CAPITAL CASE

No. 11-845

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

PHILIP PARKER, WARDEN
Petitioner

v.

DAVID EUGENE MATTHEWS,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circut

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

INTRODUCTION

This case does not warrant this Court's review because the opinion of the Sixth Circuit Court of Appeals granting federal habeas corpus relief to Respondent David Eugene Matthews has virtually no application beyond the narrow facts of this case. This decision involves an analysis of an element of Kentucky's murder statute that has not existed since 1985. Also, the Sixth Circuit's decision is well-grounded in fact and law, where the prosecution did not present *any* evidence whatsoever to prove this element, but rather sought to sustain its burden by making improper and prejudicial closing arguments to the jury. Significantly, the Sixth Circuit granted relief on two separate grounds, one of which reduces his conviction from murder to manslaughter, while the other remands Matthews' case for a new trial. Thus, even if the Petitioner were to prevail on one of these claims, the writ would nonetheless be granted, resulting in a lesser conviction or a new trial.

In 1981, when the homicides in this case occurred, Kentucky law unambiguously provided that the absence of extreme emotional distress ("EED") was an essential element of murder. When the defendant provided evidence of EED, the prosecution bore the burden to prove the absence of EED beyond a reasonable doubt. *Gall v. Commonwealth*, 607 S.W.2d 97, 109 (Ky. 1980) ("*Gall I*"). The relative burdens changed dramatically in 1985, when the Kentucky Supreme Court overruled its prior decisions and held that the "absence of EED" was no longer an element of murder but rather a defense. *Wellman v. Commonwealth*, 694 S.W.2d 696, 697 (Ky. 1985).

At his trial, Respondent David Eugene Matthews presented unimpeached expert testimony that he acted under the influence of EED at the time he killed his wife and mother-in-law. The prosecution presented no expert of its own or any proof that Matthews acted in the

absence of EED. Instead, the prosecution's response to the EED element was to mock and denigrate the defense itself. In finding the evidence sufficient to uphold his conviction, the Kentucky Supreme Court inappropriately shifted the burden to him, explaining, "The proof that [Matthews] was acting under the influence of extreme emotional disturbance was far from overwhelming." *Matthews v. Commonwealth*, 709 S.W.2d 414, 421 (Ky. 1985).

On these facts, a panel of the Sixth Circuit granted habeas corpus relief on two grounds. First, the Kentucky court unreasonably applied clearly established federal law as articulated by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and *In re Winship*, 397 U.S. 358 (1970), because the burden of proving the EED element was improperly shifted onto Matthews, and no rational trier of fact could find the prosecution had proven the element. *Matthews v. Parker*, 651 F.3d 489, 504 (6th Cir. 2011). Second, the Kentucky court unreasonably applied clearly established law articulated by this Court in *Darden v. Wainwright*, 447 U.S. 168 (1986), because the prosecutor committed flagrant misconduct in closing argument when he denigrated the EED defense itself and argued that Matthews and his defense team colluded to manufacture his EED claim. *Id.* at 507. The Petitioner correctly notes that the grant of the writ on the sufficiency of the evidence claim could result in Matthews' release, as he has already served over 30 years in custody, which is enough time in custody to satisfy a sentence for manslaughter. (Cert. Pet. 9). The grant of the writ on the prosecutorial misconduct claim, however, would merit a new trial.

The Sixth Circuit's opinion is soundly reasoned and consistent with the principles of AEDPA and 28 U.S.C. § 2254. The panel applied the relevant law as stated by the Kentucky Supreme Court and concluded, unremarkably, that the prosecution did not meet its burden of proof beyond a reasonable doubt where the defense presented an unimpeached expert who diagnosed Matthews with EED. The prosecution presented no expert of its own or other evidence

contradicting the EED diagnosis, and its response to Matthews' evidence largely consisted of arguments mocking and deriding the EED defense itself.

The Petitioner is misguided in his attempt to frame this issue as one involving an inappropriate federal reinterpretation of state law or a failure to give due deference to state laws. Its arguments regarding *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000), and *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003), earlier Sixth Circuit federal habeas decisions involving the EED defense, are unconvincing and do not call the decision in the instant case into question. Furthermore, its retroactivity arguments, concerning this Court's decision in *Rogers v. Tennessee*, 532 U.S. 451 (2000), are waived, as the Petitioner did not present this argument to the Sixth Circuit panel, and in any event, that case was not a factor in either the majority or the dissent's analysis.

In short, this case is not worthy of certiorari because the Sixth Circuit's opinion affects only David Matthews and has no application to any other cases in Kentucky or the rest of the country. *See Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (this Court grants certiorari in order to review "question[s] of national importance"). Furthermore, the primarily fact-intensive basis upon which habeas relief was granted counsels against this Court's review. *See Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J. dissenting) (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

STATEMENT OF THE CASE

A. Kentucky Law Regarding EED

Under Kentucky law, a person is guilty of murder when, ". . . with the intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of

extreme emotional disturbance, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Ky. Rev. Stat. Ann. § 507.020.

