COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000483-MR

GREGORY WILSON — APPELLANT

v.

Appeal from Kenton Circuit Court
Action No. 87-CR-00166
Hon. Gregory M. Bartlett, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, GREGORY WILSON

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Certificate of Service

This is to certify that a copy of this brief was mailed, first-class postage prepaid, to Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division. Kenton County Judicial Center, 230 Madison Avenue, Covington, KY 41011, and Hon. Robert Sanders, Commonwealth's Attorney, 303 Court Street, Suite 605, Covington, KY 41011, and was delivered to the office of Hon. Heather M. Fryman and Hon. Julie Scott-Jernigan, Assistant Attorneys General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on January 27, 2014. I further certify that the record on appeal was returned to the office of the Clerk of the Supreme Court of Kentucky.

BRUCE P. HACKETT

INTRODUCTION

This appeal is from the order of the Kenton Circuit Court that denied Gregory Wilson's RCr 11.42 Motion to Vacate Judgment based upon ineffective assistance of appellate counsel on direct appeal *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). The circuit court found that the claim of ineffective assistance of appellate counsel had been denied by the federal court on habeas review; therefore, it had been "previously asserted and adjudicated" and that Mr. Wilson "is not entitled to further review of these issues which have been fully litigated and decided." (TR V, p. 608; Box 8 of 8; Appendix A to this brief).

STATEMENT CONCERNING ORAL ARGUMENT

The appellant believes that oral argument would be helpful to the Court. This appeal presents a post-conviction ineffective assistance of appellate counsel issue that was not addressed in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). The appellant requests that oral argument be scheduled.

NOTE CONCERNING CITATIONS

The court proceedings in Kenton Circuit Court were recorded on videotape. References to that record will be in accordance with CR 98: (VR, month/day/year, hour:minute:second).

References to the Kenton Circuit Court Clerk's record will be: (TR, volume, page; Box __ of __). (It appears that the Clerk of the Kenton Circuit Court began the numbering of pages anew with each appeal in the case; therefore, this brief will also refer to the box number that contains the record). The pretrial and trial transcripts will be designated: (TE, volume, page) and the RCr 11.42 hearing as: (TH, volume, page).

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STATEMENT OF THE CASE

I. Introduction

This appeal presents an issue left open in this Court's ineffective assistance of appellate counsel (IAAC) decision, *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). Specifically, in *Hollon*, this Court ruled that a prisoner who alleged and proved that his direct appeal attorney was ineffective for **failing to raise** an issue on appeal could obtain relief in an RCr 11.42 proceeding. *Id.* at 436. This Court also made it clear that relief would not be available if the claim was that the direct appeal attorney had done a poor job of presenting a particular claim to an appellate court. *Id.* at 437. Further, this Court declared that the *Hollon* decision would not be applied retroactively. *Id.* at 439. Mr. Wilson's RCr 11.42 motion filed pursuant to *Hollon* presents the issue of whether a direct appeal attorney who raises ineffective assistance of trial counsel (IAC) on direct appeal based on a record that was not fully developed to present such a claim herself renders ineffective assistance of counsel.

This Court never fully addressed the merits of the ineffective assistance of trial counsel issues in Mr. Wilson's case other than to say that when appointed counsel participated at trial, they were effective. *Wilson v. Commonwealth*, 836 S.W.2d 872, 879 (Ky. 1992), and *Wilson v. Commonwealth*, 975 S.W.2d 901, 903 (Ky. 1998) ("In applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we determined that Hagedorn and Foote did render Appellant effective assistance of counsel in those instances when they were allowed to participate in the trial. *Wilson, supra*, at 879."). Specifically, this Court never addressed the consequences of the ineffective assistance of counsel that occurred prior to trial when

appointed counsel did nothing to prepare a defense, did nothing to investigate or prepare for the penalty phase of trial and forbid co-counsel from initiating any mitigation investigation whatsoever. Because direct appeal counsel prematurely raised ineffective assistance of trial counsel on direct appeal, once Mr. Wilson developed the underlying facts to support his claim for relief, he was precluded from a merits review by the "law of the case" doctrine. *Wilson v. Commonwealth*, 975 S.W.2d at 903-904.

II. Procedural History of Mr. Wilson's case

Mr. Wilson was charged, tried and convicted together with Brenda Humphrey in a joint trial in Kenton Circuit Court in 1988. Both co-defendants were charged with murder, robbery, kidnapping, conspiracy to commit robbery and rape in an indictment returned in June 1987. (TR I, 3; Box 3 of 8). Humphrey was convicted of kidnapping, conspiracy and facilitation of both murder and rape. (TR V, 685-691; Box 3 of 8). Humphrey's sentence was life without parole for 25 years on kidnapping and a total of 50 years on other offenses. *Humphrey v. Commonwealth*, 836 S.W.2d 865, 867 (Ky. 1992). Mr. Wilson was convicted of all the charged offenses and was sentenced to death for kidnapping and murder. (TR V, 678-684; 714-718; Box 3 of 8).

On direct appeal, Mr. Wilson's convictions were affirmed, as were the sentences, with the exception of the kidnapping death sentence that was vacated and remanded for resentencing. *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). After he was resentenced to 20 years for kidnapping, Mr. Wilson filed a post-conviction motion to vacate the judgment, raising numerous claims, most of which related to ineffective assistance of trial counsel. (TR I, 54-118; Box 1 of 8). A final order denying all relief was entered on March 5, 1997. (TR IX, 1100; Box 1 of 8). This Court affirmed the

Kenton Circuit Court. *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998). The United States Supreme Court denied certiorari. *Wilson v. Kentucky*, 526 U.S. 1023 (1999).

Mr. Wilson's petition for a writ of habeas corpus, filed in the United States District Court for the Eastern District of Kentucky, was denied on September 30, 2004. In federal court, Mr. Wilson had been granted an evidentiary hearing on his claim that he had been denied effective counsel on direct appeal (IAAC).[1] At that hearing, the attorney who had "ghost-written" the brief,[2] Hon. Gail Robinson, testified that, with the exception of a public trial argument written by Hon. Russ Baldani,[3] she wrote the briefs filed in the Kentucky Supreme Court in the direct appeal from the final judgment entered in Kenton Circuit Court. (Appendix F, p. 9). One of the issues raised in the direct appeal was the ineffective assistance of trial counsel (Hagedorn and Foote). When Ms. Robinson raised the issue, she did not consider that by doing so, she would be responsible for barring later litigation of the issue in a post-conviction RCr 11.42 proceeding. (Appendix F, p. 14). Because of that, she testified in federal court that it was a mistake to raise the issue on direct appeal.[4] (Appendix F, p. 13).

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[1] The transcript of that evidentiary hearing was submitted to the circuit court as Appendix F to the motion to vacate. (TR I, 59; Box 8 of 8).

[2] Hon. William Summers, Hon. David Bruck, Hon. Mario Gerald Conte, Jr. and Hon. Robert W. Carran were the appellate attorneys of record, as reflected in the briefs filed in this Court (Appendices A, B, C, D and E to the motion to vacate). (TR I, 59; Box 8 of 8).

[3] Brief for Appellant, Gregory Wilson, Argument V, pp. 84-90 (Appendix A).

[4] When this Court decided the direct appeal, appellate counsel realized the error they had made in raising IAC and filed a petition for rehearing in which they claimed they had never raised the issue. Petition for Rehearing, p. 7. (Appendix D). Counsel made this assertion upon rehearing despite the arguments (Argument I and III) in the Brief for Appellant (Appendix A) alleging IAC.

Hon. Ira Mickenberg, attorney, training consultant, and law professor, testified as an expert in the field of criminal appellate practice and procedure. (Appendix F, pp. 22-31). (TR I, 59; Box 8 of 8). Mr. Mickenberg had reviewed the relevant court records, transcripts, briefs, rulings and opinions issued in Mr. Wilson's case at the trial, post-conviction and appellate levels of review. (Appendix F, pp. 30-31). He testified that it is always necessary and absolutely essential to develop facts beyond the record on appeal in order to properly present an IAC issue. (Appendix F, p. 33). Mr. Mickenberg then explained how facts that were developed outside the record, and not available for the direct appeal, could readily prove both the substandard performance and prejudice prongs required by *Strickland.* (Appendix F, pp. 35-45).

Also, Mr. Mickenberg testified about the conflict of interest that Hagedorn had in that he had an attorney-client relationship with Willis Maloney, one of the two main witnesses against Mr. Wilson. (Appendix F, p. 38). Information was uncovered in post-conviction that was not available to the direct appeal attorney in the trial record. The unavailability of this information at the time of the direct appeal prevented the presentation of the conflict of interest as a component of the IAC claim on direct appeal. After the direct appeal, it was discovered that Hagedorn had previously represented Maloney on a criminal charge, that Hagedorn failed to advise either the court or Mr. Wilson of the conflict, and that Mr. Wilson had requested Hagedorn to cross-examine Maloney, but Hagedorn asked no questions. (Appendix F, pp. 38-42). Furthermore, there was information that could have been used to cross-examine Maloney and challenge his credibility, and thereby his claim that Mr. Wilson had confessed to him. (Appendix F, p. 42).

