COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2006-SC-881-MR

WILLIAM HARRY MEECE — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HON. JAMES G. WEDDLE, SPECIAL JUDGE
CASE NO. 06-CR-00656

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, WILLIAM HARRY MEECE

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CERTIFICATE REQUIRED BY CR 76.12(6):

The Undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail, postage prepaid, on March 12, 2008: Hon. James G. Weddle, Special Judge, Circuit Court, 2nd Fl., 231 Courthouse Square, PO Box 307, Liberty, Kentucky 42539-0307; Hon. R. Brian Wright, Commonwealth's Attorney, 630 Campbellsville St., PO Box 658, Liberty, KY 42539-0658; Hon. Vincent P. Yustas, Assistant Public Advocate, 850 Old Ekron Rd., PO Box 518, Brandenburg, Kentucky 40108; Hon. Jonathon G. Hienemann, 223 E. Main St., Campbellsville, KY 42718; and by state messenger service to Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Supreme Court of Kentucky on this date.

Donna L. Boyce
DONNA L. BOYCE

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Index

Introduction

This is the direct appeal from the Warren Circuit Court's final judgment imposing 40 years imprisonment plus three sentences of death on Appellant William Harry Meece for convictions of first degree burglary, first degree robbery and three counts of murder.

Statement Concerning Oral Argument

William Meece requests oral argument based on the severity of the sanctions imposed and the complexity of the factual and legal issues involved. Oral argument will assist this Court in reaching a just decision and is mandated by KRS 532.075(4).

Preface

Unpreserved errors are reviewable where the death penalty has been imposed. KRS 532.075(2); Rogers v. Commonwealth, 992 S.W. 2d 183, 187 (Ky.1999); Perdue v. Commonwealth, 916 S.W. 2d 148, 153-154 (Ky.1995). "The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the Commonwealth is permitted to visit upon wrongdoers." Rogers, supra (citing Cosby v. Commonwealth, 776 S.W. 2d 367 (Ky.1989), citing Beck v. Alabama, 447 U.S. 625 (1980)). Thus, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process. Id. Every allegation of error must be reviewed in this context. Campbell v. Commonwealth, 564 S.W.2d 258, 531 (Ky.1979), allows this Court to exercise its supervisory function and review unpreserved errors. KRE 103(e) allows this Court to consider "insufficiently raised or preserved" errors and to grant appropriate relief "upon a determination that manifest injustice has resulted from the error." In this

case, there is not reasonable justification or explanation for trial counsels' failure to object to any of the unpreserved errors, e.g., counsels' failure could in no way have been a legitimate trial tactic. These unpreserved errors, along with all preserved errors, were prejudicial, i.e., without the error the jury may not have convicted Bill Meece of a capital crime or sentenced him to death. Perdue, supra. In accordance with CR 76.12(4)(c)(iv), counsel have noted at the beginning of each issue whether it is preserved. To avoid repetition, counsel will not refer to the capital case contemporaneous objection rule, KRE 103(e), RCr 10.26 and Campbell, supra where the issue is unpreserved.

Citations To The Record

The following abbreviations are used in referring to the appellate record:

TR 1 – 11 - Transcript of Record

TRA - miscellaneous Adair County pleadings & orders

VRH 1 – 4 – video record of hearings, deposition

SVH – sealed video record of hearings

TD – Transcript of deposition of Mary Preston

VRA 1 – 8 - video record through guilty plea

VR 1 – 17 – video record after guilty plea

EX - exhibit

A - Appendix.

Statement of Points and Authorities

Statement Of The Case

Bill Meece was born to a bipolar, paranoid, schizo-affective mother and a violent, suicidal ex-marine father with a drinking problem. VR 17, 9/18/06, 1:29:23-1:38:38, 1:41:21-2:01:47, 2:38:27-3:06:00. Bill's mother, Jennette, left his father John before Bill was born. Id. Bill never met his father. Id. When Bill was ten months old, Jennette left him with her mother, Clara. Id. The two additional voices Jennette acquired when Bill was born were jealous of him and urged her to kill him. Id. She fled because she feared she might follow their directives. Id. Bill knew Clara to be his mother and knew Jennette as his sister. Id. He briefly met Jennette when he was 5 and she returned home to sign his adoption papers. Id. At 8 or 9, Bill began reading Mack Bolan and Phoenix Force books and was demonstrating a great imagination, making up stories and lies about himself. Id. At 10, Bill started reading Tom Clancy books. Id. Jennette returned home to care for her mother, who had become gravely ill, until she died when Bill was 12. Id. Bill was very close to Clara and upset about her death to the point of losing a great deal of weight. Id. From things Bill said to her when he was young, Jennette believed he, like her, heard voices and was mentally ill. Id. Jennette and Bill stayed in Florida 2 more years until she announced people were out to get her and they had to go. Id.

They moved to Lexington, KY where Jennette assumed the identity of her sister and became Bill's Aunt Flo for the next 15 years. Id. Aunt Flo shared her paranoia with Bill, hiding her own identity, keeping him out of school initially and warning him not to talk to people. Id. He had few friends at school and dropped out shortly. Id. His mother enrolled him as a non-degree student at UK when he was sixteen and he later attended Lexington Community College. Id.

When Bill was 16 and Regina was 17, she moved in with Bill and his mother. Id. Bill and Regina married three years later and had two daughters and a son. Id. According to Regina, Bill talked about guns and the military all the time and told her he was a navy seal before she met him. VR 11, 9/1/06, 10:19:45-10:21:47, 10:42:20-10:44:34. Bill and Regina had an open marriage. Id. at 10:01:00.

Bill met Randy Appleton through a computer bulletin board, and met Meg Wellnitz in fall 1992 while attending Lexington Community College. VR 15, 9/14/06, 1:39:44-1:44:00; VR 12, 9/5/06, 9:51:52-9:56:45, 3:44:10-3:47:50; VR 10, 8/31/06, 3:52:37-3:56:00. Bill and Meg's relationship was sexual, and Bill introduced her to Randy who began dating and later married her. Id. Regina was aware of Bill and Meg's relationship, and the three of them plus Randy played cards and role playing games together. Id.

According to Regina, in 1992 Meg complained about her mother and when she wished she would just go away, Bill said he could make it happen. VR 10, 8/31/06, 3:57:1- 3:58:15. Regina reported later hearing Bill and Meg discuss getting a gun, teaching her how to shoot, going over floor plans of the Wellnitz house and that it would cost her to get rid of her family. Id. at 3:58:50-4:08:00. Randy never heard any discussions about killing Meg's parents. VR 12, 9/5/06, 4:06:3- 4:07:15. Bill, Randy, Meg, and Regina with daughter Becky went out target shooting several times. VR 10, 8/31/06, 4:08:25-4:09:50; VR 12, 9/5/06, 10:02:40-10:04:35. A couple days before Meg's parents were shot, her mother called to say her contact lenses had arrived at their home in Columbia and she should pick them up. VR 12, 9/5/06, 10:05:30-10:07:45. Meg's mother did not like Bill because Meg was sleeping with him and he was married. Id. at

10:11:00-50. Meg thought if she actually met Bill, she might like him. Id. Meg, Bill, Regina and Randy all went to Columbia where they stayed for several hours and Randy gave Bill a tour of the house. Id. at 10:06:17-10:07:45.

Bill was fascinated by guns and had bought and sold a number of them, including a 9 mm Browning High Power he bought through Meg for a friend. VR 15, 9/14/06, 1:44:16-1:51:50. Both Meg and Bill denied there was any plan to kill Meg's parents or that they were involved in the killing of the Wellnitz family. VR 12, 9/5/06, 10:12:25-37; VR 15, 9/14/06, 1:51:50-1:52:06.

On the morning of February 26, 1993, Dan Lawhorn and Cindy Yates arrived to work at Joe Wellnitz' veterinary clinic and found Joe, his wife Beth and their son Dennis dead inside the house. VR 9, 8/30/06, 11:15:35-11:18:50, 11:34:03-11:37:55. They all died of multiple gunshot wounds. Joe's body was found between the dining room and kitchen, and Beth and Dennis were found next to their beds. Id. 10:36:45-10:43:00. The door to the house was closed but unlocked. Id. at11:25:30-11:26:15.

Ten years after the killings in February 2003, an Adair County grand jury indicted Bill Meece and Meg Wellnitz for the murders of Joseph, Elizabeth and Dennis Wellnitz, first degree burglary and first degree robbery. TR 1 1-10.

Trial began in November 2004. After a week of voir dire, due to a continuing problematic, conflicted relationship with counsel and in an effort to avoid what appeared to be inevitable death sentences, Bill Meece "entered" a guilty plea in exchange for the prosecutor's recommendation of LWOP/25 and his agreement to arrange an extended visit between Meece and his young children. TR 5 651, 653; VRH 3, 5/31/05, 10:46:50-10:52:00 As part of plea discussions, Meece's counsel provided previously unknown

information about the purchase of a 9 mm gun and Meece gave two statements to the prosecutor. EX 50, 45.1, 45.2; SVH, 7/12/06, 3:24:00, 3:31:43. The trial court did not formally accept the guilty plea, deferring that until sentencing. VRA 8, 11/15/04, 16:59:30, 17:11:40-17:19:10. Several months later, Meece was permitted to withdraw his coerced plea and counsel was replaced. VRH 3, 5/31/05, 11:12:05-11:21:20.

At the second trial, Bill Meece's conviction and death sentences were insured by the refusal to include LWOP as a sentencing option and the introduction, *inter alia*, of his withdrawn guilty plea, the two statements he gave during plea discussions, the information about the purchase of the 9mm gun provided the prosecutor by defense counsel during plea discussions, statements protected by the marital privilege, selected statements made to an undercover police woman after assertion of his rights to counsel and to remain silent, evidence of Wicca worship and the occult, and other crimes/bad character evidence. See facts set out in Arguments 1, 3, 4, 5, 6, 9, 12, 14, 30.

Bill Meece was found guilty of first degree burglary, first degree robbery and three counts of murder. TR 10 1463-1467. The jury imposed twenty year sentences on the burglary and robbery, and, based on a finding of aggravating factors, recommended three sentences of death. TR 10 1478-79, 1483-84, 1488-89, 1491. Final judgment was entered on November 13, 2006. TR 11 1631-38. Notice of Appeal was filed November 27, 2006. TR 11 1642.

Arguments

1. Allowing Statements Made As Part Of Guilty Plea.

Preserved. TR 5 682, TR 9 1294-1300; VR 1, 7/31/06, 10:47:53-11:14:19. Meece's motion in limine to suppress these statements was denied. TR 10 1424-1425.

The first trial commenced on 11/8/04. At the conclusion of the individual voir dire, on 11/15/04, the parties entered into several hours of negotiations with the purpose of reaching an agreement that would obviate the need for a trial. During those initial discussions, Bill Meece gave a lengthy, taped statement to the prosecutor and a number of police officers. Ex. 50.

After that, Meece filed a motion to enter a guilty plea, TR 5 651, and the parties filed the Commonwealth's Offer on Plea of Guilty. TR 5 653. In exchange for the guilty plea, statements, and anticipated testimony against Meg Appleton, the prosecution agreed to a sentence of LWOP/25 and an extended visit by Meece with his children so he could explain why he was pleading guilty.

The trial court then took Meece's guilty plea. At the time of the plea, the trial court informed Meece "the agreement is conditioned on you providing a truthful, recorded statement," and on "cooperating fully with the Commonwealth" in the prosecution against Meg Appleton. VRA8, 11/15/04, 16:50:35. The judge warned, "If for any reason that the defendant fails to abide by the terms set forth, I have just read, said failure shall be grounds to set aside the Commonwealth's offer on a plea of guilty and this matter shall proceed to trial by jury." Id., 16:51:29. The trial judge also told Meece, "Do you understand that I am not bound by the Commonwealth's recommendation, but

that I may, after looking at a pre-sentence investigative report, refuse to accept this recommendation. ... And do you understand that if I was to attempt to impose any sentence that would be to your detriment, more severe than the punishment that's in this plea bargain agreement, I will give you the right to withdraw your plea." Id.; 16:56:12.

The trial judge proceeded with the plea colloquy. He asked Meece if he was satisfied with the services of his attorney, and Meece said, "I believe my complaints and concerns with my original representation, Ms. Niemi, are well recorded on the record." VRA 8, 11/15/04, 16:52:50. He asked Meece if he was pleading guilty due to threats, promises or pressure from others, and Meece responded, "I believe the pressure should be obvious, but I am pleading guilty of my own free will." Id., 16:57:10.

