COMMONWEALTH OF KENTUCKY
LIVINGSTON CIRCUIT COURT
CASE NO. 09-CR-00027

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V. **RE-NOTICE ORDER**

KEVIN DUNLAP #235052 — DEFENDANT

Due to courts in the Commonwealth being closed for the Governor's Inauguration,

The Court hereby gives notice the hearing scheduled on December 12, 2023 at 9:00 a.m. is RE-NOTICED to be heard on January 9, 2024 at 9:00 a.m.

Zoom link for Livingston Rule Day (Division I) on January 9, 2024.

Join Zoom Meeting
https://kycourts-net.zoom.us/j/84534929174

Meeting ID: 845 3492 9174

SO ORDERED this 14th day of November, 2023.

JAMES R. REDD, III
CIRCUIT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that a copy of this Order has been mailed to the following:

ATTORNEYS FOR PLAINTIFF

Hon. Christopher Henry
Assistant Attorney General
Office of the Solicitor General
Criminal Appeals Division
1024 Capital Center Drive
Frankfort, KY 40601-8204

Hon. Carrie Ovey-Wiggins
Commonwealth's Attorney
P.O. Box 679
Eddyville, KY 42038

ATTORNEYS FOR DEFENDANT

Hon. Dennis Burke
2202 Commerce Parkway, Suite D Hon.
LaGrange, KY 40604

Hon. Margaret O'Donnell
P.O. Box 41815
Frankfort, KY 40604
P.O. Box 4815

Mr. Kevin Wayne Dunlap
Kentucky State Penitentiary
266 Water Street
Eddyville, KY 42034
DEFENDANT

On this 15 day of November, 2023.

Debbie Hogg Kinsey by bgt, DC
CLERK/ DEPUTY CLERK

COMMONWEALTH OF KENTUCKY
LIVINGSTON CIRCUIT COURT
CASE NO. 09-CR-00027

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **ORDER ON DEFENDANT'S RCr 11.42 AND CR 60.02/ 60.03 MOTIONS AND MOTION FOR AN EVIDENTARY HEARING**

KEVIN DUNLAP #235052 DEFENDANT

This matter is before the Court on the Defendant's (1) Motion to Vacate and Set Aside Conviction and Sentence of Death Under RCr 11.42, (2) Motion to Vacate Convictions and Death Sentences Under CR 60.02/60.03, and (3) Motion for an Evidentiary Hearing. An oral argument on the motions was held June 9, 2023 at 10:00 a.m. Defendant was present with his attorneys, Hon. Dennis J. Burke and Hon. Margaret O'Donnell. The Commonwealth was represented by the Commonwealth's Assistant Attorney General, Hon. Christopher Henry and Commonwealth Attorney, Hon. Carrie Ovey-Wiggins.

The Defendant filed a lengthy Motion to Vacate and Set Aside Conviction and Sentence of Death Under RCr 11.42 on September 25, 2015 ("Def.'s 11.42 Mot."). The Commonwealth filed a Response on August 30, 2016. The Defendant filed a Motion to Vacate Convictions and Death Sentences Under CR 60.02/60.02 on January 19, 2017 ("Def.'s 60.02 Mot."). The Defendant filed Motions to Amend the RCr 11.42 Motion on January 19, 2017 ("Def.'s First Am. 11.42 Mot.") and April 28, 2022 ("Def.'s Second Am. 11.42 Mot."). The Defendant filed a Motion for an Evidentiary Hearing on April 18, 2022 ("Def.'s Mot. for Evid. Hr'g"). The Commonwealth filed a Response on June 28, 2022. Additional replies and pleadings were filed by both parties with respect to the aforementioned motions and responses.

The Court notes the first motion in this series of pleadings was filed eight years ago, but is only now being ruled upon. There is an explanation. About six months after the Kentucky Supreme Court affirmed Defendant's conviction, Defendant, pro se, on December 5, 2013 filed a

Motion to Prohibit Further Unauthorized Appeals indicating he did not wish to pursue any other appeals, CR 60.02, RCr 11.42, or habeas actions. This was resolved by an Order entered April 11, 2014 wherein the Department of Public Advocacy reached an agreement with Defendant to not take any further action without express written consent from Defendant, but attorneys would file a Petition for Writ of Certiorari with the United States Supreme Court. After the Commonwealth filed its first Response a status conference was held on November 14, 2016, and Defense counsel expressed a desire to file additional pleadings.

On February 8, 2017, Defendant sent a letter to the court explaining that he did "not feel (his) wishes (had) ben completely understood with regard to (his) 11.42." He believed his "attorneys and he (had) different views regarding (his)case." So he "respectfully and most humbly request(ed)" "a relatively short period of contemplation of all the information presented … to see if it merits granting a trial."

Former Circuit Judge of the 56th Judicial Circuit, Honorable C.A. Woodall, III, then granted several Agreed Orders Abating the Case beginning on October 27, 2017. This case was ultimately removed from abeyance on October 27, 2021. The pleadings are receiving this delayed ruling today, as the undersigned did not take the bench of this Court until March 18, 2022 and has been trying to find the abundant time needed to rule on this matter. The Court has had to watch the entire eleven day trial and read numerous cases cited by the parties. The Court entered its first ruling July 24, 2023, allowing Defendant to amend his 11.42 Motion with both the first and second amended 11.42 Motions.

FINDINGS OF FACT

1. For a factual background, the Court hereby copies the background supplied by the Kentucky Supreme Court in *Dunlap v. Commonwealth*, 435 S.W.3d 537, 621 (Ky. 2013):

On October 15, 2008, Appellant (Defendant herein) approached Kristy Frensley while she was working in her yard. Kristy's house was for sale and Appellant asked if she would show it to him. Once inside, Appellant put a gun to her head, zip tied her hands and ankles, and moved her to her bedroom. Shortly thereafter, Kristy's three children, Kayla Williams, 17, Kortney Frensley, 14, and Ethan Frensley, 5, returned home from school. Appellant pushed all three children into the bedroom and tied Kayla and Kortney with zip ties and Ethan with pantyhose. He then took the children to a different part of the house.

Appellant returned to Kristy's bedroom and raped her. After giving her a shower, he placed Kristy in her bed, began to strangle her, and attempted to smother her with a pillow. After that, he began cutting her neck. He briefly left the room; when he returned he stabbed Kristy in her left ear and twice in her lower back. Kristy later learned that Appellant had broken off a butter knife in her neck at the handle that had to be surgically removed. Kristy pretended that she was dead by lying still and slowing her breathing. Appellant covered her with a blanket and left the room. Feeling smothered by the blanket, Kristy moved so that her nose was uncovered and she could see.

Appellant poured flammable liquid on the floor of the bedroom and set the bedroom on fire. From her position, Kristy could see Ethan across the hall lying on a pile of pillows. Kristy attempted to rescue him but before she could do so her foot caught fire. She then discovered her legs were not functioning properly and rolled off of her bed to the bedroom's French doors which led to the pool deck. She pulled one of the door handles with her foot but her legs failed her again and she got stuck in the doorframe. Eventually, with her hands still tied, she managed to roll into the pool where a Sheriff's deputy later found her.

The fire caught the attention of neighbors and passers-by and Kayla's body was seen through a window; they punched out the window with their fists and pulled her body outside. The fire was so hot that when they pulled her body out her skin came off in their hands. Kayla's hands were still tied and her mouth was gagged with pantyhose; her throat had been cut from ear to ear, deep enough that her trachea was visible. A steak knife blade was protruding from her back through her sweater. Remarkably, Kayla was still alive, gasping for breath and gurgling. Two women attempted CPR, but Kayla died in the yard from her wounds.

The fire destroyed the home, burning Kortney and Ethan's bodies. An autopsy revealed that Ethan had two stab wounds to the chest (including one that penetrated his heart), six stab wounds to his back and one to his stomach. Kortney had three stab wounds to her chest that penetrated the left lung and one stab wound to the right side of the neck. The doctor who performed the children's autopsies testified that all three children died from the stab wounds.

Based on an eyewitness description of a vehicle seen at the Frensley's house that day, a search warrant was issued for Appellant's home. Law enforcement officers seized several items linking him to the Frensley massacre. Forensic analysts at the Kentucky State Crime Lab examined the seized items and a "rape kit" that medical personnel had performed on Kristy. A vaginal swab revealed that DNA inside Kristy matched Kevin Dunlap. The analyst also discovered DNA on the driver's side seatbelt of Appellant's truck that matched Kristy's. Additionally, Kortney's DNA was found on Appellant's tennis shoes.

Appellant was indicted by a Trigg County Grand Jury for three counts each of capital murder, capital kidnapping, and tampering with physical evidence; and one count each of attempted murder, first-degree burglary, first-degree arson, and first-degree rape. Upon joint motion by the Commonwealth and Appellant, the

Trigg Circuit Court granted a change of venue to the Livingston Circuit Court. Thereafter, the Commonwealth's Attorney gave notice that he was seeking the death penalty.

Two months prior to trial, Appellant was sent to the Kentucky Correctional Psychiatric Center (KCPC) for a thirty-day evaluation of his competency to stand trial and criminal responsibility. The Livingston Circuit Court held a competency hearing on January 22, 2010, approximately three weeks prior to the trial date. The court heard the testimony of Dr. Amy Trivette, the psychiatrist supervising Appellant's evaluation at KCPC, who testified that Appellant understood the nature and consequences of the charges against him and had a general understanding of the courtroom proceedings and the individuals involved. Consistent with this testimony, the trial court found Appellant competent to stand trial.