Mr. Mickenberg also addressed the absences at trial of Mr. Hagedorn as they related to IAC. He explained that on direct appeal, there was no evidence about how often Mr. Hagedorn was absent or when he was absent or why he was absent, all of which weakened the IAC issue. (Appendix F, pp. 42-44). On post-conviction, Mr. Wilson had been able to find more information showing that Mr. Hagedorn may have missed as much as 50% of the trial. (Appendix F, p. 43).

Mr. Mickenberg testified that it is absolutely mandatory that trial counsel in a capital case do a thorough mitigation investigation. Such an investigation cannot be done after the return of a guilty verdict (as Mr. Hagedorn said he planned to do). (Appendix F, p. 35).

Mr. Mickenberg said that in Kentucky, given the rule that issues raised on direct appeal cannot be raised in a post-conviction action, "it can never be effective assistance of appellate counsel to raise IAC on direct appeal." (Appendix F, p. 46). It was his opinion that effective assistance of counsel on appeal was not rendered in Mr. Wilson's case, that Mr. Wilson was prejudiced by appellate counsel's substandard performance, and that but for the ineffective assistance, Mr. Wilson would have prevailed on appeal. (Appendix F, pp. 48-49).

Applying the "doubly deferential"[5] standard of review required under the federal habeas corpus statute, the federal district court denied relief on this claim and all other claims. A panel of the Sixth Circuit Court of Appeals affirmed. *Wilson v. Parker*, 515

[5] *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011), citing *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009). *See also Burt v. Titlow*, 134 S.Ct. 10, 13 (2013) ("When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt.") [Internal quotation marks deleted].

F.3d 682 (6th Cir. 2008). Mr. Wilson sought a rehearing and a rehearing *en banc*, which were both denied. The United States Supreme Court denied certiorari.

Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2011), became final on April 21, 2011. On February 17, 2012, Mr. Wilson, by counsel, filed a "Motion to Vacate Judgment" that sought relief on the basis that he had been denied his constitutional right to the effective assistance of counsel on direct appeal. (TR I, 1; Box 8 of 8). The Commonwealth filed a response on April 24, 2012. (TR I, 60; Box 8 of 8). The Kenton Circuit Court denied Mr. Wilson's motion in an order entered on June 18, 2013. (TR V, 608; Box 8 of 8; Appendix A to this brief).

III. The trial

The Commonwealth's theory of the case at trial was that Brenda Humphrey and Gregory Wilson forced Deborah Pooley, a waitress, into her own car in Covington, abducted and robbed her and that Mr. Wilson later raped and killed Pooley while Humphrey drove the car. Ms. Pooley's body was dumped in Crawfordsville, Indiana, near the Illinois border. Ms. Pooley's credit cards were later used to make various purchases in Illinois. The Commonwealth argued that a watch in Mr. Wilson's possession at the time of his arrest along with other merchandise in the possession of Humphrey linked them to the crimes because the items were purchased with Ms. Pooley's credit cards.

At trial, co-defendant Brenda Humphrey and jailhouse snitch Willis Maloney were the two main witnesses against Mr. Wilson. Maloney claimed that Wilson confessed to killing Pooley, but Maloney was not cross-examined by Wilson's attorney (despite Mr. Wilson's request that he do so, and despite that fact that Wilson told the

judge that he did not know how to cross-examine). As a result, the jury never heard that Maloney, a paid professional snitch, was receiving special treatment from the prosecutor in exchange for his testimony, special treatment that went above and beyond any assistance with his various pending federal and state charges. Brenda Humphrey told the jury that she witnessed Wilson raping and killing Pooley, but the jury never heard that Humphrey had actually confessed to her sister that Humphrey herself had killed Pooley by cutting her throat.

Willis Maloney, an admitted convicted felon and chronic alcoholic, claimed that while he and Wilson were in the Kenton County Jail, Wilson told him about his involvement in the abduction, rape and murder of the victim. (TE V, 733, 736; Box 1 of 8). Maloney was in the Kenton County Jail because he had been arrested for a domestic violence assault charge in which the victim was his girlfriend. That charge was dismissed by the prosecutor, who also told Maloney that a felony theft charge pending in Cincinnati might be amended to a misdemeanor. (TE V, 733-734; Box 1 of 8). At the time of his incarceration, Maloney was also on federal parole. After his release from the Kenton County Jail, Maloney was taken to court in Ohio, where the prosecutor helped him get released on his own recognizance. (TE V, 734; Box 1 of 8). At the time of trial, he was facing a theft charge and the prosecutor told him he would advise the court about Maloney's cooperation. Although eligible, he was not charged as a persistent felony offender. (TE VI, 782-785; Box 1 of 8).

Maloney said he met Wilson in the Kenton County Jail, where they shared a cell. Maloney claimed that Wilson confessed to all of the following: 1) His biggest mistake was to involve Humphrey in the murder, 2) that the car had been wiped clean, 3) that he

told Humphrey not to use the credit cards, 4) the body was left in a remote area, 5) the motive was robbery, 6) the victim was dead before they crossed into Indiana, 7) Humphrey used the victim's credit cards, 8) they went to St. Louis, 9) when they returned to Covington, he took the license plates off the car and abandoned it, 10) Wilson said he strangled the victim, and 11) Wilson told him that after the abduction, he stayed with Ms. Pooley on the floodwall while Humphrey went to get gas in Ms. Pooley's car. Maloney said that at night he took notes about what Wilson was telling him and he contacted the prosecutor's office and gave those notes to Detective Denham after speaking to him at the prosecutor's office. (TE V, 732-778; TE VI, 782-808; Box 1 of 8).

Because Maloney was not cross-examined, except by Humphrey's attorney, the jury never heard about how Maloney had the opportunity to learn all of these alleged "facts" by speaking to the representatives of the Commonwealth on numerous occasions. Not coincidentally, the "facts" related by Maloney supplied the necessary jurisdictional and venue foundations that the Commonwealth's Attorney needed for the Kenton County prosecution of the offenses, especially the murder charge.

Humphrey testified that on the day of the abduction, she had money, about $60, so she and Wilson, her friend, were not broke. When they were walking along, they approached a lady (Ms. Pooley) and, while talking to her, Wilson suddenly took out a knife and put it to the victim's throat. Wilson ordered Humphrey and Ms. Pooley into Ms. Pooley's car and ordered Humphrey to drive. Humphrey filled the car with gas while Wilson kept the knife to Ms. Pooley's throat, threatening he would kill both of them. Humphrey then drove into Ohio while Wilson tied Ms. Pooley's hands with a lamp cord. Eventually, Wilson and Ms. Pooley got into the back seat while Humphrey continued to

drive. Wilson raped Ms. Pooley in the back seat and then choked her to death with something. Wilson told Humphrey to take the next exit and they dumped the body. They stayed at a motel and Humphrey used Ms. Pooley's credit cards to make purchases of gas, clothing and other items. After they returned to the Covington area, they abandoned the car. Humphrey denied ever telling Beverly Finkenstead that she (Humphrey) had told Ms. Pooley that she had to die because Ms. Pooley had seen Humphrey and Wilson. (TE VI, 874-914; TE VII, 917-1017; Box 1 of 8).

Although Humphrey was cross-examined by the prosecutor, the prosecutor took issue with very little of what Humphrey had said on direct examination because Humphrey said what the prosecutor had expected and had wanted her to say consistent with the Commonwealth's theory – that Wilson was responsible for everything. Because Mr. Wilson's attorneys did not cross-examine Humphrey and because Wilson was incapable of conducting cross-examination, there was never a challenge to Humphrey's credibility and no real adversarial testing of the Commonwealth's case. Although the prosecutor was aware that Humphrey had confessed to her sister, Lisa Maines, that she, Humphrey, had actually killed Pooley, the prosecutor never questioned Humphrey about her confession nor did he call Maines as a witness.

Predictably, Mr. Wilson was convicted and, equally predictably, sentenced to death when his attorneys, who had conducted no mitigation investigation, presented no evidence at all in the penalty phase of the trial.