Although the court found Meece intelligently, knowingly, and voluntarily waived his rights, and there was a factual basis for the plea of guilty, the court did not formally accept the plea. Id., 16:59:30. Final sentencing was set for February, 22, 2005. Id., 17:00:13. Final sentencing and formal acceptance of the plea never occurred.

Immediately following the plea, the Commonwealth agreed sealed portions of the record should remained sealed: "My reasons for that, I think that in all fairness, Mr. Meece has not been sentenced, and there is a provision in my offer that that would be set aside if he doesn't comply with certain obligations." VRA 8, 11/13/04; 17:06:00. The trial judge agreed, saying, "Whatever in the record is sealed shall remain sealed pending further orders of the court. So I had indicated to Ms. -- Well, this is not over with yet. I had told the press when this is over with they were going to see everything, but its not over with yet. Id., 17:06:17.

After the visitation with his children was delayed, and then terminated early, Meece moved to withdraw his guilty plea. The judge ruled he was competent to stand trial, and then allowed the withdrawal of the guilty plea. VR 3, 5/31/05, 10:42:50, 11:15:04.

Meece then filed a pro se motion to suppress the 2 statements taken as a condition of his guilty plea. His attorney joined in that motion and an evidentiary hearing was held. TR 9 1294-1300. The trial court rejected Meece's argument that the admissibility of the statements made pursuant to the plea agreement were controlled by this Court's opinion in Roberts v. Com., 896 S.W.2d 4 (Ky. 1995). The court, instead, allowed the statements as evidence under its interpretation of U. S. v. Marks, 209 F.3d 577 (6th Cir. 2000). TR 10 1424-25.

KRE 410 provides that the following are not admissible against a defendant:

> (1) A plea of guilty which was later withdrawn;
>
> * * * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

KRE 410(4) lists two exceptions, neither of which apply in this case.

In Roberts, supra, the defendant and prosecutor agreed if the defendant would give a truthful statement concerning his involvement in some unsolved robberies, the defendant would not be charged as a persistent felon. After this agreement was reached, the defendant gave his statement. Id. at 5. The prosecutor was not satisfied the statement was truthful, and charged Roberts as a persistent felon.[1] This Court adopted the two part test of U.S. v. Robertson, 582 F.2d 1356 (5th Cir. 1978) as the appropriate test for

determining whether a statement was made during the course of plea discussions for purposes of KRE 410:

> KRE 410 contemplates a bargaining process whereby the Commonwealth and the accused seek a concession for a concession. Robertson, at 1366, sets out a two prong test which we adopt to be applied by the trial court in determining whether a discussion should be characterized as a plea discussion:
>
> 1. Whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion
>
> AND
>
> 2. Whether the accused's expectation was reasonable given the totality of the objective circumstances.
>
> The intent is to protect the accused's subjective expectations while protecting against subsequent, self-serving claims by the accused. *See* United States v. Swidan, 689 F.Supp. 726 (E.D.Mich. 1988). In this case, Duncan sought to clear up a series of robberies and Roberts sought to avoid an enhanced sentence. There was a quid pro quo. Each side made a concession. This was clearly a "plea discussion."

Roberts, supra, at 5-6. Under Roberts, when the statement is made by the defendant with the intent of obtaining a plea, the subjective element of the Roberts test is met. When there is a quid pro quo for the statement, in which both the prosecution and the defense seek to obtain something from the arrangement, then Roberts holds that the objective element of the Robertson test has obviously been met. Roberts held when the Robertson test has been met, the statement is considered to have been made during the course of the plea discussions. The Roberts decision was recently cited favorably by this Court in the unpublished decision, Boston v. Com., No. 2004-SC-0469-MR, A-62-69.

That is the situation in the present case. The prosecution sought to gain information it could use in the prosecution against Meg Appleton. Meece sought to avoid

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[1] Although Roberts had not been formally charged at the time of his agreement with the prosecutor, this Court held that the negotiations were nevertheless covered by KRE 410. Roberts, 896 S.W.2d at 6.

the death penalty, and obtain a visit with his children. There was a quid pro quo for the giving of the statements. Meece had a subjective belief his statements were made as part of the plea negotiation process and they would not be admissible against him if the plea deal fell through. When he was advised of his Miranda rights at the beginning of the second statement in December, Meece said, "Yeah, I understand those rights. And this conversation is having to be made as part of an outstanding plea." VR 11, 9/1/06, 3:55:32. The second sentence shows Meece's subjective belief that the Miranda warnings were superfluous and that the statement was part of the on-going guilty plea discussions. The evidence showed Meece's subjective belief was objectively reasonable. Dennis Benningfield testified that as he understood the plea agreement, the statements that Meece gave were part of the agreement. VR 11, 9/1/06, 4:40:43. Benningfield also testified Meece's visit with his children was part of the plea agreement. Id., 4:40:51. The fact that a 3rd party to the plea discussions understood the statements to be part of the quid pro quo demonstrates Meece's belief was objectively reasonable.

The trial judge ignored Roberts and Robertson, and relied on a case from another jurisdiction, U.S. v. Marks, supra. In Marks, two defendants entered into a plea bargains with the prosecution and agreed to cooperate fully with the prosecution of other co-defendants in exchange for specified sentences. Marks at 580. When the defendants became dissatisfied with their pleas and moved to withdraw them, the prosecutor warned he intended to introduce as evidence post-plea statements to FBI agents they had made while they were cooperating with the government, and the trial judge warned the defendants those statements might be admissible. The defendants persisted in withdrawing their pleas, and the trial judge allowed the introduction of their statements

made pursuant to the cooperation agreements at trial. Id. at 582. The 6th Circuit affirmed. The bulk of its decision on the issue dealt with a major distinction between the Marks case and the instant case, i.e., that a statement to the FBI is not a statement to the "attorney for the prosecuting authority" as required by FRE 410(4) and KRE 410(4). While the defendants in Marks spoke with the FBI agent outside the presence of the attorney for the prosecution, both of Meece's statements were in the presence of the prosecutor in the instant case. The prosecutor played a major role in shaping the statements that Meece made so that they covered areas he wanted to cover, and in that sense they showed continuing discussions concerning the information to be covered by the plea. That type of discussion was not possible in the Marks case because the prosecutor did not participate in the giving of the statements. Moreover, both the prosecutor and the judge warned the defendants in Marks that there would be attempts to use their statements against them and the statements might very well be admissible if they persisted in withdrawing their guilty plea. There were no warnings given to Meece concerning using his statements at the time he withdrew his guilty pleas. Although Meece was formally represented by attorney Bellew at the time he withdrew his guilty plea, she was not present at the hearing when the plea was withdrawn. VRH3, 5/31/05, 11:15:42. Although attorney Yustas was present when the plea was withdrawn, he had not entered his appearance as counsel. VRH3, 7/1/05, 10:22:11. So, technically, Meece was not represented by counsel when his plea was withdrawn.

A number of cases agree with the holding in Roberts that statements required by a plea agreement are during the course of plea discussions, since the agreement can be unilaterally repudiated based upon an "unacceptable" statement. *See*, U.S. v. Ventura-

Cruel, 356 F.3d 55, 62-65 (1st Cir. 2003); U.S. v. Young, 223 F.3d 905 (8th Cir. 2000)(Affidavit admitting guilt executed after parties informed court they had reached an agreement fell under the protections of rules excluding plea discussions despite defendant's breach of the agreement, but defendant waived that protection in writing); State v. Nelson, 33 P.3d 419 (Wash.App. 2001)(Testimony given at trial of co-defendants pursuant to agreement should have been suppressed after plea agreement fell through); Bowie v. State, 135 S.W.3d 55 (Tx.Ct.Cr.App. 2003)(Defendant's testimony given at a "Timely Pass for Plea" proceeding after plea agreement had been reached and guilty plea entered should have been suppressed from later jury trial after the defendant withdrew his guilty plea).

The most damaging of the 2 statements given by Meece should have been suppressed because it was unquestionably made during the plea discussions with the prosecutor. Prior to the filing of any plea agreement, prior to the entry of his guilty plea, Meece gave a statement to the prosecutor and several police officers. There was no evidence that this statement was given after the plea agreement had been reached. On the contrary, at the conclusion of the statement, the prosecutor was still trying to solidify the terms of the plea agreement. According to the transcript tendered by the prosecution, the prosecutor said at the conclusion of that statement:

> Wright: [T]his is made pursuant to your agreement to cooperate fully with us in the trial of Commonwealth vs. Margaret Ann Wellnitz Appleton and it is my understanding that if we have more questions that you will be available as part of your agreement to cooperate with us, to answer any questions we have and that may include some more questions, here in just a little while. After we take a break, you enter your formal plea in open court and then we come back, ***is that fair?***
>
> Bellew: ***Right. With his attorney present.***

Wright: ***Certainly. Certainly.***

Meece: ***That is correct. As long as my attorney is present***, I am available at the discretion of the Commonwealth, with my attorney present.

Transcript of Ex.50, p. 15 (emphasis added). Also, as stated before, the prosecutor was actively participating in the examination of Meece, discussing what facts and questions he wanted addressed as part of the statement. For instance, the prosecutor asked the name of Appleton's friend who was in the car when the Browning 9mm was purchased; VR 13, 9/6/06, 4:08:33; the prosecutor clarified that the firebox was taken because it might contain a deposit from the vet clinic; VR 13, 9/6/06, 4:17:39; the prosecutor asked Meece to tell him what Meg said when they got back to Lexington the morning of the killings; VR 13, 9/6/06, 4:22:51; the prosecutor asked Meece to address Appleton's motives for the murders; VR 13, 9/6/06, 4:23:30; the prosecutor asked Meece to address if there were discussions of the value of the estate or life insurance policies before the incident; 4:24:15. In short, the prosecutor's questioning of Meece and determining the scope and direction of the statement he was supposed to give continued throughout the giving of the 11/15/04 statement. The prosecutor's participation made it clear that, not only was this statement required by the plea negotiations, but they were continuing in a discussion of exactly what matters had to be addressed in the statement in order to reach an agreement.

The prejudice of the introduction of this statement was immense. On top of being an admission to being the shooter in a triple homicide, it contained a lot of information that was duplicated nowhere else in the record. It contained two accounts of the murders in para-military language that were not repeated anywhere other than a brief, antiseptic, non-military version in the 12/15/04 statement. VR 13; 9/6/06, 4:15:45-4:17:35. That portion of this inadmissible statement, alone, makes it prejudicial. Near the end of the

statement, then-Lieutenant Benningfield revisited the killings. Id., 4.46.40. These passages alone show that the introduction of this statement was not harmless. In addition, the statement reveals that the purpose of the visit to the Wellnitz house on that Wednesday was to do "advance work," i.e. reconnaissance. Id., 4:10:09. It is the only statement that admits they threw the gun, etc., into the Campbellsville McDonald's dumpster. Id., 4:18:55. This dovetails into the testimony of Felice that a good way to dispose of the murder weapon would be to throw it into a dumpster. Id., 2:29:30. This statement was the only evidence that Meece attempted to break into the Sentry Firebox by cutting it open with a hacksaw, other than the prosecutor's cross-examination of Meece based on the statement. VR 13, 9/6/06, 4:19:50; VR 15, 9/14/06, 4:15:38. This was critical because later the prosecutor argued that the jury should find Meece guilty because of this detail. VR 16, 10/15/06, 2:35:45. In the statement Meece admits that he wrote a letter to Meg threatening to go to the police if she did not give him money. VR 13, 9/6/06, 4:26:19. This corroborated Justin Manley's testimony that the letter inferred Meece and Meg conspired in the killings. Id., 9.20.44. It seriously undermined the defense claim that the letter was a request to borrow money to start a lawn business. VR 15, 9/14/06, 2:06:17.

The 12/15/04 statement also was part of the plea discussions because it was a condition of the plea agreement. On top of that, the parties continued to discuss, not only the terms of the plea, but the scope of what information Meece would be required to divulge as part of the agreement, much as they had during the 11/15/04 statement. At the beginning, Meece said, "[T]his conversation is having to be made as part of an

outstanding plea agreement." VR 11, 9/1/06, 3:55:32. Near the end of the statement, the following discussion occurred:

Wright: Bill, do you still agree that you will testify in this case?

Meece: Um, as long as everything is the way it's supposed to go.

Wright: What do you mean by that? I want to know on this tape.

Benningfield: On your visit?

Meece: It, it is part of the agreement that I will get to have a, a extended visit with my children. And that visit has been scheduled, to the best of my knowledge, for 21st of December. And that, as long as that visit goes off without any hitch, [inaudible] I agree to testify.

Wright: And the only obligation I made was that I would not do anything to, to hinder that visit, and at the beginning that I would encourage your attorney to facilitate that.

