GRAVES, LAMBERT, STUMBO, and WINTERSHEIMER, JJ., concur.
KING, J., not sitting.

Ky., 1996.
Haight v. Com.
938 S.W.2d 243

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Supreme Court of Kentucky.
Randy HAIGHT, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 1998-SC-0931-MR.
April 26, 2001.

Defendant filed application for postconviction relief from capital murder convictions after the Supreme Court, 760 S.W.2d 84, first reversed conviction for two intentional murders, subsequently, 833 S.W.2d 821, resolved that commonwealth was entitled to seek death penalty upon retrial, and following retrial, 938 S.W.2d 243, affirmed conviction for two intentional murders. The Circuit Court, Jefferson County, Benjamin F. Shobe, Special Judge, denied the application. Defendant appealed. On denial of rehearing, the Supreme Court, *Wintersheimer, J.*, held that: (1) defendant did not establish that trial counsel was ineffective in preventing him from freely exercising peremptory challenges; (2) defendant was not denied due process nor fundamental fairness by denial of motion for leave to amend postconviction relief motion; (3) defendant was not entitled to funding for expert in neuropsychology at trial or on postconviction relief motion; (4) defendant was not entitled to discovery of whether commonwealth made deals or agreements with crucial prosecution witnesses or of any documents commonwealth had relating to defendant’s family; (5) trial counsel was not ineffective in failing to introduce commonwealth’s previous, withdrawn plea bargain with defendant, as mitigating evidence at penalty phase; and (6) defendant failed to establish that jury improperly considered possibility of parole or slept during punishment phase.

Affirmed.

Keller, J., filed a dissenting opinion in which Stumbo, J., joined.

West Headnotes

[1] Criminal Law 110 ⇐ 1427

110 Criminal Law
110XXXX Post-Conviction Relief
110XXXX(A) In General
110k1427 k. Matters Which Either Were or Could Have Been Adjudicated Previously, in General. Most Cited Cases

Criminal Law 110 ⇐ 1440(1)

110 Criminal Law
110XXXX Post-Conviction Relief
110XXXX(A) In General
110k1435 Consideration Despite Waiver or Other Bar

110k1440 Counsel
110k1440(1) k. In General. *Most Cited Cases*

Review of claims raised in a collateral attack by a postconviction relief motion is limited to the issues that were not and could not be raised on direct appeal, and an issue raised and rejected on direct appeal may not be relitigated in postconviction relief proceedings by simply claiming that it amounts to ineffective assistance of counsel. *U.S.C.A. Const. Amend. 6, Rules Crim. Proc., Rule 11.42.*

[2] Criminal Law 110 ⇌ 1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient Representation and Prejudice in General. *Most Cited Cases*
(Formerly 110k641.13(1))

In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *U.S.C.A. Const. Amend. 6.*

[3] Criminal Law 110 ⇌ 1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient Representation and Prejudice in General. *Most Cited Cases*
(Formerly 110k641.13(1))

Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won. *U.S.C.A. Const. Amend. 6.*

[4] Criminal Law 110 ⇌ 1883

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1883 k. Prejudice in General. *Most Cited Cases*
(Formerly 110k641.13(1))

Critical issue to determining whether counsel was ineffective is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *U.S.C.A. Const. Amend. 6.*

[5] Criminal Law 110 ⇌ 1403

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1401 Constitutional, Statutory, and Regulatory Provisions
110k1403 k. Purpose. *Most Cited Cases*

Purpose of the Rule of Criminal Procedure governing motions for postconviction relief is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Rules Crim. Proc., Rule 11.42.*

[6] Criminal Law 110 ⇌ 1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient Representation in General. *Most Cited Cases*
(Formerly 110k641.13(1))

In considering ineffective assistance of counsel claims, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *U.S.C.A. Const. Amend. 6.*

[7] Criminal Law 110 ⇌ 1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In General. *Most Cited Cases*
(Formerly 110k641.13(1))

Defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *U.S.C.A. Const. Amend. 6.*

[8] Criminal Law 110 ⇌ 1871

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and Burden of Proof in General. *Most Cited Cases*
(Formerly 110k641.13(1))

Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *U.S.C.A. Const. Amend. 6.*

[9] Criminal Law 110 ⇌ 1870

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1870 k. In General. *Most Cited Cases*
(Formerly 110k641.13(1))

Right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial. *U.S.C.A. Const. Amend. 6.*

[10] Criminal Law 110 ⇌ 1615

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1615 k. Degree of Proof. *Most Cited Cases*

In a postconviction relief proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the postconviction proceeding. *Rules Crim. Proc., Rule 11.42.*

[11] Criminal Law 110 ⇌ 1158.36

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 k. Post-Conviction Relief. *Most Cited Cases*

(Formerly 110k1158(1))

Even when the trial judge does conduct an evidentiary hearing in a postconviction relief proceeding, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. *Rules Crim. Proc., Rule 11.42.*

[12] Criminal Law 110 ⇌ 1652

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1652 k. In General. *Most Cited Cases*

Evidentiary hearing in postconviction relief proceedings is not required to consider issues already refuted by the record in the trial court. *Rules Crim. Proc., Rule 11.42.*

[13] Criminal Law 110 ⇌ 1652

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1652 k. In General. *Most Cited Cases*

Conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing because the Rule of Criminal Procedure governing postconviction relief proceedings does not require a hearing to serve the function of discovery. *Rules Crim. Proc., Rule 11.42.*

[14] Criminal Law 110 ⇌ 1652

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1652 k. In General. *Most Cited Cases*

Even in a capital case, a postconviction relief movant is not automatically entitled to receive an evidentiary hearing, and an evidentiary hearing is not required about issues refuted by the record of the trial court. *U.S.C.A. Const. Amend. 6.*

[15] Criminal Law 110 ⇨ 1652

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)3 Hearing and Determination
 110k1651 Necessity for Hearing
 110k1652 k. In General. *Most Cited Cases*

Defendant was not entitled to hearing on postconviction relief motion, where many of defendant's claims were raised and disposed of on direct appeal, some were based on speculation or were not pled with particularity, defendant failed to prove prejudice on any claims, defendant had opportunity to present claims in lengthy and detailed motion accompanied by exhibits, there was no indication that defendant was denied due process under either federal or state constitution, motion raised numerous factual issues about counsel's conduct, none of which were persuasive, and special judge who presided over postconviction proceedings was same judge who presided over trial. *Rules Crim.Proc., Rule 11.42.*

[16] Criminal Law 110 ⇨ 1652

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)3 Hearing and Determination
 110k1651 Necessity for Hearing
 110k1652 k. In General. *Most Cited Cases*

If the record refutes the claims of errors in a postconviction relief motion, there is no need for an evidentiary hearing. *Rules Crim.Proc., Rule 11.42.*

[17] Criminal Law 110 ⇨ 1429(2)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(A) In General
 110k1428 Presentation of Issue in Prior Proceedings
 110k1429 In General
 110k1429(2) k. Post-Conviction Proceeding Not a Substitute for Appeal. *Most Cited Cases*

Criminal Law 110 ⇨ 1508

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1508 k. Conduct of Trial in General. *Most Cited Cases*

Postconviction relief afforded by the Rules of Criminal Procedure is not a substitute for appeal and does not permit review of alleged trial errors which fall short of a denial of due process. *Rules Crim.Proc., Rule 11.42.*

[18] Criminal Law 110 ⇨ 1652

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)3 Hearing and Determination
 110k1651 Necessity for Hearing
 110k1652 k. In General. *Most Cited Cases*

Evidentiary hearing on a postconviction relief motion is not required about issues refuted by the record of the trial. *Rules Crim.Proc., Rule 11.42.*

[19] Criminal Law 110 ⇨ 1901

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1901 k. Jury Selection and Composition. *Most Cited Cases*
 (Formerly 110k641.13(2.1))

Defendant failed to establish that trial counsel was ineffective for preventing defendant from freely exercising peremptory challenges, even though defendant asserted that he wanted to peremptorily strike two jurors, where defendant did not indicate whether he desired to strike other jurors who were peremptorily challenged, and did not provide any reason that defendant gave to counsel in support of alleged desire, and where trial judge allowed defendant to exercise full number of available peremptory challenges. *U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 9.40.*

[20] Jury 230 ⇨ 136(4)

230 Jury
 230V Competency of Jurors, Challenges, and Objections
 230k134 Peremptory Challenges
 230k136 Number
 230k136(4) k. Criminal Prosecutions. *Most Cited Cases*

Rules specifying the number of peremptory challenges to jurors are not mere technicalities, they are substantial

rights and are to be fully enforced.

[21] Jury 230 ⇨ 142

230 Jury
 230V Competency of Jurors, Challenges, and Objections
 230k142 k. Objections and Exceptions. *Most Cited Cases*

Defendant's peremptory challenge claims were waived when jury was sworn at trial. *Rules Crim.Proc., Rule 9.36(3).*

[22] Criminal Law 110 ⇨ 1580(1)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)1 In General
 110k1574 Petition or Motion
 110k1580 Particular Issues
 110k1580(1) k. In General. *Most Cited Cases*

Defendant's allegation with respect to juror, that juror was "a woman whose father had been a police officer," did not satisfy requirement of specificity in Rule of Criminal Procedure governing postconviction relief. *Rules Crim.Proc., Rule 11.42(2).*

[23] Criminal Law 110 ⇨ 1166.16

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1166.5 Conduct of Trial in General
 110k1166.16 k. Impaneling Jury in General. *Most Cited Cases*

Alleged error concerning whether defendant was able to freely exercise his peremptory challenges was not of nature which deprived defendant of basic protections, without which criminal trial could not reliably serve its function as vehicle for determining guilt or innocence, and thus, defendant did not demonstrate structural error.

[24] Jury 230 ⇨ 135

230 Jury
 230V Competency of Jurors, Challenges, and Objections
 230k134 Peremptory Challenges
 230k135 k. In General. *Most Cited Cases*

There is no constitutional right to peremptory challenges to jurors.

[25] Constitutional Law 92 ⇨ 4836

92 Constitutional Law
 92XXVII Due Process
 92XXVII(H) Criminal Law
 92XXVII(H)12 Other Particular Issues and Applications
 92k4836 k. Post-Conviction Relief. *Most Cited Cases*
 (Formerly 92k270.5)

Criminal Law 110 ⇨ 1575

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)1 In General
 110k1574 Petition or Motion
 110k1575 k. In General. *Most Cited Cases*

Defendant was not denied due process or fundamental fairness by denial of motion for leave to amend motion for postconviction relief, where verdict was rendered approximately four years prior to motion, defendant had sufficient time in which to investigate issues and formulate arguments to present to court, and he tendered no amended petition and simply solicited open end approval to amend. *U.S.C.A. Const.Amend. 14; Rules Crim.Proc., Rule 11.42.*

[26] Costs 102 ⇨ 302.4

102 Costs
 102XIV In Criminal Prosecutions
 102k301.1 Security for Payment; Proceedings in Forma Pauperis
 102k302.4 k. Medical or Psychiatric Witnesses or Assistance. *Most Cited Cases*

Defendant had full benefit of mental health evaluations and experts during trial, and thus was not entitled to funding for expert assistance in neuropsychology, even though expert offered by defendant said that there was high degree of certainty that it was possible that defendant may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance, where opinion was mere speculation. *Rules Crim.Proc., Rule 11.42.*

[27] Criminal Law 110 ⇨ 1519(1)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel

110k1519 Effectiveness of Counsel
110k1519(1) k. In General. *Most Cited Cases*

Rule of Criminal Procedure governing postconviction relief proceedings does not provide for a relitigation of the performance of trial counsel. U.S.C.A. Const.Amend. 6, Rules Crim.Proc., Rule 11.42.

[28] Criminal Law 110 ⇌ 1590

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1590 k. Discovery and Disclosure. *Most Cited Cases*

Defendant was not entitled to discovery of whether commonwealth made deals or agreements with crucial prosecution witnesses or of any documents in possession of commonwealth relating to defendant's family, in postconviction relief proceedings, in light of fact that postconviction relief proceedings were intended to provide basis for known grievances and not opportunity for fishing expedition. *Rules Crim.Proc., Rule 11.42.*

[29] Criminal Law 110 ⇌ 1433(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(1) k. In General. *Most Cited Cases*

Criminal Law 110 ⇌ 1491

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1486 Jury
110k1491 k. Qualification, Bias. *Most Cited Cases*

Criminal Law 110 ⇌ 1580(10)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1580 Particular Issues

110k1580(10) k. Right to Counsel. *Most Cited Cases*

Defendant was not entitled to postconviction relief based on general allegations of ineffective assistance of trial counsel with regard to individual jurors and jury pool, where petition failed to state with particularity facts that would warrant relief, some allegations were raised and rejected on direct appeal, and complaint that was not raised on direct appeal concerned juror who appeared open to range of penalties and willing to consider all evidence. U.S.C.A. Const.Amend. 6, Rules Crim.Proc., Rule 11.42.

[30] Criminal Law 110 ⇌ 1891

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for Trial. *Most Cited Cases*
(Formerly 110k641.13(6))

There is a necessity for complete investigation by defense counsel, and defense counsel has duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances, applying a heavy measure of deference to the judgment of counsel. *Rules Crim.Proc., Rule 11.42.*

[31] Criminal Law 110 ⇌ 1891

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for Trial. *Most Cited Cases*
(Formerly 110k641.13(6))

Reasonable investigation by trial counsel is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct, but rather the investigation must be reasonable under all the circumstances. *Rules Crim.Proc., Rule 11.42.*

[32] Criminal Law 110 ⇌ 1931

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1931 k. Experts; Opinion Testimony. *Most Cited Cases*
(Formerly 110k641.13(6))

Trial counsel was not ineffective in not seeking expert assistance to evaluate defendant's mental status and psychological make up early in preparation for trial, even though one report mentioned a possibility of brain damage, where report did not make a finding of brain damage, clinical forensic psychologist who examined defendant in preparation for trial specifically found no evidence that defendant was psychotic, suffered from any serious neurological defect, or was otherwise retarded, and there was no reasonable probability that evaluation would have changed result reached by jury or sentence fixed by it. U.S.C.A. Const.Amend. 6, Rules Crim.Proc., Rule 11.42.

[33] Costs 102 ⇌ 302.4

102 Costs
102XIV In Criminal Prosecutions
102k301.1 Security for Payment; Proceedings in Forma Pauperis
102k302.4 k. Medical or Psychiatric Witnesses or Assistance. *Most Cited Cases*

The right to funding for expert psychiatric assistance only arises when a defendant's mental state is seriously in question.

[34] Criminal Law 110 ⇌ 1963

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1963 k. Other Particular Issues in Death Penalty Cases. *Most Cited Cases*
(Formerly 110k641.13(7))

Defendant failed to establish any improper consideration of parole by jury when it was deliberating about death penalty, and consequently failed to establish that trial counsel was ineffective in doing nothing to seek a remedy or preserve issue for appellate review. U.S.C.A. Const.Amend. 6, Rules Crim.Proc., Rule 11.42.

[35] Criminal Law 110 ⇌ 957(1)

110 Criminal Law
110XXXI Motions for New Trial
110k948 Application for New Trial
110k957 Statements, Affidavits, and Testimony of Jurors
110k957(1) k. In General. *Most Cited Cases*

Jury testimony that it had improperly considered parole is incompetent under rules prohibiting jurors from being examined to establish grounds for a new trial.

[36] Criminal Law 110 ⇌ 1580(12)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1580 Particular Issues
110k1580(12) k. Sentencing. *Most Cited Cases*

Allegation in postconviction motion regarding jurors sleeping during part of penalty phase was insufficiently specific where defendant did not state which jurors were alleged to be sleeping, did not indicate when sleeping occurred, and did not indicate what information jurors supposedly missed, or how information would have changed outcome. U.S.C.A. Const.Amend. 6, Rules Crim.Proc., Rule 11.42(2).

[37] Criminal Law 110 ⇌ 1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. *Most Cited Cases*
(Formerly 110k641.13(7))

Trial counsel was not ineffective in failing to introduce Commonwealth's previous, withdrawn plea bargain with defendant, as mitigating evidence at penalty phase of capital murder trial, where the question of a defendant's right to introduce evidence of a withdrawn guilty plea as mitigating evidence was a novel legal theory in the Commonwealth. U.S.C.A. Const. Amend. 6, Rules of Evid., Rules 408, 410.

[38] Criminal Law 110 ⇌ 1890

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1890 k. In General. *Most Cited Cases*
(Formerly 110k641.13(2.1))

While the failure to advance an established legal theory may result in ineffective assistance of counsel, the failure to advance a novel theory never will. U.S.C.A. Const.Amend. 6.

[39] Criminal Law 110 ⇌ 1957

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1952 Sentencing in General
 110k1957 k. Other Particular Issues. *Most Cited Cases*
 (Formerly 110k641.13(7))

Defense counsel was not ineffective in failing to request that a “no adverse inference” instruction relating to defendant’s right to remain silent be given at penalty phase. *U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.*

[40] Criminal Law 110 ⇌ 1961

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1958 Death Penalty
 110k1961 k. Presentation of Evidence in Sentencing Phase. *Most Cited Cases*
 (Formerly 110k641.13(7))

Defense counsel was not ineffective in failing to introduce, as evidence in mitigation in death penalty sentencing phase, a letter written by defendant in which he admitted committing murders, expressed sorrow at having caused pain and suffering, and expressed desire to die for having done so; defense counsel stated a desire not to reemphasize defendant’s guilt phase testimony to the jury. *U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.*

***440** Daniel T. Goyette, Jefferson District Public Defender, Bruce P. Hackett, Deputy Appellate Defender, Jefferson District Public Defender, Louisville, Counsel for Appellant.

A.B. Chandler III, Attorney General, Susan Roncanti, Assistant Attorney General, Kent T. Young, Assistant Attorney General, Criminal Appellate Division, Frankfort, Counsel for Appellee.

WINTERSHEIMER, Justice.

This appeal seeks post-conviction relief from an order denying Haight a hearing ***441** on his RCr 11.42 motion, denying him an opportunity to amend or supplement his motion, denying a request for discovery, denying him funds for experts, as well as denying the motion itself.

Haight has been the subject of three published Opinions of this Court. His first conviction was reversed by a majority of this Court in *Haight v. Commonwealth, Ky., 760 S.W.2d 84* (1988). Subsequently, Haight sought a ruling that would require the Commonwealth not to seek the death penalty upon retrial. This Court resolved that

issue against him in *Haight v. Williamson, Ky., 833 S.W.2d 821* (1992). After the case was removed from Garrard County to Jefferson County and a special judge appointed, Haight was again convicted of two intentional murders and sentenced to death. He was also sentenced to two concurrent terms of twenty years in prison for two counts of first degree robbery and five years imprisonment for possession of a handgun by a convicted felon. The conviction and sentences were affirmed in *Haight v. Commonwealth, Ky., 938 S.W.2d 243* (1996).

In this RCr 11.42 appeal, Haight raises twelve issues and identifies as one of the more significant issues, the question of whether he was entitled to an evidentiary hearing on his motion. The essential facts are that after having escaped from a county jail, and in the course of committing first-degree robbery, Haight killed two victims in a parked car by inflicting multiple gunshot wounds upon them. Haight admitted at trial that he killed the two people and moved their car to enable him to continue his flight. This Court has reviewed each of the twelve arguments presented on appeal.

[1] We believe it is valuable to again set out the standard of review of claims raised in a collateral attack under RCr 11.42, alleging ineffective assistance of counsel at the original trial. Such a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. *Sanborn v. Commonwealth, Ky., 975 S.W.2d 905* (1998); *Brown v. Commonwealth, Ky., 788 S.W.2d 500* (1990) and *Stanford v. Commonwealth, Ky., 854 S.W.2d 742* (1993).

[2][3][4][5] The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674* (1984); *accord Gall v. Commonwealth, Ky., 702 S.W.2d 37* (1985); *Sanborn, supra*. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow, 977 F.2d 222, 229* (6th Cir.1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858* (1983).

[6] In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that ***442** counsel rendered reasonable professional assistance. *See Morrow; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305* (1986).

[7][8][9] A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *McQueen v. Commonwealth, Ky., 949 S.W.2d 70* (1997). *Strickland* notes that a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

[10][11] In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding.

Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). Even when the trial judge does conduct an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. *Sanborn; McQueen v. Commonwealth, Ky., 721 S.W.2d 694* (1986); *McQueen v. Scroggys, 99 F.3d 1302* (6th Cir.1996).

I. Lack of Evidentiary Hearing

Haight filed a 55-page motion to vacate the judgment pursuant to RCr 11.42 on October 14, 1997. The Commonwealth responded to each claim and indicated that there were no grounds which would warrant an evidentiary hearing. In any event, on March 16, 1998, a hearing was held to consider issues such as the discovery motion and the motion to amend. On September 9, 1998, the trial judge entered an order denying the RCr 11.42 motion and the discovery motion and also declined to have any ex parte hearing for expert funding. During this process, the trial judge entered an order stating that the March 16th hearing was for the purpose of determining whether the matters in the RCr 11.42 motion required a hearing. The trial judge asked counsel during the March 16th hearing, what claims he planned to submit in an amendment and defense counsel indicated that he could not state with specificity what those issues would be.

[12][13][14] An evidentiary hearing is not required to consider issues already refuted by the record in the trial court. Conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery. *Sanborn, citing Stanford v. Commonwealth, Ky., 854 S.W.2d 742* (1993); *Stanford, citing Skages v. Commonwealth, Ky., 803 S.W.2d 573* (1990), stands for the proposition that even in a capital case, a RCr 11.42 motion is not automatically entitled to receive an evidentiary hearing. *Sanborn* states in pertinent part, “An evidentiary hearing is not required about issues refuted by the record of the trial court” *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674* (1984), supported the conclusion that an evidentiary hearing is not always required in an ineffective assistance of counsel claim.

[15][16] Haight was not entitled to a hearing on the motion, and he was not denied a full and fair opportunity to present his claim. As stated in *Bowling v. Commonwealth, Ky., 981 S.W.2d 545* (1998), *citing Stanford*, “If the record refutes the claims of errors, there is no need for an evidentiary hearing.”

Many of the claims of Haight have already been raised and disposed of on direct appeal and are not to be heard now ***443** under the rule of ineffective assistance of counsel. Some of the allegations are based on speculation or are not pled with the degree of particularity required by RCr 11.42(2). Haight failed to prove prejudice on any of the claims. He received a fair trial and is not entitled to an evidentiary hearing. He had a complete opportunity to present all of his claims which he did in a lengthy and detailed RCr 11.42 motion accompanied by a hundred pages of exhibits. An examination of these documents indicates that the trial judge was correct in determining that no valid claims were presented. The trial judge was also correct when he determined that the sentence was not constitutionally invalid for lack of due process, for ineffective assistance of counsel or for any other reason ascertainable by the trial court.

There is no indication that Haight was denied due process under either the federal or state constitution. His motion raised numerous factual issues about defense counsel’s failure to properly investigate, present relevant and important evidence, refusal to carry out the wishes of the defendant, failure to seek remedies for prejudicial occurrences at trial and failure to raise and preserve errors during and after trial. None of his arguments are persuasive.

[17] The post-conviction relief afforded by this rule is not a substitute for appeal and does not permit review of

alleged trial errors which fall short of a denial of due process. *Smith v. Commonwealth, Ky., 412 S.W.2d 256* (1967). Clearly, the trial judge was able to resolve the issues from the face of the record or determine that the allegations, even if true, were not sufficient to invalidate the convictions. *Wilson v. Commonwealth, Ky., 975 S.W.2d 901* (1998). It should be remembered that the special judge who presided over the RCr 11.42 proceedings was the same judge who presided over the trial.

As noted in *Sanborn*, the collateral attack authorized by RCr 11.42, is limited to issues that were not and could not be raised on direct appeal. Any issue raised and rejected on direct appeal may not be relitigated in such proceedings by claiming that they amount to ineffective assistance of counsel. *Brown v. Commonwealth, Ky., 788 S.W.2d 500* (1990); *Stanford*.

[18] An evidentiary hearing is not required about issues refuted by the record of the trial. *Stanford*. Conclusory allegations which are not supported by particular facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.

II. Peremptory Challenges

[19] The trial judge allowed Haight to exercise the full number of peremptory challenges pursuant to RCr 9.40. Haight argues that the right to exercise peremptory challenges has been deemed to be a substantial right and cites *Thomas v. Commonwealth, Ky., 864 S.W.2d 252* (1993) or a substantive right citing *Bowling Green Municipal Utilities v. Atmos Energy Corp., Ky., 989 S.W.2d 577* (1999). He claims that it was his defense counsel who prevented him from freely exercising his peremptory challenges.

[20] An analysis of the authorities cited by Haight indicates that *Thomas, supra*, stated that “The rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced.” Here, Haight received the full number of peremptory challenges and his attempt to characterize this claim as ineffective assistance is unavailing.

***444** [21][22] We must observe that his peremptory challenge claims were waived when the jury was sworn at trial. RCr 9.36(3). His allegation of error is not proper in an RCr 11.42 proceeding. Haight now asserts that he wanted to peremptorily strike two jurors, but the motion does not indicate whether he desired to strike those jurors who were peremptorily challenged or any reason that Haight gave to counsel in support of his alleged desire. The allegation with respect to a juror as “being a woman whose father had been a police officer” does not satisfy the requirement of specificity required in RCr 11.42(2).

[23] Haight’s reliance on *Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35* (1999), is without merit. Invoking the doctrine of structural error does not persuade us that the errors claimed here are of the nature which deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence. There was no structural error in providing Haight the number of peremptory challenges provided by the rule and this Court rejected the allegations of juror bias on direct appeal. Haight cannot show prejudice by simply alleging ineffective assistance of counsel. There is no reasonable probability that the result of his trial would have been any different under the standards provided in *Strickland*.

[24] There is no constitutional right to peremptory challenges. *McQueen, citing Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80* (1988). *See also United States v. Boyd, 86 F.3d 719* (7th Cir.1996), for a review of a

situation where a criminal defendant makes a post-verdict challenge to the exercise of peremptory strikes by defense counsel. The conduct of trial counsel did not deprive Haight of this right to use peremptory challenges. Counsel was not ineffective.

III. Amended Motion

[25] Haight argues that he was denied a complete opportunity to present his RCr 11.42 claims because the trial judge did not allow him to file an amended or supplemental motion. Haight admits that he told the court that it would be important to amend his motion and that he would need at least six months to do so. Within that six-month period, he filed only a motion for leave to amend with no actual amendment. At the hearing of March 16, 1998, the trial judge asked Haight what other grounds should be considered. Haight's counsel indicated that they needed funding and they were not comfortable with filing an amendment and he could not state with specificity what those other issues would be. The purpose of RCr 11.42 is to provide the opportunity to present known grievances and not the chance to research potential grievances. *Gilliam v. Commonwealth, Ky.*, 652 S.W.2d 856 (1983). The verdict was rendered in 1994. Haight had sufficient time in which to investigate the issues and formulate arguments to present to the Court. He tendered no amended petition and simply solicited an open end approval to amend. The trial judge did not deny Haight an opportunity to present his claims. He was not denied any due process or fundamental fairness.

IV. Expert Funding

Haight argues that he wanted funds during the post-conviction proceedings to hire a neuropsychologist to examine him for organic brain damage. Trial counsel had claimed that he did not know of the need for a neurological examination until after the trial had started.

*445 [26] Before Haight made any request for funding based on his indigent status, the Commonwealth moved to prohibit any ex parte communications between the defense and the trial judge. The trial judge, relying on *Sanborn*, denied the request for an ex parte hearing for expert fundings, noting that there is no authority to support ex parte motions for hearings for expert fundings in an RCr 11.42 motion. Haight contends that he wanted to ask for funding for expert assistance in neuropsychology in order to prove ineffective assistance of counsel at trial. The trial judge correctly interpreted *Sanborn* in reaching his decision. This Court has already found that Haight had the full benefit of mental health evaluations and experts during his trial. *Haight, supra*.

[27] The expert offered by Haight said that there was a high degree of certainty that it's possible that Haight may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance. This is mere speculation. A RCr 11.42 proceeding does not provide for a relitigation of the performance of trial counsel. It should be recalled that the report by the expert was not filed until after the circuit court denied the RCr 11.42 motion. We find that Haight has not demonstrated any prejudice in this regard. He was not denied fundamental due process under either the federal or state constitution.

V. Discovery

[28] Haight argues that he was denied discovery. Haight filed a written motion for discovery of certain documents and information thought to be in the possession of the Commonwealth. The prosecutor objected. Haight contends that he sought to discover whether the Commonwealth had made deals or agreements with crucial prosecution witnesses. He also sought to produce any documents in the possession of the Commonwealth relating to the background of the Haight family.

The trial judge correctly denied the discovery motion based on *Sanborn* because discovery is not authorized in a post-conviction proceeding. The citation by Haight to *Bowling v. Commonwealth, Ky.*, 926 S.W.2d 667 (1996) and *Skaggs v. Radford, Ky.*, 844 S.W.2d 389 (1992) are incorrect. *Skaggs* holds that discovery is not necessary because the material would have already been turned over during the prosecution phase or the trial phase. Citation to *East v. Scott*, 55 F.3d 996 (5th Cir.1995) is also inappropriate and does not provide authority for discovery in RCr 11.42 proceedings. Haight was not entitled to discovery because the purpose of the RCr 11.42 motion is to provide a basis for known grievances and not an opportunity to conduct a fishing expedition for possible grievances. *See Sanborn* at 910. There was no violation of the rights of Haight in denying discovery at this stage.

VI. Jury Issues

Haight now complains that defense counsel failed to render effective assistance when he made no motions to strike for cause unqualified jurors, when he did not question certain jurors about publicity or mitigating factors, when he incorrectly defined extreme emotional disturbance, when he failed to move for a mistrial and when he did not investigate the under representation of African Americans in the jury pool.

[29] The trial judge acted correctly in denying the RCr 11.42 motion with respect to the allegations concerning individual jurors and the jury pool. The petition presented failed to state with particularity facts which, if true, would warrant relief and that defense trial counsel was constitutionally ineffective. There is no reason to *446 believe that but for trial defense counsel's errors, there is any reasonable probability that the result of the trial would have been any different or that Haight did not receive a fair trial and a sentence that was reliable.

The questions relating to an African American juror were rejected on direct appeal by this Court. *Haight*, 938 S.W.2d 243 (1996), when it held that the defense decision to reject objections to the juror was legitimate trial strategy.

The complaint about juror Kaiser was not raised in direct appeal. Our review of the juror's answers indicates that he was open to a range of potential penalties and willing to consider all the evidence before fixing a sentence, if any. Allegations regarding juror Helson were rejected in the direct appeal in regard to his exposure to a newspaper article. Nothing in the record indicates that juror Carnes would have been disqualified even if a motion had been properly made. The same is true of juror Cunagin. The complaints about the voir dire of two jurors regarding extreme emotional disturbance do not require RCr 11.42 relief. The allegation with respect to juror Donahue was rejected in the direct appeal of this case. Defense counsel was not ineffective and Haight received a fundamentally fair trial by an impartial jury.

VII. Adequate Investigation

[30][31] This Court has recognized the necessity for complete investigation by defense counsel. We must agree with the view expressed by the United States Supreme Court in *Strickland, supra*, to the effect that counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir.1998). The investigation must be reasonable under all the circumstances. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir.1992).

[32] Haight now complains that trial counsel was ineffective and deficient in not seeking expert assistance to evaluate his mental status and psychological makeup as early as possible in preparation for trial. In December of 1985, trial counsel filed a motion for funds for expert witnesses and for an ex parte hearing. The trial judge heard arguments and overruled the motions but granted leave to the defense to establish a need for experts. A month later, the defense made a request for a continuance, stating that it could not make requests for experts until after discovery was completed.

Here, Haight maintains that the need for neuropsychological evaluation and psychopharmacologist evaluation should have been obvious to defense counsel. He asserts that although counsel may have been prevented from expending funds for expert witnesses between May 8, 1991, until *Haight v. Williamson, supra*, was decided on May 14, 1992, counsel was not prevented from otherwise investigating and preparing the case.

On direct appeal, Haight made a claim that he was improperly denied the expert assistance of a neuropsychologist which was rejected when his conviction was affirmed.

The clinical forensic psychologist who examined Haight in preparation for trial, specifically found no evidence that Haight was psychotic or suffered from any serious neurological deficit or was otherwise retarded. *447 This expert testified during the penalty phase of the trial. Here, as in his direct appeal, Haight is creating an issue based on the same brief references and reports from the mid-1970s which mentioned a possibility of brain damage but did not make such a finding.

[33] The right to funding for expert psychiatric assistance only arises when a defendant's mental state is "seriously in question." *Hunter v. Commonwealth, Ky.*, 869 S.W.2d 719, 722 (1994), quoting *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Defense counsel was not ineffective for relying on the opinion of an expert he obtained who determined that Haight had no significant neurological deficit. *See Walls v. Bowersox*, 151 F.3d 827 (8th Cir.1998). Trial counsel is required only to conduct a reasonable investigation. *Mahaffey v. Page*, 151 F.3d 671 (7th Cir.1998).

In this case, there is no reasonable probability that the omitted evaluations would have changed the result reached by the jury or the sentencing fixed by it. He was not prejudiced by the alleged failure of trial counsel to investigate and present defense and mitigating evidence. There is no showing of either deficient performance or substantial prejudice which are required to present an ineffectiveness of counsel argument.

VIII. Possibility of Parole

[34][35] Haight claims that the jury improperly considered the possibility of parole when it was deliberating about the death penalty and his trial counsel did nothing to seek a remedy or preserve the issue for appellate review. This argument is speculative. Jury testimony that it had improperly considered parole is incompetent under rules prohibiting jurors from being examined to establish grounds for a new trial. *Cf. Gall v. Commonwealth, Ky.*, 702 S.W.2d 37 (1985).

Here, Haight has failed to demonstrate any improper consideration of parole by the jury, or any improper extrajudicial influence. Consequently, no ineffective assistance of counsel or prejudice has been shown.

IX. Sleeping Jurors

[36] Haight argues that trial counsel was ineffective because he failed to move for a mistrial or make any effort to get factual details into the record regarding the alleged sleeping of jurors during part of the penalty phase. He also contends that the trial judge committed error when he took no action on his own initiative.

Haight does not plead this claim with the specificity required by RCr 11.42(2). He does not state which jurors were alleged to be sleeping and he does not indicate when the event occurred, if it actually took place. Haight is not entitled to the requested relief. *Sanborn* at 911.

Haight does not indicate what information the jurors supposedly missed and how that would have changed the outcome of his trial. If defense counsel did see jurors with their eyes closed, there is no evidence that they were sleeping. In addition there is no evidence that the trial judge ever observed the alleged sleeping.

X. Previous Plea Bargain

[37] Haight maintains that defense counsel was ineffective by not introducing evidence during the penalty phase that the Commonwealth had previously entered into a plea bargain. He asserts that he has a right to have the jury which sentenced him consider mitigating evidence. The question of whether a defendant has the right to introduce evidence of a withdrawn guilty plea as mitigating evidence has not been decided in the Commonwealth. *448 There appears to be a split of authority on the issue. *See Wright & Graham, Federal Practice and Procedure: Evidence* § 5348 (1980). In terms of our rules, there is a potential conflict between KRE 410, which provides that withdrawn guilty pleas are not admissible against the defendant, and KRE 408, which provides that compromises and offers of compromise are inadmissible. The Commonwealth argues that Haight's prior guilty plea is inadmissible under KRE 408. The argument is not without merit or support. *See id.* On the other hand, Haight argues that KRE 408 is limited to civil cases. *See United States v. Baker and Mazzilli*, 926 F.2d 179 (2nd Cir.1991), construing FRE 408.

[38] Under the *Strickland* standard for ineffective assistance of counsel, the first thing the aggrieved defendant must show is "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693. We are at a loss to see how failure to move to admit evidence—the admissibility of which is still an open question—can ever sink below sufficient performance into deficiency. Further, how can it be called an error that deprived Haight of his constitutional right to counsel? If the evidence is not admissible, there can be no error. *See Commonwealth v. Davis, Ky.*, 14 S.W.3d 9, 11 (1999). Thus, the error is at most potential error that is in the air, weightless and awaiting decisional law that may or may not give it legal gravity. In short, while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will.

XI. No Adverse Inference

[39] Haight complains that trial counsel was ineffective by not requesting that a "No adverse inference" instruction relating to the defendant's right to remain silent be given at the penalty phase. Haight testified at the guilt phase of this trial, but he did not testify during the penalty phase. His counsel did not tender a "No adverse inference" instruction, did not request such an instruction or object to the failure of the court to give one. He asserts that it was incumbent upon the trial judge to instruct the jury that the defendant did not have an obligation to testify in mitigation and no adverse inference could be drawn from his failure to do so.

This claim does not amount to ineffective assistance of counsel. The allegation is not properly presented on his

appeal because it was an issue on direct appeal of the case. Haight did testify during the guilt phase of his trial and admitted killing the two victims. *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), is not applicable.

XII. The Letter

[40] Haight argues that defense counsel was ineffective when he did not introduce into mitigation evidence a letter which Haight had written to a member of one victim's family. In the letter, Haight admitted committing the murders, expressed sorrow at having caused so much pain and suffering, and further expressed a desire to die for having done so. Defense counsel clearly stated a desire not to reemphasize Haight's guilt phase testimony to the jury when it considered mitigating evidence in the penalty phase. The letter stated in part, "If you think I should pay with my life, then I'd have to agree with you" Defense counsel was not ineffective in not introducing the letter into mitigation.

*449 Haight received reasonably effective assistance of counsel. Any alleged ineffectiveness was not so serious as to deprive him of a fair trial and there is no reasonable probability that a different result could have been achieved. An exhaustive review of the record in this case indicates that defense counsel was not ineffective and that Haight received a fundamentally fair trial with a reliable and fair sentence.

The judgment of the circuit court is affirmed.

LAMBERT, C.J., COOPER, GRAVES, JOHNSTONE, and WINTERSHEIMER, JJ., concur.
KELLER, J., dissents by separate opinion, with STUMBO, J., joining that dissent.

KELLER, Justice, dissenting from order denying petition for rehearing and modifying opinion.
I believe we should grant Haight's petition for rehearing to properly evaluate his claim that his trial counsel was ineffective in failing to introduce evidence that the Commonwealth offered Haight a plea bargain to a total sentence of life imprisonment without possibility of parole for twenty-five years. Although I joined the majority opinion when the Court originally considered Haight's appeal from the trial court's denial of RCr 11.42 relief, after reviewing the authority Haight cites in his petition, I believe Haight has demonstrated that the Court "misconceived the issues presented on the appeal or the law applicable thereto." ^{FN3}

FN1. CR 76.32(1)(b).

In our original opinion, we addressed Haight's claim in Section X and found no deficient performance because KRE 408 and KRE 410 prohibited its introduction:

Haight maintains that defense counsel was ineffective by not introducing evidence during the penalty phase that the Commonwealth had previously entered into a plea bargain. He asserts that he has a right to have the jury which sentenced him consider mitigating evidence. Defense counsel was not ineffective for failing to introduce such an agreement. KRE 408 provides that compromise and offers of compromise are inadmissible. The general inadmissibility of withdrawn guilty pleas is also noted in KRE 410.

Haight argues his trial counsel should have introduced as mitigation evidence the "offer" made by the Commonwealth during plea negotiations—in this case, an offer to spare his life. ^{FN2}

FN2. See *Haight v. Commonwealth*, Ky., 760 S.W.2d 84, 85 (1988):

As a result of these [plea] negotiations, ... the Commonwealth made an offer to appellant whereby, in return for his guilty plea to two counts of murder and two counts of robbery in the first degree, it would recommend a sentence of life imprisonment without possibility of parole for a period of twenty-five years.

Id.

Although we suggested a policy of "general inadmissibility" emanates from KRE 410, that rule actually states that such evidence "is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussion." ^{FN3} KRE 410 contains no limitations upon evidence introduced by the defendant.

FN3. KRE 410 (emphasis added).

The authority Haight cites in his petition convinces me that we incorrectly construed KRE 408 as embracing offers and statements made during plea negotiations contrary to the weight of authority limiting the identical federal rule's scope to offers *450 to compromise civil matters.^{FN4} I now recognize that the majority's interpretation of KRE 408 (illogically treated KRE 410 as redundant. The Kentucky Evidence Rules Study Committee's Commentary to KRE 410 demonstrates that although policy judgments behind KRE 408 and KRE 410 are identical, each rule addresses a different context:

FN4. See 29 Am.Jur.2d (Evidence) § 512:

[I]t should be noted that Rule 410 generally governs admissibility of evidence of guilty pleas and plea negotiations. It has been held that the rule excluding from evidence offers of compromise or settlement of a claim which is disputed as to either validity or amount applies only to civil litigation, since the reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over criminal charges or a plea bargain do not ordinarily constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount."

Id. See also Charles Alan Wright and Kenneth W. Graham, 23 *Federal Practice and Procedure* § 5306 at 216-219 (1980) ("It seems odd to refer to the prosecution's case against a criminal defendant as a 'claim' ... The arguments [in favor of doing so] are not convincing." *Id.*); *United States v. Baker*, 926 F.2d 179, 180 (2nd Cir.1991); *United States v. Graham*, 91 F.3d 213, 218-219 (D.C.Cir.1996).

The considerations underlying Rule 408 on compromises and offers of compromise apply with equal force to criminal pleas, offers to plead, and plea discussions. Resolution of criminal cases through agreement is no less important than the resolution of civil cases through settlement. On the basis of these premises, Rule 410 adopts rules designed to remove evidentiary obstacles to candid discussions between the prosecution and defense in criminal cases and to protect defendants against subsequent use of evidentiary products of the plea process. ^{FN5}

FN5. KRE 410 (Evidence Rules Study Committee Commentary). See also Robert G. Lawson, *Kentucky Evidence Law* (3rd Ed.) § 2.50 & 2.55 (Michie 1993) ("With one important alteration, KRE 408 simply codifies ... long-standing rules." *Id.* § 250 at 134. "The principles described in KRE 410 are akin to the rules that relate to offers of compromise and settlements.... They are new to Kentucky Law" *Id.* § 255 at 137.)

The Commonwealth cites only one case to the contrary, *United States v. Verdoorn*,^{FN6} which dates back to shortly after the adoption of the Federal Rules of Evidence and in which the Eighth Circuit Court of Appeals based its conclusion largely on a Federal Rule of Criminal Procedure.^{FN7} The *Verdoorn* Court does draw support from "the rationale of [FRE] 408," ^{FN8} and the Court describes FRE 408 as a rule which fosters plea-bargaining by encouraging confidential and meaningful dialogue. Courts, however, make decisions about whether evidence is admissible or not by examining the rules themselves, not the "policies" which underlie them. We should turn to those underlying policies only where the language of the rule itself is ambiguous. We can always amend the rules of evidence if we find that they do not serve the ends for which we adopted them. Our rules unquestionably embody the policies upon which they are based. Allowing the policy to consume the rule itself, however, allows the tail to wag the dog.

FN6. 528 F.2d 103 (8th Cir.1976).