About one month prior to trial, a CT scan revealed two non-specific hyper-attenuated punctuate foci—essentially, abnormal spots—on the right frontal lobe of Appellant's brain. Defense counsel requested a PET scan and an MRI, and moved the trial court for a continuance so the results of these tests could be fully examined. The trial court permitted the tests but denied the continuance. About a week before trial was to begin, the tests revealed that Appellant had an arterial venous malformation (AVM) on his right frontal lobe, measuring approximately one cubic inch—a tangle of arteries and veins existed where cortical matter would be on a normally-developed brain.

The day before jury selection was to begin, Appellant informed the court that he wanted to change his plea from Not Guilty to Guilty but Mentally Ill (GBMI). He also informed the court that if it did not accept his GBMI plea then he wished to enter a plea of Guilty. In light of the newly discovered AVM, defense counsel moved to stay the proceedings and have Appellant reevaluated. After hearing testimony from Appellant's expert witness, Dr. Michael Nicholas, the trial court denied counsel's request to stay the proceedings, rejected Appellant's request to plead GBMI, and accepted his Guilty plea (It is further noted it was placed on the record Defendant's plea was made against the advice of counsel).

Appellant reserved his right to be sentenced by a jury for his capital convictions, and a capital sentencing proceeding began on February 10, 2010, lasting two weeks. After deliberating for three hours, the jury recommended a death sentence on each of the capital offenses; the trial court adopted its recommendation. Appellant waived jury sentencing on the non-capital charges, and the trial court sentenced him to life imprisonment for kidnapping, rape, and arson; twenty years' imprisonment for attempted murder and burglary; and five years' imprisonment for each of the tampering convictions. The twenty-year sentences and the five-year sentences were to run consecutively to one another, for a total of fifty-five years, and concurrently with the life sentences which, by law, must run concurrently with one another.

2. Defendant's convictions and sentences were upheld in that eighty-four page decision by the Kentucky Supreme Court. His judgment became final on October 6, 2014, when the Supreme Court of the United States denied certiorari in his case.

3. Defendant's original Motion to Vacate and Set Aside Conviction and Sentence of Death Under RCr 11.42 filed September 25, 2015 has nine claims:

> **Claim One** – Trial counsel rendered ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Sections Seven, Eleven and Fourteen of the Kentucky Constitution, by failing to fully investigate and fully present mitigation evidence.

Claim Two – Trial counsel rendered ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Sections Seven, Eleven and Fourteen of the Kentucky Constitution, when counsel stipulated to a fact not in evidence, and failed to respond to the prosecution's improper statements during its closing argument.

Claim Three – Kevin was denied the right to an unbiased capital sentencing jury and a reliable sentencing determination under the Eighth and Fourteenth Amendments to the United States Constitution.

Claim Four – Trial counsel's inadequate voir dire of L.C. and L.H. deprived Kevin of his right to a fair and impartial jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, his right to a reliable capital sentencing proceeding under the Eighth Amendment, and the right to effective assistance of counsel under Section Eleven of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the U.S. Constitution.

Claim Five – Trial counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments by failing to fully investigate the interplay of Kevin's arteriovenous malformation, mental illness, and suicidal ideation, and to fully consult with and present testimony from an expert who could explain why these factors in conjunction with each other indicated that Kevin was not competent to enter a guilty plea.

Claim Six – Trial counsel rendered ineffective assistance under the Sixth and Fourteenth Amendments by failing to fully investigate and advise Kevin of the viability of a defense that voluntary intoxication, coupled with Kevin's brain defect, had negated the *mens rea* element necessary to prove intentional murder.

Claim Seven – Kevin's trial counsel were ineffective for failing to challenge the grand jury indictment on the grounds of perjured testimony and overt use of irrelevant and overly inflammatory religious jargon.

Claim Eight – Each of the claims raised herein, viewed independently or cumulatively, deprived Kevin of a fair trial and a reliable determination of punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Sections One, Two, Three, Seven, Eleven, Seventeen, and Twenty-Six of the Kentucky Constitution.

Claim Nine – Trial counsel rendered ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution by failing to challenge the capital kidnapping charge as unconstitutional under the Eighth Amendment of the U.S. Constitution and Section Thirteen of the Kentucky Constitution.

4. Mr. Dunlap's First Amended RCr 11.42 Motion filed on January 19, 2017 seeks to generally amend Claims One, Five, and Six to include evidence that he is bipolar, his medication for generalized depression made his bipolar disorder more attenuated, and that he has impaired executive functioning. Mr. Dunlap references proffered expert opinions.

5. Mr. Dunlap's Second Amended RCr 11.42 Motion filed on April 28, 2022 seeks to generally amend Claims One and Six with facts relating to his developmental history, frontal lobe impairment, effects of drug interactions, and mental illness. Other proffered expert reports are referenced.

6. Mr. Dunlap moves for an evidentiary hearing on claims one, three, four, and six of his RCr 11.42 Motion. (Def.'s Mot. for Evid. Hr'g, at 1.)

7. The Court will reference other facts when relevant.

CONCLUSIONS OF LAW

I. Kentucky Rule of Criminal Procedure RCr 11.42

Kentucky Rule of Criminal Procedure RCr 11.42 allows prisoners to seek post-conviction relief, providing in pertinent part:

> A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

The Kentucky Supreme Court elaborated on the standard for an RCr 11.42 motion in *Sanborn v. Commonwealth*, stating the 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 claiming that it amounts to ineffective assistance of counsel. An evidentiary hearing is not required about issues refuted by the record of 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 a discovery deposition.

975 S.W.2d 905, 909 (Ky. 1998) (internal citations omitted).

Additionally, in an 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 hearing." *Haight v. Commonwealth*, 41

S.W.3d 436, 442 (Ky. 2001) (citation omitted), *overruled* in part by *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009) ("[A] separate collateral claim of ineffective assistance of counsel related to the alleged error . . . may be maintained even after [an alleged error] has been addressed on direct appeal, so long as they are actually different issues.") A court reviewing an RCr 11.42 motion should limit claims granted an evidentiary hearing to issues that are not refuted by the record. *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998).

Mr. Dunlap's nine different claims under RCr 11.42 will be for the purposes of this Order generally categorized into claims for ineffective assistance of counsel, jury claims, and a claim of cumulative error. The claims are analyzed independently below by each of these three categories.

II. Ineffective Assistance of Counsel Claims

Mr. Dunlap raises six different causes of action for ineffective assistance of counsel. The U.S. Constitution guarantees a fundamental right to a fair trial in the Due Process Clauses of the Fifth and Fourteenth Amendments, but the Sixth Amendment includes a Counsel Clause, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The right to effective assistance of counsel is also guaranteed by the Kentucky Constitution. *See e.g.*, *Rice v. Davis*, 366 S.W.2d 153, 156 (Ky. 1963) (holding that defendants have a right to effective assistance by counsel, guaranteed by Section 11 of the Constitution of Kentucky).

The United States Supreme Court has provided a two-part test for ineffective assistance of counsel claims requesting the reversal of a conviction or death sentence:

> First, the defendant must show 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. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

The first prong of the *Strickland* test (deficient performance) requires a defendant show counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. This standard of reasonableness is to be consistent with prevailing professional norms at the time of trial.[1] *Id.* Further, a reviewing court is to give counsel's performance a high level of deference, including a "strong presumption that counsel's conduct falls 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.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

The second prong of the *Strickland* test (prejudice) requires a defendant to 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 [one] sufficient to undermine confidence in the outcome." 466 U.S. at 694. In respect to death sentences, "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."

[1] In *Strickland*, the Court notes that the prevailing norms of practice are reflected in the American Bar Association Standards, which provides a guide for determining if counsel's actions are reasonable, "but they are only guides." 466 U.S. at 688.

Id. at 695. Finally, a reviewing court must "consider the totality of the evidence before the judge or jury." *Id.*

The *Strickland* Court noted "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. The Kentucky Supreme Court adopted the *Strickland* standard as controlling. *See, e.g.*, *Haight*, 41 S.W.3d at 441; *Commonwealth v. Pridham,* 394 S.W.3d 867 (Ky. 2012). For clarity, the Court will independently analyze the facts, law, and merits of each claim.

A. Ineffective Counsel for Failing to Fully Investigate and Present Mitigation Evidence (Claim One).

Mr. Dunlap's first ineffective assistance of counsel claim argues trial counsel failed to fully investigate and present mitigation evidence. To succeed on a claim for ineffective assistance of counsel, a defendant must survive the two-part test from *Strickland* by making a showing that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." 466 U.S. at 687. When analyzing the deficiency prong, a court is to consider "the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the habeas proceeding (or in the case *sub judice*, the RCr 11.42 hearing) – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 588 U.S. 30, 41-43 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). The reasonableness of the investigation considers the evidence known to counsel and if that evidence would "lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

i. Mitigating Evidence Presented by Trial Counsel

It should be noted Mr. Dunlap's trial counsel did present substantial mitigating evidence, unlike cases in which no mitigating evidence was presented. (Def's. 11.42 Mot., at 29-36); *see*

e.g., *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (finding ineffective assistance of counsel where counsel failed to present any mitigating evidence).