Kentucky's murder statute, enacted in 1975, was modeled after the Model Penal Code, and it was unique among the states in that the legislature incorporated the issue of extreme emotional disturbance directly into the statute. *See Gall v. Parker*, 231 F.3d 265, 289-90 (6th Cir. 2000) ("*Gall II*"), *cert. denied*, 533 U.S. 941 (2001). Prior to the offenses in the instant case, the Kentucky Supreme Court had interpreted the murder statute such that the absence of EED was an essential element of murder. In *Ratliff v. Commonwealth*, 567 S.W.2d 307, 309 (Ky. 1978), the Court opined, "[T]he prosecution carried the burden to satisfy the jury of the absence of extreme emotional disturbance as statutorily defined." Later that year, in *Bartrug v. Commonwealth*, 568 S.W.2d 925, 926 (Ky. 1978), the Court stated, "[T]he language of this statute makes the absence of 'extreme emotional disturbance' an essential element of the offense of murder." In 1979, the Court reversed a murder conviction because the jury was not instructed on the "absence of EED" element. *Edmonds v. Commonwealth*, 586 S.W.2d 24, 27 (Ky. 1979). Then, in 1980, the Court held that where a defendant presents *no* evidence of EED at trial, a jury need not be instructed that it must find the absence of EED in order to convict on a murder charge. *Smith v. Commonwealth*, 599 S.W.2d 900, 905 (Ky. 1980). Though this holding required a defendant to make a minimum showing of EED for the issue to reach the jury, it did not change the underlying fact that the absence of EED remained an element of the crime.

In *Gall v. Commonwealth*, 607 S.W.2d 97, 109 (Ky. 1980) ("*Gall I*"), the Court continued to consider the absence of EED an element of the crime, though it ruled that the

prosecution need not present evidence negating EED unless the evidence of EED presented by the defense was of "such probative force" that the defendant would be entitled to acquittal as a matter of law. Still, "the Kentucky Supreme Court in *Gall I* said nothing to undermine its clear statements from the two prior years that EED was an element of murder under the new statute." *Gall II*, 231 F.3d at 289. Thus, following *Gall I*, "[t]he defendant bore the initial burden of production required to trigger the inclusion of the EED element as an element of the crime. Once the defendant satisfied its burden of production and 'raised a reasonable doubt' regarding the EED element, the state bore the ultimate burden of persuasion, and was required to prove the EED element beyond a reasonable doubt." *Matthews v. Parker*, 651 F.3d 489, 500 (6th Cir. 2011) ("*Matthews II*").

The crimes in this case occurred several months after *Gall I* was decided. At the time of the offense, Kentucky law provided that "a mental disorder, whether or not it amounts to legal insanity, may constitute a reasonable explanation or excuse for extreme emotional disturbance." *Gall I*, 607 S.W.2d at 109. Following Matthews' crime, the Kentucky Supreme Court repeatedly held that the absence of EED was an element of murder, addressing the issue at least four times without changing its mind. *See Henley v. Commonwealth*, 621 S.W.2d 906 (Ky. 1981); *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981); *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982); *Carwile v. Commonwealth*, 656 S.W.2d 722 (Ky. 1983). Finally, in 1985, the Court explicitly overruled its oft-repeated formulation of the EED issue and made a dramatic change, holding that the absence of EED was no longer an element of murder. *Wellman v. Commonwealth*, 694 S.W.2d 696, 697 (Ky. 1985). Instead, "[t]he presence of extreme emotional distress is a matter of evidence, not an element of the crime." *Id.*

B. Facts Regarding Matthews' Offense

On June 29, 1981, Matthews shot and killed his estranged wife Mary Marlene Matthews ("Marlene"), and his mother-in-law Magdalene Cruse ("Magdalene"). The sole disputed issue at trial concerned Matthews' mental and emotional state at the time of the crimes. At the close of the Commonwealth's case and presentation of all the evidence, the defense motions for a directed verdict were denied. (Appx. 1146, 1256-57)[1] The jury was instructed on murder as well as manslaughter. (Appx. 1256-59)

The evidence established without contrary authority that he was acting under the influence of EED at the time of the murders. Matthews and his wife, Marlene, had an acrimonious relationship that was rapidly deteriorating in the weeks leading up to her death. The couple had separated and reconciled a number of times, and during their periods of separation, the problems between them only grew worse. (Appx. 886) Marlene would often walk the street in front of the home of Matthews' mother, Laverne Matthews, calling him names, giving him dirty looks and cussing at him. (Appx. 946-47, 1151-52) When Marlene would walk the couple's baby by Laverne's house, she would let the baby fall and leave her crying in the street. As late as 2 a.m. on some nights, Matthews could not sleep because of the sound of his baby crying outside. (Appx. 948-49)

Marlene also swore out warrants against Matthews during their periods of separation. After having Matthews arrested, she would hire a lawyer to represent him and post his bond. (Appx. 1247) Shortly before the crimes in this case occurred, she swore out a warrant accusing Matthews of sexually abusing one of her children. Matthews was extremely upset about it, and the tensions between himself and his estranged wife escalated. Matthews adamantly denied the

[1] "Appx." refers to the appendix in the Sixth Circuit Court of Appeals.

accusation, and there was no evidence to support it. (Appx. 1249)

The problems between Matthews and his wife also created tension between their two families. Laverne received harassing phone calls she suspected came from Marlene and was forced to change her phone number. The situation deteriorated to the point where Laverne had to take out a warrant against Marlene to prevent further contact. (Appx. 931, 936) Matthews knew of the problems between the families, and they began to affect his life. His brother, Roger Matthews, testified, "He was actually afraid to go and leave Mother by herself in the house." (Appx. 972) Matthews could no longer relax or even be comfortable in his own home.