FN7. *Id.* at 107 ("Plea bargaining is sanctioned by recent amendments to the Federal Rules of Criminal Procedure. Further, Fed. R.Crim. 11(e)(6) (effective August 1, 1975) provides for the general inadmissibility of offers to plea and related statements in connection therewith." *Id.*)

FN8. *Id.*

In any event, the language of KRE 408 itself plainly excludes evidence of compromise*451 or offers to compromise only when offered "to prove liability or invalidity of the claim or its amount." ^{FN9} Because of the different sentencing procedures employed in federal court, none of the federal authority addressing FRE 408's relation to offers or statements made during plea negotiations in criminal cases concerns the admissibility of such statements during a separate jury sentencing procedure like the one we have in Kentucky.^{FN10} Even if this Court were to construe KRE 408 to embrace offers and statements made during plea negotiations by adopting an unwarranted and expansive interpretation of "liability" and "claim," we would fall on our backsides before we could bend over far enough to interpret "its amount" to include a jury's sentencing determination, especially a sentence of death.

FN9. KRE 408.

FN10. See RCR 9.84; KRS 532.055.

In my opinion, the modified opinion is, at best, a slight improvement. The Court now recognizes that the question of KRE 408's applicability to offers and statements made during plea negotiations is a question of first impression for this Court. Instead of answering that question, however, we "fast-forward" to the conclusion and decide that, regardless of this Court's interpretation of KRE 408, Haight's trial counsel did not perform deficiently under *Strickland* by failing to introduce such evidence. I find incredulous our basis for that conclusion, which I would paraphrase as "Because we haven't told attorneys whether this evidence would be admissible, an attorney's failure to introduce it cannot be deficient performance." I find it inexcusable, however, for this Court, after articulating such a

standard for deficient performance, to decline to answer the substantive question, allow the issue to remain unresolved, and offer no guidance to counsel in future cases.

My perceptions are no doubt colored by the fact that, after revisiting the KRE 408 issue, I no longer find it murky, or particularly close. I believe the question of whether the general relevancy requirement at KRE 401 would allow a defendant to introduce evidence of the Commonwealth's offer as mitigation evidence is far closer,^{FN11} however, and I believe the Court should grant the petition for rehearing to finally determine both issues. As concerned as I am that the modified majority opinion perpetuates the error we committed originally, however, I am even more troubled by the modified opinion's contention that no deficient performance can result from trial counsel's failure to make arguments new to this Court.^{FN12} This contention*452 raises the *Strickland* deficient performance bar even higher and discourages the type of innovative advocacy necessary to the defense of a capital case.

FN11. A offer by the Commonwealth to recommend a life sentence in exchange for a guilty plea to a capital offense would not be direct evidence "bearing on the defendant's character, prior record or circumstances of the offense, or relative to one of the specified statutory mitigating circumstances," *Jacobs v. Commonwealth*, Ky., 870 S.W.2d 412, 419-420 (1994) citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Given a prosecutor's special ethical responsibilities, see SCR 3.130(3.8) comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate" *Id.*); *Bailey v. Commonwealth*, 193 Ky. 687, 237 S.W. 415, 417 (1922) ("[T]he duty of a prosecuting attorney is not to persecute, but to prosecute He should always be interested in seeing that the truth and the right shall prevail" *Id.*), such an offer might, however, be inferential evidence of the strength of a defendant's other mitigating evidence.

FN12. I dispute the majority's characterization of Haight's argument as "novel." First, this Court's past use of that term creates an pejorative connotation roughly equivalent to "frivolous." See, e.g., *Commonwealth v. Cooper*, Ky., 899 S.W.2d 75, 78 (1995) ("We have admonished against 'novel theories to revise well-established legal practice and principle [.]' " *Id.*); *Holbrook v. Knoff*, Ky., 847 S.W.2d 52, 55 (1992) ("We have no intention that such cases should encourage lawsuits espousing novel theories" *Id.*); *Neel v. Wagner-Shuck Realty Co.*, Ky., 576 S.W.2d 246, 249 (1978) ("This is a novel theory unsupported by reason or authority." *Id.*). My examination of the merits of Haight's interpretation of KRE 408 leads me to believe that his interpretation is far from frivolous. Second, I believe it is the Commonwealth and not Haight who has suggested this "novel theory." Haight's RCr 11.42 petition merely contended that trial counsel should have introduced this evidence, and appears to have relied on the presumption of admissibility for relevant evidence contained in KRE 402 ("All relevant evidence is admissible, except as otherwise provided" *Id.*). The Commonwealth first suggested that KRE 408 would prohibit the introduction of this evidence.

I believe this Court should grant Haight's petition for rehearing specifically to reconsider his allegation concerning his trial counsel's failure to introduce evidence that the Commonwealth offered him a plea bargain which would have spared his life. My review of the law leads me to believe that this Court misconceived the law applicable to Haight's claim when we held that such evidence would have been inadmissible under KRE 408. We should decide this issue and properly evaluate Haight's claims of ineffective assistance of counsel for the benefit of the bench and bar.

STUMBO, J., joins.
Ky., 2001.

Haight v. Com.
41 S.W.3d 436

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.
Randy HAIGHT, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2006-SC-000344-MR.
Aug. 23, 2007.
Rehearing Denied April 24, 2008.

Background: After defendant's convictions for murder and other crimes and his sentence of death was affirmed on appeal, defendant filed a motion to vacate judgment. The Circuit Court, Jefferson County, Benjamin F. Shobe, Special Judge, denied the motion. Defendant appealed.

Holding: The Supreme Court held that trial court lacked jurisdiction to rule on defendant's motion to vacate judgment. Affirmed.

West Headnotes

Criminal Law 110 1668(3)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(3) k. Particular Issues and Cases. Most Cited Cases

Trial court lacked jurisdiction to rule on defendant's motion to vacate judgment, where the Supreme Court had previously denied defendant's motion to abate and had affirmed the judgment on defendant's underlying motion to set aside sentence. *Rules Civ. Proc., Rule 59.05; Rules Crim. Proc., Rule 11.42.*

On Appeal from Jefferson Circuit Court, No. 85-CR-000032; Benjamin F. Shobe, Special Judge. Daniel T. Goyette, Louisville Metro Public Defender, Bruce P. Hackett, Deputy Appellate Defender of the Jefferson District, Louisville, KY, Counsel for Appellant.

Gregory D. Stumbo, Attorney General, Louis F. Mathias Jr., Tami Renee Stetler, Assistant Attorney Generals, Office of Criminal Appeals, Frankfort, KY, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

*1 In this matter of right appeal Randy Haight asks this Court to find that the circuit court has jurisdiction to rule on a CR 59.05 motion to vacate the judgment on his RCr 11.42 motion, when this Court has already denied his motion to abate the appeal and affirmed the judgment denying Haight's RCr 11.42 motion. Under the law of the case doctrine, when this Court denied Haight's motion to abate his appeal pending the outcome of the CR 59.05 motion and entered our opinion affirming the circuit court's ruling on the RCr 11.42 motion, the circuit court no longer had jurisdiction to rule on the CR 59.05 motion. All other issues raised by Haight in this appeal should have and could have been raised on direct appeal or in his RCr 11.42 motion. Hence, we affirm.

On August 22, 1985, Randy Haight escaped from the Johnson County Jail, and in the course of committing First-Degree Robbery, murdered David Omar and Patricia Vance as they sat in their parked car. After an initial reversal of his conviction and death sentences pursuant to a guilty plea, see *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1296, 122 L.Ed.2d 687 (1993), Haight was tried by a jury on January 10, 1994-February 3, 1994. On March 21, 1994, final judgment was entered sentencing Haight to death on two counts of Murder, twenty (20) years on each of two counts of First-Degree Robbery, and five (5) years for Possession of a Handgun by a Convicted Felon, all to run concurrently. On direct appeal, Haight's conviction was affirmed by this Court on November 21, 1996. *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996), cert. denied, 522 U.S. 873, 118 S.Ct. 110, 139 L.Ed.2d 63 (1997).

Haight filed an RCr 11.42 motion to vacate on October 13, 1997, which was denied by the trial court on September 9, 1998. On September 21, 1998, Haight filed both an CR 59.05 motion asking the trial court to vacate the September 9, 1998 order, and his notice of appeal of the September 9, 1998 order. Thereafter on January 7, 1999, Haight filed a motion to abate the appeal pending the outcome of the trial court's ruling on the CR 59.05 motion. On February 11, 1999, this Court entered an order denying Haight's motion for abatement of the appeal, but granted Haight an extension of time to file his brief and perfect his appeal. This Court rendered its opinion affirming the denial of RCr 11.42 relief on June 15, 2000, which was final upon denial of Haight's petition for rehearing on April 26, 2001. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), cert. denied, 534 U.S. 998, 122 S.Ct. 471, 141 L.Ed.2d 386 (2001).

On November 29, 2001, Haight filed a motion in the circuit court seeking to amend and supplement his RCr 11.42 and CR 59.05 motions. At the status hearing held in the case in the circuit court on October 15, 2004, the Commonwealth argued that the circuit court no longer had jurisdiction to rule on Haight's pending claims. On April 6, 2006, the circuit court entered its order denying the CR 59.05 motion "for the reason that the issues raised by Movant have been determined adversely to him by the Supreme Court Of Kentucky, and the Circuit Court is without jurisdiction to hear the additional evidence offered regarding the same issues."

*2 Citing *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005), cert. denied, 547 U.S. 1005, 126 S.Ct. 1466, 164 L.Ed.2d 251 (2006), Haight argues that the trial court erred in determining that it no longer had jurisdiction to rule on the pending CR 59.05 motion once this Court denied his motion to abate, and affirmed the judgment on the underlying RCr 11.42 motion. In *Mills*, this Court ruled that CR 59.05 applied to a final order on an RCr 11.42 motion, but specified that, unlike a civil case, the filing of a CR 59.05 motion would not suspend the time for filing an appeal of the RCr 11.42 motion under RCr 12.02.⁷⁸⁰ *Id.* at 323. The *Mills* Court, however, allowed *Mills'* untimely appeal to proceed, recognizing that *Mills* was entitled to rely on the pre-2005 cases determining that CR

59.05 applied to criminal cases and suspended the running of time for an appeal of an RCr 11.42 ruling. *Id.* Haight argues that given that his CR 59.05 motion was filed in 1998, he was likewise entitled to presume that the filing of his CR 59.05 motion would suspend the time for taking his appeal and render the September 9, 1998 order denying RCr 11.42 relief interlocutory, thereby retaining jurisdiction in the circuit court. As a result, Haight maintains that jurisdiction did not properly rest in this Court at the time this Court ruled on the motion to abate and affirmed the judgment on the RCr 11.42 motion.

FN1. Effective January 1, 2007, RCr 12.02 was amended to specify that CR 73.02(1)(c) now applies to criminal cases, thereby now suspending the running of the time for appeal upon the filing of a CR 59.05 motion in a criminal case.

The flaw in Haight's argument is that the *Mills* case does not work in his favor. *Mills* made it clear that the filing of a CR 59.05 motion did not suspend the running of time for appeal. The only reason the *Mills* Court then allowed *Mills* to proceed with his untimely appeal in reliance on pre-2005 law was for the purpose of protecting his right to appeal. In the instant case, Haight preserved his right to appeal the judgment on his post-conviction motion by simultaneously filing his notice of appeal with his CR 59.05 motion. Haight sought and received an appeal from the judgment on his post-conviction motion. Further, the pre-2005 cases that this Court allowed *Mills* to rely on were decided in 2001-2004, after Haight's CR 59.05 motion was filed (1998), and even after this Court's order denying Haight's motion to abate (1999). *Id.* n. 8-10. Haight is essentially asking this Court to find that the circuit court has jurisdiction to make a ruling in a case that could possibly overturn this Court's appellate ruling on the same motion - the underlying RCr 11.42 claim. This Court has already ruled in 1999 that Haight's appeal would not be abated by the filing of the CR 59.05 motion. That ruling by this Court, and this Court's subsequent opinion affirming the judgment on RCr 11.42 motion, are now the law of the case and are controlling. See *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky. 1996); *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961). Accordingly, the Jefferson Circuit Court properly determined that it did not have jurisdiction to rule on the CR 59.05 motion.

*3 The remaining issues raised by Haight-that he was denied his right to counsel in the post-conviction proceeding because of conflicts of interest within the Department of Appellate Advocacy, that he should have been granted leave to amend and supplement his RCr 11.42 motion, that he was denied effective assistance of counsel at trial, and that he should have gotten Wanton Murder and Theft instructions-are issues that either were raised in the RCr 11.42 motion and on direct appeal, or should have been raised in the RCr 11.42 motion or on direct appeal. See *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000), cert. denied, 531 U.S. 1157, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001). RCr 11.42(3) provides, "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." See *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997). Also, to the extent that certain of the issues were raised for the first time in the CR 59.05 motion, it has been held that a party cannot invoke CR 59.05 to raise issues that could have been presented in the proceedings prior to entry of the judgment. *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997). In viewing Haight's CR 59.05 motion, we see that the issues raised in that motion were issues that were known to Haight prior to the filing of his RCr 11.42 motion.

This Court's opinion affirming the post-conviction judgment directly addressed Haight's claims in this appeal that his trial counsel was ineffective for failing to exercise peremptory challenges and that he was wrongfully denied the opportunity to amend and supplement his RCr 11.42 motion, as well as the numerous other arguments raised in that appeal. *Haight*, 41 S.W.3d at 443-444. This Court noted in that opinion that many of the claims raised in that appeal

had already been raised and disposed of on direct appeal. *Id.* at 442-443. Haight has been given a full and fair opportunity to raise his post-conviction claims before this Court.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

All sitting: LAMBERT, C.J., CUNNINGHAM, MINTON, NOBLE, SCHRODER, SCOTT, JJ., concur.

Ky., 2007.
Haight v. Com.
Not Reported in S.W.3d, 2007 WL 2404494 (Ky.)

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Footnotes

- 1 This argument is raised at pages 19-28 of Haight's petition memorandum and at pages 11-14 of his reply in support of his petition (hereinafter "reply"). (DNs 61,142). The argument is also found at pages 18-35 of Haight's motion for summary judgment, which incorporates all of his plea agreement-related claims contained in grounds 1,2,3,4 and 33 of his petition. (DN 141).
- 2 The Court further notes that only prosecutorial or judicial misconduct intended on the part of the prosecutor or judge to "subvert the protections afforded by the Double Jeopardy Clause" satisfies the concerns discussed in  *Kennedy*, 456 U.S. at 676, 102 S.Ct. 2083. Mere misconduct of any lesser nature would not be sufficient for a defendant to raise the double jeopardy bar after having succeeded in having his or her conviction set aside. Haight has not and can not show such a level of misconduct, nor is the Kentucky Supreme Court clearly erroneous in this respect in its findings.
- 3 This argument is raised at pages 29-31 of Haight's petition memorandum and at pages 11-14 of his reply. (DN 61, 142). The argument is also found at pages 18-35 of Haight's motion for summary judgment, which incorporates all of his plea agreement-related claims contained in grounds 1,2,3,4 and 33 of his petition. (DN 141).
- 4 Haight explains in footnote 1 on page 1 of his petition memorandum that he consciously elected to focus his arguments therein on establishing the existence of each alleged federal constitutional violation rather than addressing matters of procedural default or the application of the AEDPA standard codified at  28 U.S.C. § 2254(d)(1) to his various claims. (DN 61, p.1, n. 1). While the Court does not criticize Haight for this approach, it required the Court to look primarily to his petition reply (DN 142) and motion for summary judgment (DN 141, 154(reply)) for elaboration on these points.
- 5 This argument is found at pages 31-33 of Haight's petition memorandum and at pages 11-14 of his reply. (DN 61, 142). The argument is also found at pages 18-35 of Haight's motion for summary judgment, which incorporates all of his plea agreement-related claims contained in grounds 1,2,3,4 and 33 of his petition. (DN 141).
- 6 This argument may be found at pages 33-35 of Haight's petition memorandum and at pages 11-14 of his reply. (DN 61, 142). The argument is also found at pages 18-35 of Haight's motion for summary judgment, which incorporates all of his plea agreement-related claims contained in grounds 1,2,3,4 and 33 of his petition. (DN 141).
- 7 This argument may be found at pages 26-47 of Haight's petition memorandum and at pages 11-14 of his reply. (DN 61, 142). The argument is also found at pages 18-35 of Haight's motion for summary judgment, which incorporates all of his plea agreement-related claims contained in grounds 1,2,3,4 and 33 of his petition. (DN 141).
- 8 The court in the initial section of this opinion has previously addressed and rejected  *Kennedy* and  *Lafler* the U.S. Supreme Court authority primarily relied on in the double jeopardy section of Haight's motion for summary judgment. (DN 141, pp. 18-35).
- 9 Haight's claims of ineffective assistance of trial counsel may be found at pages 47-85 of his petition memorandum and at pages 14-54 of his reply. (DN 61, 142). Grounds 5 and 8 may be found at pages 6-17 of Haight's motion for summary judgment. (DN 141).

- 10 Until its decision in [!\[\]\(746d018fdf6ab02bf5fb7681133e8b29_img.jpg\) *Leonard v. Commonwealth*, 279 S.W.3d 151 \(Ky. 2009\)](#), the Kentucky Supreme Court had long held that substantive issues raised and rejected on direct appeal could not be revived in the context of a post-conviction claim of ineffective assistance of counsel; nor could issues not raised on direct appeal serve as the underlying basis for a post-conviction claim of ineffective assistance of counsel. See, [!\[\]\(5daa6eee1904cb6b9d765700250de764_img.jpg\) *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 \(Ky. 1990\)](#). Because [!\[\]\(d72e437c7cc5947bc0b147aba6602563_img.jpg\) *Leonard*](#) was not made retroactive, and because Haight's post-conviction appeal proceedings became final in 2001, well prior to [!\[\]\(0d2a89e6d0cbcd8e0459b972b9332401_img.jpg\) *Leonard*](#), the warden concludes that the pre-[!\[\]\(cdcd8a42e5993b465235781ccc1c8555_img.jpg\) *Leonard*](#) state rules of procedural default continue to apply to Haight's current [!\[\]\(c0c9434f3698c901303014555ccb5687_img.jpg\) § 2254](#) petition.
- 11 For convenience, the Court includes in this portion of the opinion the Sixth Amendment standard for ineffective assistance of counsel on appeal.
- 12 This argument may be found at pages 48-57 of Haight's petition memorandum and at pages 15-16 of his reply. (DN 61, 142). Grounds 5 and 8 may be found at pages 6-17 of Haight's motion for summary judgment. (DN 141). Haight has attached to his motion for summary judgment a 10-page transcript of the individual voir dire of juror Gaugh. (DN 141, transcript).
- 13 The Supreme Court in [!\[\]\(4f9bd4c242eb94a69f6647adc92289eb_img.jpg\) *Haight III*](#) contrasted murder and first degree manslaughter as follows:
- The murder and first degree manslaughter statutes go hand in hand. Under the murder statute, if one commits an act while not under the influence of EED, he is guilty of murder. Under the manslaughter statute, if he does the same act while under the influence of EED, he is guilty of manslaughter in the first degree. Thus, depending upon the finding of the jury with respect to the absence or presence of EED, the same act may justify conviction of murder or a conviction of manslaughter.
- [!\[\]\(2043c91b19713cb6115a4799f072cbca_img.jpg\) *Id.*](#)
- 14 This argument may be found at pages 57-61 of Haight's petition memorandum and at pages 15-16 of his reply. (DN 61, 142). Grounds 5 and 8 may be found at pages 6-17 of Haight's motion for summary judgment. (DN 141)
- 15 The current version of [RCr 9.40\(1\)](#) provides that
- if the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.
- [RCr 9.40\(1\)](#).
- 16 Again, the Court uses the term “presumably” because this exact argument is not specifically raised, but may be readily inferred.
- 17 This argument may be found at pages 61-62 of Haight's petition memorandum and at pages 16-17 of his reply. (DN 61, 142). Ground 9 is not separately raised in Haight's motion for summary judgment. (DN 141)
- 18 In [!\[\]\(db8bdec0696fd5238eefca5b38e3467b_img.jpg\) *Haight IV*](#), the Kentucky Supreme Court specifically pointed out that “the complaint about juror Kaiser was not raised on direct appeal. Our review of the juror's answers nevertheless indicates that he was open

to a range of potential penalties and willing to consider all of the evidence before fixing a sentence, if any.”

 *Haight IV*, 41 S.W.3d at 444-46.

- 19 As noted earlier, the Kentucky Supreme Court subsequently overruled the  *Sanborn* line of cases well after Haight's post-conviction appeal became final. The decision that overruled *Sanborne* announced in  *Leonard v. Kentucky*, 279 S.W.3d 151, 159 (Ky. 2009) was not made retroactive on appeal. The Respondent relies upon the pre- *Leonard* procedural rules in effect under  *Sanborn* to argue that many of Haight's ineffective assistance of counsel claims are procedurally barred. While this appears to be certainly so at least as to the Sixth Amendment claims involving juror Helton, the Court need not rely on the procedural bar as such claims are lacking in substantial merit regardless, given the objectively reasonable conclusion of the Kentucky Supreme Court under  *Strickland* that the claims lack merit. For federal decisions that discuss the  *Leonard* decision, see *Hodge v. Haeberlin*, 579 F.3d 627, 643 (6th Cir. 2009), *cert. denied*, 559 U.S. 1075, 130 S.Ct. 2107, 176 L.Ed.2d 736 (2010); *Stopher v. Simpson*, 2010 WL 3909314 at *11-12 (W.D. Ky. Sept. 29, 2010); *Adkins v. Motley*, 2009 WL 960107 at *17 (E.D. Ky. Apr. 7, 2009).
- 20 No doubt exists that Haight did raise this claim as argument VI in his brief on post-conviction appeal in Appeal No. 98-SC-931-MR at pp. 43-44.
- 21 Haight raised this issue also in argument VI of his post-conviction appeal in Appeal No. 98-SC-931-MR.
- 22 Respondent argues that this argument, which was considered on the underlying claim and rejected in  *Haight III*, also is procedurally barred as noted by the Kentucky Supreme Court in  *Haight IV* based on the pre- *Leonard* procedural bar rules routinely applied in Kentucky in the  *Sanborn* line of cases. That conclusion may indeed be correct, but the Court need not conduct a procedural default analysis, as to do so would only add unnecessary complexity to the matter given the obvious meritless nature of the argument regarding the composition of the jury pool.
- 23 This argument may be found at pages 62-64 of Haight's petition memorandum and at pages 17-20 of his reply. (DN 61, 142). Ground 6 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 24 Indeed had trial counsel successfully sought to introduce the letter through Haight's penalty phase testimony it is reasonably probable that this Court still would find itself analyzing a claim of ineffective assistance of trial counsel for his decision to seek the admission of the Omer letter. See, *Mathis v. Cline*, 2009 WL 256567 (D. Kan. Feb 02, 2009)(claim of ineffective assistance based on counsel's decision to introduce felony murder defendant's letter to 2-year old victim's mother expressing remorse for his actions.)
- 25 This argument may be found at pages 64-67 of Haight's petition memorandum and at pages 20-24 of his reply. (DN 61, 142). Ground 16 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 26 This argument may be found at pages 67-80 of Haight's petition memorandum and at pages 24-41 of his reply. (DN 61, 142). Ground 13 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 27 During the  § 2254 proceedings in this Court Haight filed under seal an *ex parte* motion for expert assistance pursuant to  18 U.S.C. § 3599(f) along with a case-specific statement of need for such assistance (DNs 93, 94) (under seal). By his motion Haight sought funds to employ three mental health experts—a neuropsychologist (Dr. Myla Young), a neuropsychiatrist (Dr. George Woods) and a psychopharmacologist (David Benjamin, Ph.D.). Along with his *ex parte* motion, Haight included the initial evaluation results obtained by the three proposed experts following their review of his existing records. (DN 94, exh., Declarations of Drs.

Woods, Young and Benjamin). The undersigned based on his review of the ex parte motion and declarations determined that expert assistance was not reasonably necessary under [§ 3599\(f\)](#) and therefor denied the motion. (DN 99) (under seal). The District Court agreed over the objections of the petitioner (DN 105)(sealed). The substance of both orders addresses in detail Haight's claims of ineffective assistance of counsel based on the alleged failure of his trial attorneys to timely obtain appropriate expert assistance. Both orders conclude that the recent declarations submitted by Drs Woods, Young and Benjamin—all of which find indications of organic brain damage—do not run to the critical issue of the reasonableness of the Kentucky Supreme Court's application of [Strickland](#).

Haight refiled the same declarations as attachments to his reply in support of his motion for summary judgment (DN 143). The Magistrate Judge denied the respondent's motion to strike the declarations from the record (DNs 147) by an order that advised the parties that the declarations would not be substantively considered in evaluating the parties' dispositive motions as they were not part of the state court record at the time of the Kentucky Supreme Court opinion in [Haight IV](#), which resolved this issue on its merits, was rendered. (DN 155). The Magistrate Judge adheres to his prior ruling and does not consider the merits of the declarations in evaluating the objective reasonableness of Haight's trial counsel in obtaining the two expert witness who testified for the defense at trial, Brad Fischer, PhD., and Carole Goodee, Associate Professor of Social Work.

- 28 [Haight v. Commonwealth](#), 938 S.W.2d 243, 249 (Ky. 1996) ([Haight III](#)).
- 29 The Magistrate Judge in his prior order denying Haight's motion for expert assistance similarly discussed both of these decisions, as well as Haight's other arguments based on this particular claim of ineffective assistance of counsel. (DN 99)(sealed)
- 30 To the extent that one might construe Haight's argument as a claim that Dr. Fisher was ineffective in his testimony, such claims of expert ineffective assistance are not recognized. See, [Woodward v. Epps](#), 380 F.Supp.2d 788, 790-93 (S.D. Miss. 2005) (“ ‘[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. As the Magistrate Judge noted in his prior order denying experts, (DN 99) to entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate.’ ”) (quoting [Wilson v. Greene](#), 155 F.3d 396, 400-01 (4th Cir. 1998)). See also, [Harris v. Vasquez](#), 949 F.2d 1497, 1518-20 (9th Cir. 1990); [Silagy v. Peters](#), 905 F.2d 986, 1013 (7th Cir. 1990) (same).
- 31 This argument may be found at pages 80-82 of Haight's petition memorandum and at pages 41-44 of his reply. (DN 61, 142). Ground 14 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 32 This argument may be found at pages 83-85 of Haight's petition memorandum and at pages 44-54 of his reply. (DN 61, 142). Ground 15 is not separately raised in Haight's motion for summary judgment. (DN 141)
- 33 These arguments may be found at pages 85-116 of Haight's petition memorandum and at pages 54-69 of his reply. (DN 61, 142). Ground 20 is raised in Haight's motion for summary judgment at pages 6-17 along with grounds 5 and 8. (DN 141)
- 34 This argument may be found at pages 85-88 of Haight's petition memorandum and at pages 55-58 of his reply. (DN 61, 142). Ground 17 is not separately raised in Haight's motion for summary judgment. (DN 141)
- 35 The Court does not disagree with the Respondent that much of the persuasive force of Haight's claim of unfair prejudice is directly undercut by Haight's other argument that his trial counsel rendered ineffective assistance at trial when counsel failed to introduce into evidence Haight's 1986 plea agreement and the circumstances

surrounding such agreement. Haight cannot reasonably argue at the same time that information concerning the circumstances of his prior failed agreement is, on the one hand, critical mitigation evidence, yet, on the other hand, also is information unfairly prejudicial to him. This irreconcilable conflict in these two positions greatly diminishes the notion that jurors Helton, Nichols or Gaugh was biased against Haight, directly contrary to the findings of the trial court. To the contrary, if Haight's ineffective assistance of counsel argument is to be accepted, then just the opposite conclusion could be argued—that the affected jurors were biased in Haight's favor due to their exposure to the newspaper article.

36 This argument may be found at pages 89-90 of Haight's petition memorandum and at pages 58-59 of his reply. (DN 61, 142). Ground 17 is not separately raised in Haight's motion for summary judgment. (DN 141).

37 This argument may be found at pages 90-95 of Haight's petition memorandum and at pages 59-62 of his reply. (DN 61, 142). Ground 19 is not separately raised in Haight's motion for summary judgment. (DN 141).

38 This argument may be found at pages 96-102 of Haight's petition memorandum and at pages 62-63 of his reply. (DN 61, 142). Ground 20 is separately raised in Haight's motion for summary judgment at pages 6-17, along with grounds 5 and 8. (DN 141)

39 The Court at this point distinguishes between mere procedural default and waiver. A procedural default is the failure of a party to adhere to a well-established and regularly enforced rule of state procedure, which may result in the defaulted issue being resolved on an adequate and independent state law ground not subject to habeas corpus review. An express waiver, on the other hand, is the conscious election by counsel to forego the pursuit when to do so appears advantageous to the defendant. The significance of this distinction is that while the decision of the Kentucky Supreme Court in  *Haight III* is decidedly ambiguous in its joint reference to multiple issues that have either not been preserved or were within the sound discretion of the trial court, no genuine question exists that, as to Gaugh's presence on the jury, the issue was consciously discarded by counsel based on a purely tactical decision, which this Court has previously considered in Haight's prior claim of ineffective assistance of counsel involving Gaugh. The underlying claim itself, however, is unreachable given the deliberate waiver by counsel.  *Smith v. Murray*, 477 U.S. 527, 534, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) ("Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases."). The Court nonetheless has considered the claim on its underlying merits as an alternate basis on which to resolve the issue.

40 This argument may be found at pages 103-107 of Haight's petition memorandum and at pages 63-64 of his reply. (DN 61, 142). Ground 21 is not separately raised in Haight's motion for summary judgment. (DN 141).

41 This argument may be found at pages 107-111 of Haight's petition memorandum and at pages 64-65 of his reply. (DN 61, 142). Ground 22 is not separately raised in Haight's motion for summary judgment. (DN 141).

42 **RCr 9.57**, Kentucky's Rule of Criminal Procedure regarding the deadlocked jury instruction, provides as follows: (1) if a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:

(a) in order to return a verdict, each juror must agree with that verdict;

(b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;

(c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;

(d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and

(e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

RCr 9.57(1).

43 This argument may be found at pages 111-113 of Haight's petition memorandum and at pages 65-67 of his reply. (DN 61, 142). Ground 27 is not separately raised in Haight's motion for summary judgment. (DN 141).

44 These arguments may be found at pages 113-117 of Haight's petition memorandum and at pages 68-69 of his reply. (DN 61, 142). Grounds 29 and 30 are not separately raised in Haight's motion for summary judgment. (DN 141).

45 We quote at length from [Raglin](#) in this regard given its particularly helpful discussion on the point:

In the alternative, Petitioner argues that [Davis v. Mitchell](#), 318 F.3d 682 (6th Cir. 2003), which was decided five years after the Ohio Supreme Court decided his direct appeal, should be applied to the merits of his claim. However, even if [Davis](#) is applicable, that decision is not “clearly established Federal law.” As the Sixth Circuit has explained:

In [Mills v. Maryland](#), 486 U.S. 367, 380–81, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the Supreme Court held a jury instruction unconstitutional that told the jury that it could not consider a particular mitigating circumstance unless all 12 jurors agreed that the circumstance had been proved to exist. Under [Mills](#), then, courts have recognized that “‘each juror [must] be permitted to consider and give effect to all mitigating evidence in deciding whether aggravating circumstances outweigh mitigating circumstances.’” [Smith v. Spisak](#), 558 U.S. 139, 130 S.Ct. 676, 682, 175 L.Ed.2d 595 (2010) (edits omitted) (quoting [McKoy v. North Carolina](#), 494 U.S. 433, 442–43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). The Supreme Court has never extended that rule to jury instructions that suggest a jury must first unanimously reject the death penalty before considering a life sentence. Notably, though, this circuit has done so, thereby adopting the “acquittal-first” doctrine for habeas cases. See [Davis v. Mitchell](#), 318 F.3d 682, 689 (6th Cir. 2003).

*22 But the Supreme Court has rejected this circuit's approach. In the recent [Spisak](#) case, which arose from this circuit, the Supreme Court reviewed acquittal-first jury instructions that are very similar to the ones [the defendant] raises in this case. The Supreme Court explained that it had never held such jury instructions unconstitutional and that “[w]hatever the legal merits of the [acquittal first] rule ... [such] jury instructions [a]re not contrary to clearly established Federal law.” [130 S.Ct. at 684](#). Thus, even in 2010—when [Spisak](#) was decided—the acquittal-first rule was not “clearly established federal law, as determined by the Supreme Court.” [28 U.S.C. § 2254\(d\)\(1\)](#). And the Supreme Court still has not adopted that rule. See, e.g., [Bobby v. Mitts](#), 563 U.S. 395, 131 S.Ct. 1762, 1765, 179 L.Ed.2d 819 (2011) (affirming *Spisak*-like Ohio jury instructions as “not contrary to clearly established Federal law” (internal quotation marks omitted)).

 [Raglin v. Mitchell](#), 2013 WL 5468227 at *21-22

- 46 These arguments may be found at pages 117-128 of Haight's petition memorandum and at pages 70-80 of his reply. (DN 61, 142). These grounds are not separately raised in Haight's motion for summary judgment. (DN 141).
- 47 This argument may be found at pages 117-120 of Haight's petition memorandum and at page 71 of his reply. (DN 61, 142). Ground 40 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 48 These arguments may be found at pages 120-123 of Haight's petition memorandum and at page 70 of his reply. (DN 61, 142). Grounds 36/38 are not separately raised in Haight's motion for summary judgment. (DN 141).
- 49 This argument may be found at pages 123-125 of Haight's petition memorandum and at page 71 of his reply. (DN 61, 142). Ground 37 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 50 This argument may be found at pages 125-128 of Haight's petition memorandum and at pages 71 of his reply. (DN 61, 142). Ground 39 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 51 These arguments may be found at pages 128-154 of Haight's petition memorandum and at pages 72-80 of his reply. (DN 61, 142). These grounds are not separately raised in Haight's motion for summary judgment. (DN 141).
- 52 These arguments may be found at pages 154-176 of Haight's petition memorandum and at pages 80-88 of his reply. (DN 61, 142). These grounds are not separately raised in Haight's motion for summary judgment. (DN 141).
- 53 This argument may be found at pages 154-158 of Haight's petition memorandum and at pages 81-82 of his reply. (DN 61, 142). Ground 23 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 54 This argument may be found at pages 159-161 of Haight's petition memorandum and at page 82 of his reply. (DN 61, 142). Ground 24 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 55 This argument may be found at pages 161-166 of Haight's petition memorandum and at pages 82-83 of his reply. (DN 61, 142). Ground 25 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 56 This argument may be found at pages 166-167 of Haight's petition memorandum and at pages 83-84 of his reply. (DN 61, 142). Ground 26 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 57 This argument may be found at pages 167-170 of Haight's petition memorandum and at pages 85-86 of his reply. (DN 61, 142). Ground 28 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 58 Further, as Respondent correctly points out,  [Simmons](#) is otherwise distinguishable as to Haight's initial parole eligibility argument in that it arose from a situation that involved the presentation of testimony concerning parole during the penalty phase of a capital defendant's trial, rather than the guilt phase as in Haight's case.
- 59 This argument may be found at pages 171-174 of Haight's petition memorandum and at pages 86-88 of his reply. (DN 61, 142). Ground 31 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 60 This argument may be found at pages 174-176 of Haight's petition memorandum and is not restated in his reply. (DN 61, 142). Ground 32 is not separately raised in Haight's motion for summary judgment. (DN 141).

- 61 This argument may be found at pages 176-186 of Haight's petition memorandum and at pages 88-89 of his reply. (DN 61, 142). Ground 34 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 62 This argument may be found at pages 186-192 of Haight's petition memorandum and at pages 88-89 of his reply. (DN 61, 142). Ground 35 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 63 These arguments may be found at pages 192-219 of Haight's petition memorandum and at pages 89-109 of his reply, excluding ground 39. (DN 61, 142). These grounds are not separately raised in Haight's motion for summary judgment. (DN 141).
- 64 Haight initially challenged Kentucky's proportionality review process, in particular  [KRS 532.075\(3\)\(e\)](#), under the Due Process Clause beginning at page 125 of his petition memorandum in the section on death penalty-related issues (DN 65, p. 125-128). He resumes the argument in the context of the 8th Amendment at page 192 of the same memorandum in the section on miscellaneous issues (Id., p 192-196). Although the arguments have substantial overlap we address them separately on their merits so as to directly consider them both in the manner in which they were asserted. While the Warden at page 135 of his response legitimately questions whether consideration of the issue is procedurally barred (DN 64, p. 135), we conclude that it is more expedient for the Court to address and reject the issue on its merits as the outcome remains unchanged under either approach.
- 65 The court notes that the  [McQueen](#) decision has been overruled on other grounds by  [In re Abdur-Rahman](#), 392 F.3d 174 (6th Cir. 2004), which itself was subsequently vacated by [Bell v. Abdur'Rahman](#), 545 U.S. 1151, 125 S.Ct. 2991, 162 L.Ed.2d 909 (2005) in light of [Gonzalez v. Crosby](#), 545 U.S. 514 (2005).
- 66 This argument may be found at pages 196-200 of Haight's petition memorandum and at pages 89-90 of his reply. (DN 61, 142). Ground 41 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 67 This argument may be found at pages 200-208 of Haight's petition memorandum and at pages 91-105 of his reply. (DN 61, 142). Ground 43 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 68 This argument may be found at pages 208-212 of Haight's petition memorandum and at pages 106-108 of his reply. (DN 61, 142). Ground 44 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 69 This argument may be found at pages 213-218 of Haight's petition memorandum and at pages 108-109 of his reply. (DN 61, 142). Ground 45 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 70 This argument may be found at pages 218-220 of Haight's petition memorandum and is not restated in his reply. (DN 61, 142). Ground 42 is not separately raised in Haight's motion for summary judgment. (DN 141).
- 71 "Some circumstantial evidence is very strong, as when you find a trout in the milk." Henry David Thoreau. See, [E-Z Mart Stores, Inc. v. Havner](#), 832 S.W.2d 368, 375 (Tex. App. 1992)(Grant, J., dissenting)(explaining that in Thoreau's time milk sellers would dilute their product with water taken from local streams so that a "trout in one's milk" would strongly suggest albeit circumstantially that the milk had been watered down).
- 72 This ruling does *not* mean that Haight may not fully set forth as a matter of fact the nature of the state post-conviction proceedings in order to advance other, more meritorious claims of constitutional error. Rather, the effect of the Court's ruling is simply to exclude further review upon claims which on their own offer Haight no opportunity for relief via  [§ 2254](#).

Appendix D

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Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky,
Louisville Division.

Randy HAIGHT, Petitioner

v.

Randy WHITE, Warden, Respondent

CIVIL ACTION NO. 3:02-CV-00206-GNS-DW

I

Signed 08/18/2017

Attorneys and Law FirmsBruce P. Hackett, Floyds Knobs, IN, [John M. Bailey, IV](#),
Brentwood, TN, for Petitioner.[Heather M. Fryman](#), Kentucky Attorney General, [Matthew R. Krygiel](#), Office of Criminal Appeals, Frankfort, KY, for
Respondent.**MEMORANDUM OPINION AND ORDER**[Greg N. Stivers](#), Judge

*1 This matter comes before the Court on the Petition for Writ of Habeas Corpus pursuant to [28 U.S.C. § 2254 \(DN 1\)](#), as amended, and Petitioner's Motion for Summary Judgment (DN 141). The Magistrate Judge has issued Findings of Fact, Conclusions of Law, and Recommendation ("R&R") (DN 160) recommending that the Petitioner's federal habeas Petition and his Motion for Summary Judgment be denied. The Petitioner has filed his Objection to the Report and Recommendation (DN 166). For the following reasons, the Petitioner's Objection is **OVERRULED** and the Magistrate Judge's R&R is **ADOPTED** to the extent that it does not conflict with this opinion of the Court.

I. BACKGROUND

The Magistrate Judge's R&R sets forth in detail the extensive procedural history and the relevant facts of this matter, which the Court incorporates herein by reference. (R. & R. 2-15, DN 160).

II. JURISDICTION

This Court has jurisdiction to "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court...." [28 U.S.C. § 2254\(a\)](#).

III. STANDARD OF REVIEW**A. The Antiterrorism and Effective Death Penalty Act of 1996 Standard**

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas corpus relief is available to state prisoners who are in custody "in violation of the Constitution or laws or treaties of the United States."

[28 U.S.C. § 2254\(a\)](#). To establish a right to relief, a petitioner must show that the state's highest court rejected the petitioner's claim on the merits, and that this rejection was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

[Id. § 2254\(d\)](#); [Harrington v. Richter](#), 562 U.S. 86, 98 (2011). These standards apply regardless of whether the state court explained its reasons for rejecting a prisoner's claim.

[Harrington](#), 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

Under the "contrary to" clause, a federal court may grant a writ of habeas corpus relief if the state court arrives at a conclusion contrary to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the U.S. Supreme Court has decided on a set of materially indistinguishable facts. [Jones v. Jamrog](#), 414 F.3d 585, 591 (6th Cir. 2005) (citing [Williams v. Taylor](#), 529 U.S. 362, 405-06 (2000)). Under the "unreasonable application" clause, a federal court may grant habeas corpus relief if the state court identifies the correct governing legal principle from the U.S. Supreme Court's decisions, but unreasonably applies that principle to the facts. *Id.* (citing [Williams](#), 529 U.S. at 409). Relief

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is also available under this clause if the state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from U.S. Supreme Court precedent to a new context. *Williams*, 529 U.S. at 407. The proper inquiry is whether the state court decision was “objectively unreasonable” and not simply erroneous or incorrect. *Id.* at 409-11.

*2 It is not enough that a federal court conclude in its independent judgment that the state court decision is incorrect or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002)). See also *Holder v. Palmer*, 588 F.3d 328, 337 (6th Cir. 2009) (explaining that a state court decision is not an unreasonable application merely because the state court's reasoning is flawed). “The state court's application of clearly established law must be objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citing *Williams*, 529 U.S. at 409). See also *Renico v. Lett*, 559 U.S. 766, 777-78 (2010). AEDPA imposes a “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Bell v. Cone*, 543 U.S. 447, 455 (2005) (quotation marks omitted) (internal citation omitted) (citation omitted). The state court decision is evaluated using the law at the time of the petitioner's state court conviction became final. *Williams*, 529 U.S. at 379-80 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

When “it is possible ‘fairminded jurists could disagree’ on the correctness of the state court's decision,” habeas relief is unavailable. *Harrington*, 562 U.S. at 101 (quoting *Yarborough*, 541 U.S. at 664). For habeas relief to be granted, “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.* at 103 (citation omitted). “The state-court decision need not refer to relevant Supreme Court cases or even demonstrate an awareness of them.” *Slagle v. Bagley*, 457 F.3d 501, 513 (6th Cir. 2006) (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)). “Instead, it is sufficient that the result and reasoning are consistent with

Supreme Court precedent.” *Id.* at 514 (citing *Early*, 537 U.S. at 8).