IV. Post-conviction

In his post-conviction motion filed pursuant to RCr 11.42, Mr. Wilson presented multiple claims for relief, including both ineffective assistance of trial counsel (IAC) and

ineffective assistance of appellate counsel (IAAC). (TR I, 90-94; Box 1 of 8). Post-conviction counsel were prepared to prove that trial counsel failed to investigate or otherwise prepare to defend Mr. Wilson and failed to do anything to present a case in mitigation at the penalty phase of his trial. But, after limiting the post-conviction hearing to the question of waiver of counsel, the Kenton Circuit Court denied post-conviction relief. (TR IX, 1100; Box 1 of 8). This Court affirmed that denial. *Wilson v. Commonwealth,* 975 S.W.2d 901 (Ky. 1998). This Court rejected the IAC claim on the basis that the issue had been raised on direct appeal and the adverse decision on direct appeal was the "law of the case." *Id.* at 904. Furthermore, in applying the law of the case doctrine to deny relief, the Court said:

> We must point out that Appellant's argument in this respect strikes at the very essence of the danger in raising an ineffective assistance of counsel claim on direct appeal. Evidence of such claims, more often than not, lacks adequate development at the time of the initial appeal.

Wilson v. Commonwealth, 975 S.W.2d at 904. Due to the inexcusable actions of Mr. Wilson's direct appeal attorneys, no court has ever fully evaluated the conduct of Mr. Wilson's trial counsel, described as "one of the worst examples . . . of the unfairness and abysmal lawyering that pervade capital trials." *Wilson v. Rees*, 624 F.3d 737, 741 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing *en banc*).

ARGUMENT

I. **The circuit court erred when it denied, without a hearing, Gregory Wilson's motion to vacate his conviction on the basis of ineffective assistance of appellate counsel on direct appeal from his criminal conviction. Mr. Wilson received ineffective assistance of counsel from Hon. Gail Robinson, appellate attorney-in-fact, as well as Hon. William Summers, Hon. David Bruck, Hon. Mario Gerald Conte, Jr. and Hon. Robert W. Carran, appellate attorneys of record, because they raised ineffective assistance of counsel on direct appeal. This precluded the presentation of facts outside of the direct appeal record that were essential to show that Mr. Wilson received ineffective assistance of trial counsel from Hon. Kevin McNally, Ms. Robinson's husband, Hon. William Hagedorn and Hon. John Foote.**

A. Preservation

On Februrary 17, 2012, Gregory Wilson filed a motion to vacate the judgment in his case on the basis that he had been denied the effective assistance of counsel on direct appeal. Among the authorities relied upon for relief were RCr 11.42, *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011), *Moore v. Commonwealth*, 199 S.W.3d 132, 135-136 (Ky. 2006), *Douglas v. California*, 372 U.S. 353 (1963), *Evitts v. Lucey*, 469 U.S. 387 (1985), *Strickland v. Washington*, 466 U.S. 668 (1984), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *United States v. Cronic*, 466 U.S. 648, 659 (1984), *Maples v. Thomas*, 132 S.Ct. 912 (2012), KRS 31.110 and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Eleven, Fourteen, Seventeen, One Hundred and Ten, and One Hundred and Fifteen of the Kentucky Constitution. (TR I,; Box 8 of 8). The Commonwealth filed a response on April 24, 2012. (TR I, 60; Box 8 of 8). The Kenton Circuit Court denied Mr. Wilson's motion in an order entered on June 18, 2013. (TR V, 608; Box 8 of 8).

B. Kenton Circuit Court ruling

The Kenton Circuit Court denied the motion to vacate as follows:

> The Defendant presented his claims of ineffective assistance of appellate counsel in habeas corpus proceedings in the United States District Court for the Eastern District of Kentucky. Thus, the claims presented to this Court have been previously asserted and adjudicated. He is not entitled to further review of these issues which have been fully litigated and decided.

(TR V, 608-609; Box 8 of 8). As explained in the subsections that follow, the circuit court erred for several reasons. First, the federal court did not address (and *could* not address) the state constitutional and statutory bases for the claims for relief. Second, the federal court analysis of the claim before that court was not only adjudicated through the deferential review process mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Publ. L. No. 104-132, § 104(d), 110 Stat. 1214, 1219, but that adjudication was fundamentally flawed. While Mr. Wilson's claims for relief presented to the Kenton Circuit Court were based, in large part, upon this Court's decision in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011), the actual issue that is now before this Court was not specifically addressed in *Hollon*.

C. Why this Court should hear Mr. Wilson's claim of ineffective assistance of appellate counsel

1. Deferential and fundamentally flawed federal review

In denying relief, the Kenton Circuit Court relied upon the adjudication of Mr. Wilson's federal claims in the federal courts. (TR V, pp. 608-609; Box 8 of 8). But the Sixth Circuit's review was restricted by the AEDPA. *See Cullen v. Pinholster*, 131 S.Ct.

1388, 1403 (2011), citing *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009). *See also Burt v. Titlow*, 134 S.Ct. 10, 13 (2013).

Furthermore, the Sixth Circuit incorrectly applied *Strickland*. In *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008), the Sixth Circuit did not apply "the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation." *Sears v. Upton*, 130 S.Ct. 3259, 3267 (2010). The court did not look to "the totality of the **available** mitigation evidence." *Sears*, 130 S.Ct. at 3266 (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)) (emphasis added). Nor did the Sixth Circuit perform the correct balancing test: it did not consider "the evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation." *Id.* In fact, the court never mentioned **any** of the mitigation evidence presented on behalf of Mr. Wilson in the District Court. See *Parker*, 515 F.3d at 698-99. Instead, the court referred exclusively to the evidence presented at trial.

In determining that Mr. Wilson could not demonstrate prejudice, the Sixth Circuit relied upon the irrelevant fact that Mr. Wilson "exercised control over the conduct of his trial" and "made a statement to the jury denying his guilt." *Parker*, 515 F.3d at 699; *contra Sears*, 130 S.Ct. at 3266-67 ("[The *Porter*] standard applies – and will necessarily require a court to speculate as to the effect of the new evidence – regardless of how much or how little mitigation evidence was presented during the initial penalty phase."). The Sixth Circuit incorrectly concluded that "the evidence of Wilson's role in raping and killing the victim was overwhelming," suggesting precisely the type of preclusion barred by *Porter*. *Parker*, 515 F.3d at 699; *contra Foust v. Houk*, 655 F.3d 524, 539-46 (6th Cir. 2011) ("Powerful aggravating circumstances, however, do not preclude a finding of

prejudice..."). Mr. Wilson is entitled to a court that applies the correct constitutional standard. *Sears*, 130 S.Ct. at 3267.

Because *Porter* was decided after *Parker*, the retroactivity of *Porter* is implicated. See *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); *Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). Mr. Wilson does not contest that the finality of his collateral attack would militate against a new rule being applied in this case. *Leonard*, 279 S.W.3d at 160.

However, *Porter* did not announce a new constitutional rule of criminal procedure. See *Walton v. Florida*, 77 So.3d 639, 644 (Fl. 2011). It did not "break[] new ground or impose a new obligation on the State or the Federal Government." *See Leonard*, 279 S.W.3d at 161 (quoting *Teague*, 489 U.S. at 301). To put it differently, *Porter* was dictated by *Strickland* at the time Mr. Wilson's RCr 11.42 became final. *Id.*; *Walton*, 77 So.3d at 644 ("*Porter*... addressed a misapplication of *Strickland*."). The *Porter* analysis should therefore apply to Mr. Wilson's claims before this Court.

Furthermore, the Sixth Circuit incorrectly applied *Strickland* by linking Mr. Wilson's alleged waiver of his right to counsel at trial to a waiver of his right to have effective counsel conduct a pretrial mitigation investigation. An accused may waive the decision to investigate or present mitigating evidence. *Soto v. Commonwealth*, 139 S.W.3d 827, 855-57 (Ky. 2004); *Zargorski v. Tennessee*, 983 S.W.2d 654, 657-59 (Tn. 1998). But that waiver must be a knowing and intelligent waiver supported by the record. The Tenth Circuit has considered the requirements for a knowing waiver of a

defendant's right to present mitigation evidence and found that a court must "review several factors, including the investigative efforts of defense counsel prior to the beginning of the penalty phase, his penalty phase strategy, the advice he rendered to [the defendant] prior to [the defendant]'s alleged decision to waive the presentation of mitigating evidence, and the trial court's examination of [the defendant] regarding his alleged waiver." *Battenfield v. Gibson*, 236 F.3d 1215, 1227 (10th Cir. 2001). But no court has found that Mr. Wilson waived his right to **investigate** mitigation evidence. See *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992) (*Wilson I*); *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998) (*Wilson II*); *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008). Certainly no court has analyzed whether such a waiver was constitutionally infirm. See *Battenfield*, 236 F.3d at 1227.