First, on February 22, 2010, trial counsel produced friends and family of Defendant. Tracey Bellucci and Patrizio Bellucci, friends of Mr. Dunlap, testified about Mr. Dunlap's service in the elite 160th Special Operations Aviation Regiment of the United States Army, his first marriage, and his personality. (VR 2/22/10, 01:19:15-1:40:40.) Mr. Dunlap's friends characterized him to the jury as "gentle and unharming." (Def.'s 11.42 Mot., at 35.) Another friend of Defendant's, Bill Burgess, testified that he was worried about Mr. Dunlap's mental health in the months preceding the crimes. (VR 2/22/10 at 1:17:25; 1:30:20; 1:42:00; Def.'s 11.42 Mot., at 35.) Trial counsel also called Defendant's mother, Sheila Dunlap, to testify. His mother shared with the jury that he had an unhappy childhood and his father's use of corporal punishment. (VR 2/22/10, 1:51:45-2:07:34.)

The following day, trial counsel brought three of their own medical experts to the stand to testify about Mr. Dunlap's brain malformation and cognitive functioning. (Def.'s 11.42 Mot., at 29-32.) First, Dr. Eric Shields, a radiologist, testified about MRI and PET CT scans conducted on Mr. Dunlap. (VR 2/23/10 at 9:07:14-9:08:55.) Dr. Shields testified that Mr. Dunlap's MRI scan showed a ping-pong ball sized vascular malformation in his right frontal lobe. Dr. Shields explained a vascular malformation is a collection of abnormal blood vessels, showing "a cold spot" on the image. (*Id.* at 9:20:50-9:21:25.) Dr. Shields testified that vascular malformations exist from birth, and the abnormal blood vessels meant that some brain tissue could not develop. (*Id.* at 9:28:19-9:28:45.) Dr. Shields classified the malformation as something akin to "having a birthmark." (*Id.* at 9:29:20-9:29:56.)

Next, the defense team produced Dr. Christopher King, a neurologist. Dr. King explained that the frontal lobe successfully allows humans to get "from point A to point B," and it "allows us to determine other people's intentions from their behavior, process it, and react in a certain way." (Def.'s 11.42 Mot., at 31.) Dr. King defined a vascular malformation as "veins and arteries that are in a little ball." (*Id.*) He agreed with Dr. Shields that Mr. Dunlap's malformation had likely been present since birth. (*Id.*) Dr. King additionally testified that he likely sees malformation like Mr. Dunlap's somewhere between 1 in 100,000 and 1 in 1,000,000, adding that "it is hard to tell because you don't always know that someone has one." (*Id.*) Dr. King explained that this abnormality can cause many problems in some patients and no problems in other patients. (*Id.*) Dr. King explained that because he never evaluated Mr. Dunlap, he was unsure if and how the vascular malformation was affecting him. (*Id.* at 32.)

Mr. Dunlap then presented Dr. Michael Nicholas, a clinical neuropsychologist. Dr. Nicholas conducted the Weschler Adult Intelligence Scale IQ test, the Minnesota Multiphasic Personality Inventory personality test, and a test for malingering. (*Id.* at 29-30; VR 2/23/2010 at 10:35:55.) Dr. Nicholas testified that Mr. Dunlap suffered from depression and anxiety, was an introvert who may harm himself, and that Mr. Dunlap's psychological profile was unusual given the facts of the crime. (*Id.*, 10:40:12; 10:46:30; 10:47:45-10:48:15; 10:54:17.)

Dr. Nicholas testified that the frontal lobe, in which the arteriovenous malformation (AVM)[2] was present, affected the area of the brain that governs judgment and can inhibit impulsive behavior. (*Id.*, 11:04:56-11:06:27; 11:16:11-11:16:55; 11:30:20-11:30:45.) Dr.

[2] Mr. Dunlap's AVM is a vascular malformation in his right frontal lobe that is around the size of a ping-pong ball. (Def.'s 11.42 Mot., at 31.) This malformation is developmental and has been present since birth. (*Id.*) In Dr. Trivette's words, "Just like if you went to your doctor today and complained of shortness of breath or you thought you had pneumonia, your doctor does an x-ray of your chest, and he incidentally finds you have a kidney stone." (VR 2/23/10, 1:10.)

Nicholas explained the size of Mr. Dunlap's malformation was significant and could impair the capacity for self-controlled judgments or discretions. (*Id.*, 11:15:00-11:15:06; 11:23:25.) Dr. Nicholas was unable to testify definitely as to whether the AVM contributed to the commission of Mr. Dunlap's crimes. (*Id.*, 11:13:09-11:13:24.)

In rebuttal to Defense experts, the jury then heard from the Commonwealth's expert, Dr. Amy Trivette, a general and forensic psychologist who evaluated and treated the Defendant when he was at the Kentucky Correctional Psychiatric Center. Dr. Trivette requested the CT scan on Mr. Dunlap which found the AVM in his right frontal lobe. (Def.'s 11.42 Mot., at 30.) Dr. Trivette testified that the AVM was not clinically significant. (VR 2/23/2010, 1:09.) She further testified that Mr. Dunlap "wasn't impulsive. He wasn't making inappropriate comments, nothing to suggest it was having any clinical impact on him." (*Id.*, 1:10:21.)

ii. The Mitigating Evidence Mr. Dunlap Argues Should Have Been Presented

Defendant argues that if trial counsel presented additional mitigation evidence, the jury "would have seen that his life was worth saving." (Def.'s 11.42 Mot., at 17.) Mr. Dunlap argues in his original 11.42 Motion there were eight specific avenues of evidence that should have been presented. In his First Amended 11.42 Motion, Defendant points to two additional areas of evidence that should have been presented. Finally, in his Second Amended 11.42 Motion, Mr. Dunlap points to one more piece of mitigating evidence.

Defendant first argues that the AVM diagnosis, its consequences, and its relation to the crime were not fully explained to the jury. (Def.'s 11.42 Mot., at 17-18.) In particular, Mr. Dunlap references a list of risks associated with AVMs that was not presented to the jury.[3] Mr.

[3] Mr. Dunlap's motion points to the following factors for which AVM patients are at a higher risk: impaired ability to determine time spans, trouble switching points of view, difficulty planning things, psychotic disturbances in memory, marked dissociation between what he says and what he does, flat, blunt, or labile affect, violence taking place amidst a flat affect, low frustration tolerance, shallow or inappropriate cheerfulness, marked preservation, problems with self-control, incompetent or ineffectual behavioral productions, family conflict due to impairments,

Dunlap argues that the mitigation specialist hired by trial counsel obtained a social history record describing a history in line with these symptoms of AVM. (Def.'s 11.42 Mot., at 18.)

Mr. Dunlap next argues that the jury should have heard of the multiple head injuries he experienced as a child, which were referenced in the Social History report. (Def.'s 11.42 Mot. at 19; Social History, p. 1.) Mr. Dunlap points to other potentially mitigating evidence not presented at trial, but that could be located in the Social History report, such as harsh physical punishment from his father, stealing at a young age – including a truck and guns – and drinking alcohol at a young age. (Def.'s 11.42 Mot., at 21-23.)

The 11.42 Motion also references Defendant's military service, where his alcohol abuse began. For example, he was treated at least twice during deployment for alcohol-related issues and was prescribed Antabuse. (Def.'s 11.42 Mot., at 24.) During his deployment, he also got in trouble for using a slingshot to shoot water balloons into an officers' club. (*Id.*)

Defendant continues to reference his mental health, including that he was diagnosed with depression and anxiety, his past experiences of seeking help for mental health, and a wide range of medications he was prescribed at the time of the crime. The narcotic and psychotropic drugs he was prescribed on October 15, 2008 include hydrocodone, trazodone, temazepam, and venlafaxine. (*Id.* at 25.) Mr. Dunlap was also allegedly taking Chantix at this time. (Def.'s Second Am. 11.42 Mot., at 5.) Mr. Dunlap asserts some of the medications he was taking on the date of the crime have contraindications with each other and major contraindications with alcohol. (Def.'s 11.42 Mot., at 25.)

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difficulty conforming to societal norms despite not meaning any harm, insensitivity, sexual disinhibition, and difficulty adapting emotional responses to social interactions. (Def.'s 11.42 Mot., at 18) (citing Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty First Century*, 56 AM. U. L. REV. 51, 59-60 (2006)).

Mr. Dunlap points to his prior divorce, which trigged more substance abuse. (*Id.* at 26.) He also references the "Reese's Cup" incident, occurring a month before the crime, which purportedly demonstrates his impulsive behavior and his distance from his prior wife. (*Id.* at 27.) He describes that after the crime, he was placed on suicide watch and did try to commit suicide. (*Id.* at 29.) Finally, Mr. Dunlap argues that the defense team should have called Mr. Dunlap's brother and his wife (who had filed for divorce) to testify. (*Id.* at 36.)

Post-conviction defense counsel had Mr. Dunlap evaluated by neuropsychiatrist Dr. George Woods and neuropsychologist Dr. John Matthew Fabian. (Def.'s First Am. 11.42 Mot., at 4.) In his First Amended 11.42 Motion, Defendant argues that he was improperly diagnosed with depression and instead suffers from bipolar disorder. In turn, he argues the medication he was prescribed for general depression (when he actually suffered from bipolar disorder) caused him "increased anxiety, irritability, and altered affective range." George W. Woods, REPORT 4 (Aug. 26, 2016). In addition, Mr. Dunlap argues the jury should have heard that he has impaired executive functioning, as determined by Dr. Fabian. Dr. Fabian argues that Mr. Dunlap's history of alcohol abuse, his AVM, and head injuries may have exacerbated his impaired executive functioning, which can also impact "decision making and risky decision making." John M. Fabian, MITIGATION EVALUATION 19 (Jan. 25, 2016).