Under *Section 2254(d)(2)*, the petitioner may obtain relief by showing the state court's factual finding is “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Thus, *Section 2254(d)(2)* applies when a petitioner challenges factual determinations by the state court. Notably, the factual findings of the state court are presumed to be sound unless the petitioner rebuts the “presumption of correctness by clear and convincing evidence.” *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (internal quotation marks omitted) (quoting *28 U.S.C. § 2254(e)(1)*). The U.S. Supreme Court has observed although this deference accorded to state court findings under *Section 2254(e)(1)* is demanding, it is not insatiable and it “ ‘does not by definition preclude relief.’ ” *Id.* at 240 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). In sum, with respect to *Section 2254(d)(2)*, “[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits in a state court will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340 (internal citation omitted) (citation omitted).

B. Summary Judgment Standard

Fed. R. Civ. P. 56 requires the Court to grant a motion for summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(a)*. If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, “set[ting] forth specific facts showing that there is a genuine issue for trial.” *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). “In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party.” *Moldowan*, 578 F.3d at 374 (citing

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 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

*3 At this stage, “ ‘the judge’s function is not ... to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.’ ” *Id.*

(quoting  *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But “[t]he mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient,” and the party’s proof must be more than “merely colorable.”  *Anderson*, 477 U.S. at 252. An issue of fact is “genuine” only if a reasonable jury could find for the non-moving party.  *Moldowan*, 578 F.3d at 374 (citing  *Anderson*, 477 U.S. at 252).

C. Objection to the Magistrate Judge’s R&R

When an objection is made to a magistrate judge’s report and recommendation, a district judge “must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). “[V]erbatim regurgitation of the arguments made in earlier filings are not true objections.” *Bushner v. Larose*, No. 5:14CV00385, 2017 WL 1199160, at *2 (N.D. Ohio Mar. 31, 2017). When an “objection” merely states disagreement with the magistrate judge’s suggested resolution, it is not an objection for the purposes of this review.  *Cvijetinovic v. Eberlin*, 617 F. Supp. 2d 620, 632 (N.D. Ohio 2008), *rev’d on other grounds*, 617 F.3d 833 (6th Cir. 2010). The Sixth Circuit has stated that “[o]verly general objections do not satisfy the objection requirement.”  *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006), *abrogated on other grounds by*  *Jones v. Bock*, 549 U.S. 199 (2007) (citations omitted). Only specific objections are entitled to *de novo* review; vague and conclusory objections amount to a complete failure to object as they are not sufficient to pinpoint those portions of the magistrate judge’s report and recommendation that are legitimately in contention.   *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). “The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious.”  *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) (citation omitted).

“ ‘[O]bjections disput[ing] the correctness of the magistrate’s recommendation but fail[ing] to specify the findings ... believed [to be] in error’ are too general.”  *Spencer*, 449 F.3d at 725 (alterations in original) (quoting  *Miller*, 50 F.3d at 380).

New arguments raised for the first time in a petitioner’s objection to a magistrate judge’s report and recommendation are considered waived. See  *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) (citing approvingly several courts which have held that, absent compelling reasons, “the Magistrate Judge Act ... does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate [judge].” (citation omitted)). Courts have applied this general rule in the habeas corpus context. See *Sanders v. Kelly*, No. 5:09CV01272, 2012 WL 2568186, at *9 (N.D. Ohio June 29, 2012) (holding that petitioner’s newly raised ineffective assistance of counsel claims in objections to a report and recommendation on habeas petition are “not properly before the Court.”). See also *Brewer v. Bottom*, No. 10-26-KSF, 2012 WL 404878, at *8 (E.D. Ky. Feb. 8, 2012) (rejecting petitioner’s claim in habeas petition raised for the first time in objections to the report and recommendation and noting that “[t]hese reasons alone are sufficient grounds to reject [the petitioner’s] objection.”). “[A]llowing parties to litigate fully their case before the magistrate [judge] and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act.”

 *Greenhow v. Sec’y of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds by*  *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).

D. Certificate of Appealability

*4 Under the AEDPA, a decision of this Court may not be appealed to the Sixth Circuit absent a certificate of appealability. See 28 U.S.C. § 2253(c)(1). “A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). “To obtain a [certificate of appealability] under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’ ”

” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quoting  *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Where a court has rejected a petitioner's constitutional claim on the merits, the petitioner must demonstrate “that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong” to satisfy Section 2253(c).  *Id.* at 484. A certificate of appealability should be issued when a writ of habeas corpus is denied on procedural grounds and the petitioner can demonstrate that: (1) “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right” and (2) “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

IV. DISCUSSION

In his Objection, Petitioner Randy Haight (“Haight”) raises issues relating to the Magistrate Judge's review of his plea agreement, his ineffective assistance of counsel claims, jury selection, the death penalty, his post-conviction proceedings, the jury instructions and verdict form, prosecutorial misconduct, and several miscellaneous matters. Each issue will be addressed in turn.

A. Plea Agreement Issues

1. Ground 1: Due Process and Specific Enforcement of the Plea Agreement

In Ground 1, Haight contends that due process requires the specific enforcement of his 1986 plea agreement entered in the Garrard Circuit Court. (Pet'r's Mem. Supp. Pet. 19-28, DN 61 [hereinafter Pet'r's Mem. Supp.]; Pet'r's Reply Resp. Pet. 11-14, DN 142 [hereinafter Pet'r's Reply]; Pet'r's Mot. Summ. J. 18-35, DN 141).¹ Specifically, Haight argues that his plea of guilty to charges of murder, which the Kentucky Supreme Court set aside in *Haight I*, rendered impossible any opportunity for him subsequently to obtain a fair trial. (Pet'r's

Mot. for Summ. J. 18-35 (citing  *Haight v. Commonwealth*, 760 S.W.2d 84, 89 (Ky. 1988)) (*Haight I*).²

*5 Central to Haight's due process argument is the language in the plea agreement in which the Commonwealth promised to take no action inconsistent with the agreement.³ *Haight II*, 833 S.W.2d at 824. He claims that the plea agreement was an enforceable contract with constitutional implications, thus the Commonwealth was bound by the plea agreement and barred from seeking the death penalty on remand. Both *Haight I* and *Haight II* rejected Haight's argument for specific enforcement of the 1986 plea agreement.  *Haight I*, 760 S.W.2d at 88; *Haight II*, 833 S.W.2d at 824. The court reasoned that there was no breach of an agreement to warrant specific enforcement because “the Commonwealth consistently presented the recommended sentence found within the 1986 plea agreement at the initial trial.” *Haight II*, 833 S.W.2d at 824. See also  *Haight I*, 760 S.W.2d at 88.

In the present action, Haight contends that the Kentucky Supreme Court's reasoning is an unreasonable application of the facts because there was a breach of the plea agreement and thus, the Kentucky Supreme Court's decision to disallow specific performance of that agreement is contrary to fundamental principles of federal law as announced in  *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Magistrate Judge concluded that: (i) the Kentucky Supreme Court's holding that the Commonwealth did not breach the plea agreement was not an unreasonable application of the facts; (ii) *Santobello* was not unreasonably applied by the Kentucky Supreme Court; and (iii) federal courts do not possess supervisory authority over state courts to impose specific performance *even if* the Kentucky Supreme Court unreasonably applied the facts of the case in finding that the Commonwealth had not breached the agreement. (R. & R. 26-41).

Haight objects to the Magistrate Judge's conclusion that the Kentucky Supreme Court's determination that the plea agreement had not been breached was not objectively unreasonable. Haight argues that the Magistrate Judge misconstrued the issue in deciding that there was not a breach because the Magistrate Judge did not consider the Commonwealth's actions on appeal or the Commonwealth's opposition of Haight's Motion to Enforce Plea Agreement. (Pet'r's Obj. R. & R. 9, DN 66 [hereinafter Pet'r's Obj.]).

The Court reiterates that in determining Haight's habeas corpus claim the question is not whether this Court could find a breach of the plea agreement, but whether the Kentucky Supreme Court's finding of no breach was objectively unreasonable. See 28 U.S.C. § 2254(e)(1). In this regard, the factual findings of the state court are presumed correct.

Id. Section 2254(d)(2) has been interpreted as precluding a federal court from “set[ting] aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record....” *Rice v. Collins*, 546 U.S. 333, 335 (2006). In *Haight II*, the Kentucky Supreme Court ruled that the plea agreement was not breached, despite the Commonwealth's opposition on appeal, because the Commonwealth honored the plea agreement through the original trial. *Haight II*, 833 S.W.2d at 824. Haight has failed to show how this is an objectively unreasonable determination of fact by the Kentucky Supreme Court or is contrary to or an unreasonable application of federal law.

*6 Moreover, as recognized by the Magistrate Judge, even if this Court were to determine that the plea agreement had been breached, Haight cannot show that he would be entitled to specific performance. (R. & R. 36-37). Haight contends that the Kentucky Supreme Court's failure to order specific performance was a clearly unreasonable application of *Santobello*. (Pet'r's Obj. 7). The U.S. Supreme Court in *Santobello* held that the remedies for a breach of a plea agreement are either specific performance of the agreement or rescission of the entire agreement and withdrawal of the guilty plea, to be fashioned by the state court based on what “the circumstances of [the] case require.” *Santobello*, 404 U.S. at 263. Citing *Santobello*, the *Haight I* decision vacated the judgment of the original trial court, vacated Haight's guilty plea, and reinstated all charges in the indictment as originally returned by the grand jury. *Haight I*, 760 S.W.2d at 89. Haight was allowed to withdraw his guilty plea after the trial court originally refused to let him withdraw from the agreement; thus, Haight sought and was granted one of the available remedies under *Santobello*. In this regard, the Kentucky Supreme Court in *Haight I* directly complied with *Santobello*, as it had the discretion to choose the most appropriate remedy based on the circumstances of the case. *Santobello*, 404 U.S. at 263. See also *Fox v. Johnson*, 832 F.3d 978, 988 (9th Cir. 2016) (“But, here, rather than seek specific performance, Fox chose to withdraw her guilty plea, voiding the plea agreement. She sought one of the remedies under *Santobello*, and received it. Even if she had sought

specific performance, *Santobello* ‘leave[s] to the discretion of the state court’ whether the circumstances of the case require specific performance or an opportunity to withdraw the plea. No binding Supreme Court decision finds a constitutional violation when a state court chooses the remedy a petitioner expressly chose or when she maintains her innocence of the original charges.” (alteration in original) (internal citation omitted)).

Accordingly, the Court overrules Haight's Objection to the R&R regarding Ground 1 of the Petition. After conducting *de novo* review and finding no error as to the reasoning of the Magistrate Judge, the R&R is adopted as to Ground 1. The Magistrate Judge also recommended the issuance of a certificate of appealability on this ground; however, the Court concludes that reasonable jurists could not debate that the Kentucky Supreme Court directly complied with *Santobello* when it allowed Haight to withdraw his guilty plea.

2. Ground 2: Vindictive Prosecution

In Ground 2, Haight claims that the decision of the Commonwealth to seek the death penalty following his initial successful appeal was presumptively vindictive in violation of the Eighth and Fourteenth Amendments. (Pet'r's Mem. Supp. 29; Pet'r's Mot. Summ. J. 18-35). The Magistrate Judge concluded that Haight did not demonstrate that clearly established precedent of the United States Supreme Court was unreasonably applied or is clearly contrary to the Kentucky state court's decisions in *Haight I*, *Haight II*, or *Haight III*. In his Petition, Haight mainly relies upon an Illinois Supreme Court case and did not cite to any U.S. Supreme Court precedent that would support his argument. (R. & R. 42; Pet'r's Mem. Supp. 29-31). Haight objects to the Magistrate Judge's conclusion and mentions, for the first time, that the Kentucky Supreme Court's ruling was an unreasonable application of *North Carolina v. Pearce*, 395 U.S. 711(1969), overruled in part by *Alabama v. Smith*, 490 U.S. 794, 801 (1989); *Wayte v. United States*, 470 U.S. 598 (1985); and *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). This injection of U.S. Supreme Court precedent into his argument, however, does not change the outcome.

While a court may constitutionally impose a greater sentence upon a defendant after a successful appeal, the imposition of such a greater sentence cannot be based upon vindictiveness.

 *Pearce*, 395 U.S. at 719-25. “[T]he Due Process Clause is not offended by all possibilities of increased punishment ... but only by those that pose a realistic likelihood of ‘vindictiveness.’ ”  *Blackledge*, 417 U.S. at 27. The U.S. Supreme Court has stressed that in cases dealing with pretrial prosecutorial decisions, “a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.”  *United States v. Goodwin*, 457 U.S. 368, 384 (1982);  *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The standard itself, however, is an objective one—whether a reasonable person would think there existed a realistic likelihood of vindictiveness.   *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980). Where the presumption of vindictiveness does not arise, the defendant bears the burden of proving actual vindictiveness. See  *Wasman v. United States*, 468 U.S. 559, 569 (1984).⁴

*7 The Magistrate Judge determined that Ground 2 failed on the merits because there was no presumption of prosecutorial vindictiveness, and therefore the Kentucky Supreme Court's denial of Haight's claim was not an unreasonable application of clearly established U.S. Supreme Court law. (R. & R. 43-44). In his Objection, Haight argues that a presumption of vindictiveness arose because the Commonwealth's decision to seek the death penalty following *Haight I* demonstrates a *realistic likelihood* of vindictiveness as there was no change in circumstances or new evidence between the original plea offer of 25 years to life without parole and the Commonwealth's decision to seek the death penalty after the initial successful appeal. (Pet'r's Obj. 12). The Kentucky Supreme Court in *Haight II* held:

With reinstatement of the original indictment and [Haight's] entry of a plea of not guilty to these charges, [Haight] returned to the place he was in before the plea agreement was entered. The Commonwealth exhibits no prosecutorial vindictiveness for there is no appearance of retaliation when a defendant is placed in the same position as he was in before he accepted the plea bargain.

Haight II, 833 S.W.2d at 824 (citing  *United States v. Anderson*, 514 F.2d 583, 588 (7th Cir. 1975)). Although this holding does not expressly state that there was no “realistic likelihood” of vindictiveness, the Kentucky Supreme Court's holding determined that there was no such likelihood of prosecutorial vindictiveness. See  *Slagle*, 457 F.3d at 513 (noting that a state court decision need not refer to U.S. Supreme Court cases as long as the results and reasoning of the state court are consistent with U.S. Supreme Court precedent) (citing  *Early*, 537 U.S. at 8).

This Court finds that the Kentucky Supreme Court's holding did not unreasonably apply U.S. Supreme Court precedent. “A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.”  *Goodwin*, 457 U.S. at 382. Haight's argument that the Commonwealth possessed a reasonable likelihood of vindictiveness is based solely on the fact that there was not a change of circumstances between the first plea and the sentence sought on remand to warrant the increased penalty.⁵ However, because Haight's guilty plea was vacated in *Haight I*, the Commonwealth was not bound by the original plea agreement and retained discretion to seek any available sentence, just as Haight was free to plead not guilty and take his case to trial.

See also  *United States v. Cooks*, 52 F.3d 101, 106 (5th Cir. 1995) (“As there is no presumption of prosecutorial vindictiveness attendant in the exercise of admittedly discretionary actions, [the defendant's] failure to offer any tangible evidence in support of his vindictiveness claim dooms it to failure.”). See also  *Goodwin*, 457 U.S. at 384 (“[M]ere opportunity for vindictiveness is insufficient....”). As in *Cooks*, Haight has presented no tangible evidence of prosecutorial vindictiveness.

*8 Moreover, following vacation of the original plea agreement the Commonwealth did not attempt to charge Haight with any crime other than capital murder, the same crime charged in the original indictment. See *Jordan v. Epps*, 756 F.3d 395, 406-07 (5th Cir. 2014) (holding that there was no presumption of prosecutorial vindictiveness in the prosecutor's refusal to make a plea agreement for a sentence of life in prison for a second time, rather than seek the death penalty, because the prosecutor did not attempt to charge defendant with any crime other than the original capital

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murder charge). Thus, the Commonwealth's decision to seek death does not warrant a presumption of vindictiveness.

Under these circumstances, Haight has not demonstrated that the Kentucky Supreme Court's holding was an objectively unreasonable application of *Pearce*, *Wayte*, or *Blackledge*. Therefore, this claim for relief will be denied. Yet, the Court does find that a certificate of appealability should be issued because jurists of reason could disagree as to the merits of this claim. Significantly, the Ninth Circuit, sitting en banc, has held that “a presumption of prosecutorial vindictiveness is warranted” in a situation where the prosecutor asked the court to impose a sentence other than death, but after the defendant's successful appeal the prosecutor rebuffed the plea offer and insisted on seeking the death penalty.  *Adamson*, 865 F.2d at 1018. This demonstrates that jurists of reason could disagree, and in fact have disagreed, as to whether a presumption of prosecutorial vindictiveness should arise in the present context. Accordingly, a certificate of appealability as to Ground 2 will be issued.

3. Ground 3: Double Jeopardy Clause

In Ground 3, Haight argues that the Fifth Amendment's Double Jeopardy Clause barred his subsequent death sentence. (Pet'r's Mem. Supp. 31-33; Pet'r's Mot. for Summ. J. 18-35). Addressing Haight's double jeopardy argument, the Kentucky Supreme Court explained that:

Appellant's double jeopardy claim has been reviewed and determined to be without merit. The essence of this claim is that upon the prior guilty plea and death sentence, jeopardy attached. Because RCr 9.84 precluded imposition of the death penalty, the argument goes, appellant was “implicitly acquitted.”

The error of the trial court was not the type and kind which preclude re-prosecution. The conduct of the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious or deliberate misleading. The trial court simply made an error which was corrected on appeal. Double jeopardy principles do not preclude further prosecution with all lawful punishments being available. In  *Simpson v. Commonwealth*, 759 S.W.2d 224, 228 (Ky. 1988), we answered appellant's double jeopardy claim as follows:

It was appellant who moved the court to withdraw his guilty plea and his confession made during the plea proceeding. Such constitutes a waiver of his constitutional protection against double jeopardy for the purpose of trial on the charge in the indictment.

 *Haight III*, 938 S.W.2d at 252 (internal citations omitted) (quoting  *Simpson*, 759 S.W.2d at 228).

The Magistrate Judge concluded that *Haight III* was neither contrary to nor an unreasonable application of any clearly established U.S. Supreme Court precedent relating to the Double Jeopardy Clause. (R. & R. 51). Haight's objection mostly states his general disagreement with *Haight III* and the Magistrate Judge's findings. See  *Cvijetinovic*, 617 F. Supp. 2d at 632 (“Near verbatim regurgitation of the arguments made in earlier filings are not true objections.” (citation omitted)). In interjecting these same arguments, Haight argues that the Magistrate Judge misconstrued his position. (Pet'r's Obj. 15). Haight asserts that his position is not that the Commonwealth should be completely barred from re-prosecution of the guilt phase of his trial, but that the Double Jeopardy Clause barred the Commonwealth from seeking the death penalty after remand from *Haight I*. (Pet'r's Obj. 17). Specifically, Haight contends that while his voluntary withdrawal of his guilty plea may have removed his re-prosecution from jeopardy, the trial court's “abuse of discretion in denying Haight's right under [Kentucky Rule of Criminal Procedure (“RCr”)] 9.84 to a jury at sentencing triggers the protections of the Double Jeopardy Clause and bars re-sentencing for death.” (Pet'r's Obj. 18). Thus, Haight contends the Kentucky Supreme Court's holding was an unreasonable application of  *United States v. Jorn*, 400 U.S. 470 (1971).

*9 *Jorn* invoked the right to the original jury because “the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial.”  *Jorn*, 400 U.S. at 485 (“When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial.” (citation omitted)). In the present case, at the original trial the case was never taken from the jury because no jury was ever

sworn in. Since *Jorn* involves the rights of a defendant in the context of a mistrial after a jury is impaneled and does not address the issue of the discretionary sentencing decision of a trial judge where no jury was ever seated, *Jorn* is wholly inapplicable here. Therefore, the Court holds that the Kentucky Supreme Court's ruling was not an objectively unreasonable application of *Jorn*.

Further, as to Haight's argument that the Double Jeopardy Clause applied to his sentencing, clearly established federal law holds that this clause only pertains to sentencing proceedings in limited scenarios. Haight has not shown that the Double Jeopardy Clause applied to the sentencing proceedings before the original trial court. The Fifth Amendment's Double Jeopardy Clause provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. The protections of the Double Jeopardy Clause attach once a court accepts a defendant's guilty plea. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). Generally, "the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." *Bullington v. Missouri*, 451 U.S. 430, 438 (1981) (citations omitted). A narrow exception to this rule holds that the Double Jeopardy Clause does apply to capital-sentencing proceedings that "have the hallmarks of [a] trial on guilt or innocence." *Id.* at 438. "[A]lthough sentencing proceedings ordinarily are governed by discretionary judgments, the Double Jeopardy Clause applies to any sentencing proceeding that *explicitly requires* the jury to determine whether the prosecution has proved its case." *Harrison v. Gillespie*, 640 F.3d 888, 897 (9th Cir. 2011) (internal quotation marks omitted) (quoting *Bullington*, 451 U.S. at 444). "[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an acquittal." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003) (internal quotation marks omitted) (citation omitted). "Absent an 'acquittal' in which the factfinder concludes that the prosecution failed to 'prove[] its case,' the Double Jeopardy Clause does not bar a retrial." *Harrison*, 640 F.3d at 897 (internal quotation marks omitted) (quoting *Poland v. Arizona*, 476 U.S. 147, 156-57 (1986)).

Haight's argument in this regard misses the mark. This scenario does not fall within the exception to the general rule allowing imposition of a harsher sentence upon retrial. First, the trial court initially imposed a death sentence, the same sentence subsequently imposed upon remand. Further, the sentencing proceedings in the original trial court did not "have the hallmarks of [a] trial on guilt or innocence" because the sentencing decision was made by the trial judge; no jury was ever impaneled. *Bullington*, 451 U.S. at 439. See also *Harrison*, 640 F.3d at 897 (rejecting the theory that the Double Jeopardy Clause applied to a judge's discretionary decision to impose a life sentence because "the defendant's life sentence had been imposed by operation of a statute rather than the jury's factual conclusion that the state had not proven its case." (citing *Sattazahn*, 537 U.S. at 109-10)). Haight points out that RCr 9.84 requires a jury to decide the appropriate punishment in capital cases.⁶ There is no question that the trial judge at Haight's sentencing did not impanel a jury, but instead made the unilateral decision to sentence Haight to death. Any error with this decision was corrected in *Haight I*. Clearly, Haight did not initially go through a trial-like process that was resolved in his favor so as to invoke double-jeopardy protection.

*10 There is nothing to suggest that the state court decision was contrary to or an objectively unreasonable application of clearly established federal law to the facts of this case. Accordingly, after conducting a *de novo* review of the R&R, the Court holds that the R&R in regard to Ground 3 is adopted and Haight's Objection is overruled. The Magistrate Judge recommended a certificate of appealability be issued as to Ground 3; however, the Court believes that reasonable jurists could not disagree that the protections against double jeopardy do not apply to the present situation as Haight was not sentenced to an earlier, lighter sentence by a jury with the "hallmarks of a trial on guilt or innocence." *Bullington*, 451 U.S. at 438.

4. Ground 4: Arbitrary, Capricious and Discriminatory Death Sentence

Haight claims in Ground 4 of his Petition that his death sentence was arbitrarily, capriciously, and discriminatorily applied in violation of the Eighth Amendment. (Pet'r's Mem. Supp. 33-35; Pet'r's Reply 11-24; Pet'r's Mot. Summ. J. 18-35). The *Haight III* decision held that the vacation of

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Haight's guilty plea in *Haight I* remedied any arbitrary and capricious death sentence.  *Haight III*, 938 S.W.2d at 250-51. The Magistrate Judge held that *Haight III* was not an unreasonable application of clearly established federal law. (R. & R. 55). In Haight's Objection, he argues that the Magistrate Judge focused on the imposition of the death sentence by the original trial judge and ignored the argument that the Commonwealth violated the Eighth Amendment by seeking the death penalty arbitrarily after Haight's appeal was successful in *Haight I*. (Pet'r's Obj. 18-19). In support, Haight cites to  *Godfrey v. Georgia*, 446 U.S. 420 (1980);  *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); and  *Wayte v. United States*, 470 U.S. 598 (1985).

Haight has failed to show how the Kentucky Supreme Court unreasonably applied any of the above-cited decisions of the United States Supreme Court. As the Magistrate Judge noted, reversal of the original conviction “wiped the slate clean” and the Commonwealth was free to seek whatever sentence it chose, just as Haight was free to plead not guilty. Haight correctly notes that “the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification”; however, Haight has not shown how the Commonwealth's decision to seek the death penalty after *Haight I* was based on any such classification.  *Wayte*, 470 U.S. at 608 (internal quotation marks omitted) (quoting  *Bordenkircher*, 434 U.S. at 364).

Based on the record before the state courts, there is nothing to suggest that the state court decision was contrary to or an objectively unreasonable application of clearly established federal law to the facts of this case. Accordingly, the Court finds Haight's Objection of no avail and after *de novo* review adopts the Magistrate Judge's recommendation to deny relief as to Ground 4. Further, although contrary to the Magistrate Judge's recommendation, the Court concludes that a certificate of appealability is not warranted as to this ground for relief. The Court does not find that reasonable jurists could debate that Haight has failed to show a denial of any constitutional right as he has provided no support for the argument that the imposition of the death penalty was “based upon an unjustifiable standard such as race, religion, or other arbitrary classification....”  *Wayte*, 470 U.S. at 608 (internal quotation marks omitted) (quoting  *Bordenkircher*, 434 U.S. at 364).

5. Ground 33: Irrevocable Prejudice

In Ground 33, Haight argues that the imposition of his capital sentence is unconstitutional due to the irrevocable prejudice that flowed from his plea of guilty in the initial proceeding. (Pet'r's Mem. Supp. 26-47; Pet'r's Reply 11-14; Pet'r's Mot. Summ. J. 18-35). The Magistrate Judge, in a lengthy analysis, found that decisions in *Haight I*, *Haight II*, and *Haight III* regarding irrevocable prejudice were not contrary to or an unreasonable application of any clearly established decision of the U.S. Supreme Court. (R. & R. 64). Moreover, the Magistrate Judge noted Haight's failure to cite to any U.S. Supreme Court precedent which was arguably applied unreasonably. (R. & R. 62). Haight's Objection to this finding reflects mere disagreement with the Magistrate Judge's conclusion. (Pet'r's Obj. 20-23).

*11 Haight takes issue with the Magistrate Judge's ruling that the passage of time and pretrial publicity did not cause Haight irrevocable prejudice. (Pet'r's Obj. 20). In his Objection, Haight avers  *Herrera v. Collins*, 506 U.S. 390 (1993), and  *Sheppard v. Maxwell*, 384 U.S. 333 (1966), support his instant claims; however, he does not explain how these cases were unreasonably applied by the Kentucky Supreme Court.⁷ (Pet'r's Obj. 20-21). Juror bias caused by pre-trial publicity, specifically a newspaper article, was explored in depth by the trial court during *voir dire* and during an evidentiary hearing. These findings were upheld in *Haight III*, and Haight has not shown them to be objectively unreasonable findings of fact.  *Haight III*, 938 S.W.2d at 246.

Accordingly, Haight's Objection is overruled, and, based on this Court's *de novo* review, the portion of the R&R pertaining to Ground 33 is adopted. While the Magistrate Judge recommended issuance of a certificate of appealability, the Court concludes that reasonable jurists could not debate the resolution of this ground for relief in the complete absence of any evidence cited by Petitioner to meet his burden to overcome the presumption of correctness afforded to the state court's finding of no irrevocable prejudice.

B. Ineffective Assistance of Counsel Claims

To establish ineffective assistance of counsel, Haight must show that his counsel provided deficient performance and such deficient performance prejudiced his defense so as to

render the trial unfair and the result unreliable.  *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under AEDPA, a state court's ruling on ineffective assistance of counsel claims will only be disturbed if it is an unreasonable application of *Strickland*.  *Bell v. Cone*, 535 U.S. 685, 693-94 (2002) (citation omitted). Focusing on the performance component, the U.S. Supreme Court explained “[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.”  *Strickland*, 466 U.S. at 687-88. The reviewing court's scrutiny of counsel's performance is highly deferential; indeed, “the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 90. The reviewing court must also not indulge in hindsight, but must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors.  *Id.* at 690; *Cobb v. Perini*, 832 F.2d 342, 347 (6th Cir. 1987).

To satisfy the prejudice prong of the *Strickland* test, “[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”  *Strickland*, 466 U.S. at 694. A “[p]etitioner is not entitled to a presumption of prejudice unless it can be said that his counsel ‘fail[ed] meaningfully to oppose the prosecution's case.’ ”  *Lundgren v. Mitchell*, 440 F.3d 754, 775 (6th Cir. 2006) (quoting  *Florida v. Nixon*, 543 U.S. 175, 179 (2004)). Where “one is left with pure speculation on whether the outcome of the trial or the penalty phase could have been any different,” there is an insufficient showing of prejudice.  *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004) (citing  *McQueen v. Scroggy*, 99 F.3d 1302, 1321 (6th Cir. 1996)).

*12 “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) (citations omitted). An “independent and adequate state ground” will bar consideration of those federal claims in a federal habeas corpus proceeding that have been defaulted

under state law, unless the default is excused.  *Coleman v. Thompson*, 501 U.S. 722, 753 (1991);  *Brown v. Allen*, 344 U.S. 443, 486-87 (1953). A default will be excused if the petitioner is able to demonstrate cause for the default and prejudice resulting therefrom or, alternatively, that manifest injustice will result from the conviction of one who is factually innocent if the claim is not addressed.  *Sutton v. Carpenter*, 745 F.3d 787, 790-91 (6th Cir. 2014).

To establish “cause,” a petitioner must demonstrate that something external to him impeded his efforts to comply with the state's procedural rules.  *Coleman*, 501 U.S. at 729-30. A petitioner can establish “cause” by showing his counsel's failure to raise the claim before the state court was an error of such magnitude that it rendered counsel's performance ineffective and in violation of the Sixth

Amendment.  *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Notably, in *Coleman*, the Supreme Court made the unqualified pronouncement that ineffective assistance by counsel during state post-conviction proceedings does not establish “cause” for a procedural default because there is no constitutional right to an attorney in such proceedings.

 *Coleman*, 501 U.S. at 752-54 (citing  *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). Recently, however, the U.S. Supreme Court carved out a limited equitable exception for claims of ineffective assistance of trial counsel that could be raised for the first time only in an initial state post-conviction proceeding. See  *Martinez v. Ryan*, 566 U.S. 1, 17 (2012);  *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). Under the U.S. Supreme Court's recent decisions in *Martinez* and *Trevino*, “Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their IATC claims by showing that they lacked effective assistance of counsel at their initial-review collateral proceedings,” such as RCr 11.42 proceedings.  *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015). However, “the holdings in *Martinez* and *Trevino* ‘[do] not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings....’ ”  *Id.* at 636 (alteration in original) (quoting  *Martinez*, 566 U.S. at 16).

To establish prejudice, a habeas petitioner must demonstrate “‘actual prejudice’ resulting from the errors of which he complains.”  *United States v. Frady*, 456 U.S. 152, 168

(1982). A petitioner must show not “that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”  *Id.* at 170.

1. Ground 5: Failure to Strike Juror Gaugh for Cause

Haight argues in Ground 5 that he received ineffective assistance of trial counsel when his attorneys failed to move to strike for cause juror Gaugh after this juror stated that he would not give serious consideration to Haight's mitigation evidence of his deprived family background. (Pet'r's Mem. Supp. 47-85; Pet'r's Reply 142; Pet'r's Mot. Summ. J. 6-17; Pet'r's Supp. Obj., DN 177). *Haight IV* held that Haight's trial counsel's decision not to strike Gaugh for cause was legitimate trial strategy, not ineffective assistance.  *Haight IV*, 41 S.W.3d at 446. The Magistrate Judge also concluded that Haight's counsel's decision to not strike Gaugh for cause was sound trial strategy and that Gaugh was not an actually biased juror. (R. & R. 98-114). Accordingly, the Magistrate Judge recommended denial of Haight's claim for relief under Ground 5 because the holding of the Kentucky Supreme Court was not an unreasonable application of *Strickland*. (R. & R. 114).

*13 Haight raises three issues as to the Magistrate Judge's conclusions. (Pet'r's Obj. 29). First, Haight argues that the Magistrate Judge overlooked this Court's order holding that there could be no tactical or strategic reason for counsel's refusal to strike a biased juror. (Pet'r's Obj. 29). This Court previously stated that “the decision whether to seat a biased juror cannot be a discretionary or strategic decision.” (Mem. Op. 8-9, DN 85 (internal quotation marks omitted) (quoting  *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004))). Haight argues that the R&R's explanation of Haight's trial counsel's possible tactical strategies ignores this Court's prior order because Gaugh was biased as a matter of law. (Pet'r's Obj. 29). The Court finds that the Magistrate Judge did not err in reviewing Haight's trial counsel's performance, as the Magistrate Judge further concluded that Gaugh was not an actually biased juror. (R. & R. 112). As the Magistrate Judge explained, the Sixth Circuit has held that actual bias is “the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” (R. & R. 107 (quoting  *Miller*, 385 F.3d at 673)). The Magistrate Judge found that although Gaugh indicated that he would

not consider evidence of Haight's deprived childhood and family background, Gaugh was not actually biased because he had no relationship with the victims, did not expressly state that he could not be fair, indicated that he would fully consider Haight's defenses of alcoholism and extreme emotional disturbance, and acknowledged that he had some sympathy for Haight. (R. & R. 113).

Haight relies on  *Morgan v. Illinois*, 504 U.S. 719 (1992), in support of his argument that Gaugh was actually biased because of his indication during *voir dire* that he would not consider a certain type of mitigating evidence. (Pet'r's Obj. 33). In *Morgan*, the U.S. Supreme Court stated that “[a]ny juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.”  *Morgan*, 504 U.S. at 739. The primary concern in *Morgan* was a juror who indicated he would automatically recommend death regardless of *any* mitigating evidence. *Id.* Here, Gaugh's statement that he would not consider *one type* of mitigating evidence does not raise these same concerns, especially where Gaugh further indicated that he would consider Haight's other mitigating evidence. See *Lagrone v. Cockrell*, No. CIV.A.4:99-CV-0521-G, 2002 WL 1968246, at *19 (N.D. Tex. Aug. 19, 2002) (“[A] prospective juror's statement that he does not consider a certain type of evidence as mitigating does not subject him to a challenge for cause because it is not evidence that he will be unable to perform his duties as a juror.”). Further, Haight has provided no authority for the proposition that a juror is biased as a matter of law because he will not consider *one discrete aspect* of mitigating evidence. Therefore, because this Court agrees with the Magistrate Judge that Gaugh was not biased as a matter of law, trial counsel's decision to not strike Gaugh for cause did not amount to ineffective assistance of counsel under *Strickland*.

Haight also takes issue with the Magistrate Judge's examination of Haight's trial counsel's possible tactical strategy. (Pet'r's Obj. 36-41). When asked by the trial court to provide a reason why he chose to not move to strike Gaugh for cause, Haight's trial counsel responded only that it was a “tactical decision.” (R. & R. 99 (citation omitted)). The Magistrate Judge concluded that Haight's counsel's explicitly described “tactical decision” in not striking Gaugh for cause was objectively reasonable because Gaugh stated that he would consider an extreme emotional disturbance defense, would consider Haight's evidence that he was under the

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influence of alcohol at the time of the crime, and because Gaugh is an African-American. (R. & R. 109-11). Defense counsel considered Gaugh to be a favorable juror in light of his belief that Gaugh's race meant he was statistically less likely to impose the death penalty. (R. & R. 109-11). Haight contends that the Magistrate Judge's proffered strategies are speculative and not supported by the record.

Under AEDPA's deferential standard of review, the question is whether there is "any reasonable argument that counsel satisfied *Strickland*'s deferential standard."  *Harrington*, 562 U.S. at 105. "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.' "  *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (quoting  *Strickland*, 466 U.S. at 689-90). A court must "affirmatively entertain the range of possible" reasons counsel may have had for proceeding as he or she did. *Id.* Accordingly, the Magistrate Judge properly pointed to parts of the state court record demonstrating defense counsel's decision not to challenge Gaugh was tactical. (R. & R. 109-11); see  *Pinholster*, 563 U.S. at 191 (presuming that counsel's actions were a matter of trial strategy "[r]ather than ... neglect" and noting statements by counsel in state-court record "support[ing] the idea that [petitioner's] counsel acted strategically...."). The Magistrate Judge noted that although "counsel may have declined to put on the record the basis for his choice, Gaugh's other statements during *voir dire* clearly reveal the basis for counsel's conscious election not to challenge Gaugh for cause." (R. & R. 109). The Magistrate Judge cited statements by Gaugh indicating that he would consider the entire range of penalties for intentional aggravated murder, that he would consider Haight's extreme emotional disturbance defense, and that he would give serious consideration to evidence indicating that Haight acted under the influence of alcohol at the time of the crime. (R. & R. 109-10 (citation omitted)). What Haight labels as the Magistrate Judge's "speculation" in fact represents the exact type of analysis the U.S. Supreme Court has instructed courts to conduct in reviewing petitions for writs of habeas corpus. Therefore, the Court finds Haight's second argument lacks merit.

*14 Haight also objects to the Magistrate Judge's conclusion that Haight's trial counsel's tactical strategy was objectively reasonable and did not amount to deficient performance. (Pet'r's Obj. 29). As stated above, it is Haight's burden to overcome the presumption of competent representation.

 *Strickland*, 466 U.S. at 689. Aside from conclusory assertions that his counsel's strategy during *voir dire* was objectively unreasonable, Haight provides no elaboration. (Pet'r's Obj. 29, 39). Accordingly, the Court concludes that he has not met his burden.  *Strickland*, 466 U.S. at 688.

Finally, the Court must address the arguments put forth in Haight's supplement to his Objection. Haight cites to  *Shelton v. United States*, 800 F.3d 292 (6th Cir. 2015), for the proposition that the Magistrate Judge should have provided fair notice and an opportunity to brief the issue of whether Haight's trial counsel decided not to strike Gaugh because Gaugh said he would consider an extreme emotional disturbance defense and because he is an African-American. (Pet'r's Supp. Obj. 3). In *Shelton*, the Sixth Circuit held that "[b]efore acting on its own initiative, [a] district court 'must accord the parties fair notice and an opportunity to present their positions.' "  *Shelton*, 800 F.3d at 294 (quoting  *Day v. McDonough*, 547 U.S. 198, 210 (2006)). Haight contends that *Shelton* applies to his case because the R&R was "the first, and only, time that the explanations for trial counsel's actions had been proposed by the Magistrate Judge." (Pet'r's Supp. Obj. 3). The Court disagrees. In *Shelton*, the Sixth Circuit held that before *sua sponte* dismissing a motion to vacate as untimely, the parties should be allowed to present their positions. The issue of whether Haight's counsel was deficient was certainly not raised *sua sponte* by the Magistrate Judge. Furthermore, Haight has been provided the opportunity to file his Objection to the R&R, which constitutes his chance to be heard by this Court. See *United States v. Renfro*, No. CR 08-93-ART-CJS-2, 2017 WL 1416869, at *1 n.3 (E.D. Ky. Mar. 22, 2017), report and recommendation adopted, No. CR 08-93-ART-CJS-(2), 2017 WL 1429192 (E.D. Ky. Apr. 19, 2017) (citing  *Shelton*, 800 F.3d at 294-96). Accordingly, the Court rejects Haight's argument that he should have been allowed an opportunity to further brief this issue, as Haight was afforded the opportunity to file his Objection, reply to the response to the Objection, and provided supplemental authority all regarding this issue.

In conclusion, the Court finds after *de novo* review that the Magistrate Judge did not err when he concluded that the holding of the Kentucky Supreme Court was not an unreasonable application of *Strickland*. Therefore, the Court adopts the R&R as to Ground 5 and overrules Haight's Objection thereto. Further, despite the Magistrate Judge's recommendation, a certificate of appealability is not

warranted as to this claim as no reasonable jurists could debate that Haight has utterly failed to show that trial counsel's performance was objectively unreasonable as to juror Gaugh.  *Slack*, 529 U.S. at 484.

2. Ground 8: Peremptory Strikes for Jurors

In Ground 8, Haight argues that he received ineffective assistance of counsel when his trial attorneys failed to honor his request to remove jurors Gaugh, Helton, and Nichols from the jury panel by use of peremptory strikes. (Pet'r's Mem. Supp. 47-85; Pet'r's Reply 142; Pet'r's Mot. Summ. J. 6-17). *Haight IV* rejected Haight's ineffective assistance of counsel claim regarding peremptory challenges.  *Haight IV*, 41 S.W.3d at 443-44 (citation omitted). The court noted that Haight received the full number of challenges to which he was entitled and could not show that he was prejudiced because “[t]here is no reasonable probability that the result of his trial would have been any different under the standards provided in *Strickland*.” *Id.* at 444. *Haight IV* also emphasized that there was “no constitutional right to peremptory challenges.” *Id.* (citation omitted). The Magistrate Judge recommended denial of relief because the Kentucky Supreme Court's holding was not an unreasonable application of or contrary to established U.S. Supreme Court precedent. (R. & R. 114-28). The Magistrate Judge explained that trial counsel's failure to honor Haight's alleged request to strike three jurors was not a “structural error” under Kentucky law that amounted to a presumption of prejudice. (R. & R. 120). Further, the Magistrate Judge noted that nothing in the record established that Haight was in any way prejudiced by his counsel's failure to strike the three jurors. (R. & R. 123-28).

*15 Haight raises two issues as to the Magistrate Judge's recommendation. First, Haight objects to the Magistrate Judge's reliance on  *Rivera v. Illinois*, 556 U.S. 148 (2009), because “*Rivera* did not address an issue of ineffective assistance of counsel.” (Pet'r's Obj. 44). The Magistrate Judge relied on *Rivera* for the principle that Haight's counsel's alleged failure to strike jurors is not a structural error because there is no freestanding federal constitutional right to peremptory challenges. (R. & R. 120 (citing  *Rivera*, 556 U.S. at 151)). Haight argues that the Magistrate Judge was misconstruing the claim, as the U.S. Supreme Court in *Rivera* did not address the issue of ineffective assistance of counsel. The Court finds Haight's argument is without merit. The

Magistrate Judge did not misconstrue the claim, but merely used *Rivera* to support the conclusion that Haight's counsel's performance was not deficient. See *Strickland*, 466 U.S. at 487.