At trial, Matthews presented the testimony of Dr. Lee Chutkow, a pyshiatrist, who opined that Matthews was acting under the influence of EED at the time of the murders. (Appx. 1219-20) As a result of the numerous stresses in Matthews' life, he was suffering from an adjustment disorder and a problem with alcohol. (Appx. 1996-97) Chutkow testified, "[Matthews] was developing for several weeks …extreme tension, irritability, and almost a kind of fear of his late wife." (Appx. 1205-06, 1219) "His conclusions about the behavior of the wife and mother-in-law, especially the wife's repeatedly having him arrested and jailed, did distort his judgment about what the wife was up to and what her role in his own personal distress was during this period of adjustment of several months." (Appx. 1199) After a thorough examination of Matthews, Chutkow concluded — and testified several times — that Matthews was suffering from EED.

The prosecution presented no evidence to rebut these opinions. And even the prosecutor conceded to the jury that "the only evidence we have of what happened there that night comes through the testimony of the psychiatrist as told to him by the defendant." (Appx. 1313) A jury convicted Matthews of the murders, and he was sentenced to death. (Appx. 1395)

C. Procedural History

On direct appeal, the Kentucky Supreme Court affirmed Matthews' conviction and death sentence. With respect to Matthews' claim that the evidence was insufficient to prove the absence of an extreme emotional disturbance, the Court held, in relevant part:

> While it is certainly true that appellant tried hard to make a case for application of the qualifying phrase, "acting under the influence of extreme emotional disturbance" as set out in KRS 507.020(1)(a), by presenting extensive evidence of preexisting serious domestic problems and through the testimony of a psychiatrist, it is equally true that the evidence regarding appellant's conduct before, during and after the crimes was more than sufficient to support the jury's findings of capital murder. It is not necessary for the Commonwealth to produce direct evidence, by confession or otherwise, of absence of extreme emotional disturbance. *See Gall v. Commonwealth*, Ky., 607 S.W.2d 97, 107 (1980).
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> We have recently written on this subject in *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985), clarifying that absence of extreme emotional disturbance is not an element of the crime of murder which the Commonwealth must affirmatively prove. The trial court's instructions in regard to extreme emotional disturbance were adequate, and the proof supported the jury's findings of intentional murder.

Matthews v. Commonwealth, 709 S.W.2d 414, 420-21 (Ky. 1985) ("*Matthews I*").

Matthews filed a petition for a writ of habeas corpus on February 12, 1999. The federal magistrate recommended granting a writ of habeas corpus, in part, based on the prosecution's failure to prove the absence of EED beyond a reasonable doubt. The District Court rejected the recommendations and denied relief on all claims. *Matthews v. Simpson*, 603 F. Supp. 2d 960 (W.D. Ky. 2009).

The Sixth Circuit, in a 2-1 decision, reversed the District Court's decision, and applying the dictates of AEDPA, granted the writ of habeas corpus on two grounds. The Sixth Circuit majority held that the Kentucky Supreme Court had unreasonably applied this Court's precedent in *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), where the burden of proving the EED element was improperly shifted onto Matthews, and no rational trier

of fact could find the prosecution had proven the absence of this element beyond a reasonable doubt. *Matthews II*, 651 F.3d at 504. The Sixth Circuit majority also held that the Kentucky Supreme Court unreasonably applied this Court's precedent in *Darden v. Wainwright*, 447 U.S. 168 (1986), because the prosecutor committed flagrant misconduct in closing argument when he argued that Matthews and his defense team colluded to manufacture his EED claim and exaggerate the extent of his EED. *Id.* at 507. The Warden filed a petition for rehearing en banc, which was denied unanimously.

REASONS TO DENY THE PETITION

I. The Sixth Circuit's Opinion Will Have Virtually No Effect On Other Cases, Including Pending Kentucky Cases In Federal Habeas.

In seeking this Court's review, the Petitioner greatly exaggerates the significance of the Sixth Circuit's opinion. The very nature of the legal issue concerns an element unique to Kentucky law and one that has not existed in the state for over 25 years. Furthermore, the basis for habeas relief was the prosecution's lack of evidence against Matthews and prosecutorial misconduct specific to Matthews' trial. To put it simply, this decision affects Matthews and only Matthews.

The Petitioner claims that two Kentucky death row inmates have habeas petitions with similar claims pending in the district court: Lief Halvorsen and Randy Haight. (Cert. Pet. 4). Even a cursory look at those two cases, however, shows that the Sixth Circuit's opinion would affect those cases only in the most tangential way. In Halvorsen's case, the defendant, at trial, presented no expert testimony or other evidence that he suffered from EED. *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 926 (Ky. 1987). In Halvorsen's post-conviction proceedings, the Kentucky Supreme Court noted that he failed to present any evidence at his [post-conviction] hearing that would have supported a finding of EED even under our earliest and most expansive

interpretation of EED." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 4 (Ky. 2007). This is vastly different from Matthews' case, where he did present expert testimony of EED at trial, thus requiring the State to prove the absence of EED.

Also, in Haight's case, defense counsel contended that the EED instructions were inadequate. *Haight v. Commonwealth*, 938 S.W.2d 243, 248 (Ky. 1996). There was no argument that the prosecution failed to meet its burden of proof, as in the present case. More significant is the fact that the crimes in Haight occurred *after* the Kentucky Supreme Court announced the new EED burden in *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985). Thus, the Sixth Circuit's analysis would have no effect on Haight's case, which would be analyzed using the post-*Wellman* framework.