Meece: You'd do, you'd do the best you could to, to see that come to pass.

Wright: And I've done both, I've fulfilled my end, correct?

Meece: To the best of my knowledge, you've fulfilled your end.

Wright: Is there any other promises other than what was in that written agreement?

Meece: There are no promises. There, the only, the only key here is that I intend to get this visit with my children, which I'm still not sure is going to happen until such a time as it does.

Wright: And, and you will testify in the trial of Meg?

Meece: That is my agreement with you as far as I am to go --

Wright: That is our agreement, but you will do that?

Meece: That is my intention.

Wright: I want your word that you will do that.

Meece: Um. It is my intention, but still, I reserve the right to change my mind.

Wright: Alright.

VR 11, 9/1/06, 4:36:37-4:38:00. Clearly, the parties were continuing to discuss the terms of the agreement, and whether or not there was an agreement. Just as he did in the 11/15/04 statement, the prosecutor continued to question Meece, thereby expanding and directing what information had to be divulged during the discussions in order to reach the final agreement. The prosecutor said he wanted to know more about Meece's discussions with Appleton in planning the offenses. VR 11, 9/1/06, 3:56:15. He wanted to know the purpose of the trip to Columbia on that Wednesday. VR Id.; 3:58:58. This directing of the information to be given during the statement continued throughout the statement, as it did during the 11/15/04 statement, so that the precise terms of the plea agreement were still being discussed and formalized.

Like the 11/15/04 statement, this statement was prejudicial because it was an admission to killing 3 people. It directly contradicts Meece's trial testimony that he was innocent of the crimes. VR 15, 9/14/06, 2:48:40. It is full of information that was damaging to Meece's defense.

The introduction of this evidence violated Roberts v. Com., supra, and KRE 410. Reversal is required. §§2, 11, 14, KY Const.; 6th, 8th, 14th Amends., US Const.

2. Meece's Statements Were Not Voluntary.

Preserved. Meece argued before trial that his statements should not be admitted because they were involuntary. TR 9 1299.

Both the 11/15/04 statement and the 12/15/04 statement were made by Meece only because they were required by the plea agreement. The facts concerning this have

previously been stated in Argument 1. Meece's statements should have been suppressed since they were involuntarily induced by the promises of leniency that were contained in the plea agreement.

It is well settled a defendant in a criminal case is denied due process if his conviction is based to any degree on an involuntary confession, regardless of the truth or falsity of the confession and even if there is ample evidence aside from the confession to support the conviction. Jackson v. Denno, 378 U.S. 368, 376 (1964). "[A] confession, in order to be admissible, must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however slight, nor by the exercise of any improper influence...." Bram v. U.S., 168 U. S. 532, 542-543 (1897).

"[T]he modern judicial tendency [is] to refuse to admit confessions when there is any reasonable ground to believe that they were induced by hope or fear." Hager v. Com., 300 Ky. 585, 189 S.W.2d 867, 869 (1945). See also Tarrence v. Com., 265 S.W.2d 52, 54 (Ky. 1954); Rector v. Com., 80 Ky. 468, 4 Ky. Law Rep. 323 (1882).

In Cobb v. Com., 267 Ky. 176, 101 S.W.2d 418 (1936), the defendant's confession was found to be involuntary and therefore inadmissible because a police officer "held out inducements to him to confess by promising him that they would help him out of his trouble." Id. at 419. The situation in the present case is no different. Meece was induced to confess by the prosecutor's promises to not seek the death penalty and to allow him an extended visit with his children. Meece was told by the trial judge he had to confess or he would be facing the death penalty. VRA8; 11/15/04; 16:50:35, 16:51:29. As the Arkansas Supreme Court stated in Freeman v. State, 527 S.W.2d 909,

912 (Ark. 1975), "...if a confession is made under the influence of hope of mitigation of punishment excited by those in authority, it is inadmissible." *See also*, Walker v. State, 771 So.2d 573, 575 (Fla. 1st DCA 2000) ("Where there is an express quid pro quo, i.e., a promise of protection from prosecution for cooperation, the promise of leniency alone is sufficient to render a confession or inculpatory statement involuntary."); Womack v. State, 205 So.2d 579 (Ala. 1967); Ashby v. State, 354 N.E.2d 192 (Ind. 1976).

In addition to the promises of leniency that directly induced the statements, the totality of the circumstances contributed to his will being overborne. At a pretrial hearing Meece testified that his guilty plea, and inferentially the statements that were made during plea discussions, came about because of his conflicts with his prior counsel. VRH3, 5/31/05, 10:47:10. His prior attorney had admitted that she had not reviewed the audiotapes of Meece speaking with Katherine Felice, and would be unprepared to cross-examine Felice at trial. VR Id.; 10:48:42. He felt his only choice was to give the statements required if he wanted to enter a guilty plea, or go to death row. VR Id.; 10:49:50.

The fact Meece was given Miranda warnings prior to the statements does not prevent the confessions from being involuntary. State v. Hinton, 42 S.W.3d 113, 126 (Tenn. 2000). Meece was led to believe if he gave the statements he would receive a more lenient sentence. The confessions were induced by an explicit promise of leniency. He also believed if he gave the statements he would receive a visit from his children.

The critical question is whether Meece believed at the time he confessed that he would receive more lenient treatment because of his confessions. He unquestionably did,

and the resulting confessions were involuntary and should have been suppressed. United States v. Harris, 301 F.Supp. 996, 999 (E.D.Wisc. 1969).

Because the statements were involuntary, their introduction requires reversal without any showing of prejudice. Jackson v. Denno, supra. Nevertheless, Meece was substantially prejudiced by each of these statements, whether considered by themselves or in unison, as stated previously in Argument 1. Reversal is required because of this error. §§2, 11, 14, KY Const.; 5th, 6th, 8th, 14th Amends., US Const.

3. Evidence Of Meece's Guilty Plea Violated The Presumption Of Innocence.

This issue is preserved. Meece filed a pro se motion in limine to prohibit the introduction of his guilty plea and the statements that were a part of his guilty plea. TR 5 682. Defense counsel filed a memorandum in support of the motion to suppress the statement that introduced his guilty plea as evidence. TR 9 1294-1300. The motion to suppress the statements was denied. TR 10 1424-1425.

The judge overruled Meece's motions to suppress his statement given to the prosecutor on 12/15/04 as part of the plea negotiations. At trial, this statement was played in its entirety during the prosecution's case-in-chief. EX 45-1 & 45-2. The jury was also given a transcript of the statement, in case they had any trouble hearing what was said on the tape. Trans for Ex 45-1 & 45-2. The tape began with a statement by Meece that he had entered a guilty plea. The statement was made in response to the giving of Miranda warnings. After reading the warnings, Dennis Benningfield asks Meece if he understood his rights. Meece responded, "Yeah, I understand those rights. And this conversation is having to be made as part of an outstanding plea." VR 11, 9/1/06, 3:55:32. The written

transcript differs slightly, "I understand those rights. At the beginning of this conversation, this statement is being made as part of an outstanding plea agreement." Trans for Ex 45-1 &45-2, 1.

Under either version, the jury surely understood that Meece had entered a guilty plea to the charges for which he was standing trial. In case the jury missed that obvious fact, both of the statements made as part of the plea discussions discuss the agreement in a way that would leave little doubt that Meece had entered a guilty plea in this case. In the statement made on 11/15/04, the prosecutor said:

> ***This is made pursuant to your agreement to cooperate fully*** with us in the trial of Commonwealth versus Margaret Ann Wellnitz Appleton and it is my understanding that if we have more questions that you will be available as part of your agreement to cooperate with us, to answer any questions we have, and that may include, that may include some more questions here in just a little while, after we take a break, ***you enter your formal plea in open court***, and then we'll come back.

VR 13, 9/6/06, 4:49:39. The jury was given a written transcript of the statement so they could not have missed the point that Meece had entered a guilty plea on 11/15/04. *See* Trans. of Ex. 50 p. 15. The plea was obviously entered because in the second statement, a month later, the prosecutor was still stating that the parties had an agreement and the prosecutor claimed that he had "fulfilled [his] end." VR 11; 9/1/06; 4:36:37-4:38:00.

Kercheval v. U.S., 274 U.S. 220 (1927), forbids what occurred here. In that case the trial court allowed the defendant to withdraw a plea of guilty and proceed to a jury trial. The prosecution was allowed to introduce the defendant's former plea of guilty during its case-in-chief. The trial judge instructed the jury to disregard the evidence of the guilty plea if they believed the defendant had been deceived into making the plea and

he was not guilty. Despite the instruction, the Supreme Court held that the withdrawn guilty plea should not have been used as evidence:

> The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it ceased to be evidence. ... As a practical matter, it could not be received as evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. Its introduction may have turned the scale against him. "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty."

Kercheval at 224 (quoting White v. State, 51 Ga. 285, 289 (Ga. 1874)).

In Marlowe v. Commonwealth, 709 S.W.2d 424, 425 (Ky. 1986), the defendant was allowed to withdraw his guilty plea and the plea was held to be inadmissible by the trial judge. This Court approved. *See also*, KRE 410(1).

That Meece later tried to ameliorate the effect of the Commonwealth's evidence by attempting to explain away the guilty plea does not keep him from raising this issue. Salinas v. Com., 84 S.W.3d 913 (Ky. 2002), held a defendant does not waive an objection to inadmissible evidence by trying to mitigate the harm after the evidence has already been introduced. "[T]he Commonwealth argues that defense counsel's subsequent cross-examination of [a police officer] concerning the [inadmissible evidence] constituted a waiver of his previous objection. If that were true, any party against whom evidence was improperly admitted would be required to forego cross-examination and enhance the risk of losing at trial, or attempt to cross-examine in an effort to mitigate the prejudicial effect of the evidence and thereby be deemed to have acquiesced in the error. We find that proposition untenable." Id., at 919. After the prosecution informed the jury that Meece

had pleaded guilty to these offenses, he had no choice other than to try to explain that fact.

The prejudice was obvious at that point. As the Court said in Kercheval, any proceedings after that admission were futile. The jury would automatically assume the defendant was guilty. At the very least, they would have to be skeptical of any claim that he was not guilty. In Boykin v. Alabama, 395 U.S. 238, 242 (1969), the Court noted, "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." The introduction of the fact that Meece had previously entered a guilty plea in this case effectively preordained the outcome. There was no reason for the jury to presume Meece to be innocent when he had admitted guilt. Reversal is required because of this error. §§ 2, 11, and 14, KY Const.; 6th, 8th, and 14th Amends., US Const.

4. The Trial Court Should Have Excluded Much Of K. D. Felice's Trial Testimony.

This issue is preserved. During Meece's first trial he moved to suppress all evidence of the conversations between him and Felice because it was inadmissible character evidence. VRA4, 11/9/04, 9:00:05-9:09:30. During Meece's second trial another hearing was held at which Meece made numerous objections to Felice's proposed testimony. Preservation for each portion of the error in admitting this testimony will be noted below.

It is important to remember the context of all of these statements. K. D. Felice was an undercover female police officer who tried to lure Meece into offering to kill her fictitious husband who she claimed was abusing her. For 3 weeks she spent the entire

work day asking Meece how she could kill her husband and not get caught. VR 13, 9/6/06, 2:27:50. Her role in manipulating the conversations must be considered when determining the relevance and in weighing the probative value of the evidence.

The target outside Meece's work cubicle. Preserved. VR 13, 9/6/06, 10:30:40. Felice testified that at Chemlawn, Meece had a black and white human silhouette target hanging outside his cubicle with approximately 26 bullet holes in an upper body spray. Id., 2.05.09. Meece objected on the relevance. The judge found it relevant because there was testimony Meece had once purchased human silhouette targets for target practice from Galls. VR 10, 8/31/06, 2:37:55. The relevance, apparently, is an inference that anyone who shoots at human silhouette targets for target practice is more likely to be a murderer than someone who shoots at bull's-eyes. If that inference were true, then shooting at human silhouette targets would be bad act evidence subject to the limitations of KRE 404(b) for which the prosecution should have given pretrial notice under KRE 404(c). No notice was given and if the inference is correct, this is propensity evidence that would be impermissible under KRE 404(b) anyway. Absent the impermissible purpose, there is no relevance to this evidence and it should have been excluded. Chumbler v. Com., 905 S.W.2d 488, 492-493 (Ky. 1995).