Next, Haight objects to the Magistrate Judge's finding that Haight cannot demonstrate prejudice for his *Strickland* claim to prevail. This argument focuses on Gaugh because, according to Haight, this juror was biased as a matter of law and thus prejudice is presumed. (Pet'r's Obj. 44). The Magistrate Judge noted that *Haight III* adopted the findings of the trial court and held that there was no information to cause the court to believe that the jurors “were in any way partial in their deliberations or their final conclusions.” (R. & R. 124 (quoting  *Haight III*, 938 S.W.2d at 247)). The Magistrate Judge then conducted a review of the record and concluded that Gaugh's statements of expressed skepticism of mitigation evidence during *voir dire* were equivocal and, to the contrary, Gaugh actually indicated that he felt somewhat sympathetic to Haight. (R. & R. 124). The Court disagrees with Haight's assessment that the Magistrate Judge is “simply and demonstrably incorrect.” (Pet'r's Obj. 45). Nothing in Haight's Objection influences this Court to disturb the Kentucky Supreme Court's factual holding that Gaugh was not biased as a matter of law. Furthermore, although Haight does not specifically object to the Magistrate Judge's conclusion that Helton and Nichols were not biased as a matter of law, the Court conducted *de novo* review and finds no error in the Magistrate Judge's analysis. Consequently, the Court agrees with the Magistrate Judge that Haight has not demonstrated that he was prejudiced in any way by his counsel's failure to strike these three particular jurors. See *Strickland*, 466 U.S. at 487.

Therefore, the Court adopts the Magistrate Judge's recommendation to deny Haight relief under this claim because *Haight IV* was not an unreasonable application of *Strickland*. Thus, the Court overrules Haight's Objection as to Ground 8. The Court further concludes that reasonable jurists could not debate whether the petition should have been resolved in a different manner with respect to the use of peremptory strikes by trial counsel.

3. Ground 9: Failure to Question Jurors, Raise Issues, and Exercise Challenges for Cause

In Ground 9, Haight presents a variety of claims all involving the ineffective assistance of trial counsel during

jury selection. (Pet'r's Mem. Supp. 61-62; Pet'r's Reply 16-17). The claims are related to the failure of Haight's trial counsel to move the court to strike for cause jurors Kaiser, Helton, Karnes, and Cunagin for various reasons, and misadvising two jurors, Larch and Karnes, on the nature of the extreme emotional disturbance defense. (Pet'r's Mem. Supp. 61-62; Pet'r's Reply 16-17). The Magistrate Judge fully addressed the nuances of each claim made by Haight, and *Haight III* and *Haight IV*'s rejection of Haight's ineffective assistance of counsel claims relating to jury selection. (R. & R. 128-29). The Magistrate Judge recommended that this Court deny relief under Ground 9 after concluding that the Kentucky Supreme Court did not unreasonably apply *Strickland* in its analysis of these claims. (R. & R. 128-38).

*16 Haight's Objection does not set out any specific objections to the Magistrate Judge's conclusion. (Pet'r's Obj. 46-49). Haight instead reiterates his arguments as to why trial counsel's performance during *voir dire* amounted to ineffective assistance of counsel. The Magistrate Judge conducted a detailed analysis and concluded that Haight's counsel was not ineffective, and thus, the Kentucky Supreme Court did not unreasonably apply *Strickland*. The Court finds no errors in this analysis. Accordingly, the R&R pertaining to Ground 9 is adopted and Haight's Objection thereto is overruled. The Magistrate Judge recommended the issuance of a certificate of appealability as to Ground 9. However, the Court does not find Haight has made a substantial showing of a denial of his Sixth Amendment right to effective assistance of counsel that would entitle him to a certificate of appealability on this ground. See  *Slack*, 529 U.S. at 484.

4. Ground 6: Introduction of the Jeanne Omer Letter

During Haight's trial, the Commonwealth introduced a letter of a victim's sister, Jeanne Omer. Haight argues in Ground 6 that he received ineffective assistance of counsel at trial when his attorney did not move to admit Haight's responsive letter in which he expressed remorse for his crimes. (Pet'r's Mem. Supp. 47-85; Pet'r's Reply 142; Pet'r's Mot. Summ. J. 6-17). On this point, *Haight IV* held:

Haight argues that defense counsel was ineffective when he did not introduce into mitigation evidence a letter which Haight had written to one victim's family. In the letter, Haight admitted committing the murders, expressed sorrow at having caused so much pain and suffering, and further expressed a desire to die for having done so. Defense

counsel clearly stated a desire not to reemphasize Haight's guilt phase testimony to the jury when it considered mitigating evidence in the penalty phase. The letter stated in part, "If you think I should pay with my life, then I'd have to agree with you...." Defense counsel was not ineffective in not introducing the letter into mitigation.

 *Haight IV*, 41 S.W.3d at 448. The Magistrate Judge concluded that *Haight IV* was not an unreasonable application of *Strickland* and recommended denial of Haight's request for relief under Ground 6. (R. & R. 139-41).

Haight's Objection offers little new argument, and in fact, much of this portion of the Objection is copied verbatim from his Reply to the Response to the Petition. (Pet'r's Reply 18-20; Pet'r's Obj. 51-54). See  *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) (noting that a reexamination of the exact same argument that was presented to the magistrate judge without specific objections "wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act."). Haight's objection mainly offers additional authority for his argument that remorse (which he contends was expressed in the letter) is important mitigation evidence. (Pet'r's Obj. 51-54).

Haight posits that because of this "compelling mitigation evidence," his counsel's strategy during the penalty phase cannot be considered "objectively reasonable strategy." (Pet'r's Obj. 55). As the Kentucky Supreme Court noted, however, counsel's strategy during the penalty phase was to avoid reemphasizing Haight's guilt-phase testimony.

 *Haight IV*, 41 S.W.3d at 448. The letter in which Haight admitted guilt would have done just that, not to mention that Haight's letter expressed support for giving him a death sentence. *Id.* See also  *Carter v. Mitchell*, 443 F.3d 517-32 (6th Cir. 2006) (holding that where evidence of a defendant's background would likely have made him look even worse to the jury, counsel's strategic decision to limit testimony about that background was "not even deficient performance, let alone prejudicial...." (internal quotation marks omitted) (quoting  *Moore v. Parker*, 425 F.3d 250, 254 (6th Cir. 2005))).

*17 The Sixth Circuit has emphasized that trial counsel's tactical decisions are particularly difficult to attack and a habeas petitioner's challenge to such decisions must overcome a presumption that the challenged action might

be considered sound trial strategy.  *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994);  *Darden v. Wainwright*, 477 U.S. 168, 185-87 (1986). Haight's objection does little to explain—beyond conclusory assertions—how *Haight IV* is an unreasonable application of *Strickland*, especially when the letter in question not only re-emphasized guilt but also invited imposition of the death penalty. Therefore, after reviewing the R&R, the Court finds no error and adopts the Magistrate Judge's recommendation that Haight's claim for relief under Ground 6 be denied. Haight's Objection thereto is overruled. Although the Magistrate Judge recommended a certificate of appealability be issued as to Ground 6, the Court concludes that reasonable jurists could not find the assessment of this constitutional claim debatable or wrong.

5. Ground 16: Introduction of the 1986 Plea Agreement

In Ground 16, Haight argues that he received ineffective assistance of counsel when his trial attorney did not introduce into evidence during the penalty phase the 1986 plea agreement by which the Commonwealth offered Haight a sentence of life imprisonment in exchange for his guilty plea to the murder and robbery charges. (Pet'r's Mem. Supp. 62-64; Pet'r's Reply 17-20). The *Haight IV* decision noted that there was a “split of authority on the issue” of whether a criminal defendant has a right to introduce evidence of a withdrawn guilty plea as mitigation evidence in a capital trial.  *Haight IV*, 41 S.W.3d at 448. Ultimately, the court held that under the *Strickland* standard it was “at a loss to see how failure to move to admit evidence—the admissibility of which is still an open question—can ever sink below sufficient performance into deficiency.” *Id.* Accordingly, the Kentucky Supreme Court concluded that “while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will.” *Id.* The Magistrate Judge concluded that this was not an unreasonable application of *Strickland* and recommended denial of Haight's claim for relief on this ground. (R. & R. 141-44). Further, the Magistrate Judge noted that introduction of the plea agreement would have been a “double-edged sword” for Haight because while it demonstrated that one state prosecutor found a life sentence to be appropriate, it likewise showed that “a state trial court [] firmly believed that death was the only fair punishment....” (R. & R. 143).

Haight argues that the *Haight IV*'s holding was unreasonable because “there was nothing ‘novel’ about the claim that a

[s]tate's offer of a sentence of less than death was mitigating evidence at the time of [Haight's] capital trial.” (Pet'r's Obj. 57). Haight maintains that  *Lockett v. Ohio*, 438 U.S. 586 (1978);  *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and  *Woodson v. North Carolina*, 428 U.S. 280 (1976), clearly establish this right. (Pet'r's Obj. 56). *Lockett*, *Eddings*, and *Woodson* hold that a capital defendant has a constitutional right to present mitigation evidence relevant to his or her *character, record, or circumstances of the case*.  *Lockett*, 438 U.S. at 604 n.12;  *Eddings*, 455 U.S. at 112;  *Woodson*, 428 U.S. at 304-05. Therefore, consistent with these clearly established legal principles, Haight argues that he had the right to introduce his plea agreement as relevant mitigation evidence and his attorney was ineffective in failing to do so.

The Sixth Circuit has previously rejected the argument that *Lockett*, *Eddings*, and *Woodson*'s clearly established legal principles create a right to introduce a plea agreement as mitigation evidence. In  *Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008), the petitioner cited *Lockett* for the argument that he had a right to present a negotiated plea agreement as mitigation evidence.  *Id.* at 421-22. The court emphasized that while *Lockett* requires the admission of *relevant* mitigation evidence, the U.S. Supreme Court held that “lower courts could continue to exclude [any] irrelevant evidence not bearing on the defendant's character, prior record, or the circumstances of the offense.”  *Id.* at 419 (citing  *Lockett*, 438 U.S. at 604 n.12). The court noted that all of the other decisions addressing whether the Constitution required the admission of failed plea negotiations as relevant mitigation evidence held that the Constitution did not prevent the exclusion of such evidence.  *Id.* at 421-22. The court then explained that “[a] rule of federal law cannot be clearly established when it has been rejected by every court that has been asked to adopt the rule, and a state court does not unreasonably apply clearly established federal law when it rejects an argument that has been unanimously rejected by other courts.”  *Id.* at 422. Accordingly, the Sixth Circuit held that the state court did not unreasonably apply or violate clearly established federal law in holding that a petitioner was not entitled to present evidence that the state had offered, and the defendant had accepted, an offer of a life sentence in exchange for a guilty plea. *Id.* See also *Wright v. Bell*, 619 F.3d 586, 600 (6th Cir. 2010) (“*Lockett* and *Eddings*

stand for the important principle that a capital defendant must be able to present any relevant mitigating evidence in order to allow the sentencing court to conduct an individualized sentencing, but do not imply that evidence of a state's plea offer is relevant mitigating evidence.”);  *Riley v. Cockrell*, 339 F.3d 308, 317-19 (5th Cir. 2003) (denying a certificate of appealability to a death row inmate who wanted to argue that his trial counsel was ineffective for not arguing that the inmate's guilty plea constituted mitigating evidence); *Hall v. Luebbers*, 341 F.3d 706, 717 (8th Cir. 2003) (rejecting the capital defendant's claim that “the trial court violated his Eighth and Fourteenth Amendment rights by excluding evidence of Hall's willingness to plead guilty....”). Therefore, the Court concludes that the notion that a plea agreement is relevant admissible mitigation evidence is not so “clearly established” as Haight contends and he has failed to establish that his counsel was ineffective for failing to offer the plea agreement into evidence.

*18 Consequently, Haight's Objection is not well taken. As the Magistrate Judge pointed out, Kentucky law regarding the admission of a withdrawn plea agreement at the time of Haight's trial and sentencing was not clear and “[a] strong argument existed that KRE 408 worked to prohibit the introduction of just such a document.” (R. & R. 143). Thus, the Court agrees with the R&R that *Haight IV* was not an objectively unreasonable application of *Strickland*, as “Haight's counsel could not be faulted under the Sixth Amendment for his decision not to introduce the plea agreement.” (R. & R. 143). Accordingly, the R&R as to Ground 16 is adopted and Haight's Objection thereto is overruled.

Further, the Court holds that a certificate of appealability is warranted as jurists of reason could disagree as to the merits of this claim. Significantly, the Ninth Circuit has previously held that evidence of a plea offer from the prosecution was mitigating because it showed that the prosecution thought the imposition of the death penalty was not clear-cut.

 *Summerlin v. Schriro*, 427 F.3d 623, 631-40 (9th Cir. 2005). This reflects that jurists of reason could disagree, and in fact have disagreed, as to whether a plea agreement could have been offered as mitigating evidence. Accordingly, a certificate of appealability as to Ground 16 will be granted.

6. Ground 13: Failure to Adequately Investigate and Present Mitigation Evidence

In Ground 13, Haight argues that the failure of counsel to perform an adequate investigation as to his mental status and psychological problems and to obtain experts in view of the information available to them of a 1974 psychological report suggesting the possibility of organic brain damage plainly constituted ineffective assistance of counsel under  *Rompilla v. Beard*, 545 U.S. 374 (2005);  *Wiggins v. Smith*, 539 U.S. 510 (2003); and  *Jacobs v. Horn*, 395 F.3d 92 (3rd Cir. 2005). (Pet'r's Mem. Supp. 67-80; Pet'r's Reply 24-41). *Haight IV* rejected this ineffective assistance of counsel claim based on the failure of Haight's trial counsel to obtain a neurological examination.  *Haight IV*, 41 S.W.3d at 444-45. The court held:

Haight argues that he wanted funds during the post-conviction proceedings to hire a neuropsychologist to examine him for organic brain damage. Trial counsel had claimed that he did not know of a need for a neurological examination until after the trial had started.

... Haight contends that he wanted to ask for funding for expert assistance in neuropsychology in order to prove ineffective assistance of counsel at trial.... This Court has already found that Haight had the full benefit of mental health evaluations and experts during his trial.

The expert offered by Haight said that there was a high degree of certainty that it's possible that Haight may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance. This is mere speculation. An RCr 11.42 proceeding does not provide for a relitigation of the performance of trial counsel. It should be recalled that the report by the expert was not filed until after the circuit court denied the RCr 11.42 motion. We find that Haight has not demonstrated any prejudice in this regard. He was not denied fundamental due process under either the federal or state constitution.

Id. (internal citation omitted). In *Haight III* the Kentucky Supreme Court determined that the revelation of the 1974 mental health evaluation during trial did not require further neuropsychological examination prior to sentencing.

 *Haight III*, 938 S.W.2d at 249. In that decision, the Kentucky Supreme Court stated:

Appellant's claim that a twenty-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

***19** *Id.*

As a threshold matter, the Court notes that the three expert reports that Haight now has in his possession are not relevant to the Kentucky Supreme Court's decision that Haight's counsel was not ineffective. As this Court has previously noted when denying Haight's request for expert assistance:

Whatever deficits neurological or psychopharmacological evaluations might now, in hindsight, uncover, such findings do not call into question the valid basis for trial counsel's reliance on the opinions of the defense experts he consulted. Newly-minted expert testimony would not assist Haight in establishing that the Kentucky Supreme Court's conclusion to reject his claim of ineffective assistance of counsel was an unreasonable application of *Strickland*.

(Order Denying Expert Assistance 5, DN 105). Although Haight takes issue with this holding, the Court will not disturb its prior ruling and therefore agrees with the Magistrate Judge that these expert reports will not be considered when analyzing Haight's request for habeas relief. (R. & R. 144 n.27). Accordingly, the Court will address issues pertaining to the experts that *were* presented during the penalty stage of the trial to determine if the Kentucky Supreme Court's holding

that Haight's counsel was not ineffective is an unreasonable application of *Strickland*.

Haight contends that his trial counsel did not adequately investigate the possibility of potential brain damage after being alerted to that possibility from a 1974 psychological evaluation. The Magistrate Judge noted that the Haight's argument overlooks the evaluation of trial counsel's expert, Dr. Fisher, and also ignores the vague nature of the 1974 psychological evaluation that only references the "possibility" of brain damage without citing any specific neurological testing or other objective bases for the opinion. (R. & R. 159). Further, the Magistrate Judge concluded that Haight's two trial attorneys obtained expert witnesses and Haight "does not compellingly argue that psychologist Fisher was incompetent, negligent or otherwise deficient in his psychological examination and his conclusions concerning Haight's lack of organic brain defect or dysfunction...." (R. & R. 159). Accordingly, the Magistrate Judge recommended denial of Haight's claim for relief because the holdings in *Haight III* and *Haight IV* that Haight's trial counsel were not ineffective were not objectively unreasonable applications of *Strickland*. (R. & R. 159-60).

None of the stated reasons for Haight's Objection as to this ground, many of which are duplications of the arguments in his Petition and Reply, dissuade the Court from the same conclusion as the Magistrate Judge. The Magistrate Judge conducted a thorough and lengthy analysis of Haight's arguments which this Court has reviewed and finds no error. Accordingly, the Court agrees with the Magistrate Judge that both *Haight III* and *Haight IV* reasonably applied *Strickland* "to reject Haight's claim that his attorneys failed to adequately investigate for mitigation evidence prior to trial or that they were deficient in their failure to request the services of a neuropsychiatrist or psychopharmacologist in addition to the clinical forensic psychologist and clinical social worker they had already obtained to assist in Haight's defense." (R. & R. 159-60). Haight's Objection is overruled and the R&R in regard to Ground 13 is adopted.

***20** The Magistrate Judge recommended a certificate of appealability be issued as to Ground 13. Yet, the Court concludes that "no reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner...."  [Slack, 529 U.S. at 484](#).

7. Ground 14: Sleeping Juror

In Ground 14, Haight argues that his trial attorneys rendered ineffective assistance of counsel when they failed to move for an immediate mistrial and to protect the trial record after notifying the court that certain members of the jury had been sleeping during the penalty phase of Haight's capital trial. As to this ground for relief, the *Haight IV* decision did not reach the merits but stated:

Haight argues that trial counsel was ineffective because he failed to move for a mistrial or make any effort to get factual details into the record regarding the alleged sleeping of jurors during part of the penalty phase. He also contends that the trial judge committed error when he took no action on his own initiative.

Haight does not plead this claim with the specificity required by [RCr 11.42\(2\)](#). He does not state which jurors were alleged to be sleeping and he does not indicate when the event occurred, if it actually took place. Haight is not entitled to the requested relief.

Haight does not indicate what information the jurors supposedly missed and how that would have changed the outcome of his trial. If defense counsel did see jurors with their eyes closed, there is no evidence that they were sleeping. In addition there is no evidence that the trial judge ever observed the alleged sleeping.

 *Haight IV*, 41 S.W.3d at 447 (internal citation omitted).

The Magistrate Judge recommended denial of Haight's request for relief under this ground because his claim, as the Kentucky Supreme Court held, was procedurally defaulted. (R. & R. 162-64). Further, the Magistrate Judge noted that Haight could not establish cause and prejudice under *Martinez* and *Trevino* to enable this Court to now hear his claim on the merits because those “decisions were rendered well after Haight's state court proceedings were entirely concluded and [cannot] ... be retroactively applied to his case in an effort to salvage this procedurally defaulted issue.” (R. & R. 164).

Haight objects to the Magistrate Judge's assertion that *Martinez* and *Trevino* cannot be retroactively applied to salvage a procedurally defaulted issue raised in the Petition because “*Martinez* and *Trevino* were rendered well after Haight's state court proceedings were entirely concluded.” (R.

& R. 164; Pet'r's Obj. 85-87). The Court finds that Haight's objection has merit, but does not change the outcome. The Magistrate Judge's conclusion that *Martinez* cannot be applied retroactively is misplaced. The Magistrate Judge relied on *Chavez v. Secretary, Florida Department of Corrections*, 742 F.3d 940 (11th Cir. 2014), and  *Buenrostro v. United States*, 697 F.3d 1137 (9th Cir. 2012), in support of his conclusion; however, these cases held that *Martinez* cannot be applied retroactively to form a basis for application for a second or successive habeas petition because *Martinez* did not create a new rule of substantive constitutional law. See *Chavez*, 742 F.3d at 946;  *Buenrostro*, 697 F.3d at 1139.

*21 The situation is quite different here as Haight's instant claim is neither second, successive, nor untimely. The Court finds convincing recent Sixth Circuit cases where the court applied the *Martinez* exception to issues that were procedurally defaulted in state courts long before *Martinez* was rendered in 2012. See  *Franklin v. Jenkins*, 839 F.3d 465, 469 (6th Cir. 2016), cert. denied, 137 S. Ct. 2188 (2017) (applying *Martinez* to a state procedural bar that was found by the Ohio Supreme Court in 2002); *Atkins v. Holloway*, 792 F.3d 654, 658 (6th Cir. 2015) (analyzing whether the *Martinez* exception applied to excuse a state procedural default that occurred in 2004);  *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014) (analyzing whether *Martinez* excused a procedural bar because of failure to raise in state court in 2000). Accordingly, the Court concludes that *Martinez* and *Trevino*, as equitable rules of federal habeas law, would apply to Haight's instant claim to excuse his state court procedural default *if* he could demonstrate cause and prejudice for his state court default by showing that his post-conviction attorney performed below the *Strickland* standard. But first, Haight must establish that “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.”  *Martinez*, 566 U.S. at 14.

First, the Court emphasizes that Haight has not provided any evidence indicating which juror was sleeping, for how long, or during which part of the presentation of evidence the juror allegedly slept. In this Court's earlier order denying Haight an evidentiary hearing as to this matter, the Court stated:

Indeed, Haight's unwillingness to state what facts he believes he could show at an evidentiary hearing not only renders this court unable to conclude that an evidentiary hearing would be anything other than a waste of time and resources, but it also strongly suggests that Haight views the evidentiary hearing as a fishing expedition rather than an opportunity to prove relevant facts to the court. The need to allege specific facts in support of his arguments should have been of particular concern to Haight given that it was the same lack of factual specificity about the underlying ineffective-assistance-of-trial-counsel claim that led to the procedural default of that claim. Haight cannot show that his post-conviction attorney was ineffective for failing to allege specific facts when Haight continues to decline to state what facts could have and should have been alleged.

(Mem. Op. 16-17, DN 135). Haight argues that it is the fault of the post-conviction courts in refusing to provide him necessary time and resources that prevented the presentation of evidence for this claim. He argues that he is not responsible for the undeveloped state court record and “[t]o saddle him with a record born [sic] of deficient and unfair process is inequitable.” (Pet’r’s Obj. 89). As previously noted, however, Haight has never stated what facts he believes these courts have prevented him from obtaining that would lead to a successful claim. Furthermore, although Haight’s post-conviction relief has been litigated for over two decades, Haight has never adduced any affidavit or other evidence to corroborate his allegations.

Even if Haight had presented evidence supporting his claim that a juror was sleeping during the penalty phase of his trial, Haight cannot show that his counsel’s performance was deficient. As discussed above, *Strickland* first directs courts to assess trial counsel’s performance and determine

whether it was reasonable.  *Strickland*, 466 U.S. at 691. During the penalty phase of trial, Haight’s counsel argued that the instructions were too complicated and would guide the jury to an enhanced penalty. (R. & R. (citation omitted)). To support his argument, he noted that the jury seemed incapable of taking direction and made the remark, “[t]his jury appears to have a pretty short attention span anyway, with a couple of them sleeping throughout the penalty phase, even early in the morning.” (R. & R. 75 (citation omitted)). Therefore, Haight’s counsel’s comment and failure to move for a mistrial because of the alleged sleeping juror was likely tactical strategy, and thus not an objectively unreasonable performance under *Strickland*. See *Sierra v. Bartowski*, No. 11-1860 (RMB), 2012 WL 4504246, at *28 (D.N.J. Sept. 27, 2012) (“[The state court correctly] surmised that it could have been sound trial strategy to forego an objection to a sleeping juror.... Other courts have also noted the strategic considerations involved when a juror has been sleeping.” (alteration in original) (internal quotation marks omitted));  *Prada-Cordero v. United States*, 95 F. Supp. 2d 76, 81 (D.P.R. 2000) (“Additionally, a court should be cognizant that attorneys may use the appearance of sleep as a strategic tool to downplay the importance of an adversary’s presentation.” (citation omitted)); *Arispe v. United States*, No. 03-10124-BC, 2005 WL 3132211, at *2 (E.D. Mich. Nov. 21, 2005) (“It is not necessarily an unreasonable strategy for a defense attorney to decline to object to juror inattentiveness, especially when the jurors may have been inattentive to the government’s case.”). This Court notes that it “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance....”  *Strickland*, 466 U.S. at 689. Haight has not overcome the presumption that his counsel’s actions “might be considered sound trial strategy.” *Id.* (internal quotation marks omitted) (citation omitted). Therefore, the Court concludes that Haight has not demonstrated that his counsel’s performance was defective, as required by *Strickland*.

*22 Finally, Haight has not shown that he was prejudiced by his counsel’s alleged error. “To establish prejudice, [Haight] must show that a reasonable probability exists that, but for counsel’s deficient performance, the result of the proceedings would have been different.”  *Tibbetts v. Bradshaw*, 633 F.3d 436, 442 (6th Cir. 2011) (citation omitted). Haight argues that he was clearly prejudiced by a juror sleeping through the presentation of his mitigating evidence. (Pet’r’s Obj. 89). Aside from the fact that there is no evidence that a juror was sleeping during the mitigating evidence, Haight has

failed to show that—even if a juror was sleeping during the presentation of such evidence—there is a reasonable probability that a mistrial would have even been granted. Where “one is left with pure speculation on whether the outcome of the trial or the penalty phase could have been any different,” there is an insufficient showing of prejudice.

 *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004) (citation omitted). This is precisely the situation here. For this reason, the Court concludes that Haight has failed to demonstrate that he was prejudiced by his counsel's alleged defective performance and has failed to make an adequate showing under *Strickland*.

Accordingly, although the Court disagrees with the Magistrate Judge's analysis in part, the Court does agree that Haight's claim for relief under Ground 14 is procedurally barred. Therefore, Haight's Objection regarding a sleeping or inattentive juror is overruled. Further, though the Magistrate Judge recommended a certificate of appealability on this issue, the Court does not believe that reasonable jurists could debate that a procedural bar is present for the purpose of granting a certificate of appealability in the complete absence of any facts to support a finding of deficient performance or prejudice.

8. Ground 15: “No Adverse Inference”

Haight argues in Ground 15 that his trial counsel was ineffective when he failed to request a “no adverse inference” instruction on Haight's right to remain silent during the penalty phase of the trial. (Pet'r's Mem. Supp. 83-85; Pet'r's Reply 44-54). The Kentucky Supreme Court held that Haight's claim was procedurally barred because he did not raise this ground for relief on direct appeal of his case; however, the Magistrate Judge concluded that Haight did in fact raise this claim on direct appeal. (R. & R. 166-68). The Magistrate Judge concluded that *Haight IV* also reached the merits of the ineffective assistance of trial counsel claim based on its statement that “this claim does not amount to ineffective assistance of counsel” followed by its observation that “ *Carter v. Kentucky*, 450 U.S. 288 (1981), is not applicable.”  *Haight IV*, 41 S.W.3d at 448. See also  *Carter*, 450 U.S. at 294-95 (holding that a no-adverse-inference instruction is required at the guilt phase). Therefore, the Magistrate Judge analyzed Haight's claim under the unreasonable-application-of-or-contrary-to-

federal-law standard, recommending denial of this ground for relief because Haight cannot demonstrate either his counsel's deficient performance or that he suffered prejudice because of the lack of a “no adverse inference” instruction within the meaning of *Strickland*. (R. & R. 164-68). Therefore, the Magistrate Judge concluded that *Haight IV* is not contrary to or an unreasonable application of U.S. Supreme Court precedent and recommended denial of Haight's claim for relief under this ground. (R. & R. 168).

Haight disputes the Magistrate Judge's conclusion for three reasons. First, Haight argues that his attorney's decision to not offer the “no adverse inference” instruction was deficient because it was against the professional state and local norms of Kentucky. (Pet'r's Obj. 92-93). Second, Haight claims that the Magistrate Judge's conception of his counsel's strategy is not supported by evidence in the record. (Pet'r's Obj. 93-94). Finally, Haight contends that the Magistrate Judge's conclusion that Haight cannot show he suffered prejudice because of the “overwhelming proof of his guilt” is irrelevant in the consideration of whether he was prejudiced during the penalty phase of his trial. (R. & R. 168; Pet'r's Obj. 94-95).

*23 Haight argues that the Magistrate Judge failed to consider the decision of  *Hibbard v. Commonwealth*, 661 S.W.2d 473 (Ky. 1983). (Pet'r's Obj. 92-93). In *Hibbard*, the Kentucky Supreme Court ruled that a defendant in a penalty proceeding was entitled to a no adverse inference instruction under  RCr 9.52 if he so requested, and failure of the trial court to give such instruction was reversible error.  *Hibbard*, 661 S.W.2d at 474. Thus, according to Haight, *Hibbard* created Kentucky common law that was “the prevailing professional norm[] in Kentucky at the time of trial” and his counsel's failure to follow this practice amounted to deficient performance. (Pet'r's Obj. 92).

Petitioner overstates the breadth of *Hibbard*. The Kentucky Supreme Court merely held there that a defendant is entitled to a no adverse inference instruction during the penalty phase of a trial *if one is requested*.  *Hibbard*, 661 S.W.2d at 474. *Hibbard* does not support the proposition that there was the “professional norm” in Kentucky for counsel to request such an instruction, only that the trial court must offer the instruction if requested. Further, Haight does not demonstrate what U.S. Supreme Court precedent the Kentucky Supreme Court contravened or applied unreasonably. Haight cites  *Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013), and

Medina v. Diguglielmo, 461 F.3d 417 (3d Cir. 2006), for the principle that attorneys who do not follow state and local professional norms are deficient under *Strickland*. (Pet'r's Obj. 92-94). In this analysis, however, federal appeals court decisions are clearly not established federal law as determined by the U.S. Supreme Court. See  28 U.S.C. § 2254(d) (1). Haight has not pointed to any U.S. Supreme Court precedent existing at the time holding that trial counsel's failure to follow local professional norms was deficient (even if *Hibbard* could be considered to reflect a local professional norm) within the meaning of *Strickland*.⁸ Therefore, the Court rejects Haight's first contention.

Next, Haight takes issue with the Magistrate Judge's conclusion that it was sound strategy for Haight's counsel not to raise at the penalty stage Haight's guilt-phase testimony admitting to murder. (Pet'r's Obj. 93-94). Haight argues that there is no record evidence indicating that this was his counsel's strategy and revives his argument raised in support of an evidentiary hearing. (Pet'r's Obj. 93-94). On habeas review, however, courts may not “indulge ‘post hoc rationalization’ for counsel's decisionmaking that contradicts the available evidence of counsel's actions...”  *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting  *Wiggins*, 539 U.S. at 526-27). Nevertheless, a court may consider objectively reasonable bases for counsel's actions.  *Id.* at 110. “*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.” *Id.* (citing  *Strickland*, 466 U.S. at 688). Accordingly, a court is not required to have record evidence of counsel's subjective strategic thinking in order to determine the reasonableness of counsel's strategy. Therefore, Haight's argument is not well taken, and the Court finds no need for an evidentiary hearing on this point.

*24 Finding that the Kentucky Supreme Court did not unreasonably apply federal law in holding that Haight's counsel's performance was not deficient under *Strickland* renders moot Haight's final issue relating to the Magistrate Judge's conclusion that Haight could not demonstrate that he suffered prejudice from the lack of a no adverse inference instruction.⁹ (R. & R. 168). Therefore, finding no error, the Magistrate Judge's recommendation that relief under Ground 15 be denied is adopted and Haight's Objection is overruled on this basis.

C. Jury Issues

1. Ground 17: Extrajudicial Knowledge

In Ground 17, Haight maintains that he was denied a fair trial by an impartial jury because various members of the jury were aware of prejudicial facts obtained from their exposure to a newspaper article entitled “Murder Trial Begins for Man Once Sentenced to Death.” (Pet'r's Mem. Supp. 85-88; Pet'r's Reply 55-58). The article reported that Haight had previously pleaded guilty to the two murders and that a police officer was accidentally shot to death by a Kentucky state trooper during Haight's arrest. The Kentucky Supreme Court in *Haight III* addressed this ground for relief on its merits:

Appellant claims entitlement to a new trial on grounds that juror Helton engaged in misconduct by failing to make full disclosure during *voir dire*, by prematurely deciding contested issues, and by possibly furnishing proscribed information to others jurors. This claim arises from the fact that prospective juror Helton read a newspaper article concerning the case prior to reporting for jury duty. According to his testimony, this juror scanned the article but did not remember the headline which revealed that appellant had been previously sentenced to death.

Initially it should be observed that during *voir dire* the prospective juror acknowledged that he had seen the article, recalled the names of the victims, and indicated that he had little recollection otherwise about what was contained in the article and in the headline. In addition, this prospective juror indicated an independence of thought and a determination to fairly try the case. No motion was made to exclude the juror for cause and no peremptory challenge was used to remove him. He was seated and participated in the verdict.

*25 In response to appellant's motion for a new trial, the trial court held a hearing relating to this juror and allegations he had withheld critical information. At the conclusion of the hearing, the trial court rendered findings of fact that are not clearly erroneous and which reveal no abuse of discretion. We deem it appropriate to quote the trial court at length:

As to juror Helton, the court finds specifically that juror Helton answered questions truthfully both on *voir dire* and at the March 7 [post-trial] hearing when he was called subsequent to the jurors' verdict. A finding that

he answered questions truthfully leads the court to the conclusion that that evidence certainly is credible. The juror says: I scanned the article. I do not remember the headline [....]

This is *voir dire* examination: I do not remember the headline. I do not remember the details except that two people—there were two murders and robberies and I remember the names Omer and Vance as being the names of the parties involved.

The court has no reason to believe that at any time Mr. Helton recalled anything else..... With that in mind, I specifically find that Mr. Helton's testimony is credible. He did not display a bias, and for that reason, overrule that portion of the motion for a new trial dealing with that testimony. There was no deliberate concealment on his part of information which would compel this court to reach a conclusion that he was partial.

We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. It is appropriate to recall that the trial judge personally conducted much of the *voir dire* examination and presided over all of it. He presided over the trial and likewise presided over the post-trial hearing on the motion for a new trial. The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as the questions of candor and impartiality of a juror.

We have examined the appellant's contentions with respect to juror Nichols and find them to be insubstantial. The transcript reveals no misunderstanding concerning the death of the police officer or disclosure to other jurors. This juror was given enough information during voir dire to have led to a mistaken belief on her part. Her post-trial testimony is without any hint of dishonesty.

As to juror Gaugh, much is made of his apparent knowledge of the police officer having been killed when, in fact, he was properly informed only that a police officer had been fired upon. We are told that this is more than enough to compel the inference that Gaugh concealed vital information. As the evidence in this regard was ambiguous, as it is likewise with respect to each of these jurors, we will rely on the trial court for the reasons stated herein and as follows: "It is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions."

 *Haight III*, 938 S.W.2d at 245-47 (internal citations omitted) (citation omitted). The Magistrate Judge recommended rejection of this claim because Haight had not shown that the Kentucky Supreme Court's holding was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts. (R. & R. 173-80). Haight's objection to this recommendation is mostly a reiteration of his earlier arguments, with some parts of his Objection presented verbatim from his Petition. (Pet'r's Mem. Supp. 85-89; Pet'r's Obj. 95-99).

*26 The only specific objection Haight puts forth is that the Magistrate Judge erred in not considering the Sixth Circuit's decision in  *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979). (R. & R. 183). In *Goins*, the Sixth Circuit held:

While neither the publicity involved nor the jurors' exposure to it was extensive in this case, we believe that its occurrence during trial and the fact that the article contained information strongly probative of guilt, along with other inadmissible and extremely prejudicial information, rendered the circumstances inherently prejudicial and that a violation of petitioner's constitutional right to trial by an impartial jury may be presumed.

 *Goins*, 605 F.2d at 954. Haight maintains that this supports his argument that prejudice should be presumed in his case because the newspaper article at issue was published during his trial and revealed prejudicial information pertaining to his past guilty plea. (Pet'r's Obj. 95-99).

In determining what clearly established federal law to apply, the court may not look to lower federal court decisions to formulate the relevant rule of law, but only to holdings of the United States Supreme Court. See  *James v. Brigano*, 470 F.3d 636, 643 (6th Cir. 2006) (reversing a district court's grant of relief based upon a Sixth Circuit decision which was not "clearly established Federal law, as determined by the Supreme Court of the United States...." (citing  28 U.S.C.

§ 2254(d)(1))). Nonetheless, decisions of lower courts of appeals may be instructive in assessing the reasonableness of a state court's holding. See  *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) (citing *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003);  *Dickens v. Jones*, 203 F. Supp. 2d 354, 359 (E.D. Mich. 2002)). Thus, Haight cannot rely on *Goins* for the proposition that it extended the doctrine of presumed prejudice, because *Goins* is not “clearly established Federal law, as determined by the Supreme Court of the United States....”  28 U.S.C. § 2254(d)(1). See  *Williams v. Griswald*, 743 F.2d 1533, 1538 n.6 (11th Cir. 1984) (declining to adopt *Goins* and noting that *Goins* cited no authority for extending the doctrine of presumed prejudice).

Additionally, Haight argues that the Kentucky Supreme Court's holding involved an unreasonable determination of the facts. “Under AEDPA, ... a federal habeas court must find the state-court conclusion ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ ”  *Rice v. Collins*, 546 U.S. 333, 338 (2006). In conducting this review, a federal court is to apply a presumption of correctness to state court findings of fact for habeas corpus purposes unless clear and convincing evidence is offered to rebut the presumption.  28 U.S.C. § 2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). *Haight III* noted that the trial judge determined the jurors to be impartial after personally conducting *voir dire* and presiding over the post-trial hearing on the motion for a new trial.  *Haight III*, 938 S.W.2d at 247. Haight puts forth no reason that would sway this Court to disagree in any respect with the factual determinations of the trial court and the Kentucky Supreme Court. See *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003) (“[A] trial court's finding that a juror was impartial is entitled to a presumption of correctness, rebuttable only upon a showing of clear and convincing evidence.”). Haight has proffered no evidence to contradict the trial court's determination regarding juror impartiality. Therefore, the Court holds that the Kentucky Supreme Court did not make an unreasonable determination of the facts related to this issue.

*27 Finding no error, the Court holds that the Magistrate Judge's recommendation to deny the relief requested in Ground 17 is adopted and Haight's Objection is overruled. A certificate of appealability will be granted as to this ground. Considering the Sixth Circuit has previously found that

prejudice was presumed on a set of somewhat similar facts regarding pretrial publicity, the Court concludes that jurists of reason could find the resolution of this ground debatable. See  *Goins*, 605 F.2d at 954. See also  *Slack*, 529 U.S. at 484.

2. Ground 18: Unfair Jury Selection Procedure

Haight argues in Ground 18 that he was deprived of due process of law and an impartial jury when the jury selection procedures during the trial “violated well established Kentucky rules for jury selection.” Regarding this argument, the Kentucky Supreme Court stated:

Initially we must state that there is no evidence upon which any impropriety may be inferred. Moreover, the procedure initially employed, i.e., drawing a sufficient number to reduce the jury to the number required by law, is permitted by RCr 9.36(2). As such, the re-draw, which produced a jury consisting of the same persons, was merely redundant. Finally, our review of the claims in this regard reveals substantial compliance with the rules relating to jury selection and certainly no error of sufficient gravity to overcome the trial court's discretion with respect to a new trial.

 *Haight III*, 938 S.W.2d at 247 (citation omitted). The Magistrate Judge concluded that this holding was not an unreasonable application of or clearly contrary to any clearly established federal law despite any possible error in the state procedures because “the jury ultimately chosen represents a fair cross-section of the community....” (R. & R. 182).

Haight avers that the alleged mistake by the trial court in jury selection procedures prevented him from having the right to a fair and impartial jury because three women—one of whom was African-American—were left off of the jury due to an alleged mistake. Thus, Haight argues, the Kentucky Supreme Court ignored U.S. Supreme Court precedent established in  *Batson v. Kentucky*, 476 U.S. 79, 91 (1986), and  *J.E.B.*

v. Alabama ex rel. T.B., 511 U.S. 127 (1994), as this error affected his right to a fair and impartial jury.

This argument has no merit. The Kentucky Supreme Court held that the jury selection process was in substantial compliance with Kentucky procedural rules, and this Court cannot disturb that holding.  *Haight III*, 938 S.W.2d at 247 (citation omitted); see  *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[F]ederal habeas corpus relief does not lie for errors of state law.... [W]e emphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” (internal quotation marks omitted) (internal citation omitted) (citations omitted)). Moreover, even if there was a mistake in the jury selection process, Haight has adduced no evidence that these women were kept off the jury because of their race or gender, or that the chosen jury failed to represent a fair cross-section of the community. The Court agrees with the Magistrate Judge that “[w]hat is important from the perspective of the federal Constitution is that, whatever state procedures may be employed, the jury ultimately chosen represents a fair cross-section of the community under the Sixth Amendment.” (R. & R. 182 (citing  *Duren v. Missouri*, 439 U.S. 357 (1979);  *United States v. Allen*, 160 F.3d 1096 (6th Cir. 1998))). Haight has not demonstrated or alleged that the jury empaneled was not a fair representation of the community. Therefore, the Court does not find that *Haight III* was contrary to or an unreasonable application of clearly established federal law. Accordingly, the Court adopts the Magistrate Judge's recommendation to deny relief under Ground 18 and overrules Haight's Objection. The Court further concludes that a certificate of appealability is not warranted because reasonable jurists could not debate this Court's resolution of Ground 18. See  *Slack*, 529 U.S. at 484.

3. Ground 19: Improper Exclusion of Jurors

*28 In Ground 19, Haight argues that jurors Hansen and Ireland were improperly excused for cause because the trial court erroneously concluded that they could not consider death as a penalty. (Pet'r's Mem. Supp. 90-95; Pet'r's Reply 59-62). With respect to this point, the Kentucky Supreme Court stated:

[A]ppellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann and Gaugh. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced a penalty phase verdict. This court has carefully considered each of these claims of error and determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court.

 *Haight III*, 938 S.W.2d at 247. Because it was unclear to the Magistrate Judge whether the Kentucky Supreme Court relied on a procedural bar, the Magistrate Judge addressed the merits of the argument and determined that *Haight III* was a reasonable application of U.S. Supreme Court precedent and a reasonable application of the facts. (R. & R. 187). Specifically, the Magistrate Judge concluded that the record supported the trial court's finding that jurors Hansen and Ireland's opinion of the death penalty would have substantially impaired their ability to impose the death penalty and this holding, as a finding of fact, should be given substantial deference. (R. & R. 186-87).

Haight objects, arguing that *Haight III* was contrary to and an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts because juror Hansen stated that she could set aside her views of the death penalty and juror Ireland stated that it was possible he could sentence someone to death if the circumstances were “extreme.” (Pet'r's Obj. 104). Haight argues that the mere fact the two jurors “might not be comfortable with the idea of imposing the death penalty” did not render them ineligible for jury duty in a capital case. (Pet'r's Obj. 104). Like many of Haight's other contentions, this is mostly copied directly from his Petition. Regardless, a review of the record reveals that *Haight III* was neither contrary to or an unreasonable application of U.S. Supreme Court precedent, nor an unreasonable determination of fact. A trial court's decision to strike a juror based on his or her views of capital punishment is a factual determination. Under  28 U.S.C. § 2254, such a determination is entitled to a presumption of

correctness, to be overturned only if it rebutted by clear and convincing evidence. See  28 U.S.C. § 2254(e)(1).