Therefore, the Sixth Circuit's opinion in this case has no application beyond Matthews himself. The narrow factual and legal circumstances of this case strongly indicate that certiorari is not warranted.

II. The Sixth Circuit Correctly Decided That The Kentucky Supreme Court Unreasonably Applied *In Re Winship* And *Jackson v. Virginia*.

After an exhaustive, fact-intensive inquiry, the Sixth Circuit concluded that the Kentucky Supreme Court unreasonably applied *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979). *Matthews II*, 651 F.2d at 504. In *Winship*, this Court held that due process requires that the prosecution prove every element of a crime beyond a reasonable doubt. *Winship*, 397 U.S. at 364. And *Jackson* clarified that when reviewing an appeal of a state jury's factual finding on an element of a charged offense, a federal habeas court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. This Court made clear that this standard is more searching than a "no evidence" rule

or a "'modicum' of evidence" rule. *Id.*

The Sixth Circuit's decision is amply supported by the record, which shows that the prosecution failed to prove beyond a reasonable doubt that the killings were committed in the absence of EED. The only expert witness presented at the trial was Dr. Lee Chutkow, who testified convincingly that Matthews suffered from EED at the time of the crime. Matthews had a rapidly deteriorating relationship with his wife, Marlene, who called him names, cussed and hollered at him, and would leave their baby crying in the street beside their home. (Appx. 886, 946-49, 1151-52) Matthews was terribly upset and afraid to go outside because of Marlene's conduct. Marlene also swore out several warrants against Matthews based on unsubstantiated allegations, including sexually abusing their child. Marlene was also suspected of making harassing phone calls to Matthews' mother, who swore out a warrant against Marlene. (Appx. 931, 936) Matthews feared leaving his mother alone and bought a gun for her protection. (Appx. 972)

Dr. Chutkow, a psychiatrist, testified that Matthews suffered from an adjustment disorder and alcohol abuse. Chutkow explained that an adjustment disorder is a "temporary emotional and behavioral disturbance" in people "subject to a variety of stresses, either psychological, social, physical, or a combination of stresses for days, weeks or months" beforehand. (Appx. 1196) Symptoms include attempts to hurt others, impaired judgment and poor self control. (Appx. 1196)

Matthews' mental condition and tension with his wife and her family led Dr. Chutkow to reiterate multiple times that Matthews acted under EED when the crimes occurred. "[Matthews] was developing for several weeks …extreme tension, irritability, and almost a kind of fear of his late wife." (Appx. 1205) This led to "a great deal of unmanageable anger, tension, and fear" that

culminated in the deaths of his wife and mother-in-law. Chutkow explained that Matthews' awareness of what he was doing and his knowledge that it was illegal did not negate his EED diagnosis. (Appx. 1207)

Matthews' showing of EED was wholly uncontradicted. The prosecution presented no expert of its own or any evidence rebutting Chutkow's testimony. In fact, as the Petitioner later conceded in the Kentucky Supreme Court and federal habeas proceedings, Dr. Chutkow maintained his position even after vigorous cross-examination by the prosecution. (Appx. 711-12, 720-21, 2211) For example, the Petitioner argued to the U.S. District Court, "Dr. Chutkow testified at great length regarding the fact that Matthews was under the influence of EED at the time of the shootings, and he maintained this position even under vigorous cross-examination regarding Matthews' attempt to cover up the crime later." (Appx. 711-12).

The prosecution did not present its own expert witness regarding EED. Nor did the prosecution present any other proof that Matthews acted in the absence of EED. On this record, the Sixth Circuit correctly concluded that no rational trier of fact could conclude that the prosecution had met its burden of proof with respect to the EED element. Further, the Kentucky Supreme Court's holding that the prosecution had met its burden amounted to an unreasonable application of *Jackson* and *Winship*. *Matthews II*, 651 F.3d at 503-04.

The Petitioner claims that a "mountain" of evidence supports a finding that Matthews was acting in the absence of EED. (Cert. Pet. 28). The Petitioner first points to the prosecution's cross examination of Chutkow, which highlighted that his opinions were based on information obtained from Matthews — information described by the Petitioner as "self-serving." (Cert. Pet. 28). However, the Petitioner's broadly labeling Matthew's own statements as "self-serving" does not compel the conclusion that it should be rejected, as any party would present evidence that

can be deemed self-serving. *See Ryan v. United States*, 657 F.3d 604, 606 (7th Cir. 2011) ("[W]e advise against using one label …, "self-serving," to describe an opponent's sworn testimony. Important testimony of a party is usually self-serving by its nature."). Hence, this "self-serving" designation does nothing to satisfy the State's burden.

The Petitioner also points to Matthews' conduct before, during, and after the crimes as circumstantial evidence of the absence of EED. (Cert. Pet. 28-30). However, Dr. Chutkow testified at trial that Matthews' understanding that his actions were criminal and his actions to minimize his connection to the crimes did not affect his EED diagnosis. Chutkow explained that Matthews "knew what the action was. His interpretation of his motives about the action or the need to do this or the purpose of doing it ... was quite unrealistic, but he knew what he was doing ... was wrong in a legal sense." (Appx. 1209-10) Subsequent to Matthews' trial, the Petitioner has conceded that Chutkow held up under the prosecution's vigorous cross-examination. (Appx. 711-12, 720-21, 2211)