The dry-firing of the gun at Felice. Preserved. VR 13, 9/6/06, 10:44:00. Meece objected to evidence he dry-fired a pistol at Felice based on relevance and prejudice. The judge overruled this without giving reasons. Id., 10:44:13. Before the jury Felice testified Meece said, "By the way, what did that little trick on the wall, referring to the silhouette target that was pinned up on his wall at his office was this, was that, and he pulled the 9mm weapon out of his [briefcase], it was a Sig Sauer, Sig Sauer 9mm, pointed at me and

dry fired twice. [She gets teary] He showed me weapon, explained it." ... "He described the weapon. He showed me, he showed me that it wouldn't shoot if he pulled the trigger without one put in the chamber, so that he could dry fire and dry fire it, but there was bullets in the chamber, that he dropped and showed me how it worked." 2.09.46 VR 13, 9/6/06, 2.08.45-2:09:46. While this certainly was an incident showing bad character, it had no relevance to the crime charged other than showing Meece had a propensity for violence. That was an impermissible purpose for introducing this evidence under KRE 404(b). This is the same as what occurred in Arnett v. Com., 470 S.W.2d 834, 837 (Ky. 1971), and the Court held this type of propensity evidence was inadmissible. If anything, the evidence in Arnett was more relevant because it was closer in time to the event in question. Evidence the defendant brandished a weapon against others is not admissible to show that he murdered someone totally different on a different date over a year earlier.

Meece's experience with lying. Preserved. VR 13, 9/6/06, 10:45:55. The objection was overruled. 10:46:11. Before the jury, Felice testified Meece "said that he had experience lying about himself with a straight face to people. He claims to be good at it. ... He said I can lie with a straight face and not feel bad about it at all. He said reality was a mild inconvenience." VR 13, 9/6/06, 2:07:50. The only probative value of that evidence was how it impacted Meece's character and credibility. As far as character, once again it was propensity evidence, i.e., once a liar always a liar. It does not fit into a permissible KRE 404(b) purpose. Lack of honesty is not a statutory element of any of the crimes with which Meece was charged, therefore his purportedly being a liar is irrelevant. Furthermore, the incident was too remote in time to be admissible to show Meece's character for truthfulness at trial. *See*, Miller ex rel. Mont. Banking v. Marymount, 125

S.W.3d 274, 286 (Ky. 2004). As far as credibility, under KRE 608, the character of a witness for truthfulness can only be attacked by evidence in the form of opinion or reputation. This was not opinion or reputation evidence. It was just a claim Meece admitted being a liar. If anything, this would be a specific instance of conduct, and that can only be inquired into on cross-examination, and then, only at the discretion of the court. KRE 608(b). The prosecutor was brought this evidence out during his direct examination of Felice. This evidence was patently inadmissible and highly prejudicial.

Statement about killing marshals. Preserved. VR 13, 9/6/06, 10:45:55. Overruled by the judge. Id., 10:46:20. Felice testified Meece told her, "If someone tries to send the marshals after him, he'd send back bodies." VR Id., 2:08:00. This statement clearly conveys Meece is a violent person who dislikes the police and likely would invoke derision from members of the jury, but it does not relate to a permissible reason for admitting character evidence under KRE 404(b). The evidence does not have any relevance to the charges for which Meece was standing trial other than the impermissible inference concerning his propensity toward violence. It should have been excluded.

Statement about police hunting you down. Preserved. VR 13, 9/6/06, 10:29:45. The objection was overruled. Id., 10:53:30. Felice testified, "Meece made the comment, if you shoot they'll find you. It may take them 30 years but they'll find you and you will die when they do. They'll find you; they'll hunt you down like a dog that you are. They will treat you real mean." While this statement carries the sinister air of an admission, it is not an admission to anything. It is the equivalent of saying, "You can't get away with murder." It is an opinion that has no relevance to the crimes for which Meece was standing trial. The prosecution knew the statement was not an admission because Meece

was not arrested on these charges until almost a decade later. Relevant evidence is evidence tending to make a fact of consequence more or less probable. KRE 401. Meece's opinion on this topic was not a fact of consequence.

Statement about getting rid of evidence. Preserved. VR 13, 9/6/06, 11:29:50. The objection was overruled. Id., 11:31:30. Felice testified:

> While discussing how to get rid of a gun after a murder, he said, you don't buy it in your name where it can't be traced, where it can't be traced or anything. I asked, what would you do with it? He said, throw it away, leave it in a garbage can, put it in a garbage can at like an Arby's, in their dumpster and you don't have to go to the dump. Say you're shooting in the east end of Lexington, you go over Nicholasville Road and put it in a plastic bag, a white plastic bag and you put it in the dumpster. It looks like any plastic bag with the 6 zillion other plastic bags. It's viable physical evidence. Even the clothes you wear. And you don't even leave any evidence, you don't. It doesn't matter if there were no witnesses or no evidence. It doesn't matter what people think. What matters is that people can, what people can prove. I'm not a nice person. You gotta trust what I'm saying. No, I just don't know how, I just know how to kill people. If you train long enough and had enough, and you do it enough, it all becomes a question of logistics.

VR 13, 9/6/06, 2:14:34. While this objected to passage appears to relate to the prosecution's theory concerning how the Wellnitz killings were carried out, the fact is there was no concrete evidence clothes or a gun were thrown away in a restaurant dumpster. Just as importantly, the last part of this passage, which was also objected to, was clearly not relevant. From the point where Felice claimed Meece said he was not a nice person to the end of the passage was nothing more than inadmissible character evidence and propensity evidence that made Meece look like a serial killer. It was unduly prejudicial and there was no way it should have been allowed.

How to act after the murder. The judge overruled the objection to this evidence. VR 13, 9/6/06, 11:31:45. Felice testified, "When discussing how to act after a murder, I said I'd look guilty. He said, 'You just act like nothing ever happened, convince yourself

it was no big deal.'" Id., 2.15.31. This so-called evidence has no relevance. Felice admitted she was leading the conversation and brought the subject up., Meece's alleged response was the only logical response anyone would make to Felice. This evidence does not make any fact of consequence to the action any more or less probable. KRE 401. Meece's demeanor was not an issue in the case. It does, however, smear Meece's character by making it look like he's someone who has thought about how to cover up killing someone. This evidence does not fall under any of the permissible uses of the defendant's character listed in KRE 404(b).

The 124 grain comment. Preserved. VR 13, 9/6/06, 11:47:10. The judge overruled the objection. Id., 11:48:00. Felice testified, "He said, if someone's pointing a pistol at me, what is going, what's he going to do? Is he willing to hold onto it so bad he is willing to get shot? He won't after the first 124 grain hollow point hits him, the first bullet. When the first bullet hits you it will wake you up, that's a fact, this is your wake up call." Id., 2.16.04. This alleged statement by Meece in which he talks about a fictitious shootout between 2 men has no relevance to the case at all. The Wellnitz's were not armed. This case is not about a shootout. The prosecutor tried to justify this irrelevant character evidence because Meece mentions a "124 grain hollow point," and the Wellnitz's were shot with 124 grain hollow point ammunition. VR Id., 11:44:35. However, 9mm ammunition only comes in a few different grain loads. The 124 grain ammunition is extremely common. It is well-known that hollow point ammunition is considered the best for personal defense. Furthermore, there was absolutely no need to introduce a fictitious shootout that had nothing to do with this case in order to say Meece mentioned 124 grain hollow point ammunition as a good choice for personal defense.

The comments about head shots. Preserved. VR 13, 9/6/06, 11.51.51. Overruled. Id., 11:53:30. Felice testified, "He said, 'Head shots. Take a head shot with a 9mm hollow point, she's on the ground. Not a problem. The target is not a problem with a head shot with a 9mm. someone is left dying. Good night. See you wherever you are headed. Say hi for me, I've got friends there.'" Id., 2:19:31. This evidence was not relevant. Felice lured Meece into giving her instructions on the best place to shoot her husband. It does not take a military genius to figure out the most lethal place to shoot a person is in the head. Even if there was marginal relevance to the "head shot" comment, the portion beginning with "Good night" should have been excluded as totally irrelevant and unduly prejudicial character evidence.

The smell of cordite and fresh blood. Preserved. VR 13, 9/6/06, 11.51.51. Overruled. Id., 11:53:30. Felice testified, "He talked about the smell of cordite, which is a, when you fire a weapon it's the powder. And he said the smell of cordite and fresh blood after you've shot someone, he was telling me about it, but not to worry about it because it didn't last very long. Then he went through a lesson about what cordite was, and, in an instructional way again, like he's telling somebody, I was acting like I didn't know what he was talking about." There was no connection made between this statement and the crimes for which Meece was standing trial. The evidence was totally irrelevant. It did not make it more likely Meece killed the Wellnitzs other than its undeniable tendency to smear Meece's character.

Shocked look on the faces. Preserved. VR 13, 9/6/06, 11.51.51. Overruled. Id., 11:53:30. Felice testified, "I asked him if he saw the bodies. He said, asked, 'Of the Wellnitz family?' I said, 'Whoever.' He said, 'Yeah, I've seen bodies before.' I asked,

'What kind of look did they have on their faces?' He paused and he said, 'Shocked mostly.'" There was no indication the dead bodies Meece claimed to have seen before were the Wellnitzs. In fact, Felice admitted that Meece clarified her statement to make sure she was not talking about the Wellnitzs. Apparently this refers to some unspecified other crime, even though it may not have been a crime scene. This evidence did not make it more likely Meece committed the charged offenses.

Instructions for killing her husband. Preserved. VR 13, 9/6/06, 1:31:35. Overruled. Id., 1:32:30. Felice's testimony is too long to quote, but she claims Meece told her to shoot him twice in the body and once in the head, then watch for 5 minutes to see if he moves. Id., 2:28:36. He allegedly told her to surprise him. Id., 2:29:10. He then told her to wash the cordite off her hands and throw everything in a dumpster halfway between Lexington and Pikeville. VR Id., 2:29:35. The entire sequence is very prejudicial because of the way it reflects on Meece's character. Only someone with a propensity for violence would plan someone's murder in such detail. But it has no relevance to the charged crimes. This was a narrative that lasted almost two whole minutes. Id., 2:28:26-2:30:19. Even if it could be argued the one little detail about disposing the evidence in a dumpster had some relevance to the prosecution's theory of the case, the remainder of the 2 minute narrative should have been excluded because it was irrelevant and overwhelmingly prejudicial.

The essence of KRE 404(b) is evidence of other crimes or bad acts is inadmissible to prove character or a criminal disposition or propensity. "[E]vidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal disposition, and only if it's probative value on that

issue outweighs the unfair prejudice with respect to character." Billings v. Com., 843 S.W.2d 890, 892 (Ky. 1992). Exceptions to the rule "must be strictly construed." Pendleton v. Com., 685 S.W.2d 549, 552 (Ky. 1985). "KRE 404(b) has always been interpreted as exclusionary in nature." Bell v. Com., 875 S.W.2d 882, 889 (Ky. 1994). The burden is on the prosecution to establish a proper basis before admitting evidence of the defendant's bad character, "including the need for such evidence, and that its probative value outweighs its inflammatory effect." Daniel v. Com., 905 S.W.2d 76, 78 (Ky. 1995). The prosecution did not carry its burden in this case. There was no relevance whatsoever to the overwhelming portion of Felice's testimony. It was nothing more than character assassination and was grossly unfair, both in the breadth and the type of character attack. Felice's direct examination lasted over 30 minutes. Her testimony poisoned the jury and denied Bill Meece a fair trial. There is no way the prosecution can show this error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). §§ 2, 11, and 14, Ky. Const.; 6th, 8th, and 14th Amends., U.S. Const.

5. The Introduction Of Unrelated Bad Acts In Appleton's Taped Statement Was Error.

Preserved. Meece moved to suppress any statements by Appleton, citing the hearsay rule. TR 4 543-545. When the prosecutor informed defense counsel he intended to play Appleton's statement at trial, counsel objected. VR12, 9/5/06, 11:44:37. Counsel also objected to giving the jury a written transcript of the statement. Id., 1:37:05. The objections were overruled. Id., 1:41:09.

Appleton gave a statement to the prosecutor on 12/31/04 as part of her guilty plea. The statement implicated Meece as the person who shot her parents and brother and

admitted involvement by her in the killings, although it tended to shift the blame to Meece and Regina Meade. At trial, Appleton testified there was no plan to kill her family and she claimed she and Meece were studying, feeding her cats, and getting coffee in Lexington during the time of the killings. The prosecutor moved to admit, and was allowed to play for the jury, her 12/31/04 statement because it was 1) a prior inconsistent statement, and 2) to rebut her claim she was high when she gave her statement. VR12, 9/5/06, 1:37:39.