The Sixth Circuit in *Parker* only considered the implications of Mr. Wilson's waiver at trial. *Parker*, 515 F.3d at 699 ("Even assuming Hagedorn's pre-waiver conduct was deficient, the fact of the waiver makes it virtually impossible to assess whether such conduct was prejudicial."). This incorrectly placed the emphasis upon the evidence presented at trial. See discussion of *Porter v. McCollum*, 558 U.S. 30, 41 (2009), *supra*. It also conflated two distinct issues: waiver of counsel for trial and waiver of counsel for pre-trial investigation. *See Depp v. Commonwealth*, 278 S.W.3d 615, 617-18 (Ky. 2009) (quoting *Iowa v. Tovar*, 541 U.S. 77, 89 (2004): "[T]he Supreme Court pointed out that the analysis regarding whether waiver of counsel is adequate at any stage requires a pragmatic approach to right-to-counsel waivers, one that asks 'what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance

counsel could provide to an accused at that stage.'" *See also Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

Not only were none of the *Battenfield* factors found in Mr. Wilson's case, the fact that the *Battenfield* factors describe events that did not occur during Mr. Wilson's counsels' investigation demonstrates the feasibility of a prejudice analysis irrespective of Mr. Wilson's presentation at trial. *See Battenfield*, 236 F.3d at 1227. None of Mr. Wilson's attorneys made any investigative efforts prior to the beginning of the penalty phase, demonstrated a penalty phase strategy, or provided Mr. Wilson with advice relating to mitigation. *Id.* Nor was this an instance where "the failure to investigate is solely and alone the result of the defendant's instructions," as Mr. Wilson never waived his right to pre-trial investigation. *Tennessee v. Smith*, 993 S.W.2d 6, 14 (Tn. 1999). Instead, by relying upon Mr. Wilson's eventual waiver of counsel at trial, the Sixth Circuit improperly sanctioned Mr. Wilson's forced reliance upon himself as the sole source of mitigating factors. *Contra Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer…").

The difference between a waiver of counsel for the pre-trial investigation and for the trial is even clearer when analyzed under the Kentucky Constitution, which permits hybrid representation. *See Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974); *Stone v. Commonwealth*, 217 S.W.3d 233, 237-38 (Ky. 2007) ("Sixth Amendment rights [are] not implicated [in a denial of counsel under Section Eleven of the Kentucky Constitution], however, as the federal Constitution does not similarly afford criminal defendants the right to act as co-counsel."). Under *Wake*, "[t]he defendant specifies the extent of legal

services he desires, but undertakes the remaining portion of his defense *pro se*. Counsels' duty to the defendant is thereafter limited to the extent of representation specified." *Stone*, 217 S.W.3d at n.1 (*citing Wake*, 514 S.W.2d at 696). This Court found that Mr. Wilson had elected to represent himself two days into his trial. Even if that waiver of counsel was knowing and voluntary, Mr. Wilson was still entitled to be represented by effective counsel in the investigation stage. *McMann v. Richardson*, 397 U.S. 759 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); see also *Wake*, 514 S.W.2d at 696 ("We recognize that such kinds of limitations on an attorney's function may create situations in which it will be necessary or desirable that a record be made to guard against future claims of ineffective assistance of counsel..."). In *Kansas v. Ventris*, 556 U.S. 586, 590 (2009), the Supreme Court said, "The core of this right [the Sixth Amendment right to counsel] has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.' *Michigan v. Harvey,* 494 U.S. 344, 348, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)." Because he never waived his right to pre-trial counsel and his attorneys never conducted any investigation, Mr. Wilson was prejudiced by the lack of effective assistance at the pre-trial stage.

2. *Hollon* did not address the issue presented in this case, and nonretroactivity should not prevent a merits review of Mr. Wilson's claims.

As noted earlier, the issue presented here was not addressed in this Court's ineffective assistance of appellate counsel decision, *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). Specifically, in *Hollon*, this Court ruled that a prisoner who alleged and proved that his direct appeal attorney was ineffective for **failing to raise** an

issue on appeal could obtain relief in an RCr 11.42 proceeding. 334 S.W.3d at 436. This Court also made it clear that relief would not be available if the claim was that the direct appeal attorney had done a poor job of presenting a particular claim to an appellate court. *Id.* at 437. Mr. Wilson's RCr 11.42 motion filed pursuant to *Hollon* presents the distinct issue of whether a direct appeal attorney who raises ineffective assistance of trial counsel (IAC) on direct appeal on a record that was not fully developed or investigated to present that claim herself renders ineffective assistance of counsel.

In *Hollon*, this Court declared that the decision would not be applied retroactively. *Id.* at 439. Despite this general statement, there are several reasons why Mr. Wilson's claims for relief should be addressed on the merits. In general, under RCr 11.42(10)(b), the motion to vacate must be filed within three years of the judgment becoming final, "unless the motion alleges and the movant proves" the following:

> (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

The "fundamental constitutional right" that is the subject of this motion is the effective assistance of counsel on appeal. As this Court acknowledged in *Hollon*, that particular constitutional right was established by the United States Supreme Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). *Hollon v. Commonwealth*, 334 S.W.3d at 434. Although this Court, in *Hollon*, set out the procedure for litigation of an IAAC claim and declared that the procedure would not apply retroactively, the actual constitutional right to effective appellate counsel was recognized by the United States Supreme Court in 1985. Thus, *Hollon* did not establish the right and RCr 11.42(10)(b) does not prohibit the Court from addressing the merits of Mr. Wilson's claim. In *Lafler v. Cooper*, 132 S.Ct. 1376,

1385 (2012), the Supreme Court, citing *Halbert v. Michigan*, 545 U.S. 605 (2005) and *Evitts v. Lucey*, 469 U.S. 387 (1985), reaffirmed "the rule that defendants have a right to effective assistance of counsel on appeal[.]"

Even if *Hollon* "established" the right to effective assistance of counsel on appeal, and *Hollon* says that the right is not to be applied retroactively, Mr. Wilson's claim for relief should still be heard by this Court. The reason is that Mr. Wilson's case presents an IAAC issue that was neither contemplated nor considered in *Hollon*. The *Hollon* decision specifically addresses IAAC when appellate counsel **fails to raise** an issue on appeal:

> We are thus persuaded that it is time, indeed past time, to overrule *Hicks* and the cases relying upon it and **to recognize IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal.** To succeed on such a claim, the defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy. As the Supreme Court noted in *Smith*, "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome." 528 U.S. at 288, 120 S.Ct. 746 (*quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). We further emphasize "ignored issues" to underscore that IAAC claims will not be premised on inartful arguments or missed case citations; rather **counsel must have omitted completely an issue that should have been presented on direct appeal.** (Emphasis added).

Hollon v. Commonwealth, 334 S.W.3d at 436-437.

Mr. Wilson's case presents a claim of IAAC where the appellate counsel on direct appeal rendered ineffective assistance by **prematurely raising** an issue of IAC of trial counsel, which precluded Mr. Wilson from getting a merits ruling in post-conviction on

IAC of trial counsel that was based upon a complete factual record. Because *Hollon* now allows defendants to present IAAC claims in the circuit court, and because Mr. Wilson's claims for relief include one not yet addressed by this Court, this Court should reach the merits of his claims for relief.

At the time of the post-conviction decision by the Kenton Circuit Court and by this Court in Mr. Wilson's case, "[i]neffective assistance of appellate counsel [was] not a cognizable issue in this jurisdiction." *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001). *See Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992). Although Mr. Wilson was granted a hearing on IAAC in federal habeas, relief was denied by the District Court and that denial was affirmed by the Sixth Circuit. *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008). The federal court was limited to addressing only federal constitutional claims. But the right to effective assistance of counsel on direct appeal is not only guaranteed by the United States Constitution, it is also a statutorily guaranteed right in Kentucky, as well as a state constitutional right. In *Moore v. Commonwealth*, 199 S.W.3d 132, 137-139 (Ky. 2006), *Coles v. Commonwealth*, 386 S.W.2d 465, 466 (Ky. 1965), and *Wilson v. Jefferson Circuit Court*, 384 S.W.2d 305 (Ky. 1964), this Court recognized both a statutory and constitutional right to appeal and a statutory and constitutional right to the effective assistance counsel in the direct appeal and post-conviction stages of a criminal proceeding. *See also In re Parker*, 49 F.3d 204, 209-210 (6th Cir. 1995)("Kentucky provides counsel to indigent capital defendants not only during the actual trial and the direct appeal but also any post-conviction collateral attacks, including federal habeas corpus. *See Ky.Rev.Stat. Ann.* § 31.220 (1993).").

Mr. Wilson has never had the opportunity to fully and fairly litigate his claim that his direct appeal counsel failed to afford him effective assistance by preventing him from getting a merits ruling on IAC of trial counsel based upon the totality of the relevant facts. This Court has previously allowed a death row inmate to present his claims for relief to this Court despite that inmate's failure to file a timely appeal. "Note, however, that this exception arises only because of the nature of Appellant's case, i.e., because he has been sentenced to death and because the analysis in our previous cases was incomplete." *Mills v. Commonwealth*, 170 S.W.3d 310, 323 (Ky. 2005), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). The law that, prior to *Hollon*, prevented the presentation of Mr. Wilson claims of IAAC was more than just "incomplete." Rather, the law forbid recognition of the claims, period. The nature of Mr. Wilson's case mandates that an exception to non-retroactivity be applied to his case.