In his Second Amended 11.42 Motion, Mr. Dunlap argues that counsel was ineffective, expanding on the original motion, for failing to look at the medications Mr. Dunlap was taking at the time of the crimes. (Def.'s Second Am. 11.42 Mot., at 15.) Mr. Dunlap specifically notes his mental health records reflect that several antidepressants were not working and in fact made his mania worse because he was being improperly treated. (*Id.*) The Second Amended Motion states there were witnesses who told trial counsel Mr. Dunlap was taking several medications,

including Chantix to stop smoking, at the time the crimes were committed. (*Id.*) The Second Amended Motion argues that Chantix, especially in combination with the aforementioned drugs Mr. Dunlap was taking, can induce "serotonin syndrome," which leads to "a variety of erratic behaviors including agitation, aggression, and violence." (*Id.* at 19.) Two proffered expert opinions are attached, one from Dr. George Corvin, a psychiatrist, who replaced Dr. Woods who was suffering from poor health, and the other from Dr. Keith Pennypacker, a neuropharmacologist.

The Commonwealth's first contention in its Response to Mr. Dunlap's 11.42 Motion alleges Mr. Dunlap's trial counsel was not deficient, as his defense team did present substantial mitigation evidence, including his AVM, military service, and positive remarks from friends. (Comm.'s Resp. to 11.42 Mot., at 32.) The Commonwealth argues this performance is "objectively reasonable" in accordance with *Strickland*. *Id.* The Commonwealth argues trial counsels' decision to not present particular mitigating evidence was strategic—that is, excusing his crimes with brain abnormalities, childhood abuse, and alcohol use could have turned the jury further against Mr. Dunlap. (Comm.'s Resp. to 11.42 Mot., at 28.) The Commonwealth further alleges Mr. Dunlap is unable to meet the prejudice standard, because in a death penalty case where aggravating factors are overwhelming, it is difficult to show prejudice at sentencing due to the alleged failure to present mitigating evidence. *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000). The Commonwealth continues that because of the brutality and utter disregard for human life exhibited by Defendant in the commission of these crimes, the new mitigating evidence proposed in Mr. Dunlap's 11.42 Motion offer, "virtually no rationale for the premedicated, cold-blooded murder, of (three) innocent victims." *Hodge v. Commonwealth*, 2009-SC-000791-MR, 2011 WL 3805960 at *5 (Ky. 2011).

All this considered, and to provide a thorough record for certain appeal regardless of how the Court rules, the Court believes to make a decision on this claim it must hold an evidentiary hearing to adequately address any facts or issues external to the current record. The Court therefore **GRANTS** Defendant's request to have an evidentiary hearing on Claim One of his 11.42 Motion.

B. Ineffective Counsel for Stipulating to a Fact Not in Evidence and Failing to Respond to Improper Statements in Closing Argument (Claim Two).

Mr. Dunlap's next claim is his trial counsel was ineffective for stipulating to a fact not in evidence and for failing to respond to an improper statement in the Commonwealth's closing argument. This claim involves a statement made by the Commonwealth in closing argument that Mr. Dunlap went to the crime scene one week before the crime. (VR 11, 2/24/2010, 9:32:00.) When the jurors were deliberating, the jury returned to the Court with the following question: "When was the first time Mr. Dunlap was at the Frensley's residence?" (*Id.*, 1:12:31-1:12:55.) The Commonwealth claimed that it was about a week before the crime, as it argued in closing. The Court did not recall what Ms. Frensley testified regarding the question and encouraged the Commonwealth and the Defense to agree on an answer for the jury. (*Id.*, 1:13:23-1:13:49.) Mr. Dunlap's trial counsel did not stipulate that Mr. Dunlap visited the house a week before the crime, but they did stipulate that Ms. Frensley testified he was there around a week prior. (*Id.*, 1:13:51-1:14:13.)

Upon reviewing the records, post-conviction counsel discovered that Ms. Frensley never testified as to the time frame of when Mr. Dunlap previously visited the home. (VR 2/19/10, 2:02-2:04:30.) What is clear, however, is that Kristy Frensley testified Defendant did come to her home before the crime and had interaction with her and her daughters in her backyard by

inquiring if they knew of a certain person for whom he was allegedly looking. (VR 2/19/10, 2:02-2:04:30.)

It is true that an incorrect or erroneous stipulation may establish deficient performance. *People v. Coleman*, 704 N.E.2d 690 (Ill. App. Ct. 1998). The stipulation in this case is less significant to the case's ultimate outcome than the instances referenced in Defendant's motion. *See id.*; *Rios v. State*, 730 So.2d 831 (Fla.1999). The inquiry for deficient performance requires "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 688. Counsel was at the end of a two-week jury trial after spending much time preparing for the case. The Court finds it reasonable that counsel may not recall every detail of Ms. Frensley's testimony.

Defendant references the timing of the jury deliberations and the verdict after this statement and post-conviction affidavits from investigators—providing speculative hearsay at most—to this stipulation's bearing on the jury's verdict. The Court finds this argument unpersuasive. "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." *Haight*, 41 S.W.3d at 442.

Moreover, this is an issue of *when* Mr. Dunlap visited the Frensley home—not *if* Mr. Dunlap visited the home—prior to the murders. As noted in the Commonwealth's Response to Mr. Dunlap's 11.42 Motion,

> Even if Dunlap's counsel had believed that the Commonwealth's statement was false, Dunlap's counsel was faced with this dilemma: To object and draw attention to his client's presence at the home before the murders or to allow the erroneous statement to pass. If Dunlap's counsel had objected, he would at most have persuaded the trial court to admonish the jury that it was unknown when Dunlap came to the Frensley home. However, this may have caused the jurors to

> speculate that Dunlap had been at the home several weeks or even a month before, and this would have been detrimental to counsel's trial strategy.

(Comm.'s Resp. to 11.42 Mot., at 43-44.)

The Court does not find this stipulation to be deficient performance. Moreover, this is not a material issue of fact that cannot be resolved by examination of the record, nor does this allegation "justify the extraordinary relief afforded by the post-conviction proceeding." *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1967); *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). For the reasons stated above, the Court **DENIES** Mr. Dunlap's request that his sentence be vacated on the grounds of this claim.

C. Ineffective Counsel for Failing to Fully Investigate and Provide Testimony that Defendant Was Not Competent To Enter a Guilty Plea (Claim Five).

Mr. Dunlap next claims ineffective assistance of counsel, arguing his trial counsel failed to fully investigate his AVM, mental illness, and suicidal ideation and to fully consult with an expert who could explain why these factors in conjunction with each other indicated he was not competent to enter a guilty plea. For this claim to succeed, Mr. Dunlap must establish:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would have not pleaded guilty, but would have insisted on going to trial.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001)).

Mr. Dunlap raised a similar issue on appeal, arguing that this Court erred by accepting his guilty plea. *Dunlap*, 435 S.W.3d at 554. The Kentucky Supreme Court reiterated the standard of competency to enter a guilty plea:

> [Mr. Dunlap] was competent to enter a guilty plea if the trial court was satisfied by a preponderance of the evidence that he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [that] he ha[d] a rational as well as factual understanding of the proceedings against him."

Id. at 556. (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). The High Court found that this Court's finding of Mr. Dunlap's competency to enter a guilty plea was supported by substantial evidence, particularly at the competency hearing held by this Court on January 22, 2010, including: (1) substantial testimony from Dr. Amy Trivette, the KCPC psychiatrist who supervised Mr. Dunlap's month-long evaluation, explaining that "to a reasonable degree of medical certainty, [Dunlap] understood the nature and consequences of the proceeding," and that he was "able to assist his counsel and rationally participate in his own defense," (2) exchanges between this Court and Mr. Dunlap during the plea colloquy where Mr. Dunlap stated "Yes, sir, I'm competent," and answered affirmatively that he could participate rationally in his defense, and (3) testimony from Mr. Dunlap's expert witness, Dr. Nicholas, who testified that "he 'never had an issue with [Mr. Dunlap's] competency to stand trial.'" *Dunlap*, 435 S.W.3d at 557. The Court also addressed the finding that Mr. Dunlap was not mentally ill, explaining at the time of the offense, this was "supported by substantial evidence." *Id.*[4]

The Kentucky Supreme Court rejected Mr. Dunlap's contentions on appeal, finding substantial evidence Mr. Dunlap entered the guilty plea knowingly, intelligently, and voluntarily.[5] On appeal, Mr. Dunlap argued that this Court's ruling in respect to his plea "deprived his attorneys the opportunity to fulfill their duty to investigate all possible defenses

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[4] *Dunlap*, 435 S.W.3d at 577 ("KRS 504.060(6) defines 'mental illness' as 'substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors.'")