Upon *de novo* review, the Court agrees with the Magistrate Judge that the trial court's decision to exclude jurors Hansen and Ireland is supported by the record. During *voir dire*, juror Hansen stated that she was opposed to the death penalty and would not seriously consider death as a sentence, admitted she could not consider the full range of penalties, and stated that it was wrong to decide if someone should live or die. (R. & R. 185 (citation omitted)). Juror Ireland also indicated that he would not consider a sentence of death. (R. & R. 185 (citation omitted)). These statements could reasonably lead a trial court to conclude that the two jurors' views would prevent or substantially impair the ability of jurors Hansen and Ireland to sit on a capital jury. See  *Adams v. Texas*, 448 U.S. 38, 45 (1980) (“[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or *substantially impair* the performance of his duties as a juror in accordance with his instructions and his oath.” (emphasis added)). This was not an unreasonable finding of fact and, therefore, *Haight III* was not contrary to or an unreasonable application of U.S. Supreme Court precedent.

*29 Finding no error, the Court adopts the recommendation of the Magistrate Judge as to Ground 19 and Haight's Objection on this basis. Despite the Magistrate Judge's recommendation that a certificate of appealability should be granted, the Court finds that no reasonable jurists could debate whether the petition should have been granted.

4. Ground 20: Failure to Exclude Jurors

In Ground 20, Haight contends that jurors Huffman, Nestmann, and Gaugh were not constitutionally qualified to sit as jurors in Haight's capital case because they stated that they would not consider Haight's background as mitigating evidence. (Pet'r's Mem. Supp. 96-102; Pet'r's Reply 62-63). *Haight III* concluded that it was within the trial court's discretion to allow Huffman, Nestmann, and Gaugh on the jury.  *Haight III*, 938 S.W.2d at 247. The Magistrate Judge recommended that the Court deny Haight's claim for relief because the Kentucky Supreme Court's holding was not clearly unreasonable or contrary to any U.S. Supreme Court precedent. (R. & R. 187-92). Haight avers that the Magistrate Judge's legal analysis is incorrect because it is

“unconstitutional to impanel a jury that cannot and will not consider relevant mitigating evidence when assessing punishment in a capital case.” (Pet'r's Obj. 110).

The Magistrate Judge noted that this claim cannot be applied as to juror Huffman because “Huffman did not sit on the jury that convicted Haight of the murders and fixed his penalty at death. Huffman was removed by peremptory challenge. Consequently Haight cannot successfully argue that his constitutional rights were in any fashion violated....” (R. & R. 189) (citing  *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2002)). Haight does not specifically object to this finding and the Court finds no error in the Magistrate Judge's analysis. Thus, the Court adopts the Magistrate Judge's recommendation to deny the claim as it pertains to juror Huffman.

The Magistrate Judge also concluded that Haight could not maintain this claim regarding juror Gaugh on the basis of waiver. As the R&R states, “[t]he conscious election of Haight's trial counsel to expressly waive any objection with respect to juror Gaugh, along with the acknowledgment on appeal that the issue concerning Gaugh was not preserved for appellate review, stands as a separate and independent basis on which to reject habeas corpus relief....” (R. & R. 191).

See  *Murray*, 477 U.S. at 485 (“*Wainwright v. Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstance, bind the habeas petitioner even if he had not personally waived that claim.” (citations omitted)). Haight does not specifically object to this recommendation by the Magistrate Judge and the Court finds no error regarding the Magistrate Judge's recommendation to deny this claim as it relates to juror Gaugh.

With respect to juror Nestmann, Haight presented a lengthy analysis of case law to which the Court does not disagree. (Pet'r's Obj. 109-13). According to Haight, any juror not willing to consider mitigating evidence should be disqualified for cause.  *Morgan*, 504 U.S. at 739. In *Morgan*, the court stated: “[a]ny juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.” *Id.* As noted above, the primary concern expressed in *Morgan* is a juror who would automatically recommend death regardless of any mitigating evidence. *Id.* Juror Nestmann acknowledged during *voir dire* that he would have difficulty in considering

certain categories of mitigating evidence, but ultimately agreed that he would consider all of the mitigating evidence in the case. (R. & R. 191 (citation omitted)). Moreover, Haight's trial counsel acknowledged that Nestmann was capable of considering mitigating evidence. (R. & R. 191 (citation omitted)). Thus, the Kentucky Supreme Court's holding that keeping juror Nestmann on the jury was within the trial court's discretion was neither clearly contrary to or an unreasonable application of clearly established federal law, nor was the finding that juror Nestmann would consider Haight's mitigating evidence an unreasonable determination of fact.

***30** Therefore, finding no error, the Court adopts the Magistrate Judge's recommendation as to Ground 20 and Haight's Objection is overruled. Further, although the Magistrate Judge recommended issuance of a certificate of appealability, the Court concludes that Haight has not made a substantial showing of a denial of a constitutional right and that reasonable jurists could not debate whether the issue should have been resolved in a different manner.

5. Ground 21: Juror Donohue's Presence in the Courtroom

Haight argues in Ground 21 that he was unduly prejudiced and deprived of a fair trial when an alternate juror, upon being excused, sat in the courtroom near the victim's family during the penalty phase of the trial. (Pet'r's Mem. Supp. 103-07; Pet'r's Reply 63-64). Haight contends that the remaining jurors saw this as a show of support for the victims' families which prejudiced their decision-making. The *Haight III* decision included this issue among others in its holding that “there was no preservation of the question or that the ruling was within the sound discretion of the trial court.”  *Haight III*, 938 S.W.2d at 247. Further, *Haight IV* noted “[t]he allegation with respect to juror Donahue was rejected in the direct appeal of this case.... Haight received a fundamentally fair trial by an impartial jury.”  *Haight IV*, 41 S.W.3d at 446. The Magistrate Judge recommended the Court deny relief as to this ground because nothing in the record supports Haight's claim that juror Donohue's mere presence near the victims' families was a nonverbal expression of support for the victims. (R. & R. 192-94).

Haight challenges this finding because his discovery request as to this claim was denied, which he maintains precluded

him from collecting facts to prove his entitlement to relief. He argues that “[i]t is fundamentally unfair to deny [Haight] the opportunity to present the facts which prove his claim and then fault him for not proving his claim.” (Pet'r's Obj. 115). This Court previously denied Haight's discovery request and held that his motion was “nothing more than a fishing expedition disguised in the form of a discovery request.” (Disc. Order 6, DN 80 (citing *Burns v. Lafler*, 328 F. Supp. 2d 711, 718-19 (E.D. Mich. 2004))). The circumstances have not changed and the Court will not overturn its prior order.

Accordingly, the Court agrees with the Magistrate Judge that “[t]he trial court found no indication of such an expression of support.... Certainly, the trial court was far and away in the best position to observe any potentially improper conduct, nonverbal or otherwise.” (R. & R. 193). Further, the Kentucky Supreme Court held that the trial court's finding was not an abuse of discretion. Considering the complete lack of evidence in the record to support this ground for relief, the Court concludes that the Kentucky Supreme Court's holding as to juror Donohue's presence in the courtroom was not an unreasonable application of clearly established federal law or an unreasonable finding of fact. Accordingly, the Magistrate Judge's recommendation that this claim for relief be denied is adopted and Haight's Objection is overruled. The Magistrate Judge recommended the issuance of a certificate of appealability on this ground; however, in view of the deference to be accorded the state court's factual determinations, the Court does not believe that reasonable jurists could debate the resolution of this issue considering the complete lack of evidence Haight has proffered in support of his claim.

6. Ground 22: Coerced Jury Verdict

***31** In Ground 22, Haight contends that the trial judge improperly forced jurors to resume deliberations after being deadlocked, thus depriving him of a fair trial, due process of law, and a reliable sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments. (Pet'r's Mem. Supp. 107-11; Pet'r's Reply 64-65). On this point, the Kentucky Supreme Court in *Haight III* held:

On the unpreserved claim that a verdict was coerced, the record simply fails to bear out such an assertion. At no

time did the jury report that it was deadlocked. In view of the gravity of the decision before the jury, the time spent in deliberation was not excessive and we discern no violation of those decisions which proscribe coercion of jurors into rendering a verdict.

 *Haight III*, 938 S.W.2d at 247 (citations omitted). The Magistrate Judge recommended denial of Haight's request for relief as to this ground because "no dispute exists that this question was not preserved for appellate review." (R. & R. 197). Haight does not object to the Magistrate Judge's conclusion that his claim is procedurally barred; however, he argues that the Magistrate Judge's recommendation is incorrect because "the state courts unreasonably failed to provide sufficient process to permit the presentation, and full and fair adjudication of [] Haight's serious constitutional claim of error." (Pet'r's Obj. 168).

Haight asserts that he can establish cause and prejudice for this claim to excuse the procedural default, yet provides scant elaboration. (Pet'r's Obj. 168). Haight's argument is set out in two sentences summarily claiming the state courts did not provide process to permit the presentation of his claims. Beyond this conclusory assertion, Haight does not specify what procedures the state failed to provide in this respect.

The Court rejects Haight's argument that he can show cause and prejudice to avoid the procedural bar. *See*

 *Bousley v. United States*, 523 U.S. 614, 623 (1998) (holding that if a petitioner fails to establish cause, it is unnecessary to determine if he was prejudiced by the alleged violation). Accordingly, the Court adopts the Magistrate Judge's recommendation to deny relief as to Ground 22. Additionally, the Court agrees with the Magistrate Judge that reasonable jurists could not debate the present procedural bar.

7. Ground 27: Refusal to Instruct on Individual Determination of Mitigation

In Ground 27, Haight argues that the refusal of the trial court to instruct the jury that each juror may individually determine, weigh, and consider evidence of mitigation, and that they did not all have to agree on the mitigators, deprived Haight of a reliable verdict on punishment in violation of

the Sixth, Eighth and Fourteenth Amendments. (Pet'r's Mem. Supp. 111-13; Pet'r's Reply 65-67). *Haight III* rejected his argument and indicated that Haight's contention "that the trial court erred in failing to inform the jury that its decision with respect to mitigation did not have to be unanimous was fully resolved in *Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1994). We discern nothing about this case which differs materially in that respect from *Bowling*."  *Haight III*, 938 S.W.2d at 249. In *Bowling*, the Kentucky Supreme Court held that "[a]n instruction on unanimous findings on mitigation is not required. The instructions only require the jury to consider mitigating circumstances." *Bowling*, 873 S.W.2d at 180 (internal citation omitted).

*32 The Magistrate Judge recommended that this Court deny Haight's request for relief as to this ground because the Kentucky Supreme Court's holding was neither contrary to any clearly established precedent of the U.S. Supreme Court nor was it an unreasonable application of such precedent. (R. & R. 204-05). Haight raises numerous reasons for challenging the Magistrate Judge's recommendation on this ground. Thus, the Court will conduct *de novo* review of Haight's request for relief regarding Ground 27.

This Court previously explained the relevant rule of law applicable to this claim as follows:

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence" offered by the defendant. "[I]n a capital case 'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " To that end, it is unconstitutional for a state to require jurors to unanimously agree on mitigators. However, the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of mitigating factors under a death penalty scheme. Kentucky has chosen not to require the trial judge to instruct the jury that its findings on the existence of any particular mitigating factor does not have to be unanimous. Still, regardless of state law requirements, the Constitution forbids a trial court from instructing a jury that it has to reach a unanimous decision on the existence of any mitigating factor. Further, sentencing instructions are constitutionally invalid if they create a *substantial likelihood that reasonable jurors* might think that they are

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precluded from considering any mitigating evidence *unless jurors unanimously agree* that the mitigator is proven.

 *Thompson v. Parker*, No. 5:11-CV-31-R, 2012 WL 6201203, at *30 (W.D. Ky. Dec. 10, 2012), *aff'd*, 2017 WL 3474044 (6th Cir. Aug. 14, 2017) (emphasis added) (internal citations omitted) (citation omitted). Accordingly, the question is whether there is a substantial likelihood that a reasonable juror would have thought that mitigating circumstances in Haight's case could not be considered unless the jury unanimously agreed that a particular mitigating circumstance existed. An answer in the affirmative would render the Kentucky Supreme Court's decision an unreasonable application of clearly established federal law.

Haight's argument focuses on Instruction No. 5, entitled "UNANIMOUS VERDICT" which provided: "[e]ach verdict of the jury must be unanimous and be signed by one of you as foreperson. You may use the forms at the end of these instructions in writing your verdict." (R. & R. 198 (citation omitted)). Haight argues that when Instruction No. 5 is read in conjunction with Instruction No. 3(c), which informed the jury that they shall consider mitigating evidence, it would cause a reasonable juror to believe that a finding of a mitigating factor by the jury must be unanimous.¹⁰

*33 Haight argues that the Kentucky Supreme Court's decision amounts to an unreasonable application of  *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the U.S. Supreme Court vacated the conviction and remanded for further proceedings because "there [wa]s a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384. *Mills* concerned a Maryland death sentence where the jury had received a verdict form which contained a list of possible mitigating circumstances, accompanied by spaces in which the jury could check "yes" or "no" and preceded by a statement that the jury "unanimously find[s] that each of the following mitigating circumstances which is marked 'yes' has been proven to exist."  *Id.* at 384-89 (emphasis added). See also  *McKoy v. North Carolina*, 494 U.S. 433, 442-44 (1990) (applying *Mills* to overturn a North Carolina death sentence where the sentencing jury received an instruction which expressly prevented the jury from considering any mitigating factor that the jury did not "unanimously" find to

exist). Conversely, in this case, the instructions were silent on the issue of unanimity as to the aggravating circumstances and the mitigating circumstances. Instruction No. 5 simply stated that the jury's verdict itself had to be unanimous. Furthermore, nothing in the record suggests that the jurors were confused by these instructions. Therefore, the Court cannot conclude that *Haight III* was an unreasonable application of *Mills*.

Upon review of the record the Court concludes that there is not a reasonable likelihood that a reasonable juror would have thought that he could not consider mitigating circumstances unless the jury unanimously agreed to that factor's presence. Instruction of the jury is a matter resting within the sound discretion of the trial court, and the trial court acted well within its discretion in denying Haight's request for an express instruction on the non-unanimity requirement for mitigating factors. See  *Thompson*, 2012 WL 6201203, at *28-34 (holding that the state court's decision was not contrary to or an unreasonable application of federal law because "[t]he instructions and verdict form in the instant case did not directly state that the jury's finding of any mitigating factor had to be unanimous but were in fact silent as to whether the mitigating factors had to [be] found unanimously.").

Finally, Haight argues that he should be able to rely on  *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), to support his argument. (Pet'r's Obj. 124-25). The Magistrate Judge concluded that Haight could not rely on a Sixth Circuit case as clearly established U.S. Supreme Court precedent. (R. & R. 203-04). As stated numerous times, a petitioner must show that the state court's decision is contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States...."  28 U.S.C. § 2254(d)(1). Therefore, Haight cannot rely on *Davis* to support his argument that the Kentucky Supreme Court's holding was an unreasonable application of clearly established federal law.

The Court finds that the Kentucky Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law. Thus, the Magistrate Judge's recommendation to deny relief under Ground 27 is adopted and Haight's Objection thereto is overruled. Further, considering the Sixth Circuit has previously found unconstitutional jury instructions that are somewhat similar to the instructions at issue here, the Court concludes that jurists of reason could find this ground for relief debatable.

See  *Davis*, 318 F.3d at 685. See also  *Slack*, 529 U.S. at

484. A certificate of appealability will be granted as to this ground.

8. Grounds 29 & 30: Impermissible Funneling of the Jurors' Discretion

Haight in Grounds 29 and 30 raises two related arguments involving the sequence of the jury instructions given at both the guilt and penalty phase. (Pet'r's Mem. Supp. 113-17; Pet'r's Reply 68-69). Haight argues that during the guilt phase, the trial court refused to submit an instruction on manslaughter prior to the instruction on murder. Instead, the trial court first instructed the jury on murder, in accordance with the instructions put forth by the prosecution. Similarly, during the penalty phase, the trial court instructed on aggravating factors before instructing on mitigating factors, contrary to Haight's request. Haight argues that the order of the instructions disturbed his presumption of innocence by channeling the considerations of the jurors and undermining the reliability of the verdicts contrary to the Sixth, Eighth, and Fourteenth Amendments. (Pet'r's Mem. Supp. 114).

*34 *Haight III* rejected this claim of error regarding the jury instructions.  *Haight III*, 938 S.W.2d at 249. The Magistrate Judge recommended that this Court deny Haight's request for relief on this ground because further instructions, as well as the fact that the jury bypassed the verdict form for the punishment of life without the possibility of parole for 25 years, eliminated any possible confusion that could have arisen from the order of the jury instructions. (R. & R. 205-10). Therefore, according to the Magistrate Judge it could not be argued that the Kentucky Supreme Court's holding was in any respect contrary to or an unreasonable application of clearly established U.S. Supreme Court precedent. (R. & R. 211).

In challenging the Magistrate Judge's recommendation, Haight only discusses his argument as to the jury instructions during the guilt phase of his trial and does not include any specific objections to the Magistrate Judge's recommendation regarding the jury instructions given during the penalty phase. Haight contends only that the Kentucky Supreme Court's conclusion that it was harmless error to include a finding of extreme emotional disturbance ("EED") as an element of manslaughter in the jury instructions contravened or unreasonably applied clearly established federal law.¹¹ (Pet'r's Obj. 125-29).

Haight III held that "[a]s the absence or presence of EED is an element of both statutes [murder and manslaughter], there was no error in the inclusion of such and requiring its determination beyond a reasonable doubt."  *Haight III*, 938 S.W.2d at 248. Subsequent to that opinion, the Kentucky Supreme Court held that "[t]he best way to address the issue [of EED in an instruction] is to include EED in the murder instruction and make no mention of it in the manslaughter instruction."  *Elery v. Commonwealth*, 368 S.W.3d 78, 92 (Ky. 2012). The court also noted that the inclusion of the additional element of proof of EED in the manslaughter instruction "required the Commonwealth to prove the absence of extreme emotion disturbance beyond a reasonable doubt in order to obtain a conviction of murder, ... and to prove the presence of extreme emotional disturbance beyond a reasonable doubt in order to obtain a conviction of first-degree manslaughter."  *Id.* at 90 (quoting  *Baze v. Commonwealth*, 965 S.W.2d 817, 823 (Ky. 1997)). Therefore, the court explained, if the Commonwealth failed to prove either beyond a reasonable doubt then the jury would have been required to acquit the defendant. *Id.* (citing  *Baze*, 965 S.W.2d at 823). Thus, the inclusion of the element of EED in the manslaughter instruction placed a higher burden on the Commonwealth and was not prejudicial to the defendant. *Id.*

Haight argues that the holdings of *Haight III*, *Elery*, and *Baze* run afoul of the U.S. Supreme Court's holding in  *Alabama v. Beck*, 447 U.S. 625 (1980). In *Beck*, the U.S. Supreme Court held unconstitutional a state statute that prohibited the jury from considering lesser-included offenses and required that the death penalty be imposed upon a finding of guilt.  *Beck*, 447 U.S. at 637. The U.S. Supreme Court reasoned that the statute enhanced the risk of an unwarranted conviction because the jury may believe that the defendant committed a crime lesser than that charged but did not want to acquit the defendant of all charges.  *Id.* at 642-43. The "fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all."  *Schad v. Arizona*, 501 U.S. 624, 646 (1991). According to Haight, the Kentucky Supreme Court's holding finding harmless error as to the instructions was contrary to or an unreasonable application of *Beck* because the instructions given during the

guilt phase of the trial “left the jury with the choice of guilty on capital murder or acquittal.” (Pet'r's Obj. 131).

*35 *Beck* is clearly distinguishable from the present case. In *Beck*, there was absolutely no instruction as to *any* lesser-included offenses. *Beck*, 447 U.S. at 630. The jury was “faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence.” *Schad*, 501 U.S. at 646-47 (internal quotation marks omitted). While Haight claims an error as to the lesser-included offense instruction, it does not equate with the situation in *Beck* where the jurors' only choice was between acquittal and death.

Beck, 447 U.S. at 642-43. Here, the jurors had a choice to convict Haight of a lesser crime, which renders *Beck* inapposite. See *Slaughter v. Parker*, 450 F.3d 224, 237 (6th Cir. 2006) (holding the petitioner's claim that the Kentucky Supreme Court misapplied *Beck* to be without merit because the petitioner had “an option to convict [the petitioner] of a lesser, though still violent, crime....”). The Court therefore finds that *Haight III* did not unreasonably apply *Beck* because the instructions to the jury specifically included the lesser-included offense of manslaughter.

Finding no error, the Court holds that the Magistrate Judge's recommendation to deny relief as to these grounds is adopted and Haight's Objection as to Grounds 29 and 30 is overruled. The Magistrate Judge recommended the issuance of a certificate of appealability as to these grounds. The Court agrees that reasonable jurists could debate the Court's analysis with respect to this claim. Thus, a certificate of appealability as to Grounds 29 and 30 will be granted. See *Slack*, 529 U.S. at 484.

D. Death Penalty Issues

1. Ground 40: Electrocution is Cruel and Unusual Punishment

In Ground 40, Haight argues that electrocution is a form of cruel and unusual punishment in violation of the Eighth Amendment. (Pet'r's Mem. Supp. 117-20; Pet'r's Reply 71; Pet'r's Second Supp. Obj. 12-13, DN 178). *KRS 431.220* provides the option of death by electrocution or lethal injection for those prisoners who were sentenced to death prior to March 31, 1998. See *KRS 431.220(1)(a)*.

The Magistrate Judge recommended denial of this ground for relief and denial of a certificate of appealability on the issue because *KRS 431.220*, as amended in 1998, gives prisoners the option to choose electrocution, and thus electrocution is not mandatory. (R. & R. 212-13). Haight does not object to the merits of the Magistrate Judge's recommendation, but argues that a certificate of appealability should be issued on this ground for relief because courts in Nebraska and Georgia have found electrocution to be unconstitutional, which indicates that reasonable jurists could differ on this issue.

Haight's Objection on this ground is without merit. As the Commonwealth points out in its response to Haight's Objection, the fact that two states have declared electrocution unconstitutional does not establish that reasonable jurists could differ as to whether the Kentucky Supreme Court's decision is contrary to federal law. (Resp't's Resp. 24). Moreover, the Sixth Circuit has previously rejected an identical challenge to *KRS 431.220* because the statute provides a death-row inmate with the option of electrocution or lethal injection; thus, the court held that it need not evaluate the constitutionality of electrocution. See *Stanford v. Parker*, 266 F.3d 442, 461-62 (6th Cir. 2001). The Court finds no error in the Magistrate Judge's recommendation to deny relief and a certificate of appealability as to Ground 40 and the R&R is adopted on this point.

2. Grounds 36 & 38: Lack of Separate and Independent Sentencing Hearing Under *KRS 532.075(1)*

In Grounds 36 and 38, Haight argues that he was denied due process when the trial court did not follow *KRS 532.075(1)* and failed to prepare a required report for review on the record. (Pet'r's Mem. Supp. 120-23; Pet'r's Reply 70). *Haight III* found this argument to be without merit and noted compliance with *KRS 532.075*, which requires review of a death penalty judgment by the Kentucky Supreme Court upon notice from the court clerk and a report from the trial court on a standardized questionnaire. *Haight III*, 938 S.W.2d at 253-54. The Magistrate Judge recommended that the Court deny Haight's claim for relief on these grounds because Haight did not show that it involved a clearly erroneous determination of the facts or that the Kentucky Supreme Court's holding was contrary to or an unreasonable

application of clearly established federal law. (R. & R. 299). The Magistrate Judge emphasized that Haight “fails to cite to any clearly established precedent of the U.S. Supreme Court to support his arguments in grounds 36 and 38” (R. & R. 299).

*36 Haight's Objection on this ground is mainly a summary of the procedural history and the Magistrate Judge's recommendation. (Pet'r's Obj. 186-88). The only specific objection offered is a paragraph in which Haight argues that “[w]hen a state fails to abide by its own statutory commands, it may implicate a constitutionally protected liberty interest.” (Pet'r's Obj. 187 (citing *Fetterly v. Paskett*, 997 F.3d 1295, 1300 (9th Cir. 1993))). Although claimed violations of state law are generally not cognizable in considering a petition for writ of habeas corpus, the U.S. Supreme Court has left room for the argument that a state-law error could, potentially, “be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment.”  *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

The Sixth Circuit has previously expressed skepticism that  KRS 532.075 creates a due process interest. See *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003). Moreover, even if failure to comply with  KRS 532.075 could amount to a due process violation, Haight has not shown that the Kentucky Supreme Court's factual determination that the statute was substantially complied with was clearly erroneous so as to overcome the presumption of correctness that this Court is required to accord state court findings of fact.  28 U.S.C. § 2254(e)(1). There can be no doubt that regardless of any defect in the trial court's questionnaire report, the Kentucky Supreme Court fully considered the substance of Haight's objections to his conviction and death sentence in *Haight III*. Accordingly, this Court finds no error in the Magistrate Judge's reasoning, adopts the recommendation of the R&R, and denies Haight's claims for relief under Grounds 36 and 38. Furthermore, the Court holds that jurists of reason would not find it debatable whether Grounds 36 and 38 of the Petition state a valid claim for federal habeas relief and denies a certificate of appealability as to this claim. See  *Slack*, 529 U.S. at 483-84 (citation omitted).

3. Ground 37: Kentucky's Death Penalty Statute Is Facially Unconstitutional

In Ground 37, Haight argues that Kentucky's death penalty statute,  KRS 532.025, is facially unconstitutional. (Pet'r's Mem. Supp. 123-25; Pet'r's Reply 71; Pet'r's Second Supp. Obj.11-12). *Haight III* rejected this argument and cited Kentucky Supreme Court decisions discussing Kentucky's death penalty statute at length and finding it constitutional.  *Haight III*, 938 S.W.2d at 253-54 (citations omitted). As the Magistrate Judge indicated, courts in this circuit have overwhelmingly rejected challenges to Kentucky's death penalty statute. (R. & R. 218-19 (citing  *McQueen v. Scroggy*, 99 F.3d 1302, 1333 (6th Cir. 1996);  *Slaughter v. Parker*, 187 F. Supp. 2d 755, 817-18 (W.D. Ky. 2001))). Haight has not pointed to any changes in U.S. Supreme Court case law which would alter this holding. Thus, the Court adopts the Magistrate Judge's recommendation that the Court deny relief under this claim.

Further, the Magistrate Judge recommended denial of a certificate of appealability on the issue because “[t]he overwhelming weight of the established case law in this circuit runs directly contrary to [Haight's] position, so much so that a reasonable jurist could not disagree.” (R. & R. 219). In opposition, Haight relies on a dissenting opinion in  *Glossip v. Gross*, 135 S. Ct. 2726 (2015), in which Justice Breyer stated:

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

*37 I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead

me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited “cruel and unusual punishment[t].”

 *Glossip*, 135 S. Ct. at 2755-56 (Breyer, J., dissenting) (alteration in original) (quoting U.S. Const. amend. VIII). Haight contends that this dissenting opinion is evidence that reasonable jurists could disagree as to the constitutionality of Kentucky's death penalty scheme. (Pet'r's Obj. 188-89).

This Court concludes that a certificate of appealability should issue with respect to this claim because reasonable jurists could find its assessment of the claim to be debatable or wrong. The Court takes into consideration the dissent of Justice Breyer, joined by Justice Ginsburg, in *Glossip*. Given that Justices Breyer and Ginsburg are unquestionably jurists of eminent reason and have recently questioned the constitutional viability of the death penalty, a certificate of appealability for Ground 37 is granted.

4. Ground 39: Unconstitutional Proportionality

Review Under KRS 532.075(3)(e)

In Ground 39, Haight argues that the sentencing judge did not conduct a proportionality review as required by  KRS 532.075(3)(c), in violation of his due process rights. (Pet'r's Mem. Supp. 125-28; Pet'r's Reply 71; Pet'r's Second Supp. Obj. 15-16). The Kentucky Supreme Court rejected this argument on the merits in  *Haight III*, 938 S.W.2d at 253-54. The Magistrate Judge conducted a thorough analysis of the issue and determined that the Kentucky Supreme Court's holding was neither contrary to nor an unreasonable application of clearly established federal law, primarily because the U.S. Supreme Court does not require states to conduct proportionality reviews. Haight objects to the Magistrate Judge's finding by repeating word-for-word the arguments in Haight's Memorandum in Support of his Petition for Habeas Corpus and asserts here mere disagreement with the Magistrate Judge's recommendation. (Pet'r's Obj. 189-90). His only specific new objection is that the Magistrate Judge “ignore[d] the constitutional mandate of [ *Gregg v. Georgia*, 428 U.S. 153 (1978)], that proportionality review is meant to be a check on arbitrariness and capriciousness and that its ineffective implementation runs afoul of *Gregg*.” (Pet'r's Obj. 191).

Gregg does not provide the “constitutional mandate” that Haight contends. As the United States Supreme Court made clear in  *Pulley v. Harris*, 465 U.S. 37 (1984), comparative proportionality review is *not* constitutionally mandated.  *Id.* at 45 (“Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable.”). In fact, in *Pulley*, the Court emphasized that the holding of *Gregg* “did not hinge on proportionality review” and the lower court “erred in concluding that *Gregg* required proportionality review.”

 *Id.* at 37, 46. Accordingly, this Court concludes that *Gregg* does not clearly establish that proportionality review is required by the U.S. Constitution and finds that Haight's Objection is without merit. As the remaining parts of his objection are merely a recitation of previous arguments in his Petition, the Court reviews the Magistrate Judge's recommendation for clear error and finds none.

*38 Because Haight offers no U.S. Supreme Court precedent supporting his notion that the Kentucky Supreme Court should have compared his case to cases in which the death penalty was not imposed, this Court concludes he is not entitled to relief on this claim. The Magistrate Judge's recommendation to deny Haight relief under Ground 39 is adopted by this Court and Haight's Objection is overruled. Moreover, the Court agrees with the Magistrate Judge that jurists of reason would not find it debatable that Ground 39 does not state valid claim for relief and denies a certificate of appealability as to this claim as well. See  *Slack*, 529 U.S. at 483-84 (citation omitted).

E. Post-Conviction Proceedings Issues

Grounds 7, 10, 11, and 12 all concern issues related to the state court post-conviction proceedings. (Pet'r's Mem. Supp. 128-54; Pet'r's Reply 72-80; Pet'r's Second Supp. Obj. 16-17). In Ground 7, Haight argues that he was denied a full and fair post-conviction hearing when the trial court declined his request for an evidentiary hearing. (Pet'r's Mem. Supp. 129-43). In Ground 10, Haight argues that he was denied due process in the post-conviction proceedings when the trial court did not allow him to amend his motion to vacate. (Pet'r's Mem. Supp. 143-47). Similarly, in Ground 11, Haight argues that he was denied due process when the court during the state post-conviction proceedings denied him the opportunity to file a motion for expert funding to pursue his claim regarding ineffective assistance of counsel related to his mental status. (Pet'r's Mem. Supp. 147-51). Lastly, Haight argues in Ground

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12 that he was denied due process when his discovery request was denied during the state post-conviction proceedings. (Pet'r's Mem. Supp. 151-54). *Haight IV* rejected all of these arguments.  *Haight IV*, 41 S.W.3d at 442-45.

The Magistrate Judge recommended denial of these claims for relief and noted that the Sixth Circuit has held that “challenges to the adequacy of post-conviction proceedings are not matters that may be addressed by way of habeas corpus.” (R. & R. 230 (citing  *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986))). Instead, “[t]he claim of a habeas petitioner ‘must directly dispute the fact or duration of the confinement.’ ” (R. & R. 230 (quoting  *Kirby*, 794 F.2d at 248)). “Because the result of habeas review of the adequacy of a post-conviction challenge will not result in a release from confinement, the scope of the writ does not include such grounds involving the adequacy of state post-conviction proceedings.” (R. & R. 230-31).

Haight raises two issues as to the R&R on these grounds. First, Haight contends that these grounds for relief should be reviewable because if he can demonstrate the denial of a full and fair state post-conviction process, he will be able to establish cause for the procedural default of specified claims and may be able to prove cause entitling him to an evidentiary hearing to further develop the facts. (Pet'r's Obj. 162). Haight contends that these findings will allow him to receive *de novo* review of his underlying constitutional claims, which could potentially result in a release from confinement and his unconstitutional sentence. (Pet'r's Obj. 162). Haight argues that this logic is similar to claims for ineffective assistance of counsel for failure to properly preserve a claim for state court review, and Haight notes that petitioners who prevail on such ineffective assistance claims are simply given the opportunity to litigate the underlying constitutional error and are not released from custody. (Pet'r's Obj. 162).

Haight's argument that these claims are reviewable because they can eventually lead to a release from confinement is of no moment. The Sixth Circuit has rejected this same argument and noted that “[t]hough the ultimate goal” in a case alleging post-conviction error “is release from confinement, the result of habeas review of the specific issue[] ... is not in any way related to the confinement.”  *Kirby*, 794 F.2d at 248. “[T]he Sixth Circuit has consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review.”  *Cress v. Palmer*, 484 F.3d 844, 853

(6th Cir. 2007) (citing  *Kirby*, 794 F.2d at 246-47;  *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002)). See also  *York v. Chapman*, No. 1:07-CV-00144-JH, 2008 WL 2168934, at *20 (W.D. Ky. May 23, 2008) (“A petition for writ of habeas corpus is not used to challenge errors or deficiencies in State post-conviction proceedings because such claims are collateral to whether [the petitioner] ‘is in custody in violation of the Constitution or the laws or treaties of the United States.’ ” (citations omitted)). Therefore, Haight's claims relating to post-conviction errors are not reviewable by this Court.

*39 Haight urges that a certificate of appealability should be issued because “this question is clearly debatable among jurists of reason where the United States Supreme Court granted certiorari to decide the question of whether a criminal defendant has a constitutional right to counsel in state post-conviction.” (Pet'r's Obj. 163 (citing  *Martinez*, 566 U.S. at 26-27 (Scalia, J., dissenting))). To obtain a certificate of appealability, “a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner....”  *Slack*, 529 U.S. at 483-84 (internal quotation marks omitted) (quoting  *Barefoot*, 463 U.S. at 893). In the Sixth Circuit, it is abundantly clear that post-conviction proceedings are outside the scope of federal habeas corpus review and the Court concludes that reasonable jurists could not debate this point. Accordingly, the Court finds Haight's Objection to be without merit. The recommendation of the Magistrate Judge that these claims for relief be denied and that a certificate of appealability not be issued is hereby adopted.

F. Instructions and Verdict Form Issues

1. Ground 23: Refusal of Trial Court to give the jury Haight's Tendered Mitigation Instruction

Haight contends that the trial court deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments when it refused to tender Haight's proposed mitigation instruction during the penalty phase. (Pet'r's Mem. Supp. 154-58; Pet'r's Reply 81-82; Pet'r's Second Supp. Obj. 13-15). Haight requested a jury instruction with specific references to his abusive background and his limited intelligence, but the mitigation instruction used by the trial court only

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referenced broadly any other circumstances that the jury could consider mitigating. The Kentucky Supreme Court rejected this argument on the merits:

Appellant claims error in the trial court's failure to give a specific instruction directing the jury to consider evidence of his childhood abuse and neglect and deprived family background. While appellant was permitted to introduce extensive evidence in this vein, the instruction by which the jury could give effect to such evidence was general and authorized the jury to consider "any other circumstances arising from the evidence which you the jury deem to have mitigating value." Appellant maintains that this instruction fails to meet the requirements of  *Penry v. Lynaugh*, 492 U.S. 302 (1989).

In *Penry*, the court reviewed the Texas capital punishment statute and, with regard to non-statute mitigating factors, determined the statute to be insufficient. The court observed that despite evidence and argument relating to the appellant's mental retardation and abuse background, the jury was given no vehicle by which it could express the view that a sentence of less than death was appropriate. It appeared that upon giving affirmative answers to questions required to be propounded, the jury was virtually mandated to impose the death penalty and lacked a vehicle by which to give effect to the background evidence. "The jury was never instructed that it could consider the evidence offered by *Penry* as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence."

The instructions given here imposed no such restriction and rather invited the jury to broadly review the evidence for circumstances it deemed to have mitigating value. The admission of evidence relating to abuse and neglect, deprived background, and mental retardation, followed by argument of counsel as to the significance of such evidence and the instruction described herein above could have left no doubt in the mind of the jury that it had a right to consider such evidence in its penalty determination. A more specific instruction was not required.

 *Haight III*, 938 S.W.2d at 247-48 (internal citation omitted) (citations omitted).

The Magistrate Judge concluded that this ruling was neither contrary to nor an unreasonable application of U.S. Supreme Court precedent and recommended denial of Haight's request for relief under Ground 23. (R. & R. 232-36). Haight's

argument merely expresses disagreement with the Magistrate Judge's conclusion. As the Court finds no error with the Magistrate Judge's analysis of this issue, the Court adopts the R&R as to Ground 23. It further agrees that jurists of reason could not disagree and denies a certificate of appealability.

2. Ground 24: EED Instruction

*40 In Ground 24, Haight argues that the word "uncontrollably" used in the definition of EED in his guilt phase jury instruction violated the Sixth, Eighth and Fourteenth Amendments, as its use is more applicable to the mental state of temporary insanity than extreme emotional disturbance. (Pet'r's Mem. Supp. 159-61; Pet'r's Reply 82). During his trial, Haight requested that the term "uncontrollably" be removed from the instruction, which request was denied by the trial court and also rejected by the Kentucky Supreme Court.  *Haight III*, 938 S.W.2d at 249 ("Appellant's additional claims of error with respect to the instructions have been reviewed and found to be without merit."). In recommending denial of Haight's request for relief per Ground 24, the Magistrate Judge concluded that Haight improperly relied on state law rather than clearly established federal law and noted that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (R. & R. 236-38 (quoting  *Estelle*, 502 U.S. at 67-68)).

In his Objection, Haight cites for the first time U.S. Supreme Court precedent in support of this ground. The crux of Haight's Objection is that "[c]learly established federal law holds that [] Haight has a federal due process right to have the jury properly instructed as to the elements of the crime and for the jury to find the elements of the crime beyond a reasonable doubt." (Pet'r's Obj. 170 (citing  *In re Winship*, 397 U.S. 358 (1970);  *Sandstrom v. Montana*, 442 U.S. 510 (1979))). Further, Haight argues that "when the defense to the crime is one of *mens rea*, the criminal defendant has a similar federal constitutional right to have the jury properly instructed as to the key element in the case and in the defense." (Pet'r's Obj. 170).

The Court agrees that a federal due process right exists to have the jury properly instructed as to the elements of the crime.  *In re Winship*, 397 U.S. at 364. Yet, Haight does not elaborate as to how U.S. Supreme Court precedent was

unreasonably applied or was contrary to *Haight III*'s holding that there was no error in the trial court's EED instruction. Haight's jury was instructed that the Commonwealth was required to prove each element of first-degree murder beyond a reasonable doubt and that Haight could not be convicted of that offense unless the Commonwealth met its burden. Moreover, an EED instruction was offered to the jury. This Court is satisfied that *Haight III* was not contrary to or an unreasonable application of U.S. Supreme Court precedent. Therefore, Haight's claim for relief under Ground 24 is denied, and because reasonable jurists could not debate this holding, a certificate of appealability is denied.

3. Ground 25: EED Mitigation Instruction

In Ground 25, Haight argues that various constitutional rights were violated when the trial court applied an incorrect definition of extreme mental or emotional disturbance. *Haight III* ruled that the trial court's instruction was sufficient.

 *Haight III*, 938 S.W.2d at 249. The Magistrate Judge determined that the Kentucky Supreme Court's finding was not contrary to or an unreasonable application of clearly established federal law. (R. & R. 238-41). The Magistrate Judge also denied a certificate of appealability as to this claim. (R. & R. 241).

In objecting to the Magistrate Judge's conclusion, Haight merely disagrees with the Magistrate Judge's assessment and reiterates the same arguments that were made in his Petition. (Pet'r's Obj. 171). The Court has conducted *de novo* review of the Magistrate Judge's R&R and finds no error. Therefore, the Magistrate Judge's recommendation is adopted and Haight's Objection is overruled. Relief as to Ground 25 is denied. Additionally, a certificate of appealability is denied.

4. Ground 26: First Degree Manslaughter Instruction

Haight argues in Ground 26 that the trial judge erred when he included EED as an element of first-degree manslaughter.

Haight III rejected this argument on the merits.  *Haight III*, 938 S.W.2d at 249. The Magistrate Judge found this was neither contrary to nor an unreasonable application of clearly established federal law. In fact, this Court rejected Haight's same argument above in the discussion of Grounds 29 and 30, albeit in a different context.

*41 Haight now reiterates his argument that the instruction is in violation of *In re Winship* and  *Sandstrom v. Montana*, 442 U.S. 510 (1970). (Pet'r's Obj. 173-76). According to Haight, a due process violation occurred when the burden of proof on the element of EED was improperly shifted to the Commonwealth to disprove EED. (Pet'r's Obj. 175). *In re Winship* and *Sandstrom*, however, both involve situations where the burden of proof was improperly placed on the defendant. See  *In re Winship*, 397 U.S. at 364 (holding that due process is only satisfied if the prosecution proves every element of a charged offense beyond a reasonable doubt); *Sandstrom*, 442 U.S. at 524 (holding that a jury instruction that eliminates or shifts a state's burden to prove every element of an alleged crime beyond a reasonable doubt violates a defendant's due process rights). This is plainly not the situation at hand. Moreover, as the Kentucky Supreme Court has noted, adding the element of EED to a manslaughter instruction actually places a higher burden on the Commonwealth to prove its case.  *Baze*, 965 S.W.2d at 823.

The rest of this portion of Haight's Objection focuses on Kentucky state law which the Court here will not address. See  *Estelle*, 502 U.S. at 67-68 (“[F]ederal habeas corpus relief does not lie for errors of state law.... [W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” (internal citation omitted)). Accordingly, Haight has not demonstrated how the Kentucky Supreme Court's decision was contrary to or an unreasonable application of clearly established federal law. Thus, after *de novo* review the Court adopts the R&R's recommendation as to Ground 26 and denies this request for relief. Furthermore, because jurists of reason could not find this denial of relief debatable, a certificate of appealability is also denied.

5. Ground 28: Evidence of Parole Eligibility

In Ground 28, Haight contends that the trial judge erred when he refused to allow mitigating evidence of Haight's parole ineligibility during the guilt phase of the trial and failed to provide jurors accurate parole guidance to rebut the prosecutor's argument of future dangerousness. (Pet'r's Mem. Supp. 167-70; Pet'r's Reply 85-86). *Haight III* rejected this argument on its merits stating only that, “[a]ppellant's claim concerning the exclusion of evidence relating to his

parole eligibility upon a previous criminal conviction was irrelevant and properly excluded.”  *Haight III*, 938 S.W.2d at 249. The Magistrate Judge recommended denial of this ground for relief because evidentiary decisions of the trial court cannot be second-guessed by this Court upon a habeas petition. (R. & R. 245-49). Additionally, as to Haight's argument that the Kentucky Supreme Court's decision was contrary to  *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Magistrate Judge concluded that Haight could not show prejudice even if *Haight III* was somehow contrary to *Simmons*, because the jury instruction tendered by Haight also stated that the jury should ignore evidence relating to parole eligibility. (R. & R. 246-47).