Mr. Wilson was never able to present his substantial claims of ineffective assistance of trial counsel to this Court in post-conviction because of the application of the "law of the case" doctrine. *Wilson v. Commonwealth,* 975 S.W.2d at 904. As explained below, Mr. Wilson was thereby denied due process of law.

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

S. Pac. R. Co. v. U.S., 168 U.S. 1, 48-49 (1897).

> [I]n order for issue preclusion to operate as a bar to further litigation, certain elements must be met: (1) the party to be bound in the second case must have been a party in the first case; (2) the issue in the second case must be the same as the issue in the first case; (3) the issue must have been actually litigated; (4) the

> issue was actually decided in that action; and (5) the decision on the issue in the prior action must have been necessary to the court's judgment and adverse to the party to be bound. The rule contemplates that the court in which the doctrine is asserted will inquire into whether the judgment in the former action was in fact rendered under such conditions that the party against whom the doctrine is pleaded had a realistically full and fair opportunity to present his case.

Kentucky Bar Ass'n v. Greene, 386 S.W.3d 717, 724 (Ky. 2012) (citing *Miller v. Administrative Office of the Courts*, 361 S.W.3d 867, 872 (Ky. 2011)) *but see Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 374 (Ky. 2010); *Rybarczyk v. TRW Inc.*, 235 F.3d 975, 982 (6th Cir. 2000) (eliminating element of identical party to be bound).

The Due Process Clause of the United States Constitution mandates that "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 482 (1982). "Redetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Id.* at 481 (citing *Montana v. U.S.*, 440 U.S. 147, n. 11 (1979)). "Significant changes in controlling facts or legal principles" may warrant revisiting a judgment. *Montana*, 440 U.S. at 155-58; *C.I.R. v. Sunnen*, 333 U.S. 591, 599 (1948) ("[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time...").

"[O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (*quoting Montana*, 440 U.S. at 153; *Blonder-*

Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 328-29 (1971)); *Goebel v. Arnett*, 259 S.W.3d 489, 492 (Ky. App. 2007) (" 'Collateral estoppel applies only if the party against whom it is sought to be applied had a realistically full and fair opportunity to litigate the issue' and if principles of justice and fairness would be served by its application.") (*quoting City of Covington v. Bd. Of Trustees of Policemen's and Firefighters' Ret. Fund*, 903 S.W.2d 517, 522 (Ky. 1995) (*quoting Sedley v. City of West Buechel*, 461 S.W.2d 556, 559 (Ky. 1970) (discussing similar parties to the action))).

None of the decisions of this Court concerning Mr. Wilson discuss the prejudice stemming from trial counsels' decision to not investigate mitigation evidence. *See Wilson v. Commonwealth*, 836 S.W.2d 872 (*Wilson I*); *Wilson v. Commonwealth*, 975 S.W.2d 901, 903 (Ky. 1998) (*Wilson II*) ("[W]e determined that Hagedorn and Foote did render Appellant effective assistance of counsel in those instances when they were allowed to participate **in the trial**") (emphasis added); *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008) ("[T]he Kentucky Supreme Court's application of *Strickland* only addressed Hagedorn's conduct **after** Wilson's waiver.") (emphasis added). And, while the Sixth Circuit in *Parker* investigated the potential prejudice of the failure to begin a mitigation investigation before Mr. Wilson's waiver, because the Sixth Circuit failed to correctly apply the prejudice prong of *Strickland*, the Due Process Clause of the U.S. Constitution mandates that *Parker* should not have any preclusive effect in Kentucky. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 482 (1982); *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974); *Battenfield v. Gibson*, 236 F.3d 1215, 1227 (10th Cir. 2001); *U.S. v. Cronic*, 466 U.S. 648, 658 (1984).

Mr. Wilson does not dispute that there are some elements of issue preclusion which may be satisfied. *Kentucky Bar Ass'n v. Greene*, 386 S.W.3d 717, 724 (Ky. 2012); *see Southern Pac. R. Co. v. U.S.*, 168 U.S. 1, 48-49 (1897). Mr. Wilson was a party to *Parker*, the issue was identical, and the decision on the issue in the prior action was necessary to the court's judgment and was adverse to Mr. Wilson. *Greene*, 386 S.W.3d at 724. But since *Parker* was a "constitutionally infirm judgment," and there is "a reason to doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation," the Due Process Clause requires that the issue be revisited. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 482 (1982).

The Supreme Court in *Porter v. McCollum*, 558 U.S. 30, 41 (2009), clarified how courts should analyze prejudice for *Strickland* purposes in circumstances where counsel inadequately failed to prepare for mitigation. *Sears v. Upton*, 130 S.Ct. 3259, 3266-67 (2010). *Porter* rendered the opinion in *Parker* obsolete. *C.I.R. v. Sunnen*, 333 U.S. 591, 599 (1948) ("[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time..."); *see* discussion *infra* of *Porter*, 558 U.S. at 41; *Sears*, 130 S.Ct. at 3266-67. The Sixth Circuit in *Parker* also failed to correctly differentiate between waiver at the trial stage and waiver at the investigation stage of Mr. Wilson's case. *See* discussion *infra* of *Wake*, 514 S.W.2d at 696; *Battenfield*, 236 F.3d at 1227. Nor did the Sixth Circuit determine if prejudice was presumed by counsels' complete absence during the mitigation investigation. *See* discussion *infra* of *Cronic*, 466 U.S. at 658.

Similarly, because Mr. Wilson never had a "full and fair opportunity to litigate" any of the issues described above and because "principles of justice and fairness" would not be served by its application, collateral estoppel should not apply. *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Goebel v. Arnett*, 259 S.W.3d 489, 492 (Ky. App. 2007). Mr. Wilson's substantial claims of ineffective assistance of trial counsel must be heard on the merits consistent with "principles of justice and fairness."

D. Merits of the ineffective assistance of appellate counsel (IAAC) claim and the ineffective assistance of trial counsel claim (IAC)

In order to succeed on his ineffective assistance of appellate counsel claim (IAAC), Mr. Wilson must demonstrate that the underlying claim of IAC has merit. "[A]n examination of trial counsel's performance was required in order to determine whether appellate counsel had been constitutionally ineffective." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001) (citing *Mapes v. Coyle*, 171 F.3d 408, 419 (6th Cir. 1999)). "If trial counsel performed adequately our inquiry is at an end; by definition, appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Id.* "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* On the IAAC claim, there can be no doubt that it was the fault of direct appeal counsel that a fully developed claim of IAC was never addressed by the Kenton Circuit Court, by this Court or by the federal court.

The "Due Process Clause of the Fourteenth Amendment to the United States Constitution, and through it the Sixth Amendment," entitled Mr. Wilson to the effective assistance of counsel during his first appeal. *Hollon v. Commonwealth*, 334 S.W.3d 431, 434 (Ky. 2010) (*citing Evitts v. Lucey*, 469 U.S. 387 (1985). In Mr. Wilson's case, there

was no "reasonable exercise of appellate strategy" in prematurely bringing Mr. Wilson's ineffective assistance of trial counsel claim; instead, it represented deficient performance by appellate counsel because Mr. Wilson was then unable to bring that claim in his RCr 11.42 petition, where the record could be properly developed to present the factual basis for the claim. *Id.* at 436; *Wilson v. Commonwealth*, 975 S.W.2d 901, 903 (Ky. 1998) (*Wilson II*); *see Yick Man Mui v. U.S.*, 614 F.3d 50, 57 (2nd Cir. 2010). Prematurely raising an IAC claim and thereby precluding the factual development of the record to include not only the trial performance of counsel, but also the pretrial performance, including the failure of trial counsel to investigate mitigation evidence was a "significant and obvious" error, to which there was no "arguably contrary authority," no other "assignments of error" able to deal with the fault, and it represented an "unreasonable decision" "only an incompetent attorney would adopt." *See Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001).

When counsel raised the IAC claim on direct appeal, counsel also rendered ineffective assistance by failing to include several crucial elements of the claim. Specifically, the attorney who actually wrote the briefs, Gail Robinson rendered ineffective assistance to Mr. Wilson not only by raising ineffective assistance of trial counsel on direct appeal based upon a record that was not adequately developed, but she also failed to raise a fully preserved component of IAC in that appeal, which would have exposed the interference of her husband, Kevin McNally, in the attorney-client relationship between Wilson and his volunteer appointed counsel. Furthermore, she raised no issue about the circumstances of her husband's abandonment of Mr. Wilson when McNally withdrew as Mr. Wilson's attorney of record. Finally, she failed to raise

her husband's own ineffectiveness, namely that which occurred after he "withdrew" from the case.