[5] *Dunlap*, 435 S.W.3d at 562 (citing *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006)) (finding Mr. Dunlap "knew precisely what he was giving up by pleading guilty," and "substantial evidence supports the trial court's conclusion that [Mr. Dunlap's] plea was voluntary").

and mitigating circumstances and bolster evidence to support a GBMI plea." *Id.* at 563. The Supreme Court held that even if another competency evaluation was performed in light of Mr. Dunlap's AVM, because the AVM was present at the time he was evaluated, any error would be harmless because the "trial court *properly* found [Mr. Dunlap] competent to reject the advice of counsel and enter a guilty plea." *Id.* In addition, the Court noted that Mr. Dunlap's plea "*absolved* defense counsel of their duty to investigate." *Id.* Thus, because Mr. Dunlap went against the advice of his counsel by entering a guilty plea, his trial counsel no longer had a duty to continue pursuing a GBMI strategy, or any related strategy for that matter.

This Court finds trial counsel was not deficient in failing to fully investigate and consult with experts regarding Mr. Dunlap's competency. Nor does this Court believe Mr. Dunlap's suicidal ideations had any bearing on his competency to enter a guilty plea. *See Austin v. Davis*, 876 F.3d 757, 780 (5th Cir. 2017) ("A history of suicidality and depression, however, does not render a defendant incompetent.") Further, documents produced by proffered experts sought by post-conviction counsel at no point indicate rebut this Court's or the Kentucky Supreme Court's finding that Mr. Dunlap was competent to stand trial. Dr. Fabian's report notes Dunlap's IQ is "high average range" Fabian Report, 10. The reports primarily deal with potential explanations for Dunlap's behavior, not his competency.

Thus, because this was litigated at the Kentucky Supreme Court and the Court cannot find deficient performance on behalf of trial counsel, the Court **DENIES** Mr. Dunlap's request that his sentence be vacated on the grounds of this claim.

D. Ineffective Counsel for Failing to Inform Defendant of Voluntary Intoxication Defense (Claim Six).

Mr. Dunlap next claims his trial counsel rendered ineffective assistance for failing to fully investigate and advise him of the viability of a defense that voluntary intoxication, coupled

with the AVM, negated the *mens rea* necessary to prove intentional murder. "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Further,

> [i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The 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. 668 at 693-694.

Mr. Dunlap argues his trial counsel obtained evidence suggesting his offenses were committed while he was voluntarily intoxicated: the combination of his prescription drugs, his known drinking habits, Ms. Frensley's statement that he smelt of alcohol[6], and his DNA on the bottle of Crown Royal held in evidence. However, a voluntary intoxication defense may exist only when a defendant was "so drunk that he did not know what he was doing," or when the intoxication "negatives the existence of an element of the offense." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002).

The evidence at trial was that Mr. Dunlap took several steps prior to, during, and after the commission of the crime that reflect he knew what he was doing.[7] Mr. Dunlap has not alleged that he personally was acting to the extent that he does not remember anything. Certainly, a truly drunken man could not have done all that Defendant did that day. This Court does not find

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[6] 10/20/2008 Interview with Kristy Frensley @ 1430 Hrs. Case Number: 01-08-0931, report by Detective Brett Miller; Def.'s 11.42 Mot., at 85.

[7] First, Mr. Dunlap drove to the scene and brought a gun and zip-ties to the Frensley residence. Second, Mr. Dunlap gained access to the house under a ruse. Third, he attempted to hide evidence of his rape of Kristy. Fourth, he attempted to cover the murders by burning the house down. Fifth, he drove away successfully.

counsel's supposed failure to pursue a voluntary intoxication defense as performance that "caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229-30 (6th Cir. 1992).

The predicate *mens rea* required for intentional murder, the crime to which Mr. Dunlap plead guilty three times is the "intent to cause the death of another person." KRS 507.020(1)(a). Nowhere does Mr. Dunlap allege he did not intend to cause the death of his victims, and the circumstances do not rebut this. *See, e.g.*, *Talbott v. Commonwealth*, 968 S.W.2d 76, 86 (Ky. 1998) ("It is elementary that intent may be inferred from the act itself or from the circumstances surrounding it.") Trial counsel's decision to not pursue this defense was a reasonable trial strategy, as the evidence above demonstrates this defense would likely be unsuccessful. Mr. Dunlap has not convincingly presented this Court with evidence he was "deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding." *Dorton*, 433 S.W.2d at 118; *Elza*, 284 S.W.3d at 122 (holding that when "overwhelming" evidence of the defendant's guilt and little hope of jury sympathy in respect to a brutal murder exists, an intoxication defense is unlikely to succeed). Because Mr. Dunlap's possible intoxication defense is overwhelmingly without merit, this Court **DENIES** Mr. Dunlap's request that his sentence be vacated on the grounds of this claim and **DENIES** Mr. Dunlap's request for an evidentiary hearing on this claim as the entire claim is refuted by the record.

E. Ineffective Counsel for Failing to Challenge the Grand Jury Indictment (Claim Seven).

Mr. Dunlap next argues that his trial counsel was ineffective for failing to challenge his indictment due to statements made by Detective Jerry Jones of the Kentucky State Police. In Detective Jones' Grand Jury testimony, he purportedly made statements such as:

> Because of my faith I know that one day I will stand in front of the Lord and answer for every action and deed, or thought. I'll be held accountable as all of you will, whether you believe that or not, that's what I believe.
> . . .
> [God says] [o]ne thing you must stand before me and be held accountable, and there will be no appeal, but the punishment starts now. You're going to be found out; you're going to be caught; you're going to be judged, and the punishment is going to start now.

(Def.'s 11.42 Mot. at 86-87.) Detective Jones also allegedly referenced a school shooting that happened near this circuit decades ago and testified that Mr. Dunlap told the police he visited the Frensley residence "a week or two" before the crime, when Mr. Dunlap allegedly did not make this statement. (Def.'s 11.42 Mot., at 87.)

Courts may dismiss indictments where "a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). Defendant does not assert that Detective Jones intentionally or knowingly presented false testimony to the grand jury. While the Court agrees that Detective Jones' purported comments are beyond the facts of the case, it is understandable he may have been a bit emotionally overwhelmed having investigated such a horrible crime.

Kentucky Rule of Criminal Procedure 6.12 provides,

> An indictment, information, complaint or citation shall not be deemed invalid, nor shall the trial judgment or other proceedings thereon be stayed, arrested or in any many affect by reason of, a defect or imperfection that does not tend to prejudice the substantial rights of the defendant on the merits.

To have an indictment dismissed, the defendant must demonstrate a flagrant abuse of the process which resulted in actual prejudice. *Baker*, 11 S.W.3d at 588-89; *United States v. Roth*, 777 F.2d 1200, 1205 (7th Cir. 1985). Detective Jones' testimony does not rise to the level of flagrant abuse. Even if it did, the grand jury—even without this testimony—had sufficient

evidence to indict Mr. Dunlap. *See Dunlap*, 435 S.W.3d at 551-52. Because the evidence does not suggest it would have been reasonable for trial counsel to challenge the indictment, this Court **DENIES** Defendant's request that his guilty plea and sentence be vacated on the grounds of this claim.

F. Ineffective Counsel for Failing to Challenge Capital Kidnapping as Unconstitutional (Claim Nine).

Mr. Dunlap's final ineffective assistance of counsel claim argues his counsel was ineffective for failing to challenge kidnapping that results in death (capital kidnapping) as unconstitutional as cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Section Thirteen of the Kentucky Constitution. Mr. Dunlap argues that because only five states authorize the death penalty for kidnapping that results in death, there has been a societal and legislative consensus against this punishment for kidnapping, and its continued use is unconstitutional. *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

Mr. Dunlap asserted this claim on appeal; however, instead of challenging on grounds of ineffective assistance of counsel, he simply challenged its constitutionality. *Dunlap*, 435 S.W.3d at 615. The Kentucky Supreme Court addressed the constitutionality of the death sentence for capital kidnapping and the Court explained it was "not persuaded that Kentucky's status as a minority jurisdiction in this respect requires us to revisit our position." *Id.*

The Court notes Mr. Dunlap was still sentenced to the death penalty for three counts of capital murder. Challenging the sentence for capital kidnapping would not result in a different outcome for the capital murder sentences of death. Because Mr. Dunlap has failed to demonstrate his counsel's performance was deficient and prejudicial and this issue was addressed on direct appeal, this Court **DENIES** Mr. Dunlap's requested relief on this claim.

III. Juror Claims

A. Denial of the right to an Unbiased Capital Sentencing Jury (Claim Three).

Mr. Dunlap's first juror argument is that he was denied the right to an unbiased capital sentencing jury because some jurors could not consider mitigation and the jurors referenced the Bible during deliberations. Defendant relies on affidavits from employees of the Department of Public Advocacy ("DPA") who conducted interviews with jurors who served on his jury. The affidavits are not from the jurors themselves, but rather from representatives of the DPA. Additionally, the interviews with the jurors occurred in March and April of 2015, which was *five* years after trial. The affidavits are not signed or endorsed by the jurors, nor are the statements placed in context to preceding statements made to the jurors. Finally, the affidavits were constructed five to six months after the interviews took place.

