COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
INDICTMENT NO.97-CR-00053

COMMONWEALTH OF KENTUCKY PLAINTIFF/RESPONDENT

VS **ORDER DENYING CR 60.02(e)(f) and 60.03 RELIEF**

ROBERT KEITH WOODALL DEFENDANT/MOVANT

The Defendant Robert Keith Woodall, has filed a Motion pursuant to CR 60.02(e) and (f) and CR 60.03 which asks that the Final Judgment be amended or set aside which sentenced him to death. The Commonwealth has responded objecting. Various replies have been filed to the responses. Movant believes that he is entitled to have an evidentiary hearing on his claim of intellectual disability in light of the relatively recent decision of Hall v. Florida, 572 U.S. 5, 134 S.Ct.1986, 188 L.Ed.2d 1007 (2014). Movant was sentenced to death after a sentencing trial in Caldwell Circuit Court on September 4, 1998, after his guilty plea to Murder, Kidnapping, and First Degree Rape on April 10, 1998.

The issues have been thoroughly and ably briefed by both sides. The issue has been ripe for decision by this Court since early March, 2016. The Court apologizes to counsel and the parties for its delay in addressing the matter.

It is unnecessary for this Court to recite the procedural history of this case since both sides are familiar with it and have set that history out in their respective filings.

CR 60.02 and 60.03 MOTIONS GENERALLY

McQueen v. Commonwealth, 948 S.W.2d 415, (Ky. 1997) sets out the standard for the review of CR 60.02 motions and the interrelationship between such motions and RCr 11.42 motions. The Court stated at page 416:

> A defendant who is in custody under sentence or on probation, parole, or conditional discharge, is required to avail himself of RCr 11.42 as to any ground as to which he is

> aware, or should be aware, during the period when the remedy is available to him. CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings.

See Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983).

The Commonwealth points out that the Movant did not raise this issue on direct appeal, which was affirmed in Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2002) *cert.den.* in 537 U.S. 835, 123 S. Ct. 145, 154 L. Ed. 2d 54 (2002). Mr. Woodall did raise "mental retardation" in his RCr 11.42 Motion, also appealed and denied in the unreported decision of Woodall v. Commonwealth, 2005 WL 3131603(Ky. 2005). Movant also filed a previous CR 60.02(f) Motion on grounds other than intellectual disability and the relief sought was denied. Woodall v. Commonwealth, 2005 WL 2674989 (Ky. 2005).

A CR 60.03 Motion asks the Court to entertain an "independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds." However, no relief shall be granted if the ground for relief has been denied in a 60.02 proceeding or would be time-barred under CR 60.02.

TIMELINESS

A preliminary question for Movant's requested relief is whether it is timely filed. CR 60.02 provides that where relief is sought under subparagraph (e) or (f), the "motion shall be made within a reasonable time." In the present case, with the above-noted sentencing date, over sixteen years passed before the filing of the present Motion. In the Gross case cited above, five years was not within a reasonable time. In Ray v. Commonwealth, 633 S.W.2d 71 (Ky. App. 1982), the Defendant was not permitted, for the first time, to attack two twelve-year-old convictions by a post-conviction motion. The trial court denied the motion without first appointing counsel and without any evidentiary hearing.

Despite the extreme passage of time in this case, in light of the Hall decision, the Court declines to decide the issue on timeliness.

NECESSITY OF EVIDENTIARY HEARING

In the Ray case, set out above, the motion was denied without a hearing. Likewise in the Gross case referred to above, the Kentucky Supreme Court stated at page 856:

> It [CR 60.02] is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Also see Commonwealth v. Bustamonte, 140 S.W.3d 581 (Ky. App. 2004) and Howard v Commonwealth, 364 S.W.2d 809 (Ky. 1963). A review of the full record in this case is dispositive of the issue without any evidentiary hearing.

ANALYSIS

In White v. Commonwealth, 500 S.W.3d 208 (Ky.2016), a case decided May 5, 2016, and modified on October 20, 2016, Kentucky's Supreme Court addressed Hall in regard to Kentucky's intellectual disability statutes (KRS 532.130, 532.135, and 532.140). The Court stated at page 214:

> In light of the Supreme Court's declaration in Hall that '[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning, ... when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.' *Id.* at 2000-2001. Therefore, trial courts in Kentucky must consider an IQ test's margin of error. And if the IQ score range produced by such consideration implicates KRS 532.130, KRS 532.140, and other relevant statutory provisions, the trial court must consider additional evidence of intellectual disability. Applying the IQ score referenced in those provisions as the dispositive factor in determining eligibility for execution without considering the test's margin of error violates the Eighth Amendment.

At page 215, in discussing whether Hall should be applied retroactively and in holding that it should be, the Court stated:

> Applying this standard to the present case, unlike Teague, Leonard or Martin, the 2014 U.S. Supreme Court case of Hall, does not deal with criminal procedure. It is 'a substantive restriction on the State's power to take the life' of individuals suffering from intellectual disabilities. See Atkins, 536 U.S. at 321, 122 S.Ct. 2242 (quoting Ford, 477 U.S. at 405, 106 S.Ct. 2595). We are dealing here with a U.S. Supreme Court directive that not only proscribes intellectually disabled people from being put to death, but defines the manner in which the mental deficiencies of offenders must be evaluated. Therefore, Hall must be retroactively applied. In so holding, we are in the company of our sister state Florida which, of course was the state in which the underlying issue in Hall first arose. See Oats v. Florida, 181 So.3d 457 (2015).

The Court continued:

> To summarize succinctly, we do not hold today that because of Hall every inmate in Kentucky under the sentence of death is entitled to an evaluation or a hearing on the issue of serious intellectual disability. Nor do we hold that White is entitled to either an evaluation or hearing.

The question in Mr. Woodall's case is whether he has had the opportunity to present additional evidence of his intellectual disability including testimony regarding adaptive deficits and significant subaverage intellectual functioning.

The Court agrees with the Commonwealth that there is ample evidence in the record as it now exists that Mr. Woodall had the opportunity to put forth evidence about his intellectual disability. Dr. Richard Johnson testified that the Movant was not intellectually disabled and acknowledged that an IQ score was a range, not a fixed number. Ms. Kay Willey and Dr. Harry Roby also testified about Mr. Woodall's adaptive behavior and IQ at the time of their examination. In addition, other witnesses testified about his adaptive behavior including in his younger years.

There was no testimony that he was intellectually disabled nor was the testimony based strictly on an intelligence quotient of seventy or below.

ORDER

The Defendant's Motion does not set forth any facts of an extraordinary nature justifying additional relief under CR 60.02(e), (f) or CR 60.03.

IT IS ORDERED that the Defendant's Motion is DENIED, without an evidentiary hearing.

This is a final and appealable Order and there is no just reason for delay.

SO ORDERED this 3 day of March, 2017.

C. A. WOODALL, III
CIRCUIT JUDGE