The prosecutor examined Appleton on direct examination about the inconsistencies between her trial testimony and her 12/31/04 statement. The prosecutor told Appleton on direct exam that in her 12/31/04 statement she said that she and Meece had a plan to kill her family, that Meece talked about setting up a commune on her parent's farm, and she was asked to give a truthful statement. VR12, 9/5/06, 10:09:24-10:10:50. The prosecutor asked if she said in her statement the gun used to kill her parents was purchased at Sports Unlimited. Id., 10:12:53. He asked her if she said in the statement Meece said the best time of night to kill somebody was 4 a.m. because that was when most people had their deepest REM sleep. Id., 10:14:54. He asked her again if she said she agreed to a plan to kill her parents and whether she had only been told to tell the truth in the statement. Id., 10:26:30. He asked if she said in the statement she had told Meece about a safe in her parent's house. Id., 10:28:00. He asked if she had told them in the statement Meece had thrown his shoes and a pair of gloves away. Id., 10:29:25. He asked if she told them she was going to let Bill and Regina live in the cabin on the farm to start a commune. Id., 10:38:20. He asked again about the one thing he asked her to tell them, and she agreed it was the truth. Id., 10:40:10.

Of the list of individual statements from the 12/31/04 statement about which Appleton was asked, she admitted she was asked to give a truthful statement, VR12, 9/5/06, 10:40:38, she kind of admitted she said there was a plan to kill her parents, Id., 10:10:34, she admitted saying Meece wanted to set up a commune on the farm, Id., 10:10:50, she admitted saying she told Meece about a safe in her parent's house, Id., 10:28:14, and, she kind of admitted saying Meece had thrown away the shoes and a pair of gloves, Id., 10:29:30. The only individual statements from the 12/31/04 statement that she did not admit making were that the gun used to kill her parents was bought from Sports Unlimited and that Meece told her the best time to kill someone was at 4 a.m. because that was when they had the deepest REM sleep. Perhaps it is arguable she did not admit to saying that she said in her statement there was a plan to kill her parents and that she said Meece disposed of his tennis shoes and a pair of gloves.

KRE 801A allows a prior inconsistent statement of a witness if a foundation is laid as required by KRE 613 and the statement is inconsistent with the witness' testimony. KRE 613 requires that the witness be asked about the circumstances of the prior statement, and, if it is in writing, to be shown a copy of the statement and given an opportunity to explain it. Meg Appleton's 12/31/04 statement was transcribed and the written transcript was given to the jurors to review while they listened to the statement. VR12, 9/5/06, 1:43:59. She was not shown the transcript of the statement during her testimony as required by both KRE 613 and KRE 801A.

In addition, there were very few of the individual statements she made on 12/31/04 that were inconsistent with her testimony at trial. Bratcher v. Commonwealth, 151 S.W.3d 332 (Ky. 2004), held when the witness admits at trial they made the prior

statements, then their actual statements are not admissible because they are cumulative of their trial testimony, i.e., they are not inconsistent. Id. at 342. In this case, that leaves Appleton's 12/31/04 statements that the gun used to kill her parents was bought from Sports Unlimited, that Meece told her the best time to kill someone was at 4 a.m. because that was when they had the deepest REM sleep, and, arguably that she said there was a plan to kill her parents and Meece disposed of his tennis shoes and a pair of gloves. The remainder of Appleton's roughly 1.5 hour statement should not have been admitted as a prior inconsistent statement because it was not inconsistent and the foundation required by KRE 613 had not been laid. VR12, 9/5/06, 1:45:15-3:13:26.

The prosecution could have easily introduced the 2-4 allegedly inconsistent statements through 1 of the 3 police officers who were present at the time of the 12/31/04 statement, or through the prosecutor. VR12, 9/5/06, 1:49.05. They chose not to introduce them through the police officers. However, they had no right to enter the 1.5 hour videotape of Appleton's statement under the guise of admitting 2-4 miniscule inconsistent statements, as they were allowed to do.

The prejudice of this error was immense. Appellant cannot possibly document every statement that should not have been admitted. Suffice it to say there was nearly 1.5 hours of confession by Appleton that should not have been admitted. The most extreme of the inadmissible statements follow.

The prosecution was allowed to introduce evidence Meece was a bisexual and had a homosexual affair with Randy Appleton. In Appleton's statement she says:

> Wright: How much did Randy know about this?
>
> Appleton: Nothing. Well, he, certainly he was around for the joke part. And I don't know what Bill told him. ***He and Bill had a strange relationship***.

Wright: Explain that to me.

Appleton: ***Certainly they had a sexual relationship***. He had known Bill for like four years longer than I had. Maybe three years? And Randy had been sleeping with, with Gina, ***too***, before I came along.

VR12, 9/5/06, 2:06:20-2:07:04; Trans. of Ex. 47 p. 9 (emphasis added). Evidence that Meece had a sexual relationship with another man was unquestionably an unnecessary smear on his character. This was a trial in a state where just two years earlier voters had passed a constitutional amendment to ban same-sex marriages. The registered voters list is used as a database for the pool of potential jurors. Evidence of homosexual voyeurism was held to be error in Purcell v. Com., 149 S.W.3d 382, 401 (Ky. 2004), a case where the evidence had far more relevance than the present case. Evidence of homosexuality that had no relationship to the crime charged was also held to be error in Chumbler v. Com., 905 S.W.2d 488, 493-494 (Ky. 1995). The evidence in the instant case was entirely collateral. There was no allegation Randy Appleton was involved in the murders and Meece's relationship with Appleton, sexual or otherwise, was completely unnecessary. This was unduly prejudicial.

The prosecutor was allowed to introduce evidence Meece aspired to be a hit man:

Wright: How did this discussion about a commune being set up, how did that lead to discussion and planning of killing your family?

Appleton: Because ***he was really by profession a Black Ops hit man***, and that was the sort of thing that he did all the time. And they thought it was just a -- it was Gina's plan.

VR12, 9/5/06, 1:54:50-1:55:15; Trans of ex. 47 p. 4. The introduction of evidence that the defendant was a hit man was held to be prejudicial error in Salinas v. Com., 84 S.W.3d 913, 918-919 (Ky. 2002). There was no other evidence introduced at trial that

Meece was a hit man. An undercover police officer, K. D. Felice, tried to hire Meece as a hit man and he turned her in to the Lexington police. VR 15, 9/14/06, 3:51:50. There is no question that referring to Meece as a "hit man" in a case where he was on trial for murder was unduly prejudicial bad character evidence and never should have been allowed.

The trial court conducted no balancing of the prejudice of this evidence prior to allowing it to come in. This Court is not required to defer to discretion that was never exercised. Purcell v. Com., 149 S.W.3d 382, 401 (Ky. 2004). The prosecution was required to give pretrial notice under KRE 404(c), but they gave no notice, pretrial or otherwise, that they were introducing evidence Meece had a sexual relationship with another man and was a Black Ops hit man. This was prejudicial error created by the Commonwealth.

The other excuse the prosecutor gave for sneaking in this 1.5 hour tape was to show Appleton's demeanor, since Appleton claimed she was high on Seroquel when she made the 12/31/04 statement. VR12, 9/5/06, 10:27:35, 1:38:27. There were 3 police officers present when the statement was made, all of whom were observing Appleton. Police are trained to detect when people are under the influence. They could have testified concerning this. Lay jurors are far less likely to be able to tell from a videotape projected on a movie screen if a person is under the influence of Seroquel than a trained police officer who was sitting in close proximity to the person while they were talking. It was never even suggested to the jury they should observe her demeanor on the video to see if they thought she was high. VR12, 9/5/06, 1:35:23-1:45:25. The proposition that this entire 1.5 hour tape should have been played for the jury, complete with references to

Meece engaging in male-on-male sex and to him being a professional hit man, is utterly specious.

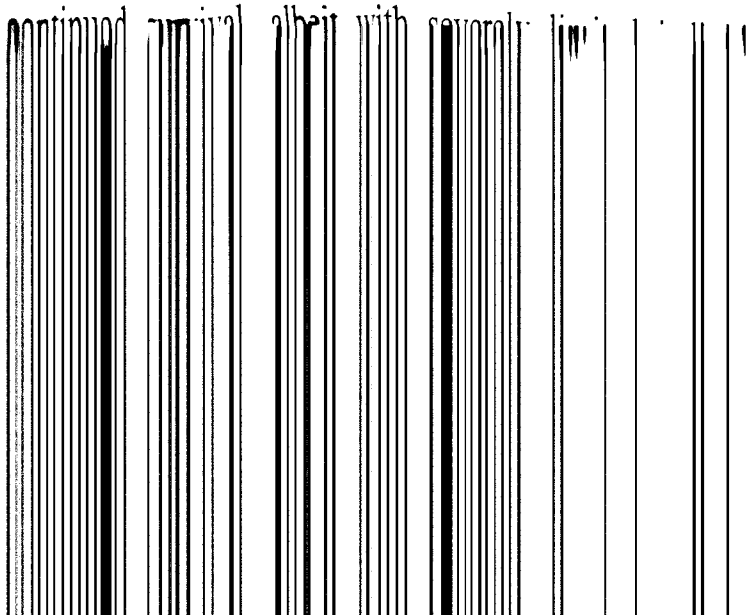
Reversal s required due to this error. §§ 2, 11, and 14, KY Const.; 6th, 8th, and 14th Amends., US Const.

6. Refusal To Include LWOP As Authorized Punishment.

Preserved. VR 17, 9/18/06, 1:10:41-1:11:27, 3:45:22-3:52:14; TR 10 1468-70; 11 1527-38.

The charge in this case arose from acts that occurred on February 26, 1993. TR 1-10. Bill Meece's trial began in August 2006. Eight years before trial, on July 15, 1998, HB 455--KRS 532.030(1)--authorizing the punishment of LWOP for a capital offense, went into effect.

KRS 446.110 provides, in relevant part, "[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgment pronounced after the new law takes effect." This Court, in Com. v. Phon, 17 S.W.3d 106, 108 (Ky. 2000), found that "[l]ife without parole is a lesser penalty than death because it allows a convicted defendant



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Although this Court's opinion in Phon, supra, stopped short of holding LWOP must be applied to a defendant in Meece's circumstances if the defendant consents, that is

the only constitutional way to interpret KRS 446.110.[2] This Court subsequently acknowledged this: "In response to the Commonwealth's suggestion that KRS 446.110 permits trial courts to exercise discretion whether to instruct on LWOP in capital cases, we recognize that such an interpretation would permit inconsistency in capital sentencing procedures that is incompatible with due process." St. Clair v. Com., 140 S.W.3d 510 (Ky. 2004). While Bill Meece initially thought he did not want LWOP included in the penalty range, VRH 2, 9/21/04, 10:56:13-11:07:05; VRH 3, 5/31/05, 11:07:10-45; VR 2, 8/11/06, 6:13:07-48; TR 10 1414, once he actually heard the evidence against him he specifically and unqualifiedly requested orally and in writing that LWOP be included in the range of sentences submitted to the jury. VR 17, 9/18/06, 1:10:41-1:11:27, 3:45:22-3:52:14; TR 10 1468-70; A 10-12. Because each juror was specifically asked if they could consider the full sentence range from 20 years to death, and LWOP falls squarely within that range, the voir dire was inadequate to ferret out any jurors who could not consider LWOP. Bill Meece should have received the benefit of jury instructions including LWOP as a punishment option.

Bill Meece was severely prejudiced by the refusal of the trial court to include LWOP as a sentencing option. 8th, 14th Amends., US Const.; § 1, 2, 3, 11, 17, 26, 28 KY Const. The jury labored three hours over what sentence to impose in this case, and jury

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[2] An interpretation of KRS 446.110 that would allow a trial court to exercise discretion in deciding when and whether to apply a mitigated punishment would violate separation of powers and amount to an unlawful delegation of legislative powers to the judiciary. §28, KY Const.; Bloomer v. Turner, 137 S.W.2d 387, 392 (Ky. 1939); LRC v. Brown, 664 S.W.2d 907, 915 (Ky. 1984). Additionally, the trial court's withholding of the benefits of the sentencing provisions of HB 455 from Meece, while similarly situated defendants in other counties were receiving those benefits, was disparate treatment without a rational basis and violative of equal protection. 14th Amend., US Const.; § 2, 3, KY Const. See Skinner v. Oklahoma, 316 U.S. 535 (1942). The Due Process Clause also would not permit an interpretation of KRS 446.110 that allowed defendants who appeared in front of one judge to have the benefits of a mitigated penalty, but denied those benefits to defendants who appeared in front of a different judge. 14th Amend., US Const.; § 2, 3, 11, KY Const. See Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Finally, the 8th

questions clearly indicate they were considering a sentence less than death and would have been particularly responsive to a "no parole" sentencing option. [3] TR 10 1471; A 31. Bill Meece's case must be remanded for a new sentencing hearing at which the jury is instructed to consider the full penalty range, including life without parole.