The Court believes the Kentucky rule that applies here is RCr 10.04, which provides a "juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Under RCr 10.04, "'evidence of another juror as to anything that occurred in the jury room' is simply incompetent to impeach the jury's verdict." *Commonwealth v. Wood*, 230 S.W.3d 331, 332 (Ky. App. 2007) (quoting *Hicks v. Commonwealth*, 670 S.W.2d 837, 839 (Ky. 1984)); *see Epperson v. Commonwealth*, 2017-SC-000044-MR, 2018 WL 3920226 at *2 (Ky. 2018) ("It was proper to try those who extrajudicially sentenced and executed [the victims]; it was improper to try the jurors who judicially sentenced Epperson to a similar fate.")

Any alleged statements by the jurors relating to their deliberations are meritless. *Hicks*, 670 S.W.2d at 839 (holding a defendant is "free to establish by *competent* evidence that a juror did not truthfully answer on *voir dire* in order to conceal bias," but a defendant "cannot attempt this by the evidence of another juror as to anything that occurred in the jury room. Such evidence

is incompetent"); *Ford v. Commonwealth*, 628 S.W.3d 147, 159 (Ky. 2021) ("[J]urors' testimony regarding why they voted to convict Ford was inadmissible to impeach their verdict. This testimony was about matters that were internal to each juror's deliberative process."); *Austin*, 876 F.3d at 790, 796-97 (holding that post-trial statements indicating jurors could not consider mitigating evidence—including explicit statements that jurors believed there was no instance in which death was inappropriate—were inadmissible because it is contrary to Federal Rule of Evidence 606(b)(1) and even if it were not, post-trial statements do not indicate a juror held these beliefs during voir dire); *Bowling v. Commonwealth*, 168 S.W.3d 2, 8 (Ky. 2004) (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)) (holding that a post-conviction affidavit from a DPA investigator with a juror who said "it was necessary for the [defendant] to prove that he was innocent in order for [Juror 64] to have reached a not guilty verdict" was inadmissible because it was a "matter resting in the personal consciousness of one juror.").

i. Mitigation

To succeed on this claim of juror mendacity, Mr. Dunlap must show that "a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003). Mr. Dunlap points to the following statements written by DPA representatives in the affidavits:

(1) Juror D.C. – Just because something happens to you in your life doesn't give me an excuse. (not in direct quotations from the juror).
(2) Juror V.D. – The brain issues "didn't make any mitigation" for her to consider, because Kevin "could figure out what was right and wrong." It "could not play a part in how he did those kids. He just killed 'em." He chose to kill a woman and three children similar to his wife and three kids, because he "couldn't do it to his family."
(3) Juror W.L. – Nothing the defense said would have changed the outcome. (not in direct quotations from the juror)
(4) Juror L.C. – Nothing could have been said or presented to her to result in a sentence of less than death, "because of what he did to those babies."

(5) Juror L.H. – There was nothing trial counsel could have said to change the sentencing outcome. The jury decided Kevin's guilt when they heard he had scoped out the Frensley residence a week before. (Not in direct quotes). "There is something wrong with my brain, too, but I don't decide to kill little kids." (in direct quotes).

(Sealed Ex. to Def.'s 11.42 Mot.) Jurors L.C.'s and L.H.'s alleged inabilities to consider mitigating evidence fall outside of RCr 10.04's allowance. The Court also notes W.L.'s voir dire shows a very open mind (VR 2-12-10 at 9:30).

Nonetheless, the Court will address the following statements by Jurors V.D. and L.H.. During voir dire, the following exchanges occurred after the Commonwealth asked V.D. if she automatically excluded any penalties:

V.D.: Something of this situation. I don't see parole as being an option.

...

Commonwealth: The judge will instruct you on penalties, if you are chosen to sit on this jury, the judge will instruct you, if he instructs you on penalties, will you be able to follow?

V.D.: Yes, ma'am.

...

Commonwealth: So on a sentence twenty to fifty [years] if you believe the evidence warranted that penalty, you would be able to consider it and impose it?

V.D.: Yes.

...

Court: After you've heard the evidence of the crimes and heard any mitigating evidence that defense may bring forward, if you thought lower end penalties were appropriate based on that evidence would you be able to consider the full range without excluding any?

V.D.: (nods) Based on the evidence.

Court: And is the reason or at least one reason you say it would be difficult as you sit there now is because you haven't heard evidence of the crimes committed or evidence of mitigation?

V.D.: (nods yes)

(VR 2/15/10, 4:09:15-4:19:48.)

V.D.'s alleged statement, that the brain issues "didn't make any mitigation" does not equate to her ability to consider mitigating evidence. She allegedly made this statement after the lengthy and difficult trial. This fails to establish she lied during voir dire, even if the affidavit was admissible. *Bowling*, 168 S.W.3d at 8.

Juror L.H.'s voir dire is summed up by the KY Supreme court as follows:

> In response to the trial court's preliminary questions, L.H. indicated that she could consider the full range of penalties and impose a penalty within that range. She also indicated that she could consider mitigating evidence if so instructed. She admitted further that she had thought about the proper penalty and that the only way she would consider the lower end of the penalty range is if Appellant presented mitigating evidence. However, she later conceded that she would be able to follow a "no adverse" interference" instruction. She asserted that even if Appellant did not present mitigating evidence that it was "possible, based on the evidence," that she could consider and impose a twenty-year sentence.
>
> Defense counsel moved to strike for cause because she could not consider a lower-range penalty absent mitigating evidence presented by the defense. The trial court denied the motion. It recognized that L.H. was "honest in saying at first blush something on the low end would not be appropriate based upon what he know about his admission," but she "established that she can conform her opinions to follow the law."

Dunlap, 435 S.W.3d at 579. It is reiterated Defense moved to challenge L.H. for cause. (VR 2/15/10,1:55:33-1:56:15.) Juror L.H.'s alleged post-conviction statement, "there is something wrong with my brain, too, but that does not mean I decide to little kids," standing alone and without any context five years after trial does not show that she was unable to consider Defendant's proof, and neither do her other alleged retrospective thoughts on the trial. It further does not suggest that mitigation was not considered in his

sentencing. Nor does this conflict with the statements she made during voir dire or show that she lied. *See Austin*, 876 F.3d at 796-97.

Mr. Dunlap fails to meet the burden of proof to establish that these jurors lied on voir dire. The affidavits are hearsay. Ky. R. Evid. 801(c). Thus, these affidavits are inadmissible. "Either direct hearsay testimony or an affidavit containing the hearsay statements of jurors in support of a motion for a new trial is inadmissible to show that a verdict was arrived at by lot." *Brown v. Commonwealth*, 490 S.W.2d 731, 732 (Ky. 1973) (internal citation omitted). Concerning juror affidavits, the Kentucky Supreme Court held "'the testimony of a juror may be received to establish that the verdict was arrived at by lot; but even this fact must be established by the testimony (affidavit) of a juror and may not be shown by hearsay testimony contained in an affidavit of one who was not present at the time of the occurrence.'" *Brown*, 490 S.W.2d at 732 (quoting *Burton v. Commonwealth*, 217 S.W.2d 627 (Ky. 1949)).

Even if the affidavits were admissible, the statements do not meet the second prong for juror mendacity. None of these statements would justify a strike for cause. "There is no entitlement . . . to a jury or to individual jurors committed at the outset to view particular mitigating factors as having a mitigating effect." *Harris v. Commonwealth*, 313 S.W.3d 40, 47 (Ky. 2010).

ii. Bias

Defendant also references Juror D.C.'s post-conviction interview, in which the interviewer wrote that Juror D.C. was the victim of a kidnapping when he was ten years old. The affidavit is hearsay. *See Crawford v. Marshall Emergency Service Assocs., PSC*, 431 S.W.3d 442, 446-47 (Ky. App. 2013) (holding hearsay affidavits are inadmissible to support a motion for

a new trial). Even if it was not hearsay, Juror D.C.'s alleged experiences are wholly unsimilar to the crimes committed by Defendant and are unlikely to qualify as a "violent" crime as alleged by Mr. Dunlap. *See* KRS 439.3401; *see also Little v. Commonwealth*, 422 S.W.3d 238, 241-44 (Ky. 2013) ("[T]he mere fact that a juror or her family member has been the victim of a crime similar to the one charged against the defendant does not, in and of itself, justify that juror's excusal.") The Court also disagrees D.C.'s alleged statement about excuses shows he did not consider mitigation.

The affidavit concerning Juror D.C.'s statements in his post-conviction interview is the only reference to the jury considering "external influences." The affidavit says "Jurors discussed interpretations of the Bible as it pertained to capital sentencing." (Sealed Ex. to Def.'s 11.42 Mot., at 2.) This is not in quotation marks, indicating it is rephrased from what Juror D.C. said and is thus hearsay. Regardless, this is inadmissible. RCr 10.04. Further, jurors are free to discuss their own personal experiences and beliefs during deliberation. *Warger v. Shauers*, 574 U.S. 40, 51 (2014).

To be extraneous, the evidence "must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury." *Thompson v. Parker*, 867 F.3d 641, 648-49 (6th Cir. 2017). External influences include "'publicity and information related specifically to the case the jurors are meant to decide,'" and internal matters "'include the general body of experiences that jurors are understood to bring with them to the jury room.'" *Ford*, 628 S.W.3d at 159 (quoting *Warger*, 574 U.S. at 51).

Because the post-trial juror affidavits are inadmissible, fail to establish that jurors lied during voir dire, and there is no proof of any external influence, this Court **DENIES** Mr.

Dunlap's request for relief on this claim and **DENIES** an evidentiary hearing on this claim as the claim is wholly refuted by the record.