Moreover, the fact that a defendant appreciated the criminality of his conduct and acted rationally does not necessarily negate an EED diagnosis; if it did, it would be virtually indistinguishable from the insanity defense. *See Gall I*, 607 S.W.2d at 109 ("[A] mental disorder, whether or not it amounts to legal insanity, may constitute a reasonable explanation or excuse for extreme emotional disturbance."); KY. REV. STAT. § 504.060(4) (1986) (defining insanity as "a mental condition which results in a lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law"). Also, under Kentucky law at the time, evidence of rational conduct did not negate an EED finding. *See, e.g., Bartrug v. Commonwealth*, 568 S.W.2d 925, 925-26 (Ky. 1978) (affirming manslaughter conviction where defendant was "staggering" drunk but still capable of rational

judgments); *Ratliff v. Commonwealth*, 567 S.W.2d 307, 308-09 (Ky. 1978) (holding that defendant was entitled to a manslaughter jury instruction where she bought a pistol and a box of shells, shot a store clerk, continued to fire her gun outside the store, and then tossed the gun into a yard). While the Petitioner analogizes this case to *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986), and *Buchanan v. Commonwealth*, 691 S.W.2d 210 (Ky. 1985), those cases were decided following *Wellman*'s reformulation of the respective burdens, and therefore, those cases are inapplicable. (Cert. Pet. 30).

The Petitioner also repeatedly makes the claim that the Sixth Circuit has refused to acknowledge this evidence. (Cert. Pet. 30, 37). This claim is false, as the Sixth Circuit did, in fact, acknowledge that evidence and quoted Dr. Chutkow's testimony explaining that the evidence did not negate his diagnosis:

> Petitioner's counsel asked Dr. Chutkow whether Petitioner's EED "[w]ould comport with his ... perhaps hiding the gun or making a false statement? ... [W]ould either his putting the gun away or ... giving a false statement, would either of those stand for the proposition that the [EED] diagnosis that you have given just completely do[esn't] exist?" (App. at 1209, Trial Tr.) Dr. Chutkow replied, "[n]o, the diagnosis still exists, because [Petitioner] knew what the action was. His interpretation of his motives about the action or the need to do this or the purpose of doing it ... was quite unrealistic, but he knew what he was doing ... was wrong in a legal sense." (*Id.* at 1209–10.) Dr. Chutkow reaffirmed this position on cross-examination. (*See id.* at 1220.)

Matthews II, 651 F.3d at 504 n.4.

To be sure, the prosecution was not required to present direct evidence of Matthews' mental state to sustain its burden of proof. *Gall I*, 607 S.W.2d at 109. The Sixth Circuit expressly acknowledged this principle. *Matthews II*, 651 F.3d at 503-04. But where Matthews satisfied his burden of coming forward with evidence of EED, it was incumbent upon the prosecution to undermine or contradict that evidence to satisfy its burden of proof. Instead of doing that, the prosecution sought to sustain its burden by mocking the EED defense and resorting to other

improper tactics in closing argument. (*See infra*, Argument V). With Dr. Chutkow's opinion standing uncontradicted and unimpeached and no contrary evidence from the prosecution, the Sixth Circuit correctly held that no rational trier of fact could conclude that the prosecution had proven the absence of the EED element.

Furthermore, the Kentucky Supreme Court's holding that the prosecution had met its burden was unreasonable. The court noted that Matthews' "conduct before, during and after the crimes was more than sufficient to support the jury's findings of capital murder." *Matthews I*, 709 S.W.2d at 421. The court, however, made no mention of Chutkow's testimony that explained how Matthews' conduct was consistent with EED. The court then opined, "The proof that [Matthews] was acting under the influence of extreme emotional disturbance was far from overwhelming." *Matthews*, 709 S.W.2d at 421. The court's emphasis on Matthews' evidence of EED—rather than the prosecution's proof of the absence of EED—reveals that the court failed to hold the prosecution to its burden of proof. This was an unreasonable application of the principles of *Winship* and *Jackson*.

The Petitioner also seeks to analogize the instant case to other decisions this Court has reversed for deciding the credibility of witnesses who testified in state court. These cases are wholly inapposite. (Cert. Pet. 31). First, in *Cavazos v. Smith*, 132 S. Ct. 2 (2011), the jury was presented with conflicting experts — three for the prosecution and two for the defense — as to whether the cause of death was shaken baby syndrome. There, the reweighing of the evidence was precluded by both *Jackson v. Virginia* and AEDPA. Here, on the other hand, there was one — and only one — expert who testified as to the element of EED, and it was unreasonable to ignore his uncontradicted testimony.

Also, in *McDaniel v. Brown*, 130 S. Ct. 665 (2010), the parties agreed that the Court of

Appeals misapplied *Jackson v. Virginia* by factoring in new evidence that was not presented in state court. Although the new evidence, a report from a DNA expert, cast doubt on the DNA testimony, a federal habeas court was not permitted to use that evidence in determining whether the state court unreasonably applied *Jackson*. Here, Matthews' claim does not involve any new evidence, but rather an evaluation of the evidence presented at his trial.

And in *Bradshaw v. Richey*, 546 U.S. 74, 78 (2005), this Court reversed the Court of Appeals' decision granting habeas relief because that court misinterpreted state law with respect to the doctrine of transferred intent. As Matthews explains below, (*see infra*, Argument III), the Sixth Circuit's interpretation of Kentucky law was correct, and it was wholly consistent with prior Sixth Circuit decisions analyzing the EED element, including *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) ("*Gall II*"), *cert. denied* 533 U.S. 941 (2001). Even the dissent did not dispute that Kentucky law at the time of Matthews' offense required the Commonwealth to prove the absence of EED; its decision rested on a finding that the prosecution had met that burden.