7. Prosecutor's Improper Introduction Of Meg's Guilty Plea And Sentence.

Unpreserved.

In his direct examination of Meg Wellnitz Appleton, the prosecutor on three occasions elicited references to her plea bargaining and her guilty plea. VR 12, 9/5/06, 10:10:00-08, 10:10:33-43, 10:32:02-32. In case the jury missed the import of these statements, the prosecutor clarified everything in his redirect examination of Meg:

> Q. And you pled guilty and acknowledged under oath that you were guilty. Is that correct?
> A. I tried to get an Alford plea and you wouldn't let me. That was the only way I could get a plea.
> Q. And you pled guilty and acknowledged under oath that you were guilty?
> A. Yes.
> Q. Of being involved in the planning of the murders of your parents and your brother. Is that correct?
> A. I acknowledged guilt in the complicity charge. I guess that that's what that means. I guess. I don't know.
> Q. And as a result of that, you're now serving a sentence. Is that correct?
> A. Yes.
> Q. How long is the sentence that you're now serving?
> A. 25 to life.
> Q. 25 to life. In other words, you're serving a prison term of life imprisonment.
> A. Yes.
> Q. And you won't be eligible for parole for at least 25 years. Is that correct?
> A. Hmm, 21 now.

Amend., US Const. and § 1, 2, 17, 26, KY Const. would be violated if our death penalty statute was not applied in an "evenhanded, rational and consistent" manner. Jurek v. Texas, 428 U.S. 262, 276 (1976).

[3] The LWOP/25 sentence had already been minimized in jurors' minds due to Meg's testimony that her LWOP/25 sentence was now really just an LWOP/21 sentence. VR 12, 9/5/06, 11:38:50-11:39:32. This, no doubt, heightened the jury's interest in a "no parole" option.

Q. 21 now. And that was in exchange for your guilty plea to your involvement in the murders of Joe, Beth and Dennis Wellnitz. Is that correct?
A. Yes. VR 12, 9/5/06, 11:38:00-11:39:12.

A co-defendant's guilty plea cannot be introduced at trial since such evidence can be construed as evidence of guilt of the defendant on trial. Gaines v. Com., 13 S.W.3d 923, 924 (Ky. 2000); Parido v. Com., 547 S.W.2d 125 (Ky. 1977); Tipton v. Com., 640 S.W.2d 818, 820 (Ky. 1982)

The introduction of this evidence highly prejudicial and violated Meece's substantial rights. 6th, 14th Amends., US Const.; § 2, 11 KY Const. Reversal is required.

8. Excluding Evidence Explaining Why Appleton Entered A Guilty Plea Denied Meece His Right To Present A Defense.

Preserved by Appleton's avowal testimony. VR 14, 9/7/06, 3:54:10-3:58:00.

During the prosecution's direct examination of Meg Appleton, the jury was informed she had entered a guilty plea to the charges for which Meece was standing trial. VR12, 9/5/06, 10:09:58; Id., 10:32:23. In addition, the prosecutor played her videotaped statement for the jury which informed them Appleton had a formalized plea agreement with the prosecutor. Id., 1:46:21. If that was not obvious enough, Appleton testified while wearing shackles and orange prison clothing. Id., 9:49:10. This unquestionably had a negative impact on Meece's defense. *See*, Parido v. Com., 547 S.W.2d 125 (Ky. 1977); *See* Argument 7.

Although Appleton claimed that she was not guilty at the trial, the actions of her entering a guilty plea spoke louder than her in-court testimony. It was essential for Meece's defense that the jury be given a plausible explanation for her entering a guilty plea to killing her parents and brother even though she was not guilty. In order to do this,

Meece attempted to introduce the advice from her counsel and the fears and circumstances that caused Appleton to enter her guilty plea.

Defense counsel asked Appleton, "Explain to us more fully your reasons for entering the guilty plea and making the statement." VR 14, 9/7/06, 2:48:52. Appleton began to explain her reasons, but the prosecutor objected. Id., 2:49:35. The judge stated her explanation was "all hearsay." Id., 2:49:50. Defense counsel argued it was not offered for the truth of the matter asserted, but to explain Appleton's subsequent actions. 2:50:00. The judge ruled again the testimony was hearsay, then he admonished the jury not to consider Appleton's statements before the objection. Id., 2:50:55.

Appleton testified to her reasons for entering the guilty plea by avowal:

> [Her attorney] said that Sheriff Cheatham was lying and my whole trial was going to be like that and everybody knew it. And that without a change of venue they might as well put the needle in my arm.
>
> * * * * * * *
>
> I was very distraught by the entire thing, and pretty much that's what pushed me over the edge to take a plea bargain. They'd been kind of pushing me towards trying to get a plea bargain for quite a while but that kind of did it. And, you know, at the time they were saying, "Well at least if you take this plea bargain, you know, your life won't be over. When you get out, it, it's, your first chance at parole, you won't, you won't be that old. Fifty-three's not old. And it -- I'd been all ready to stand firm and, you know, stand up for myself, and try to trust the judicial system, but he basically told me it was going to be a joke and I was screwed. And that, you know, the Truth was irrelevant and what was relevant was what was going to happen to me and did I really think I could get a fair trial in Adair County? And, I didn't. I couldn't even go to my own high school reunion and I hadn't even been indicted yet.
>
> * * * * * * *
>
> He said that the only way I wasn't get -- when we lost, the only way I wasn't going to die is if Nannie and Gabe got on the stand and cried and begged the jury for my life.
>
> * * * * * * *

> My grandmother's had enough, and this, this whole thing is horrible enough for her to begin with. I mean, I can't even imagine putting her in that position, I mean, that's just horrible, and he, and he would bring that up every time I say him. Well, have you decided what you're going to do about the penalty phase? And, you know, it was really -- I wasn't on my psych meds. I was already really depressed anyway. I was under tremendous amounts of strain and, you know, then he started talking about, and they might not let, then they might put it off and try Bill first and, "You could be in County Jail for another two years." And, I mean, I just pretty much gave up. And, you know, they were telling me that that was the only chance I was going to have at any sort of a life ever, was to take a plea bargain and hoe for parole.

VR 14, 9/7/06, 3:54:10-3:58:20.

This evidence was not hearsay. It was not offered to prove the truth of the statements that were made to Appleton. The purpose of the testimony was show why Appleton would enter a guilty plea even though she claimed she was not guilty. The use of out-of-court statements to prove the listener's state of mind is a legitimate non-hearsay use of the statements. R. Lawson, The Kentucky Evidence Law Handbook, §8.05(3) 563-566 (4th ed. 2003); Perdue v. Com., 916 S.W.2d 148, 156 (Ky. 1996).

The prejudice to Meece from the exclusion of this testimony was substantial. One of the biggest hurdles he had to overcome was convincing the jury there were legitimate reasons why he and Appleton would plead guilty even though they were innocent. If he could not convince them there were legitimate reasons then the trial was a mere formality leading up to a conviction. Kercheval v. U.S., 274 U.S. 220, 224 (1927). The exclusion of this evidence prevented him from presenting Appleton's reasons for pleading guilty. It took away half of Meece's defense to these crimes. He had an absolute right to explain why the pleas were entered as part of his right to present a defense. Crane v. Kentucky, 476 U.S. 683, 690-691 (1986); Washington v. Texas, 388 U.S. 14, 19 (1967). Reversal is required. §§ 2, 11, 14, KY Const.; 6th, 8th, 14th Amends., US Const.

9. Refusal To Exclude Testimony Precluded By KRE 504.

Preserved. TR 2 186-189, 204-206, 234-248, 261-264, 268-271; TR 5 632-635, 683-684; TR 6 826-829; TR 7 1030; TR 8 1174-1179; TR 9 1318-1321; TR 11 1527-1538; VRH 4/20/04, 9:33:36-10:14:00; SVH 7/12/06, 3:50:07-4:35:07.

KRE 504(b) establishes a marital communications privilege: "An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage....A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person."[4]

At Meece's trial, numerous statements by Regina Meade were introduced in violation of KRE 504(b) and one of those was introduced in violation of the court's order finding it barred by the privilege. These statements include the following:

A. Meade testified that in the early morning hours before the Wellnitz family was killed, Meece came upstairs to her bedroom around 1:30 or 2 a.m. to tell her he and Meg were leaving to get coffee. VR 10, 8/31/06, 4:19:26-4:20:38.

B. Meade testified Meece told her not to talk to the police or let them in their house. Id. at 4:29:00-30. This conversation took place a couple of weeks after the murders and no one else was present. VRH 1, 4/20/04, 9:52:00-9:53:25. The court had previously ruled this statement was barred by KRE 504. TR 2 268.

C. Meade testified Meece discussed "plausible deniability"—"knowledge without knowledge"—with her after the murders and possibly after the divorce. He explained he

[4] KRE 504(c) sets out an exception to the privilege "[i]n any criminal proceeding in which the court determines that the spouses conspired or acted jointly in the commission of the crime charged." There was no claim by the prosecutor, nor finding by the court, that the exception applied.

was not telling her stuff so if she was arrested, she could claim plausible deniability and that she did not know anything. VR 11, 9/1/06, 9:29:37-9:30:52.

D. Meade testified when she and Meece went with Meg to the Wellnitz home a week after the murders to help pack stuff up, Meece made statements to her about the murders. Id. at 9:35:00-9:37:50. Meade testified she and Meece were separate from Meg most of the time and Meece's statements were not made in Meg's presence. Id.

E. Meade testified Meece, who claimed to be an ex-Navy seal when he met her at 16, told her he knew where to hit somebody with a bullet to put them down and that a hit to the head would kill a person instantly. Id. at 10:42:55-10:44:34.

It is clear from the record neither Meg nor anyone else was present during these 5 conversations that took place during Meece and Meade's marriage[5] and that these conversations were private and not intended for disclosure to others. These confidential spousal communications made during the Meece/Meade marriage were privileged and inadmissible under KRE 504(b). St. Clair v. Com., 174 S.W.3d 474 (Ky. 2005); Slaven v. Com., 962 S.W.2d 845 (Ky. 1997). The introduction and use of this privileged testimony was unfairly prejudicial. It established the beginning timeline of the crime consistent with other facts, guilty knowledge, information only the shooter or an on-site accomplice would know, and a "how to kill" plan consistent with the wounds on 2 of the 3 victims. Its introduction denied Meece due process, a fair trial and reliable capital sentencing in violation of the 5th, 6th, 8th, 14th Amends., US Const.; § 2, 7, 11, 17, KY Const.; KRE 504(b). Reversal is required.

[5] Meece and Meade were married in 8/1991 and divorced in 11/2000. VRH 1, 4/20/04, 9:40:43

10. Prosecutor's Failure To Correct Regina Meade's Perjured Testimony.

Preserved. Prior to trial, Bill Meece filed a *pro se* motion to bar the prosecutor from introducing false evidence. TR 7 948-950; TR 9 1318-1321; TR 11 1527-1538; VRH 3, 6/1/06, 3:11:54-3:14:44; SVH 7/12/06, 2:48:40-2:56:22. The court overruled the motion, telling Meece the motion was very offensive and if it had been filed by counsel, they would have been held in contempt. SVH 7/12/06, 2:55:00-2:56:15; TR 9 1318-1321.

On June 30, 2003, the prosecutor filed a lengthy written discovery response setting out, *inter alia*, the deal he made with Regina Meade in the presence of her two attorneys in exchange for her provision information and her cooperation in the investigation and prosecution of this case. TR 1 62-104 at 97-98. The agreement was Meade would not be prosecuted for having provided incorrect and/or incomplete information about the case previously or for having possessed physical evidence related to this case. Id. At a hearing nearly 9 months later, the prosecutor again described his deal with Meade—in exchange for her truthful and complete statement, he agreed not to pursue criminal charges related to any criminal conduct she discussed and he would ask the Fayette County prosecutor not to charge her with tampering with physical evidence or for any other crime she discussed. VRH 1, 3/24/04, 1:23:50-1:29:48. The court ordered the entire deal given Meade in exchange for her testimony be provided in writing to the defense. Id. No further information was ever provided. TR 1- 11. Fifteen months later, in July 2005, Meece's counsel withdrew and were replaced by new attorneys. TR 6 772-774; VRH 7/1/05, 10:21:50.

At trial in 9/2006, Regina Meade, a critical prosecution witness, testified falsely on cross-examination about her deal:

Q. Do you have any agreements with the Commonwealth regarding your testimony here today?
A. No.
Q. There was never any agreement between you and the Commonwealth that you would not be charged with any crime?
A. Not to my knowledge.
Q. Not to your knowledge?
A. Not that I remember.
Q. I take it you've never been charged with any crimes then?
A. Nope. VR 11, 9/1/06, 9:47:57-9:48:33.