B. Inadequate Voir Dire (Claim Four)

Mr. Dunlap's next claim regarding the jury is that his trial counsel inadequately conducted voir dire of jurors L.C. and L.H., claiming that this deprived him of the rights to a fair trial, an impartial jury, a reliable capital sentencing proceeding, and the right to effective assistance of counsel. The Court will initially state voir dire in this case was exceptionally thorough. Potential jurors reported to court over the course of seven days. There were four days of individual voir dire with over ninety potential jurors questioned by both parties.

The Court initially notes the standard of performance for trial counsel during voir dire is generally more demanding in death penalty cases.

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding 'death qualification' concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

ABA Guideline 10.10.2.B (2003).

Defendant argues that his trial counsel failed to ask clearly defined questions to Juror L.C. regarding whether she could comprehend and respond accurately and meaningfully. Mr. Dunlap points to the exchanges between the Court, counsel, and Juror L.C. during voir dire, alleging she did not understand the concept of mitigating evidence. Mr. Dunlap also relies on the post-trial interview with Juror L.C., where she allegedly could not "remember the term

[mitigation] at all." (Def.'s 11.42 Mot., at 77.) As enumerated above, this post-trial affidavit is inadmissible.

Once again, because Mr. Dunlap's claim for inadequate voir dire is for ineffective assistance of counsel, he must meet the *Strickland* standard. Mr. Dunlap's trial counsel thoroughly questioned Juror L.C. during voir dire. The relevant exchanges, beginning with those with the Court, are as follows:

> Court: What was your initial reaction to what the punishment ought to be?
>
> L.C.: The death penalty.
>
> Court: And from what you've said… do you think you can set aside that initial opinion and make a determination of punishment based on evidence that you would hear at the sentencing part of the trial?
>
> L.C.: Yes sir.
> …
> Court: If you were a juror, would you be able to consider the entire range of penalties?
>
> L.C.: Yes.
>
> Court: Would you be able to not only consider that full range, but would you be able to impose the full range? In other words, could you sentence someone, Mr. Dunlap, for that matter, to any of those penalties within that range, from the twenty years, through and including, the death penalty?
>
> L.C.: Yes sir.
>
> Court: My next topic has to do with what the law calls mitigation evidence. And that's not a term that ordinary people are necessarily familiar with. And in the law, what that evidence has to do with is evidence about a person's character or background or education or circumstances that the jury can consider as a reason for perhaps imposing a less severe penalty instead of a more severe penalty. So, again, if the instructions tell the jury that they are to consider factors in mitigation to punishment, if you are a juror, would you consider those mitigating factors that you thought were important?
>
> L.C.: yeah.
>
> (VR 2/11/2010, 10:34:24; 10:38:02; 10:38:52.)

The relevant exchanges with the defense team and Juror L.C. are as follows:

Defense: Ok. Uhm. You indicated that when you had first heard about this case, you had an opinion about what you thought the appropriate punishment would be. I believe you said you thought the death penalty was the appropriate punishment.

L.C.: Mhm.

Defense: Did you ever express your opinion to your co-workers, back in that point in time?

L.C.: No, probably my husband. But, no, not my coworkers.

Defense: Ok. Uhm, when did you decide to set aside your opinion? If that's a fair way of putting that?

L.C.: I guess when I realized that I may be the one to have to actually make that decision.

Defense: And I guess I'm a little confused as to when you came to that realization?

L.C.: Just the last couple of weeks I guess. Since we've come to court the first time and we was here for the orientation and stuff and realized you know, that you're the one going to be making a decision of somebody else's life.

Defense: So, let me make sure I understand you correctly and please tell me if I am saying this wrong. Up to say, first / second week of January, when you came here for juror orientation, you were of the opinion that Mr. Dunlap should get the death penalty? Is that fair?

L.C.: Well, I – I'm not saying that – I don't think so. I mean, it has crossed my mind, and yes, when you think about these kids, that comes to your mind, you know, ok. But I don't know that I was out telling everybody I just thought he should die, no. No.

Defense: Ok, what were you thinking up to that point? I'm just a little more confused.

L.C.: Ok. I'm a mom. So, I'm thinking if that happened to my child, that's probably what I would think. But I'm also a sister (tears up) – what if he was my brother? You know?

Defense: Ok. I'm a parent, too, and I can completely understand where you're coming from, believe me. I guess I'm just confused as to – were you totally committed prior to the juror orientation to the death penalty?

L.C.: No, no, I don't think so. No.

Defense: Ok.

L.C.: I'm not totally committed now. I'm just wanting to hear the evidence, if I have to make that decision.

Defense: Ok, and you believe that uh once you've heard all the evidence, that you could – and felt that it was appropriate – that you could give Mr. Dunlap the death penalty?

L.C.: Yeah, probably.

Defense: Let me ask you the other side of the coin. Once you've heard all the evidence and could consider all the evidence, could you consider and impose the minimum sentence?

L.C.: The minimum?

Defense: Yeah, twenty to fifty years?

LC … Probably not.

Defense: You don't believe you could consider the minimum?

L.C.: Not the minimum.

Defense: Okay. Even if the judge instructed you that this was the law?

L.C.: Oh, well if, I mean, if he instructed that was what we had to do, yeah … I mean, what do you mean?

Defense: Well, I, I don't want to confuse you, I just…

L.C.: Yeah, you confused me with that last one.

Defense: Ok. I'm sorry I didn't mean to. As the judge indicated, the range of possible penalties here starts at twenty years and can go all the way up through and including the death penalty. My question to you is if – do you believe that you could – after hearing all of the evidence and testimony – do you believe that you could consider and impose the minimum sentence?

L.C.: You're saying twenty years.

Defense: Yes, twenty years.

L.C.: No. Not twenty years.

Defense: You couldn't – you don't believe you could?

L.C.: I don't think I could. I'm sorry.

Defense: Even after hearing all the evidence?

L.C.: Well, I mean, after you hear all the evidence, that's true, something could change. I mean, okay, yeah, yeah, I could. I could. If I hear all the evidence, okay…

Defense: Yeah, I think I'm confusing you too.

L.C.: Yeah, okay. Today, if you ask me that today, I don't think I could, but after I hear the evidence … if the evidence, yes, I could. I'm sorry.

Defense: The judge asked you about mitigation. Do you understand what that concept is? What mitigation evidence is?

L.C.: Yeah, I think so.

Defense: And what is it?

L.C.: Just his personal, his personal life – I mean I'm not sure. Something – his character.

Defense: Ok. I think those things would be part of it. Would you be able to consider the full range of penalties even if we didn't present any of that evidence?

L.C.: No evidence at all, just what I know right now?

Defense: no, no, .no, no …

L.C.: No, okay none of his character—

Defense: No, no, I'm not talking about that, I'm not talking about you making a decision right now, believe me.

L.C.: Oh okay, oh okay okay.

Defense: You haven't heard a single piece of evidence right yet

L.C.: Oh, okay, okay…

Defense: And I don't want you to make a determination right now without that. What I'm asking you is, um, should we not present any mitigation evidence, as

the judge described, uh, could you impose the full range of penalties under those circumstance?

L.C.: Well, yeah, if, uh, if I've heard all the evidence.

Defense: Ok. Ok.

(VR 2/11/2010, 10:41-10:48:11-10:48:30.)

Finally, L.C.'s and the Commonwealth's relevant exchanges are as follows:

Commonwealth: If the court instructs you to consider that full range, based upon the evidence, would you be able to fairly consider and impose that full range, if you thought the evidence warranted it?

LC: Yes.

Commonwealth: Now, you might not want to. But, if you felt like, based upon the evidence, and based upon the instructions, that a twenty to fifty year sentence was what should be done, you could do that? You could consider it and impose it, correct?

LC: Yes.

Commonwealth: And likewise, all the way up, including the death penalty?

LC: Yes.

Commonwealth: Now, is that a fair statement of what you believe or can do based upon the court's instruction?

L.C.: Yes.

Commonwealth: And, is it also a fair interpretation that when you first heard about this case, you felt like the maximum should be imposed?

L.C.: Yes.

Commonwealth: Kind of generic, like they ought to do something about that, right?

L.C.: Right, yes sir.

Commonwealth: And then, this is a fair statement about your thinking also – that when you realized you could be the one making a decision, did your mind change about that?

L.C.: Yes.

Commonwealth: So, talk's cheap and when you're actually down to the actual doing, it's a different matter?

L.C: Yes sir. That's right.

(VR 2/11/2010, 10:48:45-10:50:28.)

The Court determines these exchanges were a thorough voir dire of Juror L.C. The record does not show that trial counsel's voir dire fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Reviewing counsel's performance with "strong presumption that counsel's conduct falls 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,'" coupled with the fact that Mr. Dunlap does not point to specific questions that should have been asked of Juror L.C., the Court does not find trial counsel's performance deficient. *Id.* at 689 (quoting *Michel*, 350 U.S. at 101); *see also Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky.2005) ("[A] claim that certain facts *might* be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr 11.42 relief").

Mr. Dunlap also argues that his trial counsel failed to adequately voir dire Juror L.H. Mr. Dunlap argues that Juror L.H. should have been questioned further about her husband who worked at the Kentucky State Penitentiary. (Def.'s 11.42 Mot., at 78.) The Court believes it is clear from the voir dire that trial counsel expressly explored any potential bias in this regard. Although Mr. Dunlap points to a list of specific questions that he claims should have been asked to Juror L.H., Mr. Dunlap fails to provide legal authority asserting how this questioning would be a reasonable trial strategy or how failure to conduct additional questioning fell below an objective level of reasonableness.