In assessing IAC at the trial stage, neither this Court nor any other court evaluated the effect that Kevin McNally's representation and interference had on the outcome of Mr. Wilson's case. McNally abandoned Mr. Wilson shortly after McNally's promise to Wilson, to the trial court and to the prosecution that he would remain on the case and try it if only he could get a continuance of the March 1988 trial date to September 1988. After the Court granted the requested continuance, McNally abruptly quit only 90 days prior to trial, causing the judge to post his "desperate" plea for volunteer counsel, resulting in the appointment of Hagedorn and Foote. Robinson never raised any issue on appeal that would have caused the court to examine McNally's actions under SCR 3.130(1.16(b)), which allows withdrawal from representation only when there will be no "material adverse effect on the interests of the client."

Another issue that was not presented as a component of IAC was the issue of interference by Kevin McNally in the attorney-client relationship between Mr. Wilson and his appointed counsel. This issue was preserved for appellate review by appointed counsel's motion for a mistrial after an article appeared in the newspaper indicating that McNally was advising Mr. Wilson in ways that were disruptive to the representation by appointed counsel. The third omitted component was Mr. McNally's ineffective assistance after he "withdrew" from the case. The record demonstrates that the improper interference of attorneys in the case, particularly McNally, was known to the court and counsel at the pretrial, trial and post-trial stages, yet it was not raised on appeal. *See* Transcript of pretrial hearing held on 8/16/88, p. 25; Box 2 of 8; Motion for mistrial, TE

VI, 869; Box 1 of 8; Post-trial Letter from John Foote to DPA, TR I, 91; Box 1 of 8). In denying post-conviction relief, the Kenton Circuit Court made a finding that McNally continued to give legal advice to Mr. Wilson. (TR IX, 1150-1151; Box 1 of 8).

By raising, on direct appeal, ineffective assistance of trial counsel, and by failing to raise preserved appellate issues concerning her husband's abandonment of Mr. Wilson, McNally's interference in the attorney-client relationship between Mr. Wilson and his appointed counsel and his ineffective assistance, Gail Robinson ensured that Mr. Wilson could never be successful in the state courts in fully and fairly litigating the ineffectiveness of his appointed trial attorneys, and she attempted to shield the conduct of her husband from judicial scrutiny. The jury never heard and considered all of the relevant facts before convicting Mr. Wilson. Before weighing the propriety of the death penalty for Mr. Wilson, the jury was given *nothing* to consider in mitigation of the ultimate punishment. In post-conviction, both the Kenton Circuit Court and this Court conducted the review of Mr. Wilson's case without ever critically evaluating all of the things that Mr. Wilson's trial attorneys did that were plainly wrong, all of the things that those lawyers failed to do, and what some of those lawyers did to bury the truth. Mr. Wilson was denied his constitutional and statutory right to effective counsel at trial, but direct appeal counsels' actions ensured that no court would ever fully and fairly consider the merits of the claim of IAC at trial.

A competent attorney would have known that "[c]laims of ineffective assistance of counsel should not ordinarily be addressed in the course of a direct appeal." *See Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009). It would have been obvious that an ineffective assistance of counsel claim "often depends on evidence

outside the trial record," "lacks development at the time of the initial appeal," and forces "appellate counsel and the court [to] proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *See Trevino v. Thaler*, 133 S.Ct. 1911, 1918 (2013) (*quoting Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (2012)); *Wilson II*, 975 S.W.2d at 904; *Massaro v. U.S.*, 538 U.S. 500, 504-05 (2003).

Because this Court only reviewed the performance of trial counsel at trial and did so only after determining that Mr. Wilson had no right to complain about his trial attorneys because he had waived counsel and had elected to represent himself, the remainder of this brief will concentrate on the IAC issue that was unaffected by any in trial waiver or election of self-representation – the failure of counsel to conduct no pretrial investigation of mitigation evidence.

Mr. Wilson was barred from raising the lack of mitigation investigation in his RCr 11.42 proceeding because it was raised on direct appeal. *Wilson II*, 975 S.W.2d at 903 (citing *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993)). This Court held that "the law of the case doctrine prevents issues raised in the direct appeal." *Id.* This Court also said that in the post-conviction proceedings "[t]here were no surprises or unknown facts revealed" that were related to IAC. But if, indeed, that were the case, it was because Mr. Wilson's RCr 11.42 hearing was limited to an "examination of whether Appellant waived his right to counsel and chose to proceed *pro se*; whether that choice was knowing, intelligent and voluntary; and whether he did in fact represent himself in accordance with *Faretta v. California*, 422 U.S. 806 (1975) and *Wake v. Barker*, 514 S.W.2d 692 (Ky. 1974)." *See Wilson II*, 975 S.W.2d at 904.

As this Court noted, this case "strikes at the very essence of the danger in raising an ineffective assistance of counsel claim on direct appeal." *Wilson II*, 975 S.W.2d at 904. And, because Mr. Wilson's ineffective assistance of counsel claim was barred by *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), it was precisely the type of ineffective assistance of appellate counsel contemplated by the Second Circuit in *Yick Man Mui* when that court said:

> [M]ost ineffective assistance claims relating to trial counsel are such that if appellate counsel raised such an issue on direct appeal and thereby precluded later such claims, the act of raising the preclusion-causing claim would itself give rise to a claim of ineffective assistance of appellate counsel. This claim would ordinarily require that the supposedly barred claims be addressed on the merits to determine the professional worthiness and effect of the preclusion-causing act.

Yick Man Mui v. U.S., 614 F.3d 50, 57 (2d Cir. 2010).

Should any court, including this Court, ever address the merits of the IAC claim relating to the pretrial performance of Mr. Wilson's counsel, the inescapable conclusion would be that counsel rendered ineffective assistance, which resulted in prejudice. "To assess [the] probability [of a different outcome under *Strickland*], [the court] consider[s] the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding and reweigh[s] it against the evidence in aggravation." *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (*quoting Porter v. McCollum*, 558 U.S. 30, 41 (2009) (internal quotation marks omitted)). "That same standard applies – and will necessarily require a court to 'speculate' as to the effect of the new evidence – regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears*, 130 S.Ct. at 3266-67; *Foust v. Houk*, 655 F.3d 524, 539-46 (6th Cir. 2011) ("Powerful aggravating circumstances, however, do not preclude a finding of prejudice, even when our review is constricted to assessing the reasonableness of how the

state court weighed the mitigating and aggravating factors."). "In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation." *Sears*, 130 S.Ct. at 3267.

"[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Coleman v. Mitchell*, 268 F.3d 417, 449 (6th Cir. 2001) (*quoting Mapes*, 171 F.3d at 426); *Johnson v. Mitchell*, 585 F.3d 923, 939-41 (6th Cir. 2009) ("The United States Supreme Court, this court, and other courts of appeals have consistently recognized the need for **meaningful** investigation by defense counsel prior to the making [of] a decision not to present mitigation testimony during the penalty phase of a capital trial.") (emphasis in original); *Poindexter v. Mitchell*, 454 F.3d 564, 578-79 (6th Cir. 2006) (holding counsel failed to conduct constitutionally adequate investigation).

"Defense counsel has a duty to investigate the circumstances of his client's case and explore all matters relevant to the merits of the case and the penalty, including the defendant's background, education, employment record, mental and emotional stability, and family relationships." *Goodwin v. Johnson*, 632 F.3d 301, 318 (6th Cir. 2011) (citing *Powell v. Collins*, 332 F.3d 376, 399 (6th Cir. 2003)); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995) (holding that counsel provided ineffective assistance when mitigating information was not presented to the jury at sentencing because counsel made virtually no attempt to prepare for sentencing phase). "'The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision

as to their utility.'" *Coleman*, 268 F.3d at 450 (*quoting Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000)).

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Sowell v. Anderson*, 663 F.3d 783, 791 (6th Cir. 2011); *Foust v. Houk*, 655 F.3d 524, 536-40 (6th Cir. 2011) ("Without acquiring rudimentary details, [defendant]'s attorneys could not have made a reasonable professional judgment to limit their investigation."). "'In assessing the reasonableness of an attorney's investigation ... the court not only considers the quantum of evidence already known to counsel, but also whether that evidence should lead a reasonable attorney to investigate further.'" *Goodwin*, 632 F.3d at 318 (*quoting Wiggins*, 539 U.S. at 527). "An attorney does not make a strategic decision by choosing to ignore a body of evidence, the contents of which are unknown. That is not strategy." *Sowell*, 663 F.3d at 791. "The question is 'whether counsel adequately followed up on the "leads" that were available to them.' " *Id.* at 792 (*quoting Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007)).