Finally, the Petitioner notes that the jury was properly instructed as to the relative burdens of proof. (Cert. Pet. 32). This is beside the point. As the *Jackson* court itself recognized, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 317. But to the extent that the instructions are relevant, it should be pointed out that the jury was instructed pursuant to *Gall I*. That is, the jury instructions accurately reflected the EED issue as an element of the offense for which the prosecution had the burden of proof.

In sum, the Sixth Circuit's decision does not run afoul of the dictates of a federal habeas court's powers and follows this Court's precedent. Where the Kentucky Supreme Court held that the prosecution met its burden to prove the absence of EED beyond a reasonable doubt, its

decision was an unreasonable application of this Court's precedent.

III. The Sixth Circuit's Analysis Of Kentucky Law Is Correct And Entirely Consistent With The Dictates Of AEDPA.

The Petitioner contends that this Court's intervention is needed because the Sixth Circuit overstepped its bounds as a federal habeas court and substituted its own interpretation of Kentucky law. (Cert. Pet. 20-22). This claim is utterly without merit.

Petitioner's complaints begin with the Sixth Circuit's decision in *Gall II*. Petitioner claims that *Gall II* "unilaterally reinterpreted Kentucky law" when it "concluded that the law in Kentucky was that EED remained an element of Murder until *Wellman I* . . . ." (Cert. Pet. 18). The decision in *Gall II*, however, was sound, and it is highly significant that even the dissent in the case at bar accepted the reasoning and the result in that case. *Matthews II*, 651 F.3d at 526 (Siler, J., concurring in part, dissenting in part). The *Gall II* court thoroughly analyzed the evolution of Kentucky law on EED and the relevant cases that were decided before and after Gall's crime. The court concluded that it was only in *Wellman* that the Kentucky Supreme Court established that the absence of EED was not an element of murder. *Wellman* stated:

> We are continually beset with arguments founded upon "extreme emotional disturbance" despite the articulation of its meaning and impact in [*Gall I*]. It is our opinion that the principal cause of this problem is the failure of this court, in *Gall*, to specifically overrule those portions of *Ratliff*, *Bartrug* and *Edmonds* [ ] which declare that the absence of extreme emotional distress is an essential element of the crime of murder and require the Commonwealth to prove such absence. . . . To the extent that such cases declare absence of extreme emotional distress to be an element of the crime of murder, they are expressly overruled.

Wellman, 694 S.W.2d at 697. Based on this language, the *Gall II* court stated, "the Kentucky Supreme Court articulated in the plainest of terms that, prior to *Gall* [*I*], absence of EED had indeed been an element of murder, and that *Gall* [*I*] had not formally changed that interpretation, although it had perhaps signaled that the change was imminent." *Gall II*, 231 F.3d at 298.

The Petitioner claims that *Gall II* dismissed all previous interpretations of Kentucky law by the Sixth Circuit. (Cert. Pet. 18). In searching for previous interpretations of the EED provision, however, the Petitioner merely comes up with a few unreported decisions. *See Wellman v. Rees*, 819 F.2d 290 (6th Cir. 1987) (unreported), *Burton v. Scroggy*, 793 F.2d 1290 (6th Cir. 1986) (unreported); *Day v. Seabold*, 785 F.2d 307 (6th Cir. 1986) (unreported). As the decisions were unpublished, they lacked precedential value, and the Sixth Circuit did not—and could not—give them effect. *See* 6th Cir. R. 206(c); *Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir. 1996) (unpublished Sixth Circuit decisions "carry no precedential weight" and "have no binding effect on anyone other than the parties to the action"). The Petitioner also gets no help from a district court opinion that post-dated *Gall II* and found that case to be factually distinguishable. *Slaughter v. Parker*, 187 F. Supp. 2d 755 (W.D. Ky. 2001), *rev'd*, 450 F.3d 224 (6th Cir. 2006).

The Petitioner also contends that *Gall II* was overruled by *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003). (Cert. Pet. 19). This is patently incorrect. *Bowling* involved multiple homicides that took place in 1990—long after *Wellman*'s reformulation of EED as a defense. In denying federal habeas relief, the *Bowling* court made the obvious point that *Gall II*'s *Winship* and *Bouie v. City of Columbia*, 348 U.S. 347 (1964), analysis did not apply to Kentucky homicides that occurred after the *Wellman* decision. It is telling that even the dissent in the present case did not rely on or even cite *Bowling* as authority for its conclusion.

The Petitioner rightly notes that a federal court may not disregard a state court's interpretation of state law. (Cert. Pet. 21-22). But in reaching its decision, the Sixth Circuit, in *Gall II* as well as this case, did not "disregard" the Kentucky Supreme Court's "authoritative interpretation of [state] law." *Bradshaw v. Richey*, 546 U.S. 74, 78 (2005). To the contrary, the Sixth Circuit carefully reviewed and respected the evolution of Kentucky law on EED and

applied that law as it existed at the time of Matthews' crime. As the analysis in *Gall II* makes clear, it is the *Gall I* formulation that controls in Matthews' case. Indeed, the trial court's instructions to the jury were consistent with *Gall I* and properly included the absence of EED as an element that must be proved beyond a reasonable doubt. (Appx. 1259-63) The Sixth Circuit did not overstep its bounds by recognizing that the Kentucky Supreme Court expressly applied the *Wellman* formulation to Matthews' case. Further, the Sixth Circuit correctly applied AEDPA's standard of review in concluding that the Kentucky Supreme Court unreasonably applied U.S. Supreme Court authority where the one and only expert presented unimpeached testimony that Matthews suffered from EED, and thus, no rational trier of fact could conclude that the Commonwealth had met its burden to prove the absence of EED.