Haight objects to the Magistrate Judge's recommendation, repeating many of the same arguments presented in his original petition. As his arguments are simply reiterations and mere disagreements with the Magistrate Judge's conclusion and this Court upon *de novo* review does not find error in the Magistrate Judge's analysis, the Court holds that the R&R pertaining to Ground 28 is adopted. Haight cannot demonstrate that he suffered prejudice, as his own tendered instruction plainly informs the jury to ignore the matter of parole eligibility. Furthermore, this Court concurs with the Magistrate Judge's recommendation that a certificate of appealability be denied as to this claim.

6. Ground 31: Examination by Neuropsychologist

Haight argues that the trial court erred when it refused to permit the defense to have Haight examined by a neuropsychologist before his sentencing. (Pet'r's Mem. Supp. 171-74; Pet'r's Reply 86-88). *Haight III* rejected Haight's claim, stating:

*42 Appellant's claim that a twenty-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration

to the mitigating evidence prior to imposition of its final judgment.

 *Haight III*, 938 S.W.2d at 249. Haight contends that this holding is an unreasonable application of  *Hitchcock v. Dugger*, 481 U.S. 393 (1987);  *Skipper v. South Carolina*, 476 U.S. 1 (1986),  *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and  *Lockett v. Ohio*, 438 U.S. 586 (1978), because the trial court's denial of the motion withheld from the court at sentencing potential mitigating evidence of organic brain damage. (Pet'r's Mem. Supp. 171-74). The Magistrate Judge recommended denial of relief under this claim because *Haight III* was not contrary to or an unreasonable application of any clearly established federal law and noted that “[n]othing in Haight's petition calls into question the above conclusions in *Haight III*.” (R. & R. 252).

Haight now objects to the recommendation. First, Haight argues that the forensic psychologist who evaluated Haight before his trial was not an appropriate expert to determine whether Haight suffered from organic brain damage. (Pet'r's Obj. 134). Second, he posits that the trial court could not properly assess whether Haight suffered from organic brain damage merely by observing him in court. (Pet'r's Obj. 134-35). Third, Haight contends there is not a “possibility” that he suffers from brain damage as the Magistrate Judge characterized, but instead there “is an all but conclusive probability.” (Pet'r's Obj. 135). Finally, Haight argues that, contrary to the Magistrate Judge's assertions, there is absolutely no evidence in the record that the trial judge considered Haight's brain damage in pronouncing final judgment in the case because no motion to appoint an expert is in evidence. (Pet'r's Obj. 136).

These arguments are without merit. Importantly, the 1974 psychological report did not conclude that Haight had an organic brain deficiency but instead alluded to the *possibility* of such. Although Haight now argues that it “is all but conclusive probability” that he suffers from organic brain damage, the Kentucky Supreme Court at the time of its holding did not have “the newly minted expert” reports in front of it; therefore, those reports are irrelevant as to whether the Kentucky Supreme Court's holding was an unreasonable application of United States Supreme Court precedent. Regardless, the Court agrees with the Magistrate

Judge that the record indicates that the trial court did consider the 1974 report. As stated in the R&R:

Haight's 1974 mental health evaluation was put before the trial court prior to his March, 1994 sentencing. The apparent decision of the trial court to give more weight to the evaluation of Haight's own trial expert in adopting the recommendation of the jury for the death penalty was not a refusal to consider mitigating evidence, but rather an appropriate exercise of the trial court's own judgment in evaluating such evidence in light of the other mental health testimony offered at trial.

(R. & R. 253). Accordingly, the Court agrees with the Magistrate Judge that the Kentucky Supreme Court's holding was not an unreasonable application of or contrary to the U.S. Supreme Court's holdings in *Hitchcock*, *Skipper*, *Eddings*, or *Lockett*. The Court therefore holds that the R&R as it pertains to Ground 31 is adopted and Haight's Objection is overruled. Further, the Court does not believe that reasonable jurists could debate this point. See  *Slack*, 529 U.S. at 484.

7. Ground 32: Instruction on Proof Beyond a Reasonable Doubt

*43 In Ground 32, Haight argues that the trial court improperly instructed the jury regarding proof beyond a reasonable doubt. (Pet'r's Mem. Supp. 174-76). *Haight III* rejected this contention as lacking merit.  *Haight III*, 938 S.W.2d at 249. The Magistrate Judge recommended denial of Haight's request for relief as to Ground 32 because Haight does not cite to any clearly established precedent of the U.S. Supreme Court that would require the trial court to define reasonable doubt in the jury instructions. (R. & R. 253-56). In support, the Magistrate Judge cites *Whiteside v. Parke*, 705 F.2d 869, 871-73 (6th Cir. 1982), where the Sixth Circuit previously explained that “Kentucky courts have long followed the rule that the failure to define reasonable doubt is not error, and [] RCr 9.56 appears to be a codification of

that view.” *Whiteside*, 705 F.2d at 871 (citing *Swopshire v. Commonwealth*, 55 S.W.2d 356, 358 (Ky. 1932)).

Haight attempts to distinguish *Whiteside* from his case, but this does not change the fact that he points to no U.S. Supreme Court precedent in support of his position. (Pet'r's Obj. 178-79). As the Magistrate Judge noted, “Haight cites no clearly established precedent of the U.S. Supreme Court that would require a definition of reasonable doubt, contrary to the longstanding state law of Kentucky.” (R. & R. 256). In his present objection, Haight does not add any contravening case law. Therefore, the Court finds this objection to be meritless and accepts the Magistrate Judge's R&R. A certificate of appealability as to Ground 32 will be denied.

G. Prosecutorial Misconduct

1. Ground 34: Prejudicial Bad Acts Evidence

Haight contends in Ground 34 that the prosecution engaged in misconduct through the introduction of prior bad acts evidence that distracted the jury from its duty to assess his mental state at the time the offenses were committed and thus denied him an opportunity to present a complete defense in violation of  *California v. Trombetta*, 467 U.S. 479 (1984), and  *In re Oliver*, 333 U.S. 257 (1948). (Pet'r's Mem. Supp. 176-86; Pet'r's Reply 88-89). *Haight III* rejected this argument, explaining:

Appellant next attacks the judgment on grounds that his trial was “polluted ... with irrelevant and immaterial collateral bad acts.” He contends, among other things, that such bad acts precluded a “meaningful opportunity” to present his EED defense to an open and receptive jury. Particularly he has identified evidence of his attempted murder of Trooper Yates; evidence as to the circumstances surrounding his guilty plea to that crime; evidence as to his theft of a farmhand's Camaro automobile while he was a fugitive; evidence of the burglary of the Shuffett home; evidence as to Tony Minnix's fear of appellant; and fear of appellant's theft of the Sasser vehicle.

It should be remembered that at trial appellant's defense was extreme emotional disturbance and it was the Commonwealth's burden to prove the absence of EED. While the relevant time frame for proof of appellant's mental state was the time of the murders, evidence as to his mental state shortly before and after the murders

was relevant. The Commonwealth maintains that from the time of appellant's escape from the Johnson County Jail until the time of his capture, his behavior amounted to a continuing course of conduct with all events being inextricably intertwined with the crimes charged. There was a legitimate basis in evidence law for admission of each such item of evidence and it was for the trial court to determine whether the probative value outweighed the prejudicial effect.

It is difficult to ignore that after his escape from the Johnson County Jail appellant went on a crime spree and along the way murdered two victims. We have found no basis to disturb the trial court's rulings on the admission of the challenged evidence. Moreover, any error in this regard would have been entirely harmless. We have carefully examined appellant's claims as set forth herein above and considered KRE 404(b) and this Court's decision in *O'Bryan v. Commonwealth, Ky.*, 634 S.W.2d 153 (1982). We are unable to find an abuse of trial court discretion in this regard.

*44 Appellant's complaints concerning the cross-examination of Randy Wheeler and the rebuttal testimony of Pamela Marcum are insubstantial and need not be addressed. Likewise, as to introduction of the three crime scene photographs, there was no error.

 *Haight III*, 938 S.W.2d at 252 (internal citations omitted) (citation omitted).

The Magistrate Judge recommended denial of Haight's request for relief on this ground because Haight did not demonstrate how the holding of *Haight III* constituted an unreasonable application of existing U.S. Supreme Court precedent. (R. & R. 260). Further, the Magistrate Judge noted that "the arguments themselves do not run so much to prosecutorial misconduct as they do the evidentiary rulings of the state trial and appellate courts," emphasizing that "evidentiary rulings of the state courts based on state law are not ordinarily subject for habeas corpus relief..." (R. & R. 260). In his objection, Haight focuses on the evidentiary rulings rather than prosecutorial misconduct and argues that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." (Pet'r's Obj. 181 (quoting  *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996))). Haight further argues that "[t]he mountain of improperly admitted other crimes and bad acts evidence ... violated [Haight's]

federal constitutional rights to due process of law...." (Pet'r's Obj. 181).

Federal habeas corpus review of evidentiary rulings based on state law is "extremely limited." *Giles v. Schotten*, 449 F.3d 698, 704 (6th Cir. 2006) (internal quotation marks omitted) (citation omitted). An issue concerning the admissibility of evidence or error in state law does not rise to a level of constitutional magnitude *unless* it can be viewed as so egregious that the petitioner was denied a fundamentally fair trial.  *Estelle*, 502 U.S. at 67-68. Furthermore, "the Supreme Court has defined 'very narrowly' the category of infractions that violates 'fundamental fairness.'"  *Bey v. Bagley*, 500 F.3d 514, 522 (6th Cir. 2008) (quoting  *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

Fundamental fairness is violated when erroneously admitted evidence is "material in the sense of a crucial, critical, highly significant factor," and the probative value of the evidence is so conspicuously outweighed by its inflammatory content that a defendant's constitutional right to a fair trial has been violated.   *Lesko v. Owens*, 881 F.2d 44, 52 (3d Cir. 1989). See also  *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) ("Whether the admission of prejudicial evidence constitutes a denial of fundamental fairness turns upon whether the evidence is material in the sense of a crucial, critical highly significant factor." (quoting  *Brown v. O'Dea*, 227 F.3d 642, 645 (6th Cir. 2000))). In conducting this inquiry, the decision of the state trial court is given great deference because it is in a unique position to assess the relative probative value and inflammatory effect of proffered testimony.   *Lesko*, 881 F.2d at 52 (citing *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986)).

Because the other-acts evidence at issue here was being offered for the relevant purpose of demonstrating Haight's mental state to rebut his EED defense, this evidence was subject only to the limitations contained in *Kentucky Rules of Evidence* 403. "Rule 403's balancing of the probative value of such testimony against the danger of unfair prejudice is a task properly reserved for the sound discretion of the trial judge." *Clark v. O'Dea*, 257 F.3d 498, 503 (6th Cir. 2001) (citing *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. 1970)). As the Magistrate Judge noted, and the Court agrees, Haight has adduced no explanation as to how the trial court's determination that the probative value of the

other-acts evidence outweighed the danger of unfair prejudice was unreasonable. Accordingly, it cannot be said that the trial court's ruling was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" to warrant habeas relief.  28 U.S.C. § 2254(d). Therefore, the Magistrate Judge's recommendation as to Ground 34 is adopted and Haight's Objection is overruled. Additionally, the Court adopts the Magistrate Judge's recommendation that a certificate of appealability should not issue as to this ground for relief.

2. Ground 35: Prosecutorial Closing Argument

*45 Haight asserts that several statements made by the prosecution during closing arguments amounted to a violation of his federal due process rights.¹² (Pet'r's Mem. Supp. 186-92; Pet'r's Reply 88-89). The Kentucky Supreme Court held:

Appellant's extraordinary history of violent criminal conduct was properly placed before the jury. Moreover, while the "prison is doing nothing" argument by the Commonwealth is of concern, it falls short of the argument condemned in  *Perdue v. Commonwealth, Ky.*, 916 S.W.2d 148 (1996), whereby the jury was exhorted to give the death penalty as the only way to prevent the defendant from killing again. The argument here is qualitatively different from the argument condemned in  *Ice v. Commonwealth, Ky.*, 667 S.W.2d 671, 676 (1984). This Court has long observed the principle that wide latitude is permitted during closing argument. In view of this principle and upon our further belief that any error which may have occurred in this regard was harmless, there are no grounds for reversal on this issue.

Appellant's unpreserved claim of improper argument designated "Death as Deterrent" does not rise to the level of palpable error. The views set forth hereinabove sufficiently answer these contentions.

 *Haight III*, 938 S.W.2d at 252-53 (internal citation omitted).

The Magistrate Judge concluded that this was not an unreasonable application of or contrary to clearly established federal law. (R. & R. 262-71). The Magistrate Judge found that none of the challenged remarks of the Commonwealth

during closing arguments "were improper, nor would such remarks, if assumed to be improper, have infected Haight's trial with fundamental unfairness so that his resulting conviction and death sentence constituted a denial of due process." (R. & R. 268). Haight asserts that the Magistrate Judge is incorrect and further states that clearly established federal law does provide that an improper prosecutorial argument can rise to the level of a due process violation. (Pet'r's Obj. 186). He asserts that the "prosecutorial misconduct here is patent." (Pet'r's Obj. 186). Haight claims that "the prosecutor's argument in [his] case, in its entirety, asks the jury to sentence [him] to death based on emotion" and that this improper argument led to a deprivation of due process in Haight's trial. (Pet'r's Obj. 186).

There is no question that improper prosecutorial argument *can* rise to the level of a due process violation; however, Haight has not demonstrated how the alleged improper comments by the prosecutor in this case violated due process. On habeas review, the question is whether the alleged improper comments of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process."  *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974);  *Darden*, 477 U.S. at 168;  *Kincade v. Sparkman*, 175 F.3d 444, 446 (6th Cir. 1999). Having reviewed the instances of alleged prosecutorial misconduct during closing arguments of which Haight complains, the Court is not persuaded that the Kentucky Supreme Court's resolution of this claim was an unreasonable application of *DeChristoforo*.¹³ Therefore, after *de novo* review, the Magistrate Judge's recommendation that Haight's claim for relief under Ground 35 be denied. A certificate of applicability should not be issued as to this claim because reasonable jurists could not debate its lack of merit.

H. Miscellaneous Issues

1. Ground 41: Ineffective Assistance Due to Videotape Record

*46 In Ground 41, Haight argues that the use of a videotape trial record results in a less than full and fair review. (Pet'r's Mem. Supp. 276). Haight avers that he was subjected to ineffective assistance of counsel due to "inherent inadequacies of the videotape record of his trial...." (Pet'r's Mem. Supp. 276). The Magistrate Judge concluded that Haight raised only a Sixth Amendment ineffective assistance

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of counsel claim related to the videotape transcript because on appeal, “Haight made no arguments relating to the language of  KRS 532.075 as a statutory basis on which to rest a constitutional obligation to provide Kentucky defendants with a written transcript of their trials.” (R. & R. 277). Thus, the Magistrate Judge concluded that Haight's claim in this regard was procedurally barred and only the ineffective assistance of counsel claim as to the videotape record survived. (R. & R. 276-77). The Magistrate Judge further explained that Haight's ineffective assistance of counsel claim “is materially deficient in all respects” as Haight has failed to discuss the deficient performance and prejudice prongs of the *Strickland* test. (R. & R. 280).

In objecting on this issue, Haight repeats the same merits arguments raised in his Petition, which the Magistrate Judge concluded were procedurally barred, without explaining how his claim survives the procedural bar. (Pet'r's Obj. 192-93). Upon review, the Court finds no error in the Magistrate Judge's conclusion that Haight's claim regarding the constitutionality of the use of a videotape trial record is procedurally barred. Furthermore, the Court finds no error in the Magistrate Judge's conclusion that Haight's ineffective assistance of counsel claim regarding the videotape record is without merit. Accordingly, the Court adopts the recommendation of the Magistrate Judge denying relief under Ground 41 and also denying issuance of a certificate of appealability.

2. Ground 43: Ineffective Assistance of Counsel on Appeal

In Ground 43, Haight argues that his appellate counsel on direct appeal was ineffective for failing to challenge the trial court's refusal to give a jury instruction on the lesser-included offense of theft. (Pet'r's Mem. Supp. 200-08; Pet'r's Reply 91-105). Haight did not raise this claim of error in his [RCr 11.42](#) motion to vacate or prior to the Kentucky Supreme Court decision in *Haight IV* that affirmed the denial of post-conviction relief. See  *Haight IV*, 41 S.W.3d at 449.

The Magistrate Judge recommended denial of Ground 43 due to a procedural bar. (R. & R. 279-84). The Magistrate Judge relied upon this Court's previous order denying an evidentiary hearing as to this claim on the basis that it was procedurally barred. (R. & R. 282-83 (citing Mem. Op. 10-13, DN 85)). The Magistrate Judge also noted that this Court later held that the exception to the procedural bar articulated

in *Martinez* and *Trevino* did not affect the procedural bar as to Haight's claim because “*Martinez* applied only when the underlying claim was one for ineffective assistance of counsel at trial.” (Mem. Op. 20, DN 135 (citing  *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013))). Recognizing that the holdings of this Court bind magistrate judges, the Magistrate Judge recommended denial as to Haight's claim of ineffective assistance of appellate counsel as being time-barred. (R. & R. 284).

Haight now argues that *Hodges*, which holds that *Martinez* does not excuse the default of a claim of ineffective assistance of appellate counsel is wrong and distinguishable from his case. (Pet'r's Obj. 141-43 (citing  *Hodges*, 727 F.3d at 531)).

Citing to  *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), where the Ninth Circuit held that the *Martinez* exception does apply to ineffective assistance of appellate counsel claims, Haight argues that *Hodges* was wrongly decided. However, the Sixth Circuit recently discussed the *Nguyen* decision while reaffirming the rule articulated in *Hodges*. See *Porter v. Genovese*, No. 16-5317, 2017 WL 167469, at *5 (6th Cir. Jan. 17, 2017) (“Yes, the Ninth Circuit sees this differently. But this does not, as [petitioner] argues, mean that there is ‘cause’ to excuse his default...” (internal citation omitted)). Rejecting a similar argument, the Sixth Circuit emphasized “the law of this circuit is that *Martinez/Trevino*'s limited exception does not extend to claims of ineffective assistance of appellate counsel.” *Id.* (citing  *Hodges*, 727 F.3d at 531). The Court follows, as it must, the binding precedent of this circuit and holds that the *Martinez* exception does not apply in this instance.

*47 The Sixth Circuit has made abundantly clear that the equitable exception carved out in *Martinez* and *Trevino* does not apply to claims of ineffective assistance of appellate counsel. See *id.* Therefore, the Magistrate Judge's recommendation that Haight's claim for relief under this ground be denied because it is procedurally barred is adopted and Haight's Objection is overruled. The Magistrate Judge recommended the issuance of a certificate of appealability, and based on *Nguyen*, the Court agrees.

3. Ground 44: Ineffective Assistance of Trial and Appellate Counsel regarding and the Wanton Murder Charge Instruction

Ground 44 seeks relief for ineffective assistance of counsel due to the failure of Haight's trial counsel to tender an instruction on wanton murder as an alternative to intentional murder. (Pet'r's Mem. Supp. 208-21; Pet'r's Reply 106-08). According to Haight, a conviction of wanton murder would have eliminated one of two aggravating circumstances and he potentially could have avoided the death penalty.

See  [KRS 532.025](#). Haight's claim involves ineffective assistance of trial counsel in not requesting the wanton murder instruction; ineffective assistance of appellate counsel in not presenting the instruction issue on direct appeal; and ineffective assistance of post-conviction counsel in failing to raise the issue in the initial [RCr 11.42](#) motion. (Pet'r's Mem. Supp. 208-21; Pet'r's Reply 106-08). The Magistrate Judge noted that, as above with Ground 43, this Court has previously held that these claims were procedurally barred when ruling Haight was not entitled to an evidentiary hearing. (R. & R. 285 (citation omitted)).

As to Haight's ineffective assistance of trial counsel claims, this Court held that Haight's claims were procedurally defaulted and that Haight could not establish cause and prejudice to excuse his procedural default. (Mem. Op. 22, DN 135 (“[E]ven if Haight were to prove what he says he can prove, he will not have shown that his post-conviction attorney nor his trial attorney were ineffective, meaning that he cannot establish cause or prejudice for his procedural default nor can he establish that he would be entitled to relief on his underlying claim.”)). This Court further noted that Haight's counsel had a strategic reason for not requesting a wanton murder charge because “wanton murder is not a lesser-included offense of intentional murder, but is another form of committing murder.” (Mem. Op. 22, DN 135 (citing  [Ratliff v. Commonwealth](#), 194 S.W.3d 258, 275 (Ky. 2006))). Further, this Court pointed out that both intentional murder and wanton murder are capital offenses, meaning Haight still would have potentially faced the death penalty if convicted of wanton murder. (Mem. Op. 22, DN 135 (citing  [KRS 507.020](#))). Accordingly, this Court has already ruled that Haight cannot show cause and prejudice for the procedural default of this ineffective of trial counsel claim. Haight's Objection does not provide him relief from this holding.

Further, as discussed above in Ground 43, the Sixth Circuit holds that the equitable exception in *Martinez* and *Trevino* does not apply to ineffective assistance of appellate counsel claims. *Porter*, 2017 WL 167469, at *5 (citing  [Hodges](#),

[727 F.3d at 531](#)). Because Haight did not raise this claim in his [Rule 11.42](#) petition, this claim is procedurally defaulted. See *Haight V*, 2007 WL 2404494, at *3 (holding that Haight's complaint regarding the wanton murder claim “should have been raised in the [RCr 11.42](#) motion or on direct appeal,” and was therefore procedurally defaulted). As this Court has previously indicated, all of Haight's claims in regard to Ground 44 are procedurally defaulted. Therefore, the Magistrate Judge's recommendation to deny this ground for relief is adopted. Further, consistent with Ground 43, the Court accepts the Magistrate Judge's recommendation in favor of issuing a certificate of appealability for Ground 44.

4. Ground 45: Conflict of Counsel

*48 In Ground 45, Haight argues that his post-conviction attorneys were ineffective. (Pet'r's Mem. Supp. 213-18; Pet'r's Reply 108-09). Specifically, Haight claims that a conflict of interest existed because his attorneys at trial, on direct appeal, and the initial post-conviction proceedings were all employed by the Kentucky Department of Public Advocacy. (Pet'r's Mem. Supp. 213-18; Pet'r's Reply 108-09). Therefore, Haight avers that this conflict of interest was in violation of the Sixth Amendment and deprived him of a fair trial, reliable verdict, and sentence. (Pet'r's Mem. Supp. 213-18; Pet'r's Reply 108-09). The Kentucky Supreme Court never ruled on this ground and now Respondent argues that the claim is procedurally barred.

The Magistrate Judge concluded that this claim fails on the merits, referencing this Court's prior order in which it held that Haight could not show good cause for discovery. This Court explained:

Haight claims that his counsel during state post-conviction proceedings were ethically disqualified from representing him. The magistrate, however, correctly concluded that this is a state law issue with which federal habeas corpus is unconcerned. The Constitution confers no right to any counsel whatsoever in state post-conviction proceedings.

 [Coleman](#), 501 U.S. at 752;  [Murray v. Giarratano](#), 492 U.S. 1 (1989) (applying this rule to capital cases). It follows that there is no constitutional right to unconflicted counsel in such proceedings. Furthermore, whether counsel was disqualified is entirely a question of state law. This is simply not a ground for finding that Haight is “in custody in violation of the Constitution or laws or treaties of the United States.”

(Mem. Op. 14, DN 85 (quoting 28 U.S.C. § 2254(a))).

Haight's contention is that “post[-]conviction counsel's conflict of interest may ... constitute cause to overcome a procedural default.” (Pet'r's Obj. 200). Haight does little to refute this Court's prior ruling that “there is no constitutional right to unconflicted counsel in [post-conviction] proceedings.” (Disc. Order, 15). After *de novo* review, this Court adopts the Magistrate Judge's recommendation and denies relief under this claim because it is established that “the right to appointed counsel extends to the first appeal of right, and no further.” *Finley*, 481 U.S. at 555. Haight, therefore, had no right under the Sixth Amendment to counsel in his post-conviction relief proceedings; thus, any conflict his appointed appellate counsel may have had cannot offend the Sixth Amendment.

The Magistrate Judge recommended that a certificate of appealability should not be issued. (R. & R. 307-08). Haight contends that a certificate of appealability should be issued because “[g]iven the recent reshaping of the legal landscape relating to equitable principles, conflict and abandonment ... and the resulting change in post-conviction counsel performance evaluation calculus ... jurists of reason could disagree with the Court's resolution of this claim.” (Pet'r's Obj. 204). Despite any recent developments in case law relating to post-conviction performance, the Court concludes that it is sound and well-established in U.S. Supreme Court precedent that Haight has no Sixth Amendment right to effective assistance of post-conviction counsel. Jurists of reason could not debate this, and a certificate of appealability for Ground 45 will not be issued.

5. Ground 42: Cumulative Error

In Haight's final ground for relief, he asserts that the cumulative effect of the errors discussed above deprived him of due process of law. (Pet'r's Mem. Supp. 218-20; Pet'r's Supp. 9-11). Haight asks the Court to consider the finding of constitutional violations that amounted to harmless errors in tandem when deciding whether to grant habeas relief under this ground for relief. (Pet'r's Mem. Supp. 219). The Magistrate Judge recommended denial of relief because “[t]he Sixth Circuit has repeatedly held that cumulative error claims are not cognizable in the setting of habeas corpus because the Supreme Court has yet to address the issue.” (R. & R. 292-93

(citing *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006))). Furthermore, the Magistrate Judge concluded that even if the cumulative effect of the claims of ineffective assistance of counsel were considered to determine prejudice under the *Strickland* standard, Haight cannot show that he was “prejudiced [] in the outcome of the state court proceedings, given the overwhelming nature of the evidence of his guilt.” (R. & R. 293).

*49 Haight explains that he “is not asking this court to create a new rule of law... [but] is merely requesting this court to analyze [Haight's] claim in a new light.” (Pet'r's Obj. 194). Haight restates his original argument that this Court should consider the accumulation of harmless errors and grant him relief. (Pet'r's Obj. 194). The Court does not see how Haight's request to “view[] the claim in a new light” is any different than raising a cumulative error claim. As stated by the Magistrate Judge, the Sixth Circuit has expressly held that cumulative error claims are not cognizable claims in habeas corpus. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)). Even assuming that the Sixth Circuit did recognize a cumulative error claim, a cumulative error claim fails where there are simply no errors to cumulate. See *Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007) (en banc); *Baze*, 371 F.3d at 330.

Further, Haight argues that “the Magistrate Judge is incorrect in refusing to consider a cumulative error review concerning issues of ineffective assistance of counsel.” (Pet'r's Obj. 195). However, the Magistrate Judge did not refuse to consider cumulative error in the context of ineffective assistance of counsel. Rather, the Magistrate Judge explained that consideration of such cumulative error was to no avail for Haight because he could not show prejudice in the outcome of the state court proceedings as a result of the overwhelming evidence of guilt. (R. & R. 293). Haight does not dispute this point. Therefore, the Magistrate Judge's recommendation is adopted, this ground for relief is denied, and a certificate of appealability will not be issued. Since Haight has not stated a cognizable claim for relief, jurists of reason could not find Haight's claim debatable.

V. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** as follows:

1. Petitioner's Objection to the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation (DN 166) is **OVERRULED**;

2. The Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation (DN 160) is **ADOPTED** to the extent that it does not conflict with the opinion of this Court;

3. Petitioner's Petition for Habeas Relief (DN 1) is **DISMISSED**;

4. Petitioner's Motion for Summary Judgment (DN 141) is **DENIED**.

5. The Court does not believe that a certificate of appealability should be issued for Grounds 1, 3, 4, 5, 6, 8, 9, 13, 14, 15, 18, 19, 20, 21, 31, 33, and 37. As discussed above, the Court does not believe that jurists of reason could debate this Court's resolution of these grounds. Nevertheless, in an abundance of caution, this Court will defer to the Magistrate Judge's recommendation that a certificate of appealability for

these Grounds be issued. The Court is cognizant that Haight would not have a chance to respond to this Court's denial of these certificates of appealability. Furthermore, the Court recognizes that this is a capital case in which "doubts as to whether a [certificate of appealability] should issue must be resolved in favor of the petitioner."  *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000) (quoting *Lamb v. Johnson*, 179 F.3d 352, 356 (5th Cir. 1999)). Accordingly, certificates of appealability will be **GRANTED** for Grounds 1, 3, 4, 5, 6, 8, 9, 13, 14, 15, 18, 19, 20, 21, 31, 33, and 37. Certificates of appealability will also be **GRANTED** for Grounds 2, 16, 17, 27, 29, 30, 43, and 44 for which this Court and the Magistrate Judge concur that issuance of a certificate of appealability is warranted.

***50** 6. The issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is **DENIED** as to Grounds 7, 10, 11, 12, 22, 23, 24, 25, 26, 28, 32, 34, 35, 36, 38, 39, 40, 41, 42, and 45.

All Citations

Not Reported in Fed. Supp., 2017 WL 3584218

Footnotes

1 Pages 18-35 of Haight's motion for summary judgment incorporate all of his plea-agreement-related claims contained in Grounds 1, 2, 3, 4, and 33 of the Petition. (Pet'r's Mot. Summ. J. 18-35).

2 Haight pled guilty in the Garrard Circuit Court in 1986, in exchange for the prosecutor's recommendation of a sentence of life without parole for 25 years. The trial court accepted Haight's plea, but disregarded the recommendation and sentenced him to death. The Kentucky Supreme Court vacated the conviction on the ground that the trial court should not have accepted a guilty plea premised on the parties' "understanding" that the court would sentence in accordance with the agreement when in fact the court retained its discretion in sentencing.  *Haight I*, 760 S.W.2d at 89. Haight then sought to enforce the plea agreement, but to no avail. *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) (*Haight II*), cert. denied, 507 U.S. 925 (1993). He was subsequently tried, convicted on all counts, and sentenced to death in 1994. The convictions and penalties were affirmed on direct review, and the state courts denied post-conviction relief.  *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996) (*Haight III*), cert. denied, 522 U.S. 873 (1997);  *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) (*Haight IV*), cert. denied, 534 U.S. 998 (2001). Haight then filed this Petition pursuant to  28 U.S.C. § 2254. This Court stayed this case to allow Haight to exhaust his state remedies with respect to certain of his claims for relief. (Order, DN 27). The Kentucky Supreme Court subsequently refused to consider

those issues on the ground that Haight had failed to raise them in his initial state collateral proceeding. *Haight v. Commonwealth*, No. 2006-SC-000344-MR, 2007 WL 2404494 (Ky. Aug. 23, 2007) (*Haight V*).

3 Haight's plea agreement provided:

It is the understanding of the defendant, and the same is hereby assured by the Commonwealth, that the above-stated sentence recommendation is, and will be presented to the Court, as a sincere and genuine request for imposition of the recommended sentence [25 years to life without parole] and that the Commonwealth will take no action inconsistent therewith.

(R. & R. 27 (citation omitted)).

4 The Magistrate Judge concluded that Haight's argument was defeated by *Alabama v. Smith*. (R. & R. 46). In *Smith*, the U.S. Supreme Court held that "there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea...." *Smith*, 490 U.S. at 803. Yet, the Sixth Circuit has noted that *Smith* did not involve a question of prosecutorial vindictiveness, as is at issue here, but rather an issue of judicial vindictiveness. *Turner v. Tennessee*, 940 F.2d 1000, 1002 (6th Cir. 1991). Thus, in *Turner*, the Sixth Circuit held that *Smith* was clearly distinguishable from the facts where the issue centered around the vindictiveness of the prosecutor, not the sentencing judge. Further, the Sixth Circuit held that nothing in *Smith* disturbed the U.S. Supreme Court's prior holding in *Goodwin*, which requires a presumption of vindictiveness if it is shown that there was "a realistic likelihood of vindictiveness" on the part of the prosecutor. *Goodwin*, 457 U.S. at 384 (citing *Blackledge*, 417 U.S. at 27). Accordingly, the Magistrate Judge's reliance on *Smith* is misplaced.

5 In Haight's Objection, he articulates a reason why the Commonwealth chose to seek death after the vacation of the plea agreement. (Pet'r's Obj. 13). See *Adamson v. Ricketts*, 865 F.2d 1011, 1019 (9th Cir. 1988), *abrogated on other grounds by* *Walton v. Arizona*, 497 U.S. 639 (1990) ("Once the presumption of vindictiveness is raised, the burden shifts to the prosecution to rebut it by presenting evidence of independent reasons or intervening circumstances which demonstrate that the prosecutor's decision was motivated by a legitimate purpose." (citations omitted)). Haight discloses that the Commonwealth's stated reason for its decision was that the opinion of the victims' families had changed in regard to advocating the death penalty. (Pet'r's Obj. 13). Thus, even if the Court was to find that a presumption of vindictiveness did exist, Petitioner recognizes that the Commonwealth provided an independent, objective reason for seeking the death penalty to rebut any presumption of vindictiveness. See *Adamson*, 865 F.2d at 1019.

6 The Kentucky Supreme Court has held that the procedural hallmarks that were present in *Bullington* to prevent a harsher sentence on remand are not present in Kentucky's capital sentencing procedures. *Hilbert v. Seay*, No. 2008-SC-000312-OA, 2008 WL 3890410, at *9 (Ky. Aug. 21, 2008). The court determined that Kentucky's capital sentencing procedure does not serve as an "implied acquittal" and jeopardy does not attach to a capital defendant's earlier, lighter sentence. *Id.* Thus, under Kentucky law jeopardy would not attach to Haight's original sentence even if he had been sentenced by a jury of his peers. See *Commonwealth v. Eldred*, 973 S.W.2d 43, 48-49 (Ky. 1998).

7 The Court cannot perceive how *Herrera* or *Sheppard* would apply. *Herrera* concerns claims of actual innocence based on newly discovered evidence. Although *Sheppard* does concern pre-trial publicity and a defendant's right to a fair trial, Haight has failed to explain how the affirmance of the trial court's finding that the jurors were unaffected by pre-trial publicity in *Haight III* was "clearly erroneous." See *Sumner v. Mata*,

455 U.S. 591, 597 (1982) (noting that the AEDPA “requires the federal courts to show a high measure of deference to the factfindings made by the state courts.”).

8 Haight cites  *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), in support of his argument that counsel's “reasonableness under prevailing professional norms” is considered when determining if counsel is deficient. This case was decided in 2003, however, and thus was not established U.S. Supreme Court precedent *at the time* of Haight's initial state court appeal. Under habeas review, the state court decision is evaluated using the law at the time the petitioner's state court conviction became final.  *Williams*, 529 U.S. at 379-80 (citing  *Teague*, 489 U.S. at 307-09). See also  *Teague*, 489 U.S. at 309 (“Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.”). Therefore, this argument is not well taken.

9 The Court agrees with Haight that the Magistrate Judge's review of the overwhelming evidence of guilt has no bearing on the analysis of prejudice in sentencing. See  *Moore v. Mitchell*, 708 F.3d 760, 797 n.16 (6th Cir. 2013) (“But the improper comments took place at the penalty phase. The overwhelming evidence of guilt was irrelevant [during the penalty phase] because the jury had already found Moore guilty. At sentencing, the jury was required to decide whether the aggravating circumstances outweighed the mitigating circumstances, necessitating a verdict of death.”). Nevertheless, even assuming *arguendo* that Haight could demonstrate the Kentucky Supreme Court unreasonably applied federal law when holding that Haight's counsel's performance was not deficient—which he cannot—he has not shown how he was prejudiced by his counsel's failure to offer a no adverse inference instruction. As to proof of prejudice where, as here, the defendant claims that counsel provided ineffective assistance in the penalty phase, “the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”  *Strickland*, 466 U.S. at 695. Haight has not made this necessary showing.

10 Specifically, Instruction No. 3(c) provides:

In fixing punishment for the defendant, you shall consider such mitigation or extenuating facts and circumstances as they have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true:

....

(c) any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

(R. & R. 199 (citation omitted)).

11 Haight is not procedurally barred from bringing this claim currently because he asserted it in his state court appeals. (Notice Filing Attach. 1, at 54, DN 126-1). Yet, this is the first time he has argued this point in his habeas corpus proceedings.

12 The various statements to which Haight objects are: the Commonwealth's reference to future dangerousness; an improper “send a message” argument to the jury; reference to a 1987 wanton endangerment conviction; and an unfair denigration of a psychologist's testimony. (Pet'r's Obj. 182-85).

13 Haight also cites to  *Griffin v. California*, 380 U.S. 609 (1965), in support of his argument that the Kentucky Supreme Court's holding is infirm. *Griffin* deals with prosecutorial misconduct in the context of a prosecutor's

comments during the trial that violated the petitioner's Fifth Amendment rights and is inapplicable. See  [id.](#) at 612.

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Appendix E

2007 WL 2404494

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST
RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.

Randy HAIGHT, Appellant

v.

COMMONWEALTH of Kentucky, Appellee.

No. 2006-SC-000344-MR.

|

Aug. 23, 2007.

|

Rehearing Denied April 24, 2008.

Synopsis

Background: After defendant's convictions for murder and other crimes and his sentence of death was affirmed on appeal, defendant filed a motion to vacate judgment. The Circuit Court, Jefferson County, Benjamin F. Shobe, Special Judge, denied the motion. Defendant appealed.

Holding: The Supreme Court held that trial court lacked jurisdiction to rule on defendant's motion to vacate judgment.

Affirmed.

West Headnotes (1)

[1] **Criminal Law** Particular Issues and Cases

Trial court lacked jurisdiction to rule on defendant's motion to vacate judgment, where the Supreme Court had previously denied defendant's motion to abate and had affirmed the judgment on defendant's underlying motion to set aside sentence. [Rules Civ.Proc., Rule 59.05](#); [Rules Crim.Proc., Rule 11.42](#).

4 Cases that cite this headnote

On Appeal from Jefferson Circuit Court, No. 85-CR-000032; Benjamin F. Shobe, Special Judge.

Attorneys and Law Firms

[Daniel T. Goyette](#), Louisville Metro Public Defender, Bruce P. Hackett, Deputy Appellate Defender of the Jefferson District, Louisville, KY, Counsel for Appellant.

[Gregory D. Stumbo](#), Attorney General, [Louis F. Mathias Jr.](#), [Tami Renee Stetler](#), Assistant Attorney Generals, Office of Criminal Appeals, Frankfort, KY, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

*1 In this matter of right appeal Randy Haight asks this Court to find that the circuit court has jurisdiction to rule on a CR 59.05 motion to vacate the judgment on his [RCr 11.42](#) motion, when this Court has already denied his motion to abate the appeal and affirmed the judgment denying Haight's [RCr 11.42](#) motion. Under the law of the case doctrine, when this Court denied Haight's motion to abate his appeal pending the outcome of the [CR 59.05](#) motion and entered our opinion affirming the circuit court's ruling on the [RCr 11.42](#) motion, the circuit court no longer had jurisdiction to rule on the [CR 59.05](#) motion. All other issues raised by Haight in this appeal should have and could have been raised on direct appeal or in his [RCr 11.42](#) motion. Hence, we affirm.

On August 22, 1985, Randy Haight escaped from the Johnson County Jail, and in the course of committing First-Degree Robbery, murdered David Omar and Patricia Vance as they sat in their parked car. After an initial reversal of his conviction and death sentences pursuant to a guilty plea, *see Haight v. Williamson*, 833 S.W.2d 821 (Ky.1992). *cert. denied*, 507 U.S. 925, 113 S.Ct. 1296, 122 L.Ed.2d 687 (1993), Haight was tried by a jury on January 10, 1994-February 3, 1994. On March 21, 1994, final judgment was entered sentencing Haight to death on two counts of Murder, twenty (20) years on each of two counts of First-Degree Robbery, and five (5) years for Possession of a Handgun by a Convicted Felon, all to run concurrently. On direct appeal, Haight's conviction was affirmed by this Court on November 21, 1996.  *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky.1996). *cert. denied*, 522 U.S. 873, 118 S.Ct. 110, 139 L.Ed.2d 63 (1997).

Haight filed an [RCr 11.42](#) motion to vacate on October 13, 1997, which was denied by the trial court on September 9,

2007 WL 2404494

1998. On September 21, 1998, Haight filed both an [CR 59.05](#) motion asking the trial court to vacate the September 9, 1998 order, and his notice of appeal of the September 9, 1998 order. Thereafter on January 7, 1999, Haight filed a motion to abate the appeal pending the outcome of the trial court's ruling on the [CR 59.05](#) motion. On February 11, 1999, this Court entered an order denying Haight's motion for abatement of the appeal, but granted Haight an extension of time to file his brief and perfect his appeal. This Court rendered its opinion affirming the denial of [RCr 11.42](#) relief on June 15, 2000, which was final upon denial of Haight's petition for rehearing on April 26, 2001.  *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky.2001), cert. denied, 534 U.S. 998, 122 S.Ct. 471, 141 L.Ed.2d 386 (2001).

On November 29, 2001, Haight filed a motion in the circuit court seeking to amend and supplement his [RCr 11.42](#) and [CR 59.05](#) motions. At the status hearing held in the case in the circuit court on October 15, 2004, the Commonwealth argued that the circuit court no longer had jurisdiction to rule on Haight's pending claims. On April 6, 2006, the circuit court entered its order denying the [CR 59.05](#) motion "for the reason that the issues raised by Movant have been determined adversely to him by the Supreme Court Of Kentucky, and the Circuit Court is without jurisdiction to hear the additional evidence offered regarding the same issues."

*2 Citing  *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky.2005), cert. denied, 547 U.S. 1005, 126 S.Ct. 1466, 164 L.Ed.2d 251 (2006), Haight argues that the trial court erred in determining that it no longer had jurisdiction to rule on the pending [CR 59.05](#) motion once this Court denied his motion to abate, and affirmed the judgment on the underlying [RCr 11.42](#) motion. In *Mills*, this Court ruled that [CR 59.05](#) applied to a final order on an [RCr 11.42](#) motion, but specified that, unlike a civil case, the filing of a [CR 59.05](#) motion would not suspend the time for filing an appeal of the [RCr 11.42](#) motion under [RCr 12.02](#).¹ *Id.* at 323. The *Mills* Court, however, allowed *Mills*' untimely appeal to proceed, recognizing that *Mills* was entitled to rely on the pre-2005 cases determining that [CR 59.05](#) applied to criminal cases and suspended the running of time for an appeal of an [RCr 11.42](#) ruling. *Id.* Haight argues that given that his [CR 59.05](#) motion was filed in 1998, he was likewise entitled to presume that the filing of his [CR 59.05](#) motion would suspend the time for taking his appeal and render the September 9, 1998 order denying [RCr 11.42](#) relief interlocutory, thereby retaining jurisdiction in the circuit court. As a result, Haight maintains that jurisdiction

did not properly rest in this Court at the time this Court ruled on the motion to abate and affirmed the judgment on the [RCr 11.42](#) motion.