Meece's convictions and death sentences cannot stand because they were based on perjured testimony from a critical witness. The use of false testimony to obtain a conviction is a violation of due process when the testimony is material. Napue v. Illinois, 360 U.S. 264, 269 (1959). It matters not whether there is good or bad faith on the part of the prosecutor. Brady v. Maryland, 373 U.S. 83, 87 (1963). When, as here, the prosecutor knew or should have known, the testimony was false; the test for materiality is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). A conviction based on perjury "results in a denial of due process under the Fourteenth Amendment and a new trial is required." Com. v. Spaulding, 991 S.W.2d 651, 656 (Ky. 1999)(citing Giglio v. United States, 405 U.S. 150, 153 (1972)).

As the Supreme Court held in Napue, supra at 269,

> ...it is established that a conviction obtained through the use of perjured evidence, known to be such by the representative of the State, must fall under the fourteenth Amendment. ...The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. ...

> ...A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and to elicit the truth. (internal cites and quotations omitted).

The prosecutor failed in this basic duty. The prosecutor failed to immediately act to correct Meade's perjury, nor did he correct her false testimony in either of his re-direct examinations of her. Id. at 9:47:57-9:48:33, 10:37:40-10:48:30, 10:52:05-50.

Whether the defendant is guilty or innocent is not a part of the test to determine the effect of the perjured testimony. Anderson v. Buchannan, 168 S.W.2d 48, 54 (Ky. 1943). Instead the focus is on "the probability that the conviction would not have resulted if the truth had been revealed." Id. But the overriding concern must be the integrity of the judicial process. Id. As the Supreme Court stated in Agurs, a court must determine if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, at 103.

Regina Meade was the heart of the prosecutor's case against Bill Meece. She claimed to have been present for most of the planning of this crime as well as many conversations Meece and Appleton had about it. She provided a key piece of evidence, the safe, to the prosecution. At every turn, she went out of her way to malign Meece's character. She did all this while portraying herself as a hapless bystander to the evil swirling around her rather than the participant her deal would have revealed her to be.

Regina Meade committed perjury and it cast her in a favorable, but highly inaccurate, light. The prosecutor, as representative of the state and the agent who negotiated the deal Meade denied, had a responsibility to correct her lies rather than let them stand. His failure to do so denied Bill Meece due process and his right of confrontation. 5th, 6th, 14th Amends., US Const.; § 2, 7, 11, KY Const. Reversal is required.

11. Refusal To Take Judicial Notice.

Preserved. TR 7 994-1001; VRH 3, 12/9/05, 2:19:25-2:33:05.

Regina Meade, the ex-wife of Bill Meece, was a key prosecution witness. Much of her testimony was laced with outrageous claims of assorted threats and bad acts perpetrated against her by Meece. Among other things, she claimed Meece raped her in December 1999 after they separated and that he was arrested and jailed on her complaint. VR 11, 9/1/06, 10:00:00-10:02:00. She acknowledged these charges were later dismissed but claimed she did not know why except it was not because she lied about the rape. Id.

Prior to trial, Meece had asked the court to take judicial notice of a Court of Appeals' opinion issued in a visitation rights appeal involving Meece and his ex-wife. TR 7 994-1001. The opinion states:

> Meece and Meade separated in November 1999. The following month, Meade filed rape charges against Meece. While the case was pending, Meece agreed not to contest Meade's request for a domestic violence order (DVO) based on the circumstances alleged in the criminal complaint.
>
> The grand jury refused to indict Meece, and the case was returned to the district court. **The charges against Meece were dismissed by the district court on the motion of the county attorney because Meade had been untruthful in her statements concerning the alleged rape.** Meece v. Meade, 2006 WL 1195929 (Ky. App. 2006) (emphasis added); TR 997; A 70-74.

The court declined the request, noting it could not take judicial notice of the prosecutor's opinion. VRH 3, 12/9/05, 2:19:25-2:33:05

The defense was not asking the court to take judicial notice of the prosecutor's opinion, whatever that might have been. It was asking for judicial notice of the fact the rape charge "against Meece was dismissed by the district court on motion of the county attorney because Meade had been untruthful in her statements concerning the alleged rape." TR 997; A 70-74. This could have been accomplished by the court taking notice of

the recitation of facts by the Court of Appeals or by obtaining the tape of the court proceedings in question.

Under KRE 201, a court may properly take judicial notice of public records, including records of other courts. Polly v. Allen, 132 S.W.3d 223, 226 (Ky. App. 2004); Newberg v. Jent, 867 S.W.2d 207, 210 (Ky. App. 1993); U.S. v. Garland, 991 F.2d 328 (6th Cir. 1993). Opinions of an appellate court, published or unpublished, are public records of that court. The tape of the court hearing where the rape charge was dismissed due to Meade's untruthfulness was a public record of the district court. The dismissal of the rape charge based on Meade's untruthfulness was a fact "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201(b)(2).

The trial court's refusal to take judicial notice of this fact and to so advise the jury denied Bill Meece his constitutional right to impeach the witness against him and to put on a defense to the criminal charges. Davis v. Alaska, 415 U.S. 308 (1974); Crane v. Kentucky, 476 U.S. 683 (1986). The state cannot carry its burden of proving this error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Reversal for a new trial is required. § 2, 11, Ky. Const.; 6th, 14th Amends., U.S. Const.

12. Error In Allowing Evidence Of The Browning Hi-Power Pistol To Be Introduced.

Preserved. Meece's motion in limine was denied. TR 7 1026-1027; TR 10 1431-1433.

In 1993, Meg Appleton was immediately suspected by the police of having been involved in the killings. Police questioned Meg and all of her friends on numerous

occasions. They questioned Meece in 1993 concerning a Browning Hi-Power pistol he had in his possession in the weeks preceding the killings. Ex. 40. At that time, Meece told them he had borrowed it from a friend of a friend to see if he might want to purchase the gun. VR 11, 9/1/06, 2:05:15. He told the police he had taken the gun target shooting in Salt Lick, KY, but decided not to buy the gun. He said he returned the gun to the friend a week before the killings. Id., 2:18:46. Meece did not tell them the person's name because he was a felon and possession of the handgun would have been another crime. Id., 2:24:15.

Prior to the start of the first trial, Meece's attorney revealed, during plea negotiations, that Meg Appleton had bought the Browning Hi-Power at a gunshop in Lexington, Sports Unlimited, using a fake ID. SVH, 7/12/06, 3:24:00. Until that point in time the prosecution had no information about the purchase of the Browning Hi-Power. Id., 3:31:43. As a result of that information being divulged during the plea discussions, the prosecution was able to track down the salesman who sold the gun to Appleton and the ATF form of the transaction. The salesman was able to pick Meece out of a photo lineup as being present when Appleton bought the gun. VRH 2, 10/8/04, 9:42:07. The ATF form indicated the gun was purchased 2/8/93, a little over 2 weeks before the crimes. VR 1, 8/11/06, 5:12:40.

Meece moved to suppress evidence concerning the purchase of the Browning pistol pursuant to KRE 410 as fruits of the failed plea negotiations. He also moved to suppress the evidence because the probative value was substantially outweighed by the prejudice. TR 7 1026-1027. The trial court denied the motion because Appleton admitted the purchase during questioning in December 2004, after the information had been

divulged by Meece's attorney, and because it believed the fruits of a statement made inadmissible by KRE 410 were not themselves inadmissible. TR 10 1431-1432.

In U.S. v. Ankeny, 30 M.J. 10 (C.M.A. 1990) the court confronted a situation almost identical to the instant case and held the witness' testimony was inadmissible as the fruit of a Mil.R.Evid. 410 disclosure. In that case, the defendant had a positive urinalysis for cocaine use and was being considered for a court martial. He hired a civilian attorney and disclosed to this attorney that he had approached the command urinalysis coordinator to see if he would switch a different urine sample for the positive urine sample the defendant had first given. The defendant's attorney then revealed this information during the course of plea discussions with the prosecuting officer. The prosecuting authorities then approached the command urinalysis coordinator who confirmed the defendant had tried to get him to switch urine samples. The Court of Military Justice held the testimony of the command urinalysis coordinator should not have been allowed based on an evidentiary rule analogous to KRE 410. The court found the lawyer's statement should be "considered as a related 'statement made in the course of plea discussions' for the purpose of this rule." The court noted the Court of Military Justice has,

> [An] avowed intent to avoid "[a]n excessively formalistic or technical approach to this rule" and Article 45. *See* United States v. Barunas, [23 MJ 71, 76 (CMA 1986)]. In fact, our practice has been to broadly construe this rule so as to encourage plea negotiations and secure the concomitant benefits for the military justice system. Id. at 75-76. Accordingly, we hold that the military judge plainly erred in letting the prosecution witness; disclosed only in defense counsel's statement, testify in this case. *See generally* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983).

U.S. v. Ankeny, supra at 15. *See also*, Joseph M. McLaughlin, ed. Weinstein's Federal Evidence § 410.09(4) (2d ed. 2005) ("It would seem that, to enforce the policy

underlying Rule 410, the better approach would be to import the 'fruit of the poisonous tree' doctrine into this area.").

The gun salesman's identity, his testimony, and the ATF form were clearly the "fruit" of Meece's attorney's proffer. The prosecutor admitted that was where he learned this information. SVR, 7/12/06, 3:31:43. The prosecutor argued the discovery of this information was "inevitable," but it was not inevitable. VR 1, 8/11/06, 5:29:15. The prosecution had investigated this case for over 10 years and had not discovered that information. The only place they could have learned it was from Appleton, and her memory was not sufficient to have identified the store where the gun was purchased, or the name on the fake ID she used. Appleton testified she did not remember the name of the store where the gun was purchased. VR 1, 8/11/06, 5:14:16. She thought the store was off New Circle Road, Id., but it was actually at Boston Rd. and Man o' War. Id., 5:16:14. Appleton testified she did not remember signing any paperwork when the gun was purchased. She testified that she was not sure she could have remembered the last name of the person whose ID she used to purchase the gun. Id., 5:15:31. Appleton testified she used 2 other fake ID's during that time with other women's names on them. Id., 5:14:50. Just as important, until the police spoke to the person who sold the gun to Appleton, they had no idea Appleton was involved in the purchase and would not have known to ask her about it. The only information the police had was Meece's statement in 1993 that he had borrowed a gun from a friend of a friend and had returned it before the shooting.

A second reason to suppress this evidence was it was divulged by the defendant to his attorney during the course of the attorney/client relationship. KRE 503(b) states, "A client has a privilege to refuse to disclose and to prevent ***any other person*** from

disclosing a confidential communication ... ." (Emphasis added). While the rule only covers communications between persons with a defined status vis-à-vis the client and his attorney, the disclosure privilege is much broader in that it allows the client to block disclosure by "any other person," even persons who would not have been within the status originally for a confidential communication to have been made to them. In Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983), the court held the prosecution's use of evidence based on a confidential communication between a defendant and his attorney violated the 6th Amendment right to counsel:

> [W]hen the prosecution gets evidence before the jury which is based on confidential communications between the defendant and his attorney it also impinges on the Sixth Amendment right to counsel. In this case we are not dealing with the scope of the judge-made exclusionary rule which is a remedy for a constitutional violation. Our concern is with a constitutional right which is at the heart of our adversary system of criminal justice.

Meece must show some prejudice from the violation of his 6th Amendment right. Weatherford v. Bursey, 429 U.S. 545, 558 (1977). However, the only prejudice that needs to be shown is that the information was used to the benefit of the government or detriment of the defendant during trial. Bishop v. Rose, 701 F.2d at 1156; U.S. v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980) (Prejudice results when evidence gained through interference with the attorney-client relationship is used against the defendant at trial). That standard is easily met in the present case because the prosecution called the salesman, Leondas Patrick, as a witness and introduced the ATF form for the purchase of the gun at trial. In addition, Patrick testified that Appleton purchased 2 boxes of hydroshock bullets, the type used in the crimes, at the same time she purchased the gun. VR 10, 8/31/06, 2:15:04. The prosecution also examined Appleton at trial based on the information it developed as a result of this communication and Meece.

Reversal is required. §§ 2, 11, 14, KY Const.; 6th, 8th, 14th Amends., US Const.

13. The Use Of Hearsay Testimony Denied Meece A Fair Trial.

This portion of this issue dealing with the testimony of Torston Rhodes is preserved. VR 13, 9/6/06, 3:22:16, 3:51:18. The remainder is not preserved.