IV. The Petitioner's Arguments Regarding *Rogers v. Tennessee* Were Not Presented In The Sixth Circuit And Are Not Persuasive.

The Sixth Circuit explained that pursuant to *Bouie v. City of Columbia*, 348 U.S. 347 (1964), the retroactive application of *Wellman* to Matthews' case was prohibited, because the redistribution of the burden of proof regarding EED was not foreseeable at the time of Matthews' crime. *Matthews II*, 651 F.3d at 500-01. In an effort to depict the Sixth Circuit's decision as contrary to this Court's precedent, the Petitioner argues that the Sixth Circuit failed to recognize the limitations placed on *Bouie* by *Rogers v. Tennessee*, 532 U.S. 451 (2000), and failed to ascertain the impact of *Rogers* on this case. (Cert. Pet. 25-27).

The Petitioner's argument is plainly refuted by the Sixth Circuit majority opinion, which discussed the holding of *Rogers* and expressly held that *Rogers* "does not alter the analysis in [Matthews'] case." *Matthews II*, 651 F.3d at 500 n.1. The Sixth Circuit acknowledged that in *Rogers*, this Court clarified that *Bouie* was rooted in due process principles and was not coextensive with the *ex post facto* clause. *Id.* (citing *Rogers*, 532 U.S. at 459-60). *Rogers*,

however, upheld *Bouie*'s fundamental principle that "a judicial alteration of a . . . doctrine of criminal law . . . must not be given retroactive effect . . . where it is 'unexpected and indefensible' . . . ." *Id.* at 462. Therefore, the Sixth Circuit acknowledged the *Rogers* decision and assessed its impact on this case. *Rogers* offers no support for the Petitioner's claim of cert-worthiness.

Furthermore, the force of the Petitioner's argument is weakened by its failure to make such an argument below. Nowhere in its brief in the Sixth Circuit was there a discussion of the limitations on *Bouie* by *Rogers*. In fact, neither the *Bouie* nor the *Rogers* case is even cited in the Petitioner's brief to the Court of Appeals. To the extent that the State put forth any retroactivity argument, it was in a single footnote stating, "The Warden has not completely abandoned his position that at the time of Matthews' trial EED was a matter of evidence — a defense — rather than an element of the crime." (Petitioner's Sixth Circuit Brief at 47). This Court should decline to consider this argument that was not developed in the Sixth Circuit. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (adhering to the "general practice" of not considering a legal rule that the party did not propose below); *Sullivan v. Louisiana*, 508 U.S. 275, 278 n.1 (1993) (refusing to consider a new argument because of "the State's failure to raise this issue below").

Furthermore, the Petitioner's argument is unconvincing, because the application of *Wellman* to Matthews' case was a clear violation of the *Bouie* and *Rogers* principles. The change in the law in *Wellman*, shifting the burden of proof of EED to the defendant, came as a complete surprise. Between the time *Gall I* was decided in 1980, and the time of Matthews' crimes in 1981, the Kentucky Supreme Court twice reaffirmed that the absence of EED was an element of murder. *See Henley v. Commonwealth*, 621 S.W.2d 906 (Ky. 1981); *Hayes v. Commonwealth*,

625 S.W.2d 583 (Ky. 1981). This remained the state of the law in two more cases decided prior to *Wellman*. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982); *Carwile v. Commonwealth*, 656 S.W.2d 722 (1983). In *Wellman*, the Kentucky Supreme Court overruled the cases holding that the Commonwealth had to establish the absence of EED and held that the absence of EED was not an element of murder. *Wellman*, 694 S.W.2d at 697.

Despite the fact that Matthews' crime occurred in 1980, the Kentucky Supreme Court applied *Wellman* to Matthews' case. The court stated, "We have recently written . . . in *Wellman* [] , clarifying that absence of extreme emotional disturbance is not an element of the crime of murder which the Commonwealth must affirmatively prove." *Matthews I*, 709 S.W.2d at 421. The application of the new burden in *Wellman* to Matthews' case was an unreasonable application of *Bouie* and *Rogers*.

V. The Sixth Circuit Correctly Decided That The Kentucky Supreme Court Unreasonably Applied *Darden v. Wainwright.*

Instead of presenting evidence to contradict Matthews' evidence that he acted under EED, the prosecutors sought to meet its burden by deliberately denigrating the EED claim itself during closing arguments and falsely suggesting to the jury that Matthews had colluded with Chutkow and his attorneys to fabricate the evidence. The Sixth Circuit correctly held that the prosecutor's argument was improper and prejudicial, in violation of due process. The Sixth Circuit also correctly held that the Kentucky Supreme Court's opinion summarily rejecting Matthews' claim was an unreasonable application of this Court's decision in *Darden v. Wainwright*, 447 U.S. 168 (1986). While the Petitioner posits that this Court should intervene to correct an erroneous conclusion (Cert. Pet. 33), it should be noted that even the dissent did not dispute the impropriety of the prosecutor's arguments, but rather focused on the prejudice. *Matthews II*, 651 F.3d at 528 (Siler, J., concurring in part, dissenting in part).