The flaw in Haight's argument is that the *Mills* case does not work in his favor. *Mills* made it clear that the filing of a [CR 59.05](#) motion did *not* suspend the running of time for appeal. The only reason the *Mills* Court then allowed *Mills* to proceed with his untimely appeal in reliance on pre-2005 law was for the purpose of protecting his right to appeal. In the instant case, Haight preserved his right to appeal the judgment on his post-conviction motion by simultaneously filing his notice of appeal with his [CR 59.05](#) motion. Haight sought and received an appeal from the judgment on his post-conviction motion. Further, the pre-2005 cases that this Court allowed *Mills* to rely on were decided in 2001-2004, after Haight's [CR 59.05](#) motion was filed (1998), and even after this Court's order denying Haight's motion to abate (1999). *Id.* n. 8-10. Haight is essentially asking this Court to find that the circuit court has jurisdiction to make a ruling in a case that could possibly overturn this Court's appellate ruling on the same motion -the underlying [RCr 11.42](#) claim. This Court has already ruled in 1999 that Haight's appeal would not be abated by the filing of the [CR 59.05](#) motion. That ruling by this Court, and this Court's subsequent opinion affirming the judgment on [RCr 11.42](#) motion, are now the law of the case and are controlling. See *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky.1996); *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky.1961). Accordingly, the Jefferson Circuit Court properly determined that it did not have jurisdiction to rule on the [CR 59.05](#) motion.

*3 The remaining issues raised by Haight-that he was denied his right to counsel in the post-conviction proceeding because of conflicts of interest within the Department of Appellate Advocacy, that he should have been granted leave to amend and supplement his [RCr 11.42](#) motion, that he was denied effective assistance of counsel at trial, and that he should have gotten Wanton Murder and Theft instructions-are issues that either were raised in the [RCr 11.42](#) motion and on direct appeal, or should have been raised in the [RCr 11.42](#) motion or on direct appeal. See  *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky.2000), cert. denied, 531 U.S. 1157, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001). [RCr 11.42\(3\)](#) provides, "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." See *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky.1997), cert. denied, 521

U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997). Also, to the extent that certain of the issues were raised for the first time in the CR 59.05 motion, it has been held that a party cannot invoke CR 59.05 to raise issues that could have been presented in the proceedings prior to entry of the judgment. *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky.App.1997). In viewing Haight's CR 59.05 motion, we see that the issues raised in that motion were issues that were known to Haight prior to the filing of his RCr 11.42 motion.

This Court's opinion affirming the post-conviction judgment directly addressed Haight's claims in this appeal that his trial counsel was ineffective for failing to exercise peremptory challenges and that he was wrongfully denied the opportunity to amend and supplement his RCr 11.42 motion, as well as the numerous other arguments raised in that appeal.  *Haight*, 41

S.W.3d at 443-444. This Court noted in that opinion that many of the claims raised in that appeal had already been raised and disposed of on direct appeal.  *Id.* at 442-443. Haight has been given a full and fair opportunity to raise his post-conviction claims before this Court.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. LAMBERT, C.J., CUNNINGHAM, MINTON, NOBLE, SCHRODER, SCOTT, JJ., concur.

All Citations

Not Reported in S.W.3d, 2007 WL 2404494

Footnotes

- ¹ Effective January 1, 2007, RCr 12.02 was amended to specify that  CR 73.02(1)(e) now applies to criminal cases, thereby now suspending the running of the time for appeal upon the filing of a CR 59.05 motion in a criminal case.

Appendix F

41 S.W.3d 436

Supreme Court of Kentucky.

Randy HAIGHT, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

No. 1998–SC–0931–MR

|

April 26, 2001.

Synopsis

Defendant filed application for postconviction relief from capital murder convictions after the Supreme Court, [760 S.W.2d 84](#), first reversed conviction for two intentional murders, subsequently, [833 S.W.2d 821](#), resolved that commonwealth was entitled to seek death penalty upon retrial, and following retrial, [938 S.W.2d 243](#), affirmed conviction for two intentional murders. The Circuit Court, Jefferson County, Benjamin F. Shobe, Special Judge, denied the application. Defendant appealed. On denial of rehearing, the Supreme Court, [Wintersheimer, J.](#), held that: (1) defendant did not establish that trial counsel was ineffective in preventing him from freely exercising peremptory challenges; (2) defendant was not denied due process nor fundamental fairness by denial of motion for leave to amend postconviction relief motion; (3) defendant was not entitled to funding for expert in neuropsychology at trial or on postconviction relief motion; (4) defendant was not entitled to discovery of whether commonwealth made deals or agreements with crucial prosecution witnesses or of any documents commonwealth had relating to defendant's family; (5) trial counsel was not ineffective in failing to introduce commonwealth's previous, withdrawn plea bargain with defendant, as mitigating evidence at penalty phase; and (6) defendant failed to establish that jury improperly considered possibility of parole or slept during punishment phase.

Affirmed.

[Keller, J.](#), filed a dissenting opinion in which [Stumbo, J.](#), joined.

West Headnotes (40)

- [1] **Criminal Law** Matters which either were or could have been adjudicated previously, in general

Criminal Law Counsel

Review of claims raised in a collateral attack by a postconviction relief motion is limited to the issues that were not and could not be raised on direct appeal, and an issue raised and rejected on direct appeal may not be relitigated in postconviction relief proceedings by simply claiming that it amounts to ineffective assistance of counsel. [U.S.C.A. Const.Amend. 6](#); [Rules Crim.Proc., Rule 11.42](#).

48 Cases that cite this headnote

- [2] **Criminal Law** Deficient representation and prejudice in general

In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. [U.S.C.A. Const.Amend. 6](#).

30 Cases that cite this headnote

- [3] **Criminal Law** Deficient representation and prejudice in general

Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won. [U.S.C.A. Const.Amend. 6](#).

31 Cases that cite this headnote

- [4] **Criminal Law** Prejudice in general

Critical issue to determining whether counsel was ineffective is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. [U.S.C.A. Const.Amend. 6](#).

55 Cases that cite this headnote

[5] **Criminal Law** 🔑 Purpose

Purpose of the Rule of Criminal Procedure governing motions for postconviction relief is to provide a forum for known grievances, not to provide an opportunity to research for grievances. [Rules Crim.Proc., Rule 11.42.](#)

12 Cases that cite this headnote

[6] **Criminal Law** 🔑 Deficient representation in general

In considering ineffective assistance of counsel claims, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. [U.S.C.A. Const.Amend. 6.](#)

55 Cases that cite this headnote

[7] **Criminal Law** 🔑 Standard of Effective Assistance in General

Defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. [U.S.C.A. Const.Amend. 6.](#)

53 Cases that cite this headnote

[8] **Criminal Law** 🔑 Presumptions and burden of proof in general

Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [U.S.C.A. Const.Amend. 6.](#)

33 Cases that cite this headnote

[9] **Criminal Law** 🔑 Adequacy of Representation

Right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial. [U.S.C.A. Const. Amend. 6.](#)

2 Cases that cite this headnote

[10] **Criminal Law** 🔑 Degree of proof

In a postconviction relief proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the postconviction proceeding. [Rules Crim.Proc., Rule 11.42.](#)

15 Cases that cite this headnote

[11] **Criminal Law** 🔑 Post-conviction relief

Even when the trial judge does conduct an evidentiary hearing in a postconviction relief proceeding, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. [Rules Crim.Proc., Rule 11.42.](#)

34 Cases that cite this headnote

[12] **Criminal Law** 🔑 Necessity for Hearing

Evidentiary hearing in postconviction relief proceedings is not required to consider issues already refuted by the record in the trial court. [Rules Crim.Proc., Rule 11.42.](#)

5 Cases that cite this headnote

[13] **Criminal Law** 🔑 Necessity for Hearing

Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because the Rule of Criminal Procedure governing postconviction relief proceedings does not require a hearing to serve the function of discovery. [Rules Crim.Proc., Rule 11.42.](#)

12 Cases that cite this headnote

[14] **Criminal Law** 🔑 Necessity for Hearing

Even in a capital case, a postconviction relief movant is not automatically entitled to receive an evidentiary hearing, and an evidentiary hearing is not required about issues refuted by the record of the trial court. [U.S.C.A. Const.Amend. 6](#).

9 Cases that cite this headnote

[15] Criminal Law 🔑 [Necessity for Hearing](#)

Defendant was not entitled to hearing on postconviction relief motion, where many of defendant's claims were raised and disposed of on direct appeal, some were based on speculation or were not pled with particularity, defendant failed to prove prejudice on any claims, defendant had opportunity to present claims in lengthy and detailed motion accompanied by exhibits, there was no indication that defendant was denied due process under either federal or state constitution, motion raised numerous factual issues about counsel's conduct, none of which were persuasive, and special judge who presided over postconviction proceedings was same judge who presided over trial. [Rules Crim.Proc., Rule 11.42](#).

6 Cases that cite this headnote

[16] Criminal Law 🔑 [Necessity for Hearing](#)

If the record refutes the claims of errors in a postconviction relief motion, there is no need for an evidentiary hearing. [Rules Crim.Proc., Rule 11.42](#).

[17] Criminal Law 🔑 [Post-conviction proceeding not a substitute for appeal](#)

Criminal Law 🔑 [Conduct of trial in general](#)

Postconviction relief afforded by the Rules of Criminal Procedure is not a substitute for appeal and does not permit review of alleged trial errors which fall short of a denial of due process. [Rules Crim.Proc., Rule 11.42](#).

3 Cases that cite this headnote

[18] Criminal Law 🔑 [Necessity for Hearing](#)

Evidentiary hearing on a postconviction relief motion is not required about issues refuted by the record of the trial. [Rules Crim.Proc., Rule 11.42](#).

5 Cases that cite this headnote

[19] Criminal Law 🔑 [Jury selection and composition](#)

Defendant failed to establish that trial counsel was ineffective for preventing defendant from freely exercising peremptory challenges, even though defendant asserted that he wanted to peremptorily strike two jurors, where defendant did not indicate whether he desired to strike other jurors who were peremptorily challenged, and did not provide any reason that defendant gave to counsel in support of alleged desire, and where trial judge allowed defendant to exercise full number of available peremptory challenges. [U.S.C.A. Const.Amend. 6](#); [Rules Crim.Proc., Rule 9.40](#).

1 Case that cites this headnote

[20] Jury 🔑 [Criminal prosecutions](#)

Rules specifying the number of peremptory challenges to jurors are not mere technicalities, they are substantial rights and are to be fully enforced.

[21] Jury 🔑 [Objections and exceptions](#)

Defendant's peremptory challenge claims were waived when jury was sworn at trial. [Rules Crim.Proc., Rule 9.36\(3\)](#).

1 Case that cites this headnote

[22] Criminal Law 🔑 [Particular Issues](#)

Defendant's allegation with respect to juror, that juror was "a woman whose father had been a police officer," did not satisfy requirement of specificity in Rule of Criminal Procedure governing postconviction relief. [Rules Crim.Proc., Rule 11.42\(2\)](#).

[23] Criminal Law 🔑 **Impaneling jury in general**

Alleged error concerning whether defendant was able to freely exercise his peremptory challenges was not of nature which deprived defendant of basic protections, without which criminal trial could not reliably serve its function as vehicle for determining guilt or innocence, and thus, defendant did not demonstrate structural error.

1 Case that cites this headnote

[24] Jury 🔑 **Peremptory Challenges**

There is no constitutional right to peremptory challenges to jurors.

1 Case that cites this headnote

[25] Constitutional Law 🔑 **Post-conviction relief**
Criminal Law 🔑 **Petition or Motion**

Defendant was not denied due process or fundamental fairness by denial of motion for leave to amend motion for postconviction relief, where verdict was rendered approximately four years prior to motion, defendant had sufficient time in which to investigate issues and formulate arguments to present to court, and he tendered no amended petition and simply solicited open end approval to amend. *U.S.C.A. Const.Amend. 14; Rules Crim.Proc., Rule 11.42.*

1 Case that cites this headnote

[26] Costs, Fees, and Sanctions 🔑 **Medical or psychiatric witnesses or assistance**

Defendant had full benefit of mental health evaluations and experts during trial, and thus was not entitled to funding for expert assistance in neuropsychology, even though expert offered by defendant said that there was high degree of certainty that it was possible that defendant may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance, where opinion was mere speculation. *Rules Crim.Proc., Rule 11.42.*

2 Cases that cite this headnote

[27] Criminal Law 🔑 **Effectiveness of Counsel**

Rule of Criminal Procedure governing postconviction relief proceedings does not provide for a relitigation of the performance of trial counsel. *U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.*

[28] Criminal Law 🔑 **Discovery and disclosure in general**

Defendant was not entitled to discovery of whether commonwealth made deals or agreements with crucial prosecution witnesses or of any documents in possession of commonwealth relating to defendant's family, in postconviction relief proceedings, in light of fact that postconviction relief proceedings were intended to provide basis for known grievances and not opportunity for fishing expedition. *Rules Crim.Proc., Rule 11.42.*

10 Cases that cite this headnote

[29] Criminal Law 🔑 **Matters Already Adjudicated**

Criminal Law 🔑 **Qualification; bias**

Criminal Law 🔑 **Right to counsel**

Defendant was not entitled to postconviction relief based on general allegations of ineffective assistance of trial counsel with regard to individual jurors and jury pool, where petition failed to state with particularity facts that would warrant relief, some allegations were raised and rejected on direct appeal, and complaint that was not raised on direct appeal concerned juror who appeared open to range of penalties and willing to consider all evidence. *U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.*

28 Cases that cite this headnote

[30] Criminal Law 🔑 **Preparation for trial**

There is a necessity for complete investigation by defense counsel, and defense counsel has duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all

the circumstances, applying a heavy measure of deference to the judgment of counsel. [Rules Crim.Proc., Rule 11.42.](#)

42 Cases that cite this headnote

[31] Criminal Law 🔑 Preparation for trial

Reasonable investigation by trial counsel is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct, but rather the investigation must be reasonable under all the circumstances. [Rules Crim.Proc., Rule 11.42.](#)

67 Cases that cite this headnote

[32] Criminal Law 🔑 Experts; opinion testimony

Trial counsel was not ineffective in not seeking expert assistance to evaluate defendant's mental status and psychological make up early in preparation for trial, even though one report mentioned a possibility of brain damage, where report did not make a finding of brain damage, clinical forensic psychologist who examined defendant in preparation for trial specifically found no evidence that defendant was psychotic, suffered from any serious neurological defect, or was otherwise retarded, and there was no reasonable probability that evaluation would have changed result reached by jury or sentence fixed by it. [U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.](#)

2 Cases that cite this headnote

[33] Costs, Fees, and Sanctions 🔑 Medical or psychiatric witnesses or assistance

The right to funding for expert psychiatric assistance only arises when a defendant's mental state is seriously in question.

2 Cases that cite this headnote

[34] Criminal Law 🔑 Other particular issues in death penalty cases

Defendant failed to establish any improper consideration of parole by jury when it

was deliberating about death penalty, and consequently failed to establish that trial counsel was ineffective in doing nothing to seek a remedy or preserve issue for appellate review. [U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42.](#)

[35] Criminal Law 🔑 Statements, Affidavits, and Testimony of Jurors

Jury testimony that it had improperly considered parole is incompetent under rules prohibiting jurors from being examined to establish grounds for a new trial.

2 Cases that cite this headnote

[36] Criminal Law 🔑 Sentencing

Allegation in postconviction motion regarding jurors sleeping during part of penalty phase was insufficiently specific where defendant did not state which jurors were alleged to be sleeping, did not indicate when sleeping occurred, and did not indicate what information jurors supposedly missed, or how information would have changed outcome. [U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 11.42\(2\).](#)

2 Cases that cite this headnote

[37] Criminal Law 🔑 Presentation of evidence in sentencing phase

Trial counsel was not ineffective in failing to introduce Commonwealth's previous, withdrawn plea bargain with defendant, as mitigating evidence at penalty phase of capital murder trial, where the question of a defendant's right to introduce evidence of a withdrawn guilty plea as mitigating evidence was a novel legal theory in the Commonwealth. [U.S.C.A. Const. Amend. 6; Rules of Evid., Rules 408, 410.](#)

6 Cases that cite this headnote

[38] Criminal Law 🔑 Particular Cases and Issues

While the failure to advance an established legal theory may result in ineffective assistance of counsel, the failure to advance a novel theory never will. [U.S.C.A. Const.Amend. 6.](#)

13 Cases that cite this headnote

[39] Criminal Law 🔑 Other particular issues

Defense counsel was not ineffective in failing to request that a “no adverse inference” instruction relating to defendant’s right to remain silent be given at penalty phase. [U.S.C.A. Const.Amend. 6](#); [Rules Crim.Proc., Rule 11.42](#).

2 Cases that cite this headnote

[40] Criminal Law 🔑 Presentation of evidence in sentencing phase

Defense counsel was not ineffective in failing to introduce, as evidence in mitigation in death penalty sentencing phase, a letter written by defendant in which he admitted committing murders, expressed sorrow at having caused pain and suffering, and expressed desire to die for having done so; defense counsel stated a desire not to reemphasize defendant’s guilt phase testimony to the jury. [U.S.C.A. Const.Amend. 6](#); [Rules Crim.Proc., Rule 11.42](#).

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

[WINTERSHEIMER](#), Justice.

This appeal seeks post-conviction relief from an order denying Haight a hearing ***441** on his [RCr 11.42](#) motion, denying him an opportunity to amend or supplement his motion, denying a request for discovery, denying him funds for experts, as well as denying the motion itself.

Haight has been the subject of three published Opinions of this Court. His first conviction was reversed by a majority of this Court in [Haight v. Commonwealth, Ky., 760 S.W.2d 84 \(1988\)](#). Subsequently, Haight sought a ruling that would require the Commonwealth not to seek the death penalty upon retrial. This Court resolved that issue against him in [Haight v. Williamson, Ky., 833 S.W.2d 821 \(1992\)](#). After the case was removed from Garrard County to Jefferson County and a special judge appointed, Haight was again convicted of two intentional murders and sentenced to death. He was also sentenced to two concurrent terms of twenty years in prison for two counts of first degree robbery and five years imprisonment for possession of a handgun by a convicted felon. The conviction and sentences were affirmed in [Haight v. Commonwealth, Ky., 938 S.W.2d 243 \(1996\)](#).

In this [RCr 11.42](#) appeal, Haight raises twelve issues and identifies as one of the more significant issues, the question of whether he was entitled to an evidentiary hearing on his motion. The essential facts are that after having escaped from a county jail, and in the course of committing first-degree robbery, Haight killed two victims in a parked car by inflicting multiple gunshot wounds upon them. Haight admitted at trial that he killed the two people and moved their car to enable him to continue his flight. This Court has reviewed each of the twelve arguments presented on appeal.

[1] We believe it is valuable to again set out the standard of review of claims raised in a collateral attack under [RCr 11.42](#), alleging ineffective assistance of counsel at the original trial. Such a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. [Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 \(1998\)](#); [Brown v. Commonwealth, Ky., 788 S.W.2d 500 \(1990\)](#) and [Stanford v. Commonwealth, Ky., 854 S.W.2d 742 \(1993\)](#).

[2] [3] [4] [5] The standards which measure ineffective assistance of counsel are set out in [Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 \(1984\)](#); accord [Gall v. Commonwealth, Ky., 702 S.W.2d 37 \(1985\)](#); [Sanborn, supra](#). In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. [Strickland, supra](#).

“Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.”  *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam v. Commonwealth, Ky.*, 652 S.W.2d 856, 858 (1983).

[6] In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that *442 counsel rendered reasonable professional assistance. See  *Morrow*;  *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

[7] [8] [9] A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *McQueen v. Commonwealth, Ky.*, 949 S.W.2d 70 (1997). *Strickland* notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

[10] [11] In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth, Ky.*, 433 S.W.2d 117, 118 (1968). Even when the trial judge does conduct an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge.  *Sanborn*; *McQueen v. Commonwealth, Ky.*, 721 S.W.2d 694 (1986);  *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir.1996).

I. Lack of Evidentiary Hearing

Haight filed a 55–page motion to vacate the judgment pursuant to RCr 11.42 on October 14, 1997. The

Commonwealth responded to each claim and indicated that there were no grounds which would warrant an evidentiary hearing. In any event, on March 16, 1998, a hearing was held to consider issues such as the discovery motion and the motion to amend. On September 9, 1998, the trial judge entered an order denying the RCr 11.42 motion and the discovery motion and also declined to have any ex parte hearing for expert funding. During this process, the trial judge entered an order stating that the March 16th hearing was for the purpose of determining whether the matters in the RCr 11.42 motion required a hearing. The trial judge asked counsel during the March 16th hearing, what claims he planned to submit in an amendment and defense counsel indicated that he could not state with specificity what those issues would be.

[12] [13] [14] An evidentiary hearing is not required to consider issues already refuted by the record in the trial court. Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery.  *Sanborn*, citing *Stanford v. Commonwealth, Ky.*, 854 S.W.2d 742 (1993); *Stanford*, citing  *Skaggs v. Commonwealth, Ky.*, 803 S.W.2d 573 (1990), stands for the proposition that even in a capital case, a RCr 11.42 motion is not automatically entitled to receive an evidentiary hearing. *Sanborn* states in pertinent part, “An evidentiary hearing is not required about issues refuted by the record of the trial court”  *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), supported the conclusion that an evidentiary hearing is not always required in an ineffective assistance of counsel claim.

[15] [16] Haight was not entitled to a hearing on the motion, and he was not denied a full and fair opportunity to present his claim. As stated in  *Bowling v. Commonwealth, Ky.*, 981 S.W.2d 545 (1998), citing *Stanford*, “If the record refutes the claims of errors, there is no need for an evidentiary hearing.”

Many of the claims of Haight have already been raised and disposed of on direct appeal and are not to be heard now *443 under the ruse of ineffective assistance of counsel. Some of the allegations are based on speculation or are not pled with the degree of particularity required by RCr 11.42(2). Haight failed to prove prejudice on any of the claims. He received a fair trial and is not entitled to an evidentiary hearing. He had a complete opportunity to present all of his claims which he did in a lengthy and detailed

RCr 11.42 motion accompanied by a hundred pages of exhibits. An examination of these documents indicates that the trial judge was correct in determining that no valid claims were presented. The trial judge was also correct when he determined that the sentence was not constitutionally invalid for lack of due process, for ineffective assistance of counsel or for any other reason ascertainable by the trial court.

There is no indication that Haight was denied due process under either the federal or state constitution. His motion raised numerous factual issues about defense counsel's failure to properly investigate, present relevant and important evidence, refusal to carry out the wishes of the defendant, failure to seek remedies for prejudicial occurrences at trial and failure to raise and preserve errors during and after trial. None of his arguments are persuasive.

[17] The post-conviction relief afforded by this rule is not a substitute for appeal and does not permit review of alleged trial errors which fall short of a denial of due process. *Smith v. Commonwealth, Ky.*, 412 S.W.2d 256 (1967). Clearly, the trial judge was able to resolve the issues from the face of the record or determine that the allegations, even if true, were not sufficient to invalidate the convictions. *Wilson v. Commonwealth, Ky.*, 975 S.W.2d 901 (1998). It should be remembered that the special judge who presided over the RCr 11.42 proceedings was the same judge who presided over the trial.

As noted in *Sanborn*, the collateral attack authorized by RCr 11.42, is limited to issues that were not and could not be raised on direct appeal. Any issue raised and rejected on direct appeal may not be relitigated in such proceedings by claiming that they amount to ineffective assistance of counsel. *Brown v. Commonwealth, Ky.*, 788 S.W.2d 500 (1990); *Stanford*.

[18] An evidentiary hearing is not required about issues refuted by the record of the trial. *Stanford*. Conclusionary allegations which are not supported by particular facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.

II. Peremptory Challenges

[19] The trial judge allowed Haight to exercise the full number of peremptory challenges pursuant to RCr 9.40. Haight argues that the right to exercise peremptory challenges

has been deemed to be a substantial right and cites *Thomas v. Commonwealth, Ky.*, 864 S.W.2d 252 (1993) or a substantive right citing *Bowling Green Municipal Utilities v. Atmos Energy Corp., Ky.*, 989 S.W.2d 577 (1999). He claims that it was his defense counsel who prevented him from freely exercising his peremptory challenges.

[20] An analysis of the authorities cited by Haight indicates that *Thomas, supra*, stated that "The rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced." Here, Haight received the full number of peremptory challenges and his attempt to characterize this claim as ineffective assistance is unpersuasive.

*444 [21] [22] We must observe that his peremptory challenge claims were waived when the jury was sworn at trial. RCr 9.36(3). His allegation of error is not proper in an RCr 11.42 proceeding. Haight now asserts that he wanted to peremptorily strike two jurors, but the motion does not indicate whether he desired to strike those jurors who were peremptorily challenged or any reason that Haight gave to counsel in support of his alleged desire. The allegation with respect to a juror as "being a woman whose father had been a police officer" does not satisfy the requirement of specificity required in RCr 11.42(2).

[23] Haight's reliance on *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), is without merit. Invoking the doctrine of structural error does not persuade us that the errors claimed here are of the nature which deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence. There was no structural error in providing Haight the number of peremptory challenges provided by the rule and this Court rejected the allegations of juror bias on direct appeal. Haight cannot show prejudice by simply alleging ineffective assistance of counsel. There is no reasonable probability that the result of his trial would have been any different under the standards provided in *Strickland*.

[24] There is no constitutional right to peremptory challenges. *McQueen, citing Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). See also *United States v. Boyd*, 86 F.3d 719 (7th Cir.1996), for a review of a situation where a criminal defendant makes a post-verdict challenge to the exercise of peremptory strikes by

defense counsel. The conduct of trial counsel did not deprive Haight of this right to use peremptory challenges. Counsel was not ineffective.

III. Amended Motion

[25] Haight argues that he was denied a complete opportunity to present his [RCr 11.42](#) claims because the trial judge did not allow him to file an amended or supplemental motion. Haight admits that he told the court that it would be important to amend his motion and that he would need at least six months to do so. Within that six-month period, he filed only a motion for leave to amend with no actual amendment. At the hearing of March 16, 1998, the trial judge asked Haight what other grounds should be considered. Haight's counsel indicated that they needed funding and they were not comfortable with filing an amendment and he could not state with specificity what those other issues would be. The purpose of [RCr 11.42](#) is to provide the opportunity to present known grievances and not the chance to research potential grievances. *Gilliam v. Commonwealth, Ky.*, 652 S.W.2d 856 (1983). The verdict was rendered in 1994. Haight had sufficient time in which to investigate the issues and formulate arguments to present to the Court. He tendered no amended petition and simply solicited an open end approval to amend. The trial judge did not deny Haight an opportunity to present his claims. He was not denied any due process or fundamental fairness.

IV. Expert Funding

Haight argues that he wanted funds during the post-conviction proceedings to hire a neuropsychologist to examine him for organic brain damage. Trial counsel had claimed that he did not know of the need for a neurological examination until after the trial had started.

*445 [26] Before Haight made any request for funding based on his indigent status, the Commonwealth moved to prohibit any ex parte communications between the defense and the trial judge. The trial judge, relying on *Sanborn*, denied the request for an ex parte hearing for expert fundings, noting that there is no authority to support ex parte motions for hearings for expert fundings in an [RCr 11.42](#) motion. Haight contends that he wanted to ask for funding for expert assistance in neuropsychology in order to prove ineffective assistance of counsel at trial. The trial judge correctly

interpreted *Sanborn* in reaching his decision. This Court has already found that Haight had the full benefit of mental health evaluations and experts during his trial. *Haight, supra*.

[27] The expert offered by Haight said that there was a high degree of certainty that it's possible that Haight may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance. This is mere speculation. A [RCr 11.42](#) proceeding does not provide for a relitigation of the performance of trial counsel. It should be recalled that the report by the expert was not filed until after the circuit court denied the [RCr 11.42](#) motion. We find that Haight has not demonstrated any prejudice in this regard. He was not denied fundamental due process under either the federal or state constitution.

V. Discovery

[28] Haight argues that he was denied discovery. Haight filed a written motion for discovery of certain documents and information thought to be in the possession of the Commonwealth. The prosecutor objected. Haight contends that he sought to discover whether the Commonwealth had made deals or agreements with crucial prosecution witnesses. He also sought to produce any documents in the possession of the Commonwealth relating to the background of the Haight family.

The trial judge correctly denied the discovery motion based on *Sanborn* because discovery is not authorized in a post-conviction proceeding. The citation by Haight to *Bowling v. Commonwealth, Ky.*, 926 S.W.2d 667 (1996) and  *Skaggs v. Redford, Ky.*, 844 S.W.2d 389 (1992) are incorrect. *Skaggs*, holds that discovery is not necessary because the material would have already been turned over during the prosecution phase or the trial phase. Citation to  *East v. Scott*, 55 F.3d 996 (5th Cir.1995) is also inappropriate and does not provide authority for discovery in [RCr 11.42](#) proceedings. Haight was not entitled to discovery because the purpose of the [RCr 11.42](#) motion is to provide a basis for known grievances and not an opportunity to conduct a fishing expedition for possible grievances. See  *Sanborn* at 910. There was no violation of the rights of Haight in denying discovery at this stage.

VI. Jury Issues

Haight now complains that defense counsel failed to render effective assistance when he made no motions to strike for cause unqualified jurors, when he did not question certain jurors about publicity or mitigating factors, when he incorrectly defined extreme emotional disturbance, when he failed to move for a mistrial and when he did not investigate the under representation of African Americans in the jury pool.

[29] The trial judge acted correctly in denying the RCr 11.42 motion with respect to the allegations concerning individual jurors and the jury pool. The petition presented failed to state with particularity facts which, if true, would warrant relief and that defense trial counsel was constitutionally ineffective. There is no reason to *446 believe that but for trial defense counsel's errors, there is any reasonable probability that the result of the trial would have been any different or that Haight did not receive a fair trial and a sentence that was reliable.

The questions relating to an African American juror were rejected on direct appeal by this Court.  *Haight*, 938 S.W.2d 243 (1996), when it held that the defense decision to reject objections to the juror was legitimate trial strategy.

The complaint about juror Kaiser was not raised in direct appeal. Our review of the juror's answers indicates that he was open to a range of potential penalties and willing to consider all the evidence before fixing a sentence, if any. Allegations regarding juror Helton were rejected in the direct appeal in regard to his exposure to a newspaper article. Nothing in the record indicates that juror Carnes would have been disqualified even if a motion had been properly made. The same is true of juror Cunagin. The complaints about the voir dire of two jurors regarding extreme emotional disturbance do not require RCr 11.42 relief. The allegation with respect to juror Donahue was rejected in the direct appeal of this case. Defense counsel was not ineffective and Haight received a fundamentally fair trial by an impartial jury.

VII. Adequate Investigation

[30] [31] This Court has recognized the necessity for complete investigation by defense counsel. We must agree with the view expressed by the United States Supreme Court in *Strickland*, *supra*, to the effect that counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure

of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.  *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir.1998). The investigation must be reasonable under all the circumstances. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir.1992).

[32] Haight now complains that trial counsel was ineffective and deficient in not seeking expert assistance to evaluate his mental status and psychological makeup as early as possible in preparation for trial. In December of 1985, trial counsel filed a motion for funds for expert witnesses and for an ex parte hearing. The trial judge heard arguments and overruled the motions but granted leave to the defense to establish a need for experts. A month later, the defense made a request for a continuance, stating that it could not make requests for experts until after discovery was completed.

Here, Haight maintains that the need for neuropsychological evaluation and psychopharmacologist evaluation should have been obvious to defense counsel. He asserts that although counsel may have been prevented from expending funds for expert witnesses between May 8, 1991, until *Haight v. Williamson*, *supra*, was decided on May 14, 1992, counsel was not prevented from otherwise investigating and preparing the case.

On direct appeal, Haight made a claim that he was improperly denied the expert assistance of a neuropsychologist which was rejected when his conviction was affirmed.

The clinical forensic psychologist who examined Haight in preparation for trial, specifically found no evidence that Haight was psychotic or suffered from any serious neurological deficit or was otherwise retarded. *447 This expert testified during the penalty phase of the trial. Here, as in his direct appeal, Haight is creating an issue based on the same brief references and reports from the mid-1970s which mentioned a possibility of brain damage but did not make such a finding.

[33] The right to funding for expert psychiatric assistance only arises when a defendant's mental state is "seriously in question."  *Hunter v. Commonwealth*, Ky., 869 S.W.2d 719, 722 (1994), quoting  *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Defense counsel was not ineffective for relying on the opinion of an expert

he obtained who determined that Haight had no significant neurological deficit. See *Walls v. Bowersox*, 151 F.3d 827 (8th Cir.1998). Trial counsel is required only to conduct a reasonable investigation.  *Mahaffey v. Page*, 151 F.3d 671 (7th Cir.1998).

In this case, there is no reasonable probability that the omitted evaluations would have changed the result reached by the jury or the sentencing fixed by it. He was not prejudiced by the alleged failure of trial counsel to investigate and present defense and mitigating evidence. There is no showing of either deficient performance or substantial prejudice which are required to present an ineffectiveness of counsel argument.

VIII. Possibility of Parole

[34] [35] Haight claims that the jury improperly considered the possibility of parole when it was deliberating about the death penalty and his trial counsel did nothing to seek a remedy or preserve the issue for appellate review. This argument is speculative. Jury testimony that it had improperly considered parole is incompetent under rules prohibiting jurors from being examined to establish grounds for a new trial. Cf.  *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985).

Here, Haight has failed to demonstrate any improper consideration of parole by the jury, or any improper extrajudicial influence. Consequently, no ineffective assistance of counsel or prejudice has been shown.

IX. Sleeping Jurors

[36] Haight argues that trial counsel was ineffective because he failed to move for a mistrial or make any effort to get factual details into the record regarding the alleged sleeping of jurors during part of the penalty phase. He also contends that the trial judge committed error when he took no action on his own initiative.

Haight does not plead this claim with the specificity required by RCr 11.42(2). He does not state which jurors were alleged to be sleeping and he does not indicate when the event occurred, if it actually took place. Haight is not entitled to the requested relief.  *Sanborn* at 911.

Haight does not indicate what information the jurors supposedly missed and how that would have changed the outcome of his trial. If defense counsel did see jurors with their eyes closed, there is no evidence that they were sleeping. In addition there is no evidence that the trial judge ever observed the alleged sleeping.

X. Previous Plea Bargain

[37] Haight maintains that defense counsel was ineffective by not introducing evidence during the penalty phase that the Commonwealth had previously entered into a plea bargain. He asserts that he has a right to have the jury which sentenced him consider mitigating evidence. The question of whether a *defendant* has the right to introduce evidence of a withdrawn guilty plea as mitigating evidence has not been decided in the Commonwealth. *448 There appears to be a split of authority on the issue. See *Wright & Graham, Federal Practice and Procedure: Evidence* § 5348 (1980). In terms of our rules, there is a potential conflict between KRE 410, which provides that withdrawn guilty pleas are not admissible against the defendant, and KRE 408, which provides that compromises and offers of compromise are inadmissible. The Commonwealth argues that Haight's prior guilty plea is inadmissible under KRE 408. The argument is not without merit or support. See *id.* On the hand other, Haight argues that KRE 408 is limited to civil cases. See  *United States v. Baker and Mazzilli*, 926 F.2d 179 (2nd Cir.1991), construing FRE 408.

[38] Under the *Strickland* standard for ineffective assistance of counsel, the first thing the aggrieved defendant must show is “that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”  *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693. We are at a loss to see how failure to move to admit evidence—the admissibility of which is still an open question—can ever sink below sufficient performance into deficiency. Further, how can it be called an error that deprived Haight of his constitutional right to counsel? If the evidence is not admissible, there can be no error. See *Commonwealth v. Davis*, Ky., 14 S.W.3d 9, 11 (1999). Thus, the error is at most potential error that is in the air, weightless and awaiting decisional law that may or may not give it legal gravity. In short, while the failure to advance an established legal

theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will.

XI. No Adverse Inference

[39] Haight complains that trial counsel was ineffective by not requesting that a “No adverse inference” instruction relating to the defendant’s right to remain silent be given at the penalty phase. Haight testified at the guilt phase of this trial, but he did not testify during the penalty phase. His counsel did not tender a “No adverse inference” instruction, did not request such an instruction or object to the failure of the court to give one. He asserts that it was incumbent upon the trial judge to instruct the jury that the defendant did not have an obligation to testify in mitigation and no adverse influence could be drawn from his failure to do so.

This claim does not amount to ineffective assistance of counsel. The allegation is not properly presented on his appeal because it was an issue on direct appeal of the case. Haight did testify during the guilt phase of his trial and admitted killing the two victims.  *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), is not applicable.

XII. The Letter

[40] Haight argues that defense counsel was ineffective when he did not introduce into mitigation evidence a letter which Haight had written to a member of one victim’s family. In the letter, Haight admitted committing the murders, expressed sorrow at having caused so much pain and suffering, and further expressed a desire to die for having done so. Defense counsel clearly stated a desire not to reemphasize Haight’s guilt phase testimony to the jury when it considered mitigating evidence in the penalty phase. The letter stated in part, “If you think I should pay with my life, then I’d have to agree with you” Defense counsel was not ineffective in not introducing the letter into mitigation.

***449** Haight received reasonably effective assistance of counsel. Any alleged ineffectiveness was not so serious as to deprive him of a fair trial and there is no reasonable probability that a different result could have been achieved. An exhaustive review of the record in this case indicates that defense counsel was not ineffective and that Haight received a fundamentally fair trial with a reliable and fair sentence.

The judgment of the circuit court is affirmed.

LAMBERT, C.J., COOPER, GRAVES, JOHNSTONE, and WINTERSHEIMER, JJ., concur.

KELLER, J., dissents by separate opinion, with STUMBO, J., joining that dissent.

KELLER, Justice, dissenting from order denying petition for rehearing and modifying opinion.

I believe we should grant Haight’s petition for rehearing to properly evaluate his claim that his trial counsel was ineffective in failing to introduce evidence that the Commonwealth offered Haight a plea bargain to a total sentence of life imprisonment without possibility of parole for twenty-five years. Although I joined the majority opinion when the Court originally considered Haight’s appeal from the trial court’s denial of RCr 11.42 relief, after reviewing the authority Haight cites in his petition, I believe Haight has demonstrated that the Court “misconceived the issues presented on the appeal or the law applicable thereto.”¹

In our original opinion, we addressed Haight’s claim in Section X and found no deficient performance because KRE 408 and KRE 410 prohibited its introduction:

Haight maintains that defense counsel was ineffective by not introducing evidence during the penalty phase that the Commonwealth had previously entered into a plea bargain. He asserts that he has a right to have the jury which sentenced him consider mitigating evidence. Defense counsel was not ineffective for failing to introduce such an agreement. KRE 408 provides that compromise and offers of compromise are inadmissible. The general inadmissibility of withdrawn guilty pleas is also noted in KRE 410.

Haight argues his trial counsel should have introduced as mitigation evidence the “offer” made by the Commonwealth

during plea negotiations—in this case, an offer to spare his life.²

Although we suggested a policy of “general inadmissibility” emanates from KRE 410, that rule actually states that such evidence “is not, in any civil or criminal proceeding, admissible *against the defendant* who made the plea or was a participant in the plea discussion.”³ KRE 410 contains no limitations upon evidence introduced *by the defendant*.

The authority Haight cites in his petition convinces me that we incorrectly construed KRE 408 as embracing offers and statements made during plea negotiations contrary to the weight of authority limiting the identical federal rule's scope to offers *450 to compromise civil matters.⁴ I now recognize that the majority's interpretation of KRE 408 illogically treated KRE 410 as redundant. The Kentucky Evidence Rules Study Committee's Commentary to KRE 410 demonstrates that although policy judgments behind KRE 408 and KRE 410 are identical, each rule addresses a different context:

The considerations underlying Rule 408 on compromises and offers of compromise apply with equal force to criminal pleas, offers to plead, and plea discussions. Resolution of criminal cases through agreement is no less important than the resolution of civil cases through settlement. On the basis of these premises, Rule 410 adopts rules designed to remove evidentiary obstacles to candid discussions between the prosecution and defense in criminal cases and to protect defendants against subsequent use of evidentiary products of the plea process.⁵

The Commonwealth cites only one case to the contrary, *United States v. Verdoorn*,⁶ which dates back to shortly after the adoption of the Federal Rules of Evidence and in which the Eighth Circuit Court of Appeals based its conclusion largely on a Federal Rule of Criminal Procedure.⁷ The

Verdoorn Court does draw support from “the rationale of [FRE] 408,”⁸ and the Court describes FRE 408 as a rule which fosters plea-bargaining by encouraging confidential and meaningful dialogue. Courts, however, make decisions about whether evidence is admissible or not by examining the rules themselves, not the “policies” which underlie them. We should turn to those underlying policies only where the language of the rule itself is ambiguous. We can always amend the rules of evidence if we find that they do not serve the ends for which we adopted them. Our rules unquestionably embody the policies upon which they are based. Allowing the policy to consume the rule itself, however, allows the tail to wag the dog.

In any event, the language of KRE 408 itself plainly excludes evidence of compromise *451 or offers to compromise only when offered “to prove liability or invalidity of the claim or its amount.”⁹ Because of the different sentencing procedures employed in federal court, none of the federal authority addressing FRE 408's relation to offers or statements made during plea negotiations in criminal cases concerns the admissibility of such statements during a separate jury sentencing procedure like the one we have in Kentucky.¹⁰ Even if this Court were to construe KRE 408 to embrace offers and statements made during plea negotiations by adopting an unwarranted and expansive interpretation of “liability” and “claim,” we would fall on our backsides before we could bend over far enough to interpret “its amount” to include a jury's sentencing determination, especially a sentence of death.

In my opinion, the modified opinion is, at best, a slight improvement. The Court now recognizes that the question of KRE 408's applicability to offers and statements made during plea negotiations is a question of first impression for this Court. Instead of answering that question, however, we “fast-forward” to the conclusion and decide that, regardless of this Court's interpretation of KRE 408, Haight's trial counsel did not perform deficiently under *Strickland* by failing to introduce such evidence. I find incredulous our basis for that conclusion, which I would paraphrase as “Because we haven't told attorneys whether this evidence would be admissible, an attorney's failure to introduce it cannot be deficient performance.” I find it inexcusable, however, for this Court, after articulating such a standard for deficient performance, to decline to answer the substantive question, allow the issue to remain unresolved, and offer no guidance to counsel in future cases.

My perceptions are no doubt colored by the fact that, after revisiting the [KRE 408](#) issue, I no longer find it murky, or particularly close. I believe the question of whether the general relevancy requirement at [KRE 401](#) would allow a defendant to introduce evidence of the Commonwealth's offer as mitigation evidence is far closer,¹¹ however, and I believe the Court should grant the petition for rehearing to finally determine both issues. As concerned as I am that the modified majority opinion perpetuates the error we committed originally, however, I am even more troubled by the modified opinion's contention that no deficient performance can result from trial counsel's failure to make arguments new to this Court.¹² This contention *452 raises the *Strickland* deficient performance bar even higher and discourages the type of innovative advocacy necessary to the defense of a capital case.