Defendant further alleges his trial counsel should have questioned Juror L.H. more about her depression. (Def.'s 11.42 Mot., at 79.) Once again, Mr. Dunlap cites no legal authority reasoning how this line of questioning would have been productive and is merely speculative. *See Haight*, 41 S.W.3d at 442 ("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.")

Additionally, the Court finds no problems with the certification of Lo. H. as a juror (VR 2-11-10, 10:45). Further, the Court further notes defense counsel wisely moved the Court to give them additional preemptory challenges, and the Court gave defense counsel two more than the Commonwealth received. The Kentucky Supreme Court noted one juror. J.F.,was not excused who should have been, but Judge Woodall's granting of the additional preemptories resolved that error. It is noted there was still an additional preemptory used by Defense over and above that required under the rules. Further, there is no cumulative voir dire error. Therefore, this Court **DENIES** Mr. Dunlap's requests to vacate his convictions and remand for new trial under this claim without an evidentiary hearing as the claim is wholly refuted by the record.

IV. Other Claims

A. Deprivation of a Fair Trial Independently or Cumulatively. (Claim Eight)

Finally, Mr. Dunlap claims that each of the individual claims asserted in his RCr 11.42 Motion must be viewed and evaluated as a whole and urges the Court to consider the claims in light and together with other presented claims. Because, as discussed above, the only claim on which the Court finds Mr. Dunlap entitled to an evidentiary hearing for this substantial form of relief is Claim One, the Court is not persuaded on the merits that Mr. Dunlap was denied a

fundamentally fair proceeding due to the enumerated alleged errors. Therefore, the Court **DENIES** Mr. Dunlap's request to grant relief on this claim.

V. CR 60.02 / 60.03 Motion

Mr. Dunlap's final Motion is his Motion to Vacate Convictions and Death Sentences under Civil Rule 60.02/60.03 in Light of New Evidence. Mr. Dunlap argues he is warranted relief because evidence of his mental illness was not discovered until after his sentence became final. The relevant facts of his mental illness are the same facts presented in his 11.42 Motion. This includes Mr. Dunlap's proffered bipolar diagnosis, brain abnormalities, and substance abuse.

Civil Rule 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:
> (a) mistake, inadvertence, surprise or excusable neglect;
> (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02;
> (c) perjury or falsified evidence;
> (d) fraud affecting the proceedings, other than perjury or falsified evidence;
> (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Further, Civil Rule 60.03 provides:

> Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

RCr 11.42 and CR 60.02 operate together in part; "[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). As a result, Kentucky courts generally decline to consider successive post-conviction motions. "At each stage . . . the defendant is required to raise all issues then amenable to review, and generally issues that either were or could have been raised at one stage will not be entertained at any later stage." *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010).

Mr. Dunlap advances his argument on three potential grounds. First, he argues this new evidence reveals he was not competent to enter a guilty plea. This is the same argument advanced above in Claim Five of his 11.42 Motion. Second, he argues his guilty plea should be vacated and changed to guilty but mentally ill. The relevant facts and legal authorities are very much similar to those as presented in Claims One and Five of his 11.42 Motion. Third, Mr. Dunlap argues the newly discovered evidence would have prevented a jury from imposing the death sentence. The relevant facts and legal authorities are the same as presented in Claim One of his 11.42 Motion.

On each of these three theories, Mr. Dunlap urges this Court to grant relief on Civil Rule 60.02(b) and 60.02(f), arguing that this newly discovered evidence could not have been discovered by due diligence in time to move for a new trial and that justice requires the Court's leave.

"CR 60.02 relief is discretionary. The rule provides that the court 'may, upon such terms as are just, relieve a party from its final judgment.'" *Gross*, 648 S.W.2d at 857. CR 60.02 provides movants might be entitled to relief if they proffer "newly

discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02[.]" CR 60.02(b). Additionally, motions made pursuant to that provision must be made "not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02. Mr. Dunlap's sentencing became final on October 6, 2014, when the Supreme Court of the United States denied certiorari in his case. Mr. Dunlap did not file his CR 60.02 motion until January 19, 2017, and his motion does not offer any reason why he was unable to consult with the new experts during this limitations period. Thus, his motion is untimely under CR 60.02. *See Kirksey v. Commonwealth*, 592 S.W.3d 324, 326-27 (Ky. App. 2019).

CR 60.02(f) allows movants to raise claims "of an extraordinary nature justifying relief" if brought "within a reasonable time[.]" To prevail, Mr. Dunlap must demonstrate that he is entitled to relief under that provision and "'(t)o justify relief, the movant must specifically present facts which render the 'original trial tantamount to none at all.' *Brown v. Commonwealth,* 932 S.W.2d 359, 361 (Ky.1996). Rule 60.02(f) 'may be invoked only under the most unusual circumstances[.]' *Howard v. Commonwealth,* 36 S.W.2d 809, 810 (1963); see also *Cawood v. Cawood,* 329 S.W.2d 569 (1959). Furthermore, … in order for newly discovered evidence to support a motion for new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.' *Jennings v. Commonwealth,* 380 S.W.2d 284, 285–86 (Ky.1964) (quoting *Ferguson v. Commonwealth,* 373 S.W.2d 729, 730 (Ky.1963))" *Foley v. Commonwealth*, 425 S.W.3d 880, 885-88 (Ky. 2014).

Consistent with Mr. Dunlap's contentions in his 11.42 Motion, the purported expert opinions of Dr. Woods, Dr. Fabian, Dr. Pennypacker, and Dr. Corvin could have

been elicited through due diligence, so they cannot constitute newly discovered evidence. This is not an extraordinary case which passes the rule, because the experts' reports cannot be truly newly discovered evidence unless they are based upon underlying facts that were not previously known and could not with reasonable diligence have been discovered. *See id.* Thus, the Court is not persuaded by Mr. Dunlap's first argument that the mitigating evidence would not have been discovered by due diligence.

Further, Mr. Dunlap's second argument that his guilty plea should be vacated and changed to guilty but mentally ill being based on the same purported expert opinions also fails to persuade the Court for the same reasons. This claim was partly addressed by the Kentucky Supreme Court and could have been raised in his 11.42 Motion.

Mr. Dunlap's third argument that the jury would have reached a conclusion other than death if this evidence was presented at sentencing is presented in Claim One of his 11.42 Motion and is therefore barred. "Civil Rule 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. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Defendant is not entitled to avoid time limitations under RCr 11.42 or CR 60.02 under the equitable relief possible under CR 60.03 as nothing in his proffered expert reports is extraordinary.

Defendant's CR 60.02 claims are barred, and his 60.03 claims also fail. There is no basis for any equitable relief under CR 60.03.

In accordance with the provisions above, this Court **DENIES** Mr. Dunlap's request to vacate his convictions and death sentences under CR 60.02 / CR 60.03.

ORDERS

In conclusion, the Court rules as follows on the Defendant's motions:

I. The Court **GRANTS** Mr. Dunlap's request for an Evidentiary Hearing on Claim One of Mr. Dunlap's original and amended RCr 11.42 Motions, after which a ruling will be made on Claim One's merits regarding post-conviction relief.

II. The Court **DENIES** Mr. Dunlap's request for an Evidentiary Hearing on the remainder of the claims from his original and amended RCr 11.42 Motions.

III. The Court **DENIES** Mr. Dunlap's requests to vacate and set aside his convictions and death sentences under RCr 11.42 on Claims Two, Three, Four, Five, Six, Seven, Eight, and Nine.

IV. The Court **DENIES** Mr. Dunlap's request to vacate his convictions and death sentences under CR 60.02/60.03.

V. A scheduling conference to set an Evidentiary Hearing on Claim One of Mr. Dunlap's 11.42 Motion will be held December 12, 2023 at 9:00 a.m. CST. Counsel may appear by Zoom with the following link:

Zoom link for Livingston Rule Day (DIVISION I) on December 12, 2023. (EARLY LINK)

Join Zoom Meeting
https://kycourts-net.zoom.us/j/86487877621

Meeting ID: 864 8787 7621

VI. This is NOT a FINAL and APPEALABLE ORDER.

SO ORDERED this 30 day of October, 2023.

JAMES R. REDD, III
CIRCUIT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that a copy of this Order has been mailed to the following:

ATTORNEYS FOR PLAINTIFF

Hon. Christopher Henry
Assistant Attorney General
Office of the Solicitor General
Criminal Appeals Division
1024 Capital Center Drive
Frankfort, KY 40601-8204

Hon. Carrie Ovey-Wiggins
Commonwealth's Attorney
P.O. Box 679
Eddyville, KY 42038

ATTORNEYS FOR DEFENDANT

Hon. Dennis Burke
2202 Commerce Parkway, Suite D Hon.
LaGrange, KY 40604

Hon. Margaret O'Donnell
P.O. Box 41815
Frankfort, KY 40604
P.O. Box 4815

Mr. Kevin Wayne Dunlap
Kentucky State Penitentiary
266 Water Street
Eddyville, KY 42034
DEFENDANT

On this 30 day of October, 2023.

Debbie Harp Knight
CLERK/ DEPUTY CLERK
Hi. DC