The contested portions of the prosecutor's arguments include the following:

> "[Matthews is] covering up, Ladies and Gentlemen, because he himself does not believe that ... any disorder he might have are his reasons for murdering his wife and mother-in-law. They aren't reasonable. Nobody's going to believe that's a reason."
>
> [Matthews] is arraigned, he meets his attorney and either he tells his attorney, I did it or I didn't do it. One way or the other. But the attorney knows what the evidence is. By the way, the defendant knows what the evidence is, because while he's giving this statement, it's sitting forth right in front of him at the Homicide Office. Here's the gun. Here's the shoes, David. "Nah, nah, I never saw it before, I never borrowed a gun. I never borrowed any money. I wasn't there. I was at home in bed asleep." He's denying it there. And what does his attorney think? His attorney sees all this evidence, and he's going through his mind, what kind of legal excuse can I have? What's the man's defense? Self protection? No, there's no proof of a gun found at that house on 310 Lytle Street. Protection of another? The defendant's mother is at home on Lytle Street. He isn't protecting her over there on North 24th Street. Intoxication? Yeah, well, he was drinking that night. Maybe that will mean something. But that isn't enough Ladies and Gentlemen. Mr. Busse has to contact a psychiatrist to see his client, and he comes in and sees his client one month after the day of his arrest, one month to the day, and by that time, Mr. David Eugene Matthews sees his defense in the form of Doctor Chutkow, and do you think this guy is aware of what's going on? He's competent, *he can work with his attorneys, and he enhances his story to Doctor Chutkow*. Yeah, I was drinking. I was drinking a lot. I was taking a lot of pills, too, and let me tell you about the pills I was taking. Don't you think he has a purpose in enhancing his story to the psychiatrist? Don't you think he would exaggerate his fears about his wife, his mother-in-law, and all these other things about what other people might be doing to his mother? Don't you think he would overstate the extent of his intoxication to his psychiatrist? *It's the defense of last resort, Ladies and Gentlemen. He has no excuse for his conduct, but that's his only way out.*

(Appx. 1309-11) (emphasis added).

The Sixth Circuit correctly found that these arguments were improper because they were calculated to denigrate the EED element rather than point to substantive evidence refuting Matthews's evidence regarding the element. *Matthews II*, 651 F.3d at 506. The arguments were an attack on the EED element itself, "designed to completely undercut the defendant's sole mitigation theory, effectively denying him fair jury consideration." *Id.* (quoting *Broom v. Mitchell*, 441 F.3d 392, 412 (6th Cir. 2006)). *See also Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) ("[N]o prosecutor may employ language which denigrates the right of a criminal

defendant to retain the counsel of his choice, or otherwise limits the fundamental due process right of an accused to present a vigorous defense."). The arguments also improperly suggested collusion between Matthews, his defense counsel, and his psychiatrist. *Matthews II*, 651 F.3d at 506. Arguments such as these, which attack a defense attorney's ethics, are particularly egregious. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Having decided that the arguments were improper, the Sixth Circuit applied the well-established factors for determining whether the arguments were flagrant. (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the [petitioner]. *Matthews II*, 651 F.3d at 506 (citing *Broom*, 441 F.3d at 412). The court found that each of these factors was met. *Id.* at 506-07.

First, the improper comments were likely to mislead the jury. Particularly where the prosecution had no evidence to refute the EED diagnosis, the jury may very well have been misled by the prosecutor's denigration of the defense and his arguments that the EED testimony was the result of exaggeration and collusion among Matthews, his attorneys, and Doctor Chutkow. Second, the improper remark was not an isolated statement, but rather two continuous pages of transcript. While Petitioner claims that the prosecutor immediately clarified his comments (Cert. Pet. 36), it is well-established that even "a single misstep" can be destructive to a defendant's right to a fair trial. *United States v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974). Third, the improper comments were part of a lengthy narrative to the jury, suggesting that the prosecutor deliberately made the comments. Fourth, the State's case that Matthews was not acting under the influence of EED was weak—so weak that a rational trier of fact could not find

that the State had proven the element. *Matthews II*, 651 F.3d at 504.

The Kentucky Supreme Court summarily rejected Matthews' argument that the aforementioned prosecutorial arguments violated his right to due process. The Sixth Circuit applied AEDPA to this claim and correctly concluded that the Kentucky court's decision was an unreasonable application of *Darden*. *Matthews II*, 651 F.3d at 507. The comments "so infected the trial with unfairness" that Matthews' conviction amounted to a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

The Petitioner argues in this Court that the Sixth Circuit erroneously relied on *Gall II* because that case preceded AEDPA. (Cert. Pet. 34). But the Sixth Circuit looked to *Gall II* in determining the levels of impropriety and flagrancy of the remarks *Matthews II*, 651 F.3d at 506. Once the Sixth Circuit reviewed the merits of the claim, determining that the prosecutor's arguments were both improper and flagrant, it then turned to AEDPA's inquiry of whether the Kentucky Supreme Court's decision was an unreasonable application of this Court's authority. Such analysis is wholly proper.

In sum, the prosecutor's closing arguments were improper and flagrant, designed to mask its failure to present any evidence regarding the EED element. The Sixth Circuit's decision involved a thorough treatment of this issue and reached the correct conclusion. Further, the fact-specific nature of the claim offers no basis for this Court's intervention.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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