I believe this Court should grant Haight's petition for rehearing specifically to reconsider his allegation concerning his trial counsel's failure to introduce evidence that the Commonwealth offered him a plea bargain which would have spared his life. My review of the law leads me to believe that this Court misconceived the law applicable to Haight's claim when we held that such evidence would have been inadmissible under [KRE 408](#). We should decide this issue and properly evaluate Haight's claims of ineffective assistance of counsel for the benefit of the bench and bar.

[STUMBO](#), J., joins.

All Citations

41 S.W.3d 436

Footnotes

¹  [CR 76.32\(1\)\(b\)](#).

² See  [Haight v. Commonwealth, Ky., 760 S.W.2d 84, 85 \(1988\)](#):

As a result of these [plea] negotiations, ... the Commonwealth made an offer to appellant whereby, in return for his guilty plea to two counts of murder and two counts of robbery in the first degree, it would recommend a sentence of life imprisonment without possibility of parole for a period of twenty-five years.

Id.

³ [KRE 410](#) (emphasis added).

⁴ See 29 Am.Jur.2d (Evidence) § 512:

[I]t should be noted that [Rule 410](#) generally governs admissibility of evidence of guilty pleas and plea negotiations. It has been held that the rule excluding from evidence offers of compromise or settlement of a claim which is disputed as to either validity or amount applies only to civil litigation, since the reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over criminal charges or a plea bargain do not ordinarily constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount."

Id. See also Charles Alan Wright and Kenneth W. Graham, [23 Federal Practice and Procedure § 5306 at 216–219 \(1980\)](#) ("It seems odd to refer to the prosecution's case against a criminal defendant as a 'claim' ...

The arguments [in favor of doing so] are not convincing." *Id.*);  [United States v. Baker, 926 F.2d 179, 180 \(2d Cir.1991\)](#);  [United States v. Graham, 91 F.3d 213, 218–219 \(D.C.Cir.1996\)](#).

- 5 KRE 410 (Evidence Rules Study Committee Commentary). See also Robert G. Lawson, *Kentucky Evidence Law* (3rd Ed.) § 2.50 & 2.55 (Michie 1993) (“With one important alteration, KRE 408 simply codifies ... long-standing rules.” *Id.* § 250 at 134. “The principles described in KRE 410 are akin to the rules that relate to offers of compromise and settlements.... They are new to Kentucky Law” *Id.* § 255 at 137.).
- 6 528 F.2d 103 (8th Cir.1976).
- 7 *Id.* at 107 (“Plea bargaining is sanctioned by recent amendments to the Federal Rules of Criminal Procedure. Further, Fed. R.Crim. 11(e)(6) (effective August 1, 1975) provides for the general inadmissibility of offers to plea and related statements in connection therewith.” *Id.*).
- 8 *Id.*
- 9 KRE 408.
- 10 See RCR 9.84;  KRS 532.055.
- 11 A offer by the Commonwealth to recommend a life sentence in exchange for a guilty plea to a capital offense would not be direct evidence “bearing on the defendant’s character, prior record or circumstances of the offense, or relative to one of the specified statutory mitigating circumstances,”  *Jacobs v. Commonwealth*, Ky., 870 S.W.2d 412, 419–420 (1994) citing  *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Given a prosecutor’s special ethical responsibilities, see SCR 3.130(3.8) comment 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate”  *Id.*); *Bailey v. Commonwealth*, 193 Ky. 687, 237 S.W. 415, 417 (1922) (“[T]he duty of a prosecuting attorney is not to persecute, but to prosecute He should always be interested in seeing that the truth and the right shall prevail” *Id.*), such an offer might, however, be inferential evidence of the strength of a defendant’s other mitigating evidence.
- 12 I dispute the majority’s characterization of Haight’s argument as “novel.” First, this Court’s past use of that term creates an pejorative connotation roughly equivalent to “frivolous.” See, e.g., *Commonwealth v. Cooper*, Ky., 899 S.W.2d 75, 78 (1995) (“We have admonished against ‘novel theories to revise well-established legal practice and principle [.]’ ” *Id.*); *Holbrook v. Knopf*, Ky., 847 S.W.2d 52, 55 (1992) (“We have no intention that such cases should encourage lawsuits espousing novel theories” *Id.*);  *Neel v. Wagner–Shuck Realty Co.*, Ky., 576 S.W.2d 246, 249 (1978) (“This is a novel theory unsupported by reason or authority.”  *Id.*). My examination of the merits of Haight’s interpretation of KRE 408 leads me to believe that his interpretation is far from frivolous. Second, I believe it is the Commonwealth and not Haight who has suggested this “novel theory.” Haight’s RCr 11.42 petition merely contended that trial counsel should have introduced this evidence, and appears to have relied on the presumption of admissibility for relevant evidence contained in KRE 402 (“All relevant evidence is admissible, except as otherwise provided”  *Id.*). The Commonwealth first suggested that KRE 408 would prohibit the introduction of this evidence.

Appendix G

938 S.W.2d 243
Supreme Court of Kentucky.

Randy Winton HAIGHT, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 94–SC–288–MR.

|
Nov. 21, 1996.

|
Rehearing Denied March 3, 1997.

Synopsis

Defendant was convicted in the Jefferson Circuit Court, Benjamin F. Shobe, Special Judge, of two counts of murder, two counts of first-degree robbery and possession of handgun and he was sentenced to death penalty as well as to various confinement periods. Defendant appealed. The Supreme Court, [Lambert, J.](#), held that: (1) defendant was not entitled to new trial based on juror misconduct; (2) method of reducing number of prospective jurors from 17 to 14 did not violate rule related to jury selection; (3) defendant was not entitled to specific instruction in penalty phase directing juror to consider evidence of his childhood abuse and neglect and deprived family background; (4) defendant failed to show that structure of verdict forms in punishment phase of murder prosecution prejudiced him; (5) court's previous order allowing defendant to withdraw his guilty plea did not preclude imposition of death penalty after trial; (6) prior bad acts evidence was admissible; (7) prosecutor's closing arguments in penalty phase were properly before jury; (8) there was no error in prosecution's introduction of defendant's criminal convictions which occurred and became final subsequent to his commission of offenses giving rise to murder prosecution; (9) trial court's failure to timely file trial judge's report was not grounds for reversal of defendant's conviction for murder or death penalty sentence; and (10) evidence clearly supported jury's finding of statutory aggravating circumstances supporting death penalty.

Affirmed.

West Headnotes (14)

[1] **Criminal Law** 🔑 Sufficiency of proofs as to disqualification of jurors

Trial court's findings that defendant was not entitled to new trial on grounds of juror misconduct arising out of allegations that juror failed to make full disclosure at voir dire regarding fact that he had read newspaper article about murder case were not clearly erroneous; trial court found that juror answered questions truthfully at voir dire, juror gave details as to his memory about article, and fact that during trial, juror remembered some of details of article did not create bias on juror's part.

4 Cases that cite this headnote

[2] **Criminal Law** 🔑 Access to or reading newspapers

Juror exposure to newspaper accounts of offenses do not automatically require reversal of convictions and true test is whether juror misconduct has prejudiced defendant to extent that he had not received fair trial.

1 Case that cites this headnote

[3] **Criminal Law** 🔑 Competency of Jurors and Challenges

Fact that prior to trial juror was told that police officer had been fired upon was not sufficient to show that juror concealed vital information at voir dire or that juror had information that would cause court to believe that jury was partial in their deliberations or their final conclusions.

3 Cases that cite this headnote

[4] **Jury** 🔑 Manner of drawing in general

Initial method of reducing number of prospective jurors from 17 to 14 in which clerk drew three names written on 17 pieces of paper did not violate rule related to jury selection such that redraw in which three names were returned to group and 14 names were drawn was

redundant and fact that same three names were selected for removal was insufficient to show any impropriety. [Rules Crim.Proc., Rule 9.36\(2\)](#).

[5] **Criminal Law** 🔑 [Reading or quoting statutes](#)

Jury instruction in penalty phase of murder prosecution that invited jury to broadly review evidence for circumstances it deemed to have mitigating value and that came directly from statute was correct statement of law and defendant was not entitled to specific instruction directing juror to consider evidence of his childhood abuse and neglect and deprived family background. 📄 [KRS 532.025\(2\)\(b\) 2](#).

[4 Cases that cite this headnote](#)

[6] **Homicide** 🔑 [Degree or classification of manslaughter](#)

Homicide 🔑 [Extreme emotional disturbance or distress; temporary insanity](#)

Jury instruction in liability phase of murder prosecution in which jury was required to find presence of extreme emotional disturbance (EED) to support conviction under first-degree manslaughter charge and absence of EED to support conviction of murder was entirely reasonable where defendant claimed EED as defense and there was evidence from which jury could find EED but that jury would not be required to so find. 📄 [KRS 507.020](#).

[9 Cases that cite this headnote](#)

[7] **Criminal Law** 🔑 [Error in Instructions Cured by Withdrawal or Giving Other Instructions](#)

Criminal Law 🔑 [Effect of verdict or determination](#)

Defendant failed to show that structure of verdict forms in punishment phase of murder prosecution prejudiced him where authorized punishments unmistakably informed jury that term of 20 years to life was available as to each count of murder, jury was told that, if it had doubt as to whether defendant should be sentenced to death, it should sentence him

to imprisonment, and jury passed over jury form which authorized it to find aggravating circumstances and to impose punishment of life without parole for 25 years and instead went to death verdict form and after finding aggravating circumstances, imposed death penalty.

[6 Cases that cite this headnote](#)

[8] **Criminal Law** 🔑 [Mandate and proceedings in lower court](#)

Sentencing and

Punishment 🔑 [Determination and disposition](#)

Supreme Court's previous order allowing defendant to withdraw his guilty plea after defendant was misled into believing that trial court had committed itself to sentence him according to prosecution's recommendation for imprisonment sentence but instead sentenced him to death did not entitle defendant to specific performance of plea agreement and did not preclude imposition of death penalty after trial. [Rules Crim.Proc., Rule 8.10](#).

[8 Cases that cite this headnote](#)

[9] **Double Jeopardy** 🔑 [Particular grounds for relief](#)

Supreme Court's previous order allowing defendant to withdraw his guilty plea after defendant was misled into believing that trial court had committed itself to sentence him according to prosecution's recommendation of imprisonment sentence but instead sentenced him to death did not preclude reprosecution of defendant under double jeopardy clause; error in punishment which led to order allowing defendant to withdraw guilty plea was not type to which jeopardy attaches and did not preclude further prosecution with all lawful punishments being available. [U.S.C.A. Const.Amend. 5](#); [Rules Crim.Proc., Rule 9.84](#).

[9 Cases that cite this headnote](#)

[10] **Criminal Law** 🔑 [Homicide, mayhem, and assault with intent to kill](#)

Criminal Law 🔑 Controverting defense evidence or theory

There was legitimate basis in law for admission of prior bad acts evidence in murder prosecution given defendant's defense of extreme emotional disturbance (EED) and prosecution's burden to prove absence of EED and it was for trial court to determine whether probative value of evidence outweighed its prejudicial effect. [Rules of Evid., Rule 404\(b\)](#).

4 Cases that cite this headnote

[11] Sentencing and Punishment 🔑 Arguments and conduct of counsel

Prosecutor's closing arguments in penalty phase which referred to defendant's extraordinary history of violent criminal conduct was properly placed before jury and did not coax jury into death sentence. 📄 [KRS 532.025\(2\)\(a\)](#).

[12] Sentencing and Punishment 🔑 Other offenses, charges, or misconduct

Defendant's criminal convictions which occurred and became final subsequent murder were admissible in penalty phase of capital murder prosecution. 📄 [KRS 532.025](#).

4 Cases that cite this headnote

[13] Criminal Law 🔑 Verdict or findings
Sentencing and Punishment 🔑 Harmless and reversible error

Trial court's failure to timely file trial judge's report was not grounds for reversal of defendant's murder conviction or death penalty where report was filed and showed that court gave appropriate consideration to aggravating and mitigating evidence. 📄 [KRS 532.075\(1\)](#).

3 Cases that cite this headnote

[14] Sentencing and Punishment 🔑 Sufficiency
Evidence clearly supported jury's finding of statutory aggravating circumstances supporting

death penalty and that sentence was neither excessive nor disproportionate to penalty imposed in similar cases. 📄 [KRS 532.075](#).

3 Cases that cite this headnote

Attorneys and Law Firms

***244** Allison Connelly, Public Advocate, Edward C. Monahan, Bobby C. Simpson, Assistant Public Advocates, Frankfort, for Appellant.

***245** A.B. Chandler III, Attorney General, Kent T. Young, Assistant Attorney General, Criminal Appellate Division, Frankfort, for Appellee.

Opinion

LAMBERT, Justice.

This appeal is from the final judgment of the Jefferson Circuit Court whereby appellant was sentenced to death for having murdered Patricia Vance and David Omer. He was also sentenced to concurrent terms of twenty years imprisonment for two counts of robbery in the first degree and five years imprisonment for possession of a handgun by a convicted felon.

There is no doubt that appellant committed the acts for which he has been held criminally responsible. Rather, upon numerous asserted grounds ranging from deprivation and mistreatment as a child to arbitrary application of the law, appellant claims exemption from the death penalty.

Some of appellant's contentions require thoughtful analysis while others merely urge reconsideration of settled law or are manifestly without merit. Some such issues will be addressed only briefly or not at all. *Stanford v. Commonwealth, Ky.*, 734 S.W.2d 781, 792–93 (1987).

This is the third opinion from this Court reviewing judgments and orders arising out of these crimes. In 📄 *Haight v. Commonwealth, Ky.*, 760 S.W.2d 84 (1988), appellant obtained reversal of his original death sentence on grounds that actions of the trial court had misled him into believing that there was a commitment from the court to impose a sentence other than death. Thereafter appellant came before this Court seeking an extraordinary writ to require

enforcement of the original plea agreement and to prevent any effort to secure the death penalty on grounds that such would amount to prosecutorial vindictiveness. *Haight v. Williamson, Ky.*, 833 S.W.2d 821 (1992). We denied appellant's claims in this regard and other matters upon which he sought review were not addressed. As a result of our decisions arising out of appellant's previous appearances here, the law of the case doctrine will have substantial application. Such matters as have been considered and resolved in the prior cases will not be modified in this proceeding.

A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the Court of Appeals. It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.

 *Williamson v. Commonwealth, Ky.*, 767 S.W.2d 323, 325 (1989) (quoting *Martin v. Frasure, Ky.*, 352 S.W.2d 817, 818 (1961)).

The essential facts are that after having escaped from the Johnson County Jail, in the course of committing first degree robbery, appellant inflicted multiple gunshot wounds upon the victims and thereby caused them to die. After a change of venue from Garrard County to Jefferson County, appellant was tried, convicted and sentenced to death and terms of imprisonment as aforesaid. Such additional facts as may be necessary will be presented in the discussion of each claim of error.

[1] Appellant claims entitlement to a new trial on grounds that juror Helton engaged in misconduct by failing to make full disclosure during voir dire, by prematurely deciding contested issues, and by possibly furnishing proscribed information to other jurors. This claim arises from the fact that prospective juror Helton read a newspaper article concerning the case prior to reporting for jury duty. According to his testimony, this juror scanned the article but did not remember the headline which revealed that appellant had been previously sentenced to death.

Initially it should be observed that during voir dire the prospective juror acknowledged that he had seen the article, recalled the names of the victims, and indicated that he had little recollection otherwise about what was contained in the article and in the headline. In addition, this prospective juror indicated an independence of thought and a determination to fairly try the case. No motion was made to exclude the juror for cause and no peremptory challenge was used to remove him. He was seated and participated in the verdict.

*246 In response to appellant's motion for a new trial, the trial court held a hearing relating to this juror and allegations that he had withheld critical information. At the conclusion of the hearing, the trial court rendered findings of fact which are not clearly erroneous and which reveal no abuse of discretion.

 *Parsley v. Commonwealth, Ky.*, 321 S.W.2d 259 (1959); *Johnson v. Commonwealth, Ky.*, 892 S.W.2d 558 (1995); and *Combs v. Commonwealth, Ky.*, 356 S.W.2d 761 (1962). We deem it appropriate to quote the trial court at length:

As to juror Helton, the court finds specifically that juror Helton answered questions truthfully both on voir dire and at the March 7th hearing when he was called subsequent to the jurors' verdict. A finding that he answered questions truthfully leads the court to the conclusion that that evidence certainly is credible. The juror says: I had scanned the article. I do not remember the headline ...

This is voir dire examination: I do not remember the headline. I do not remember the details except that two people—there were two murders and some robberies and I remember the names Omer and Vance as being the names of the parties involved.

The court has no reason to believe that at that time Mr. Helton recalled anything else. He says that as the trial progressed, ... some of the article came back to him. I don't find that to be extraordinary in human experience that a repetition of some matters may cause us to remember other things by association. I'm glad that's true; otherwise, I wouldn't remember anybody's name, particularly at this stage in my life. With that in mind, I specifically find that Mr. Helton's testimony is credible. He did not display a bias, and for that reason overrule that portion of the motion for a new trial dealing with that testimony. There was no deliberate concealment on his part of information which would compel this court to reach a conclusion that he was partial.

We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. It is appropriate to recall that the trial judge personally conducted much of the voir dire examination and presided over all of it. He presided over the trial and likewise presided over the post-trial hearing on the motion for new trial. The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror. *Riley v. Commonwealth, Ky.*, 271 S.W.2d 882 (1954).

[2] On this point we accept the view expressed in  *United States v. Klee*, 494 F.2d 394 (9th Cir.1974) (citing *United States v. Goliday*, 468 F.2d 170, 171 (9th Cir.1972)), that “[w]hen a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge ‘was in a better position than we are to determine whether what happened was prejudicial.’ ” See also *McQueen v. Commonwealth, Ky.*, 721 S.W.2d 694, 698 (1986). Our decision in  *Byrd v. Commonwealth, Ky.*, 825 S.W.2d 272 (1992), stands for the proposition that exposure to newspaper accounts of trials in progress does not automatically require reversal. “It was not reversible error for the trial judge to deny Byrd’s motion for a mistrial because not every incident of juror misconduct requires a new trial. The true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial.”  *Id.* at 274–75. Numerous other cases hold that in ruling on motions of this type, great deference should be given to the views of the trial court.

This case is a far cry from  *Paenitz v. Commonwealth, Ky.*, 820 S.W.2d 480 (1991), in which a prospective juror withheld the information that she had talked with a key witness for the Commonwealth about the case. This case also differs from  *Randolph v. Commonwealth, Ky.*, 716 S.W.2d 253 (1986), where the juror failed to reveal that she was employed by the Commonwealth’s Attorney and where we held that despite the disclaimer of bias, implied bias was shown by virtue of the relationship. There was no such error in the trial court’s ruling with respect to juror Helton.

*247 We have examined appellant’s contentions with respect to juror Nichols and find them to be insubstantial. The transcript reveals no misunderstanding concerning the death of the police officer or disclosure to other jurors. This juror was given enough information during voir dire to have led

to a mistaken belief on her part. Her post-trial testimony is without any hint of dishonesty.

[3] As to juror Gaugh, much is made of his apparent knowledge that a police officer had been killed when, in fact, he was properly informed only that a police officer had been fired upon. We are told that this is more than enough to compel the inference that Gaugh concealed vital information. As the evidence in this regard was ambiguous, as it is likewise with respect to each of these jurors, we will rely upon the trial court for the reasons stated hereinabove and as follows: “It is pretty clear that they [the questioned jurors] had no information which would cause the court to believe that they were in any way partial in their deliberations or their final conclusions.”

[4] Appellant also claims a violation of RCr 9.36 and the doctrine of randomness of jury selection in the manner of selecting the jury and alternates who tried the case. After challenges for cause and peremptory challenges had been exercised, there remained seventeen prospective jurors. As the trial court had determined to conduct the trial with twelve jurors and two alternates, it was necessary to reduce the number from seventeen to fourteen. Initially the clerk who was charged with this duty drew three names written on pieces of paper from the seventeen. When this procedure was questioned, the three names were returned to the group and then fourteen sheets of paper were drawn. Remarkably, on both occasions the same three prospective jurors were excluded. Based on the improbability of such an occurrence, appellant cries foul and asks this Court to infer impropriety.

Initially we must state that there is no evidence upon which any impropriety may be inferred. Moreover, the procedure initially employed, i.e. drawing a sufficient number to reduce the jury to the number required by law, is permitted by RCr 9.36(2). As such, the re-draw, which produced a jury consisting of the same persons, was merely redundant. Finally, our review of the claims in this regard reveals substantial compliance with the rules relating to jury selection and certainly no error of sufficient gravity to overcome the trial court’s discretion with respect to a new trial. *Williams v. Commonwealth, Ky.App.*, 734 S.W.2d 810 (1987).

In addition to the jury issues discussed hereinabove, appellant has raised questions concerning jurors Hansen, Ireland, Huffman, Nestmann and Gaugh. He has also questioned the post-discharge behavior of an alternate juror and complained that the court coerced a penalty phase verdict. This Court has carefully considered each of these claims of error and

determined that as to each, there was no preservation of the question or that the ruling was within the sound discretion of the trial court. On the unpreserved claim that a verdict was coerced, the record simply fails to bear out such an assertion. At no time did the jury report that it was deadlocked. In view of the gravity of the decision before the jury, the time spent in deliberation was not excessive and we discern no violation of those decisions which proscribe coercion of jurors into rendering a verdict. *Abbott v. Commonwealth, Ky.*, 352 S.W.2d 552, 554 (1961), and *Earl v. Commonwealth, Ky.App.*, 569 S.W.2d 686, 688 (1978).

[5] Appellant claims error in the trial court's failure to give a specific instruction directing the jury to consider evidence of his childhood abuse and neglect and deprived family background. While appellant was permitted to introduce extensive evidence in this vein, the instruction by which the jury could give effect to such evidence was general and authorized the jury to consider "any other circumstances arising from the evidence which you the jury deem to have mitigating value." Appellant maintains that this instruction fails to meet the requirements of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In *Penry* the Court reviewed the Texas capital punishment statute and, with regard to non-statutory mitigating factors, determined the statute to be insufficient. The *248 Court observed that despite evidence and argument relating to the appellant's mental retardation and abused background, the jury was given no vehicle by which it could express the view that a sentence of less than death was appropriate. It appeared that upon giving affirmative answers to questions required to be propounded, the jury was virtually mandated to impose the death penalty and lacked a vehicle by which to give effect to the background evidence. "The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.*, 492 U.S. at 320, 109 S.Ct. at 2947.

The instructions given here imposed no such restriction and rather invited the jury to broadly review the evidence for circumstances it deemed to have mitigating value. The admission of evidence relating to abuse and neglect, deprived background, and mental retardation, followed by argument of counsel as to the significance of such evidence and the instruction described hereinabove could have left no doubt

in the mind of the jury that it had a right to consider such evidence in its penalty determination. A more specific instruction was not required. *Bowling v. Commonwealth, Ky.*, 873 S.W.2d 175 (1994); *Halvorsen v. Commonwealth, Ky.*, 730 S.W.2d 921 (1987); *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Appellant's claim with respect to the alleged failure of the instructions to give guidance on the application of extreme mental or emotional disturbance is without merit. The penalty phase instruction as given on this point was clear that the extent of such disturbance need not rise to the level of that which would constitute a defense to the crime. This was sufficient to inform the jury that the definition of extreme emotional disturbance given during the guilt phase had no application to the extreme mental or emotional disturbance instruction in the penalty phase. The instruction given came directly from the statute, *KRS 532.025(2)(b)(2)*.

[6] Appellant next contends that the trial court improperly required proof beyond a reasonable doubt that he acted under extreme emotional disturbance (EED) in its first degree manslaughter instruction. Appellant claims that upon failure of the Commonwealth to prove the absence of EED in connection with the murder charge, the law results in a determination of guilt of first degree manslaughter. His argument is as follows:

Not acting under EED is a negative essential element of murder. *KRS 507.020*. If the prosecution fails to prove that negative essential element, a defendant is guilty of first degree manslaughter.

The murder and first degree manslaughter statutes go hand in hand. Under the murder statute, if one commits the act while not under the influence of EED, he is guilty of murder. Under the manslaughter statute, if he does the same act while under the influence of EED, he is guilty of manslaughter in the first degree. Thus, depending on the finding of the jury with respect to the absence or presence of EED, the

same act may justify a conviction of murder or a conviction of manslaughter. While the murder statute includes EED as a positive element, i.e. "... because he [positively] acts under the influence of extreme emotional disturbance ...," in circumstances where there is evidence from which the jury could find EED but would not be required to so find, it is entirely reasonable to submit both offenses to the jury for its finding. That was precisely what happened here. Conviction of murder was authorized if there was no EED and a conviction of manslaughter was authorized if there was EED. As the absence or presence of EED is an element of both statutes, there was no error in the inclusion of such and requiring its determination beyond a reasonable doubt.

The instructions tendered by appellant omit the mention of EED with respect to first degree manslaughter. These tendered instructions set forth the elements but lack any mention of the mental state which distinguishes it from murder. If the instructions tendered by appellant had been given, the jury might well have been misled to the *249 absurd conclusion that appellant's acts could constitute only manslaughter in the first degree. In any event, however, when the jury found that appellant committed the acts while not under the influence of EED, a conviction of first degree manslaughter was precluded. A person cannot at once be not under the influence of EED and under the influence of EED. Such mental states are utterly inconsistent and a finding of one precludes the other. As such, if there was error with respect to the manslaughter instruction, it was rendered harmless by the jury verdict.

Appellant's claim that the trial court erred in failing to inform the jury that its decision with respect to mitigation did not have to be unanimous was fully resolved in *Bowling v. Commonwealth, Ky.*, 873 S.W.2d 175, 180 (1994). We discern nothing about this case which differs materially in that respect from *Bowling*.

Appellant's claim concerning the exclusion of evidence relating to his parole eligibility upon a previous criminal conviction was irrelevant and properly excluded.

Appellant's argument with respect to the order of presenting the instructions to the jury is utterly without merit and deserves no further comment.

[7] Appellant next complains that the structure of the verdict forms "funneled" the jury toward imposing an enhanced punishment, i.e. life without parole for twenty-five years or

death upon its finding of aggravating circumstances, thereby effectively precluding the jury from imposing a punishment of twenty years to life. While we understand appellant's contention in this regard and believe better practice would dictate a modification of the standard verdict forms, in this case there was no prejudice.

First, the authorized punishments unmistakably informed the jury that a term of twenty years to life was available as to each count of murder. Second, in the reasonable doubt instruction, the jury was told that if it had such a doubt as to whether the defendant should be sentenced to death, then it should sentence him to imprisonment. Third, and most significantly, the jury passed over the verdict form which authorized it to find aggravating circumstances and then impose a punishment of life without parole for twenty-five years. Instead the jury went to the death verdict form and, after finding aggravating circumstances, imposed the death penalty.

It would be irrational to suggest that the jury would have sentenced appellant to a term of twenty years to life, but on the mistaken belief that it could not so sentence him, disregarded the option of sentencing him to life without parole for twenty-five years and then gave him the death penalty.

The dissenting opinion in  *Thomas v. Commonwealth, Ky.*, 864 S.W.2d 252 (1993), is critical of the structure of the verdict forms used here. However, the majority opinion saw no reversible error and, while we now believe better practice would dictate modification of the verdict form to more forthrightly tell the jury that it may find aggravating circumstances but still impose punishment of twenty years to life, there was no reversible error in this aspect of the instructions in this case.

Appellant's claim that a twenty-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

Appellant's additional claims of error with respect to the instructions have been reviewed and found to be without merit.

[8] In a multi-faceted attack upon his conviction and death sentence, appellant claims exemption from the death penalty by virtue of the 1986 plea agreement after which he was sentenced to death but which was subsequently reversed on appeal. He claims, *inter alia*, that by virtue of actions of the state, a non-death sentence is required; that he is entitled to specific performance of the 1986 plea agreement; and that the death penalty has been imposed in an arbitrary, freakish, discriminatory and disproportionate manner. We will address the issues presented *250 by appellant to the extent we deem it to be necessary but will not respond to every minute point raised.

Any analysis of these issues must begin with [Haight v. Commonwealth, Ky., 760 S.W.2d 84 \(1988\)](#), and it should be reiterated that the law of the case doctrine precludes relitigation of matters settled therein. In [Haight v. Commonwealth](#), this Court reversed appellant's death sentence. In the opinion we detailed the negotiations between the attorney for the Commonwealth and defense counsel which led to entry of the guilty plea.

We reversed the final judgment on grounds that when he entered the guilty plea, appellant was misled into believing that the trial court had committed itself to sentence him in accordance with the Commonwealth's recommendation. We noted, however, that appellant, by counsel had pressured the trial court in the direction of making such a commitment, but that the trial court had refused. Parenthetically, we observe here that at that stage of the proceedings, any such commitment from the trial court would have been unlawful. [Commonwealth v. Corey, Ky., 826 S.W.2d 319 \(1992\)](#). We rejected appellant's contentions, however, that the trial court had indeed made such a commitment and held [Johnson v. Commonwealth, Ky., 609 S.W.2d 360 \(1980\)](#), and [Workman v. Commonwealth, Ky., 580 S.W.2d 206 \(1979\)](#), to be inapplicable. However, we did find statements by the trial court sufficient to result in a commitment to permit withdrawal of the guilty plea in the event sentence was not imposed in accordance with the agreement. Effectively, we enforced the agreement to permit appellant to withdraw his guilty plea after the trial court had determined that a death sentence would be appropriate. We wiped the slate clean of the defective guilty plea negotiations and trial court sentence and restored the status quo immediately after the indictment. "For the foregoing reasons the final judgment of the trial court and the trial court's order of May 8, 1986, accepting appellant's guilty plea are vacated. All charges in

the indictment as originally returned by the Grand Jury are reinstated and this cause remanded to the trial court for a plea to the crimes charged." [Haight v. Commonwealth, 760 S.W.2d at 89](#).

At this juncture, it is also appropriate to review our decision in [Haight v. Williamson, Ky., 833 S.W.2d 821 \(1992\)](#), for it, too, is the law of the case and is also controlling. [Haight v. Williamson](#) rejected appellant's arguments that he was entitled to specific enforcement of the original plea agreement and that the Commonwealth acted in a vindictive manner when it sought the death penalty following reversal on appeal. The Court noted that the Commonwealth had lived up to its bargain with respect to presenting the recommended sentence throughout the initial proceeding. Thus, we held [Workman v. Commonwealth, Ky., 580 S.W.2d 206 \(1979\)](#), and [Commonwealth v. Reyes, Ky., 764 S.W.2d 62 \(1989\)](#), to be inapplicable. Holding that no prosecutorial vindictiveness had been shown, the Court relied on the remand language in [Haight v. Commonwealth](#) which directed the parties to start over. [Haight v. Williamson](#) resolved against appellant the contention that the Commonwealth is forever bound by the original agreement and that vindictiveness was shown by the Commonwealth when it subsequently sought the death penalty. We fully embraced the view that all prior negotiations and all prior agreements and judgments were vacated in favor of a new beginning.

We deem it unnecessary and improper to reconsider herein matters which have been so firmly settled in our previous opinions. Review of our prior decisions reveals no error which needs correction, and appellant's arguments will be considered only in light of what remains after our holdings as aforesaid are applied.

In his brief and at oral argument, appellant has vehemently contended that the fact of his death sentence following his guilty plea has placed him in a class by himself due to the subsequent change in [RCr 8.10](#) which permitted withdrawal of guilty pleas on failure of the court to approve the agreement. Again and again we have been bombarded with the words "arbitrary, freakish, discriminatory and disproportionate," terms which have little analytical force and serve only to elevate the decibel level of the discussion.

*251 By the 1989 amendment of [RCr 8.10](#), upon the determination of a trial court that it will not follow the plea agreement made between the prosecutor and the defendant,

the defendant has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point.  *Commonwealth v. Corey*, Ky., 826 S.W.2d 319 (1992). At the time of appellant's original guilty plea there was no such rule and upon a guilty plea, the only requirement upon a trial court was to sentence within the range provided by law.

In  *Haight v. Commonwealth* this Court determined that the plea agreement was fundamentally flawed. We believed the trial court made statements from which the defendant could have believed a commitment to a life sentence had been made. We corrected the trial court error and directed the parties to go back to the point of beginning and start all over. While RCr 8.10 as amended, effective August 28, 1989, had not yet been promulgated, we applied legal principles which had the same effect as the post-amendment RCr 8.10. Upon rejection of the plea agreement by the trial court, we directed the parties to start over, with the result being precisely what RCr 8.10 as amended would have yielded.

Appellant's argument that his predicament is unique would be persuasive if the original judgment had been affirmed but the rule thereafter changed. Then, indeed, only he would have been subjected to a death sentence pursuant to a guilty plea where the trial court had refused to impose the agreed-upon punishment. In fact, and despite his argument to the contrary, appellant's predicament is no different than other persons who have negotiated non-death sentences but failed to obtain trial court approval and who were thereby forced to withdraw their guilty pleas and go to trial.

Appellant further contends that by virtue of the conduct of the trial court as described in  *Haight v. Commonwealth*, he was denied his right to have the jury fix punishment, a right secured by RCr 9.84 and recognized in *Commonwealth v. Johnson*, Ky., 910 S.W.2d 229 (1995). Under this theory, by virtue of having been misled, appellant's right to have a jury determine guilt and punishment, or depending on his election, punishment only, with the Commonwealth being bound by the agreement not to seek the death penalty, was irretrievably lost. Appellant reasons that if a jury had been empaneled when he asked for it, a point in time after the trial court had found death to be appropriate but prior to imposition of the death penalty, the Commonwealth would have been bound by virtue of  *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979), and  *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), to uphold its part of the bargain and refrain from asking for the death penalty. As such,

appellant maintains there was irreparable prejudice by virtue of the flawed 1986 guilty plea.

While this argument is not without appeal, it must fail for various reasons. First, it was appellant who moved for relief in the 1986 case in the form of a motion to withdraw his guilty plea. Under the former and then prevailing version of RCr 8.10, whether a guilty plea could be withdrawn was within the trial court's sound discretion. Nevertheless, on appeal this Court granted appellant exactly the relief he had sought in the trial court. Upon the belief that appellant had been misled by statements of the trial court, we vacated the final judgment and restored the status quo immediately post-indictment. Thereafter, appellant received a jury trial as to guilt and punishment. While the jury trial he received was not at the time and place and under the circumstances he now insists upon, he was accorded his rights consistent with his demand.

When all is said and done and after the over-wrought and repetitious arguments of appellant have been put in perspective, it is clear that what he really wants and believes himself entitled to is enforcement of the original agreement. On at least three prior occasions, this Court has said no to enforcement of the original agreement and in this opinion we say it again. The flaw in the Garrard Circuit Court proceeding was in the trial judge's failure to keep his distance from the plea negotiations with the result being that appellant was misled as to the trial judge's intentions. We corrected that error and restored *252 appellant to all the rights he had prior to the guilty plea.

[9] Appellant's double jeopardy claim has been reviewed and determined to be without merit. The essence of this claim is that upon the prior guilty plea and death sentence, jeopardy attached. Because RCr 9.84 precluded imposition of the death penalty, the argument goes, appellant was "implicitly acquitted."

The error of the trial court was not of the type and kind which precludes re-prosecution.  *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). The conduct of the trial court was ambiguous and misleading by virtue of a desire to accommodate counsel for both sides. There was no indication of malicious or deliberate misleading. The trial court simply made an error which was corrected on appeal. Double jeopardy principles do not preclude further prosecution with all lawful punishments being available.

 *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In  *Simpson v. Commonwealth, Ky.*, 759 S.W.2d 224 (1988), we answered appellant's double jeopardy claim as follows:

It was appellant who moved the court to withdraw his guilty plea and his confession made during the plea proceeding. Such constitutes a waiver of his constitutional protection against double jeopardy for the purpose of trial on the charge in the indictment.

 *Id.* at 228.

[10] Appellant next attacks the judgment on grounds that his trial was “polluted ... with irrelevant and immaterial collateral bad acts.” He contends, among other things, that such bad acts precluded a “meaningful opportunity” to present his EED defense to an open and receptive jury. Particularly he has identified evidence of his attempted murder of Trooper Yates; evidence as to the circumstances surrounding his guilty plea to that crime; evidence as to his theft of a farm hand's Camaro automobile while he was a fugitive; evidence of the burglary of the Shuffet home; evidence as to Tony Minnix's fear of appellant; and evidence of appellant's theft of the Sasser vehicle.

It should be remembered that at trial appellant's defense was extreme emotional disturbance and it was the Commonwealth's burden to prove the absence of EED. While the relevant time frame for proof of appellant's mental state was the time of the murders, evidence as to his mental state shortly before and after the murders was relevant. The Commonwealth maintains that from the time of appellant's escape from the Johnson County Jail until the time of his capture, his behavior amounted to a continuing course of conduct with all events being inextricably intertwined with the crimes charged. There was a legitimate basis in evidence law for admission of each such item of evidence and it was for the trial court to determine whether the probative value outweighed the prejudicial effect.

It is difficult to ignore that after his escape from the Johnson County Jail appellant went on a crime spree and along the way murdered two victims. We have found no

basis to disturb the trial court's rulings on the admission of the challenged evidence. *Caldwell v. Commonwealth, Ky.*, 503 S.W.2d 485 (1972), and  *Stanford v. Commonwealth, Ky.*, 793 S.W.2d 112 (1990). Moreover, any error in this regard would have been entirely harmless. We have carefully examined appellant's claims as set forth hereinabove and considered KRE 404(b) and this Court's decision in *O'Bryan v. Commonwealth, Ky.*, 634 S.W.2d 153 (1982). We are unable to find an abuse of trial court discretion in this regard.  *Dunbar v. Commonwealth, Ky.*, 809 S.W.2d 852 (1991).

Appellant's complaints concerning the cross-examination of Randy Wheeler and the rebuttal testimony of Pamela Marcum are insubstantial and need not be addressed. Likewise, as to introduction of the three crime scene photographs, there was no error.  *Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 (1980).

[11] Appellant contends that the Commonwealth coaxed the jury into sentencing him to death by arguing future dangerousness. Excerpts of the prosecutor's penalty phase summation which contained ample references to appellant's other criminal convictions *253 have been provided. The Commonwealth responds that the arguments were based upon appellant's unique individual criminal history and that they established that he had not benefitted from previous incarceration.

Contrary to appellant's argument, we do not believe this amounted to use of a non-statutory aggravator. Appellant's extraordinary history of violent criminal conduct was properly placed before the jury.  KRS 532.025(2)(a). Moreover, while the “prison is doing nothing” argument by the Commonwealth is of concern, it falls short of the argument condemned in  *Perdue v. Commonwealth, Ky.*, 916 S.W.2d 148 (1996), whereby the jury was exhorted to give the death penalty as the only way to prevent the defendant from killing again. The argument here is qualitatively different from the argument condemned in  *Ice v. Commonwealth, Ky.*, 667 S.W.2d 671, 676 (1984). This Court has long observed the principle that wide latitude is permitted during closing argument. In view of this principle and upon our further belief that any error which may have occurred in this regard was harmless, there are no grounds for reversal on this issue.

Appellant's unpreserved claim of improper argument designated “Death as Deterrent” does not rise to the level of

palpable error. The views set forth hereinabove sufficiently answer these contentions.

[12] There was no error in the Commonwealth's introduction, pursuant to [KRS 532.025](#), of appellant's criminal convictions which occurred and became final subsequent to his commission of the instant offenses. Our decision in [Templeman v. Commonwealth, Ky., 785 S.W.2d 259 \(1990\)](#), allows the introduction of such final convictions:

[T]he trial judge was correct in allowing the prosecution to introduce evidence of prior criminal convictions which occurred subsequent to the commission of the crime. The term prior is the status of the defendant at the time of sentencing, not at the time of the commission of the charged crime.

[Id.](#) at 260.

[13] Appellant's complaint concerning the trial court's failure to timely file a trial judge's report as required by [KRS 532.075\(1\)](#) fails to reveal grounds for reversal. As appellant has acknowledged, the report was filed. It appears that the court gave appropriate consideration to the aggravating and mitigating evidence and otherwise complied with the statute. [Epperson v. Commonwealth, Ky., 809 S.W.2d 835 \(1991\)](#), and [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#).

For his final claims of error, appellant has attacked various aspects of the Kentucky death penalty statute and asserted, among other things, that the Act is unconstitutional. We have answered appellant's contentions in this regard on numerous occasions including [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#); [Smith v. Commonwealth, Ky., 734 S.W.2d 437 \(1987\)](#); and [Gall v. Commonwealth, Ky., 607 S.W.2d 97 \(1980\)](#). As such, we will not reiterate those discussions.

[14] Notwithstanding appellant's failure to preserve his right to a proportionality review, we will address this issue in obedience to the requirements of [KRS 532.075](#). In [Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 793 \(1987\)](#) (relying on [Matthews v. Commonwealth, Ky., 709 S.W.2d 414, 424 \(1985\)](#)), we recognized the difficulty of comparing one murder case with another, but declared that death for the crime committed in [Stanford](#) was neither excessive nor disproportionate to the penalty imposed in similar cases. Here, we have determined that the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence of record clearly supports the jury's finding of statutory aggravating circumstances as enumerated in [KRS 532.025\(2\)](#) and we have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.¹ In addition to the *254 cases cited in [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#), we have also considered [Epperson v. Commonwealth, Ky., 809 S.W.2d 835 \(1991\)](#); [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#); [Wilson v. Commonwealth, Ky., 836 S.W.2d 872 \(1992\)](#); [Bowling v. Commonwealth, Ky., 873 S.W.2d 175 \(1994\)](#); [Sanborn v. Commonwealth, Ky., 892 S.W.2d 542 \(1995\)](#); and [Bussell v. Commonwealth, Ky., 882 S.W.2d 111 \(1994\)](#), decisions rendered since 1990. We have reviewed all claims of legal error identified by appellant and concluded that no error or accumulation of error substantially prejudiced appellant's rights. From the evidence, there is no doubt that appellant committed the crimes of which he has been convicted and for those crimes the punishment imposed was entirely appropriate.

Accordingly, we affirm the convictions and sentences including the sentences of death.

STEPHENS, C.J., and BAKER, GRAVES, LAMBERT, STUMBO, and WINTERSHEIMER, JJ., concur.

KING, J., not sitting.

All Citations

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Footnotes

- ¹ In  [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#), n. 10, this Court listed all cases in which the death penalty was imposed after January 1, 1970. We incorporate that list herein by reference and further state that we have noted a particular similarity between this case and  [McQueen v. Commonwealth, Ky., 669 S.W.2d 519 \(1984\)](#),  [Sanders v. Commonwealth, Ky., 801 S.W.2d 665 \(1990\)](#), and [Epperson v. Commonwealth, Ky., 809 S.W.2d 835 \(1991\)](#), cases in which the death penalty was imposed and which have been affirmed on appeal.