"Under circumstances where a finding of guilty cannot come as a surprise, failure to anticipate such a finding so as to adequately prepare for the sentencing phase is constitutionally impermissible." *Greer v. Mitchell*, 264 F.3d 663, 677 (6th Cir. 2001) ("[C]ounsel failed to make any significant preparations for the sentencing phase until after the conclusion of the guilt phase. This inaction was objectively unreasonable."); *Blanco v. Singletary*, 943 F.2d 1477, 1500 (11th Cir. 1991) (finding failure to conduct

reasonable investigation where trial court continued trial for four days so defense counsel could produce witnesses).

In Mr. Wilson's case, trial counsel not only failed to conduct any mitigation investigation, lead counsel, Hagedorn, ordered associate counsel to do no investigation. Specifically, Hagedorn directed Sharon Sullivan not to work on tasks such as a change of venue, suppression of evidence, use of experts, and mitigation. Sullivan saw no formal preparation being done and noted that in June 1988, Hagedorn was clearly not ready for trial, yet he rejected the notion of a continuance. When Sullivan suggested to Hagedorn that she was willing to work on a case in mitigation by visiting Mr. Wilson in jail or travelling to Ohio to contact family members, Hagedorn ordered her to do no such investigation, since his opinion was that to do a mitigation investigation would amount to an admission of guilt ("An absolute total presumption that this man's guilty."). As a result, Sullivan felt compelled to remove herself from the case. (TH, 10/22/96, pp. 135-195; Box 2 of 8).

During the August 16, 1988, pretrial hearing concerning counsel, while Mario Conte (who would eventually represent Mr. Wilson on appeal) was discussing the importance of pretrial investigation of mitigating evidence, Hagedorn objected, stating: "The other day we had a hearing. This was covered. I have protected myself on that, as the Court knows, as the [prosecutor] has agreed to ... What did we decide on the mitigation? ... That the Court's giving me extra time on that." (TE, 8/16/88, 38; Box 1 of 8). Hagedorn's idea of "extra time" was to investigate and prepare for the penalty phase after the return of a death-eligible guilty verdict, but he did not even do that.

During the five days between the guilty verdict and the commencement of the

penalty phase, Foote and Hagedorn made no attempt whatsoever to develop mitigating evidence or to prepare for the penalty phase. (TH 10/2/96, 183; Box 2 of 8). Foote testified that there was no strategic or tactical reason for the decision not to prepare. (*Id.* 183, 186; Box 2 of 8).

The federal circuit courts generally recognize that when there are indications that an investigation into a client's background could produce mitigating evidence, failure to perform such an investigation constitutes a deficient performance. *Harries v. Bell*, 917 F.3d 631 (6th Cir. 2005); *Skaggs v. Parker*, 235 F.3d 261, 269 (6th Cir. 2000); *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997); *Glenn v Tate*, 71 F.3d 1204, 1206-10 (6th Cir. 1995); *Jermyn v. Horn*, 266 F.3d 257, 306-08 (3rd Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215, 1227-30 (10th Cir. 2001); *Moore v. Johnson*, 194 F.3d 586, 616-19 (5th Cir. 1999); *Caro v. Calderon*, 165 F.3d 1223, 1226-27 (9th Cir. 1998); *Hall v. Washington*, 106 F.3d 742, 749-51 (7th Cir. 1997); *Antwine v. Delo*, 54 F.3d 1357, 1365-68 (8th Cir. 1995); *Blanco v. Singletary*, 943 F.3d 1477, 1500-03 (11th Cir. 1991).

In *Harries*, the Sixth Circuit summarized counsel's duties under clearly established federal law:

> Counsel's constitutional duty to investigate a defendant's background in preparation for the sentencing phase of a capital trial is "well-established." *Coleman v. Mitchell*, 268 F.3d 417, 449 (6th Cir. 2001); *see also Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The "prospect of being put to death unless counsel obtains and presents *something* in mitigation" magnifies counsel's responsibility to investigate. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999). And notwithstanding the deference *Strickland* requires, neither this court nor the Supreme Court has hesitated to deem deficient counsel's failure to fulfill this obligation. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 523-28, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003) (concluding that counsel's failure to expand their investigation of the

> defendant's personal background, which included physical and sexual abuse, beyond the presentence investigation and Department of Social Services reports constituted constitutionally deficient performance); *Williams v. Taylor*, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) (finding counsel's failure "to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood" deficient); *Carter v. Bell*, 218 F.3d 581, 596-97 (6th Cir. 2000) (concluding that defense counsel's failure to investigate the defendant's family, social, or psychological background "constituted representation at a level below an objective standard of reasonableness").

417 F.3d at 637-638. The Supreme Court reiterated counsel's duty to investigate in *Rompilla v. Beard*, 545 U.S. 374 (2005):

> [T]he American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

374 U.S. at 387. Capital defense counsel has:

> a duty to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be

overemphasized.

Goodpaster, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES, 58 N.Y.U.L. Rev. 299, 323-24 (1983). This "requires literally hundreds of hours of the attorney's time and requires the attorney's utmost attention and ability." *State v. Wigley*, 624 So.2d 425, 430 (La. 1993) (Dennis, J., concurring). Effective assistance in a capital case includes adequate investigation and preparation. "Counsel's constitutional duty to investigate a defendant's background in preparation for the sentencing phase of a capital trial is 'well-established.'" *Harries v. Bell*, 417 F.3d 631, 637 (6th Cir. 2005). "At the heart of effective representation is the independent duty to investigate and prepare." *Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983) (citing *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982)). To conclude that counsel was ineffective with respect to the failure to develop mitigation evidence, this Court need only look to the penalty phase of the trial, rather than the entire record. See *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991).

As the Supreme Court explained in *Wiggins*, when counsel has failed to investigate mitigating evidence, defense counsel's "decision not to investigate . . . must be directly assessed for reasonableness under the circumstances." *Wiggins*, 539 U.S. at 533 (citation omitted). Any failure to investigate is not reasonable if it is "the result of inattention, not reasoned strategic judgment." *Id.* at 534.

Importantly, as the Court explained in *Wiggins*, it is imperative that counsel conduct a reasonable social history investigation into the client's background and circumstances. *Id.* at 524-525 (noting that professional standards required preparation of social history report). In fact, "failure to prepare a social history [does] not meet the

minimum standards of the profession" in a capital case. *Id.* at 527 (*quoting Wiggins v. State*, 352 Md. 580, 609 (Md. 1999)). Indeed, as of 1980, the Sixth Amendment has demanded that "trial counsel . . . fulfill their obligation to conduct a ***thorough investigation*** *of the defendant's background.*" *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (emphasis supplied) (*citing* 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). As shown, counsel here, however, did not conduct that "thorough investigation" demanded by the Sixth Amendment.

Wiggins also makes clear that defense counsel performs deficiently if he or she fails to conduct a thorough social history investigation and provide that information to psychological experts. *Id.* In *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), a jury convicted Glenn of first-degree murder and the case proceeded to the sentencing hearing. At that hearing, counsel presented the testimony of a videotape producer about the neighborhood in which Glenn grew up, a minister and teacher who had known Glenn when he was small, a minister who attempted to present theological objections to the death penalty, and a lawyer who opined that Glenn did not have a significant criminal record. *See Glenn v. Tate*, 71 F.3d at 1207. The jury sentenced Glenn to death.

Glenn's post-conviction attorneys demonstrated that trial counsel failed to investigate his background or perform appropriate mental health testing. As a result, the sentencing jury did not hear evidence that, among other things, Glenn had a low intellect, was beaten by his mother, was more of a follower than a leader, and suffered a neurological impairment. The Sixth Circuit concluded that the sentencing hearing could "hardly be relied upon as having produced a just result" given trial counsel's failure to present the sentencing jury with this information. *Id.* at 1211. The Court noted that its

sister circuits have had "no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity," and to conclude that there was no prejudice in the defendant's case would put the Sixth Circuit "badly out of step with the other circuits." *Glenn v. Tate*, 71 F.3d at 1211 (citing cases). Thus, the Court concluded that trial counsel's deficient performance was prejudicial and Glenn's death sentence was unconstitutional.

Wilson's family members, including siblings and others, were all willing and able to testify on Gregory Wilson's behalf at trial. Each had significant mitigation evidence to offer, but none of them were ever contacted by Mr. Wilson's attorneys. As co-counsel Foote stated, Hagedorn "did absolutely nothing to prepare a penalty phase." Mr. Wilson was raised in a home in which he experienced emotional and economic deprivation. His mother died when he was 16 years old. Hagedorn and Foote made no effort to explore or investigate anything to do with mitigating evidence. Information provided by an Ohio parole officer that was in Foote's possession indicated that Mr. Wilson was the victim of sexual and/or physical abuse as a child or adolescent, but that avenue of mitigation also was never explored.

There can be no doubt that Gregory Wilson has been prejudiced. "[W]eighing all of the mitigating evidence – both that introduced at trial and that introduced in [this] habeas proceeding – against the available aggravating evidence, [it is] reasonably probable that but for [Mr. Wilson's] counsel's deficient performance the outcome of [Mr. Wilson's] sentencing proceeding would have been different." *Harries*, 417 F.3d. at 641. Of course, in Mr. Wilson's case, absolutely no mitigation evidence was offered at the penalty phase.

Mr. Wilson's defense attorneys at trial did not function as the counsel guaranteed under Section Eleven of the Kentucky Constitution and the Sixth Amendment to the United States Constitution. Mr. Wilson was constitutionally guaranteed the "assistance of counsel" and had the "right to be heard by himself and counsel." The evidence gathered at the post-conviction phase proved both the deficient performance prong and the prejudice prong of the *Strickland* test. The conduct of Mr. Wilson's trial attorneys did not amount to the assistance of counsel that the constitution mandates.

But given the facts of Mr. Wilson's case, he need not show prejudice to prevail on his claim. In *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008), the Sixth Circuit did not investigate whether the failure of counsel to investigate mitigation evidence was a "complete denial of counsel at a critical stage." *See U.S. v. Cronic*, 466 U.S. 648, 658 (1984); *Bell v. Cone*, 535 U.S. 685, 695-696 (2002). Because counsel completely failed to investigate in preparation for the sentencing phase of his trial, Mr. Wilson did not need to demonstrate prejudice. *See Mitchell v. Mason*, 325 F.3d 732, 742 (6th Cir. 2003). "[T]he pre-trial period is indeed a critical stage, the denial of counsel during which supports a *Cronic* analysis." *Mitchell*, 325 F.3d at 742 (finding complete denial of counsel when attorney never contacted witnesses and only met with defendant three times).

Much like the defendant in *Mitchell*, Mr. Wilson's attorneys constructively failed to investigate evidence that would be required at trial. In doing so, they struck at the heart of counsel's responsibilities during this critical period. *Mitchell*, 325 F.3d at 743 ("The pre-trial period constitutes a critical period because it encompasses counsel's constitutionally imposed duty to investigate the case."). Counsel's failure to investigate

is nothing short of an "abdication of advocacy." *Skaggs*, 235 F.3d at 269, and constitutes a deficient performance under *Strickland*. *See Glenn v. Tate*, 71 F.3d at 1206-10 (counsel's failure to investigate background and obtain available support services constitutes a deficient performance).

In abdicating their roles as advocates for Mr. Wilson at the pretrial stage, the attorneys abandoned Mr. Wilson at a critical stage. In that sense, Mr. Wilson's case is similar to *Maples v. Thomas*, 132 S.Ct. 912 (2012) In both Mr. Wilson's case and in *Maples*, the defendant was represented by volunteer counsel. The Supreme Court noted, "at trial, [Maples] was represented by two appointed lawyers, minimally paid and with scant experience in capital cases." *Maples v. Thomas*, 132 S.Ct. at 916. The Court also said:

> Maples pleaded not guilty, and his case proceeded to trial, where he was represented by two court-appointed Alabama attorneys. Only one of them had earlier served in a capital case. See Tr. 3081. Neither counsel had previously tried the penalty phase of a capital case.

Maples v. Thomas, 132 S.Ct. at 918 Mr. Wilson was similarly represented at trial by two attorneys with less than "scant" capital trial experience. Foote had never tried a felony case. Hagedorn falsely claimed to have previously tried a capital case.

In *Maples*, the post-conviction claims for relief included several IAC claims, including that trial counsel were "woefully underprepared for the penalty phase of trial." *Maple v. Thomas*, 132 S.Ct. at 919. Mr. Wilson's attorneys were not merely underprepared, they were woefully unprepared for the penalty phase, having conducted no mitigation investigation at all.

The issue in *Maples* concerned the abandonment of Maples by post-conviction counsel. Two associates of a large New York law firm had been representing Maples in post-conviction. After they left the firm without telling Maples, the Alabama post-conviction court issued a judgment denying relief. Part of the problem that the Supreme Court recognized is that once Maples' two attorneys left the firm, and the deadline to appeal had passed, the other members of the firm who tried to get the appeal on track had a conflict of interest.

The Supreme Court said this about the law firm's continued representation of Maples in post-conviction after the deadlines for the notice of appeal had passed:

> As *amici* for Maples explain, a significant conflict of interest arose for the firm once the crucial deadline passed. Brief for Legal Ethics Professors et al. as *Amici Curiae* 23-27. Following the default, the firm's interest in avoiding damage to its own reputation was at odds with Maples' strongest argument – *i.e.* that his attorneys had abandoned him, therefore he had cause to be relieved from the default. Yet Sullivan & Cromwell did not cede Maples' representation to a new attorney, who could have made Maples' abandonment argument plain to the Court of Appeals. Instead, the firm represented Maples through briefing and oral argument in the Eleventh Circuit, where they attempted to cast responsibility for the mishap on the clerk of the Alabama trial court.

Maples v. Thomas, 132 S.Ct. at 925, fn. 8.

In Mr. Wilson's case, his strongest arguments on direct appeal were that McNally had abandoned him and that McNally and others had interfered in the case to pursue an agenda that was adverse to Mr. Wilson's interests. Robinson's "interest in avoiding damage" to the reputations of McNally, Carran and her employer, Public Advocate Isaacs, as well as herself, was "at odds with [Wilson's] strongest argument[s]." *See Maples*, *supra*, 132 S.Ct. at 925, fn. 8. Just as the attorneys in the *Maples* case

"attempted to cast responsibility ... on the clerk of the Alabama trial court," the appellate lawyers in Mr. Wilson's case tried to cast responsibility solely on the trial judge. See Arguments I, II, III, IV and VII. (Brief for Appellant, pp. 39-83, 95-104; Appendix A to the motion to vacate). (TR I, 59; Box 8 of 8). Like Maples, Mr. Wilson must be afforded relief based upon his counsels' abandonment of him at a critical stage of his trial proceedings.

This Court and the Sixth Circuit dismissed Mr. Wilson's claim of IAC based upon an erroneous finding that Mr. Wilson had elected to represent himself and for that reason could not complain about the performance of counsel that he had waived mid-trial. But even if Mr. Wilson had elected on the second day of trial to represent himself, he is still entitled to relief and he is not precluded from arguing that his attorneys were ineffective. The United States Supreme Court, in *Strickland*, *Wiggins* and *Rompilla*, made it clear that to evaluate the deficient performance prong of IAC, a court must avoid "the distorting effects of hindsight" and must look at counsel's actions and decisions at the time that they are taken or made. *See Strickland*, 466 U.S. 668, 689 (1984). This means that Hagedorn's pretrial decision to conduct no mitigation investigation must be evaluated at the time that he made it to see if it fell below reasonable professional judgment prevailing at that time. It cannot seriously be argued that prevailing standards in 1988 did not require counsel to do a pretrial mitigation investigation. *Strickland* itself was decided in 1984, and the Supreme Court recognized in *Rompilla* and *Wiggins* that the 1982 ABA Standards for Criminal Justice were the prevailing norm in 1988.

> "[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. at 524, 123 S.Ct. 2527 (quoting *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. 2052).

Rompilla v. Beard, 545 U.S. 374, 387 (2005)

The deficient performance by Hagedorn in the pretrial stage meant that later, at trial, counsel (whether Hagedorn, Foote or Mr. Wilson) could not present an effective case for life. Thus, in Mr. Wilson's case, even if Mr. Wilson was representing himself as of the second day of trial, and even if it was his strategy to present no case in mitigation, that "strategy" was "the product of [Hagedorn's] incomplete investigation." *Poindexter v. Mitchell*, 454 F.3d 564, 581 (6th Cir. 2006).

Furthermore, in *Faretta*, the Supreme Court did not foreclose the possibility of an ineffective assistance of counsel claim on the basis that counsel prejudiced the defense by failing to properly conduct an adequate pretrial investigation. In *Faretta*, the Court merely pointed out:

> Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'

Faretta v. California, 422 U.S. at 834, fn. 46 (1975). (Emphasis added) Here, it was the quality (or lack thereof) of Hagedorn's pretrial preparation that amounted to a denial of the effective assistance of counsel. Had IAC been raised for the first time in post-conviction, Mr. Wilson would have prevailed, at a minimum, in gaining a new penalty phase. Certainly, there is a reasonable probability that raising IAC for the first time in the RCr 11.42 motion would have changed the result of the post-conviction action.

A defendant is entitled to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This due process right applies to both the first phase and to the penalty phase of a capital trial. *See Simmons v. South*

Carolina, 512 U.S. 154, 164-65 (1994). Counsel's actions – and inactions – deprived Mr. Wilson of this right. Gregory Wilson was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Eleven, Fourteen, Seventeen, One Hundred and Ten, and One Hundred and Fifteen of the Kentucky Constitution.

CONCLUSION

For the foregoing reasons, the appellant, Gregory Wilson, respectfully requests that this Court reverse and remand the June 18, 2013, order of the Kenton Circuit Court.

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