The trial of this action was replete with hearsay. The following 4 instances of hearsay, singularly and certainly cumulatively, denied Meece a fair trial.

1. During Justin Manley's testimony, he testified that Meg Appleton said of Bill Meece, "He's crazy. He says he was, you know, he's killed people, and he's, and he's been in the CIA and stuff like that." VR 13, 9/6/06, 9:21:50. Manley reinforced the effect of this hearsay statement by testifying, "I tell Meg that this doesn't exactly reassure me on anything." VR Id., 9:21:58. In a case where Meece was standing trial for murdering 3 people, it was prejudicial and unfair to introduce hearsay that he had killed people before. This statement does not come within any exception to the hearsay rule. It was not a prior inconsistent statement, nor was the foundation required by KRE 613 ever laid.

2. Manley also testified about a letter Appleton received from Bill Meece. Manley described the letter as requesting payment for services rendered long ago. VR 13, 9/6/06, 9:20:44. According to Manley, Appleton shredded the letter and threw it in the trash. Id., 9:22:30. He claimed he asked Appleton why she shredded the letter, and according to him she said, "That could be used as evidence against me, you know." Id., 9:22:49. According to Manley, "When we first met she, she told me she was under suspicion. That she was innocent, but people in, back in Columbia, Kentucky thought that she was responsible for her family's death." Id., 9:22:56. The allegation Appleton

destroyed the letter because it was evidence that could be used against her was extremely harmful. It is the equivalent of an admission of guilt. Appleton was never asked about the alleged statement. The foundation required by KRE 613 was not laid. The statement does not come within any exception to the hearsay rule.

3. Regina Meade testified that on the morning of the murders, Appleton and Meece returned to her apartment and Meece was carrying a safe. According to Meade, "Meg had said [the safe] came from the house." VR 11, 9/1/06, 10:40:11. This was a critical admission since Meece testified he bought the safe and Appleton testified that the Wellnitz safe did not look like the safe that had been introduced into evidence. VR 15, 9/14/06, 2:18:25; VR 14, 9/7/06, 2:29:04. The safe was significant because it was the only piece of physical evidence that was alleged to directly link Meece to the offenses. This hearsay statement allegedly made by Appleton did not come within any exception to the hearsay rule, nor was the foundation required by KRE 613 ever laid.

4. Meade also testified that on the morning of the murders Appleton made several statements to the effect her brother Dennis was not supposed to be there when the killings occurred. VR 10, 8/31/06, 4:22:48. While at first blush these statements might appear to be admissible under KRE 803(2) as an excited utterance, the statements were not made until two hours after the killings, after Appleton had allegedly driven from Columbia to Meece's apartment in Lexington. She certainly had time to begin thinking up ways to try and distance herself from responsibility for the killings. An excited utterance is one made "so near in point of time as to exclude the presumption that it was the result of premeditation or design." Consolidated Coach Corp. v. Earl's Adm'r, 263 Ky. 814, 94

S.W.2d 6, 8 (1936). This statement by Appleton does not qualify as an excited utterance or under any other exception to the hearsay rule.

5. Torston Rhodes, an engineer for the Sentry Safe Company, testified that based on his research of company records he learned of a design change instituted for the type of safe that Regina Meade gave to the state police and claimed was taken from the Wellnitz residence. After July 1993 Sentry Safe no longer sold this type of safe without a key number on the lock to make it easier to provide replacement keys to customers. VR 13, 9/6/06, 3:32:58. Rhodes impeached a letter provided to the prosecution by another engineer at Sentry Safe that said, based on the serial number of the safe, the safe had been manufactured in October 1993, after the Wellnitz's had been killed. Id., 3:40:35. Meece first objected to Rhodes' testimony because it was speculation. Id., 3:22:16. He later objected because it was hearsay. Id., 3:51:18. The testimony was obviously hearsay because it was based upon business records and there was no foundation laid as required by KRE 803(6). Rhodes was not shown to be the custodian of the records or another qualified witness. He did not say how the record that formed the basis of his testimony was made and kept, and he did not "testify that the record comports with the business record exemption to the hearsay rule." Robinson v. Com., 926 S.W.2d 853, 854 (Ky. 1996). The evidence was also speculative since Sentry Safe continued to manufacture safes without key numbers on the locks for 5 months after the Wellnitz's died.

The individual hearsay statements in this case denied Meece a fundamentally fair trial. Fulcher v. Motley, 444 F.3d 791 (6th Cir. 2006). Certainly, together they violated his rights to confront the witnesses and to due process. The prosecution cannot show that

the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). §§ 2, 11, and 14, KY Const.; 6th, 8th, and 14th Amends., US Const.

14. Allowing Irrelevant Evidence Of Wicca Worship And The Occult.

This issue is arguably preserved by Meece's motion for a new trial. TR XI 1534.

When the police first investigated this crime they noticed that there was a book of the occult on Beth Wellnitz's nightstand, and that Meg Appleton had a black candle in her bedroom along with a freshman term paper on human sacrifice among the ancient Inca Indians. Putting two and two together, they decided this offense had an occult component. VR 14, 9/7/06, 4:38:55.

The prosecutor introduced the jury to this occult component in his opening statement. He told the jury that Meece and Appleton were sexually involved and that they were both into Wicca, a type of religious belief that included magic and that their common belief in Wicca was part of what attracted them together. VR 9, 8/30/06, 9:36:15.

During trial the prosecutor questioned Regina Meade, Meg Appleton, and Bill Meece concerning Wicca and their respective beliefs in Wicca. VR 11, 9/1/06, 9:21:08-9:23:45; VR12, 9/5/06, 9:56:57; VR 14, 9/7/06, 3:40:25-3:42:35; VR 15, 9/14/06, 4:37:52. Meece was asked about Wicca during both of the statements he gave as part of the plea negotiations. VR 11, 9/1/06, 4:26:17; VR 13, 9/6/06, 4:42:45.

In his guilty phase closing argument, the prosecutor had this to say about the Wicca evidence:

> The discussions about the occult and Wicca. I don't believe the evidence supports an inference that this was a ritualistic sacrifice. I believe that that certainly

> demonstrates, along with a lot of other things, demonstrates the character of Bill Meece. I think it shows you that he is willing to lie. He told you in his statement that he was into reformed Judaism. Talked about the cult of personality of Jesus Christ. And said on his statement, "I'm not even going to apologize if that offends anybody." That wasn't from the discovery, that was him talking, telling the truth. Certainly Wicca was something that Beth Wellnitz questioned. She was concerned about her daughter's involvement with those people. Meg told you in her statement that part of her reasoning for wanting to take Bill and Regina down was to show her mother that they weren't such evil monsters. You know, from a very early age, one of the biggest fears that anyone has, almost two years old, one of the biggest fears anybody has is, is a monster going to get us during the night? She took them down there to show them, to show her parents that they weren't evil monsters. Forty-eight hours later what did they do? What did he do? But do I think that the occult involvement was the primary reason for this? No. Was it a factor? Certainly. Was it a factor in who the suspects were? Absolutely. But Bill Meece in his statement told you about the occult involvement versus what his motive was. This is his discussion, not from the discovery, but his discussion of what his motive was. "The occult involvement in these murders was entirely secondary to a financial gain motive. The financial gain motive was for Meg for the estate, and secondary for me was what Meg was supposed to pay me." Secondary for what Meg was supposed to pay me. That's what he wanted.

VR 16, 9/15/06, 2:08:21-2:11:05. In his closing, the prosecutor admitted the "Wicca component" had been introduced to show Meece was a person of bad moral character. But there was never any KRE 404(c) notice this evidence was going to be introduced to show character. KRE 404(b) does not allow the prosecution to smear a defendant's character just because it is easier to get a conviction against a pagan, a Wiccan, or a Jew.

There should be little argument that evidence concerning a person's involvement in witchcraft is "character evidence" as that term is used in KRE 404(a). In fact, it is evidence of bad character, or at least the prosecutor though so. Although the issue has apparently never been raised in this Commonwealth, evidence the defendant practiced the Wicca religion was found to be bad character evidence in State v. Theer, 639 S.E.2d 655, 664 (N.C.App. 2007) (Noting that the evidence had a "tenuous, at best, relevance to the question of Defendant's guilt.")

Other jurisdictions have held that evidence of a defendant's involvement in similar occult activities is bad character evidence subject to the limitations of 404(b). In Mitchell v. State, 379 S.W.2d 123 (S.C. 1989), the South Carolina Supreme Court held that evidence the defendant was involved in devil worship improperly place the defendant's character in issue. The defendant's attorney had failed to object at trial, but the South Carolina Supreme Court vacated the conviction under the more stringent Strickland v. Washington, 466 U.S. 668, 694 (1984) standard of prejudice (whether "there is a reasonable probability that, but for counsel's ... errors, the result of the proceeding would have been different.")

In Flanagan v. State, 846 P.2d 1053 (Nev. 1993) the Supreme Court of Nevada vacated a death sentence because the prosecution introduced evidence the defendants believed in the occult and participated in a "coven." According to Wikipedia, the typical worship unit for Wiccans is a "coven" of 13 persons. *See*, http://en.wikipedia.org/wiki/Wicca. Flanagan held the prosecution had used the evidence to establish the defendant's bad character. The court stated, "The prosecution may not raise the issue of appellant's religious beliefs for the bare purpose of demonstrating appellant's bad character. By violating this prohibition, the prosecution invited the jury to try appellants for heresy." Id., 846 P.2d at 1058-59. Appellant submits there is little doubt that allegations of Wicca worship and the occult were used solely to reflect negatively on Meece's character. The prosecutor admitted as much in his closing argument.

The evidence of Wicca was introduced into this case to prove the two defendants had a propensity to commit murder because they had bad morals. The evidence was

nothing more than propensity evidence, and was clearly inadmissible under KRE 404(a). This case is controlled by Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991). Dyer involved allegations of sodomy of a boy under the age of twelve. The prosecution was allowed to introduce pornographic materials that were found in the possession of the defendant in order to show that the defendant was a sexual pervert, and, in particular, that his perversion was pedophilia. In reversing, this Court stated:

> We declare, unqualifiedly, that citizens and residents of Kentucky are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged. If the boy's testimony was intended to be the connecting link, evidence would be limited to that which the boy could identify as having been shown to him. If this material is supposed to provide a picture of the appellant as a pedophilia, such profile evidence is inadmissible in criminal cases to prove either guilt or innocence.

Id., 816 S.W.2d at 652. In the present case, as in Dyer, there was no connecting link between the crime and the evidence of occultism. The sole purpose was to show Meece was a person of low moral character which supposedly made it more likely that he would commit a crime like this. That is inadmissible profile evidence.

As an additional point, Wicca is a religion which is constitutionally protected by the 1st Amendment to the U.S. Constitution. Flanagan v. State, supra. In Dawson v. Delaware, 503 U.S. 159 (1992), the Supreme Court vacated a death sentence because the state had introduced evidence of the defendant's participation in the Aryan Brotherhood at the penalty phase of the trial. The state had introduced the evidence to demonstrate the defendant's bad character. The Supreme Court reversed, holding the state is not free to punish someone based upon his participation in a constitutional protected activity. Likewise, if, as the prosecution alleged, Meece and Meg Appleton were involved in Wicca, the involvement is a constitutionally protected activity under the 1st Amendment.

Unless the prosecution could demonstrate some connection between this religious practice and the crime involved, then the admission of the evidence violates Meece's 1st Amendment rights.

It should be noted that the evidence in this case was not overwhelming. Ten years elapsed before the prosecution even sought an indictment. The main evidence against Meece was his own statements given during plea negotiations. Ballistics evidence indicated the murder weapon was very similar to a Takarov the KSP ballistics examiner looked at, instead of the Browning HiPower Meg Appleton bought. VR 1, 8/11/06, 2:27:33. In fact, the markings from the Takarov were so similar to the markings on casings from the crime scene the ballistics expert thought the barrel of the murder weapon had been manufactured by the same machine and in close proximity to the barrel of the Takarov. VR1, 8/11/06, 2:27:55. The introduction of the Wicca evidence was not harmless error in this case. Chapman v. California, 386 U.S. 18, 22 (1967). Reversal for a new trial is required. §§ 2, 5, 11, and 14, Ky. Const.; 1st, 6th, 8th, and 14th Amends., U.S. Const.

15. Improper Excusal For Cause Of Jurors Qualified To Decide This Case.

Preserved. VR 5, 8/24/06, 9:19:46-9:38:38, 11:28:15-11:48:03; VR 8, 8/29/06, 10:31:35-10:43:51.

Danny Smith. VR 5, 8/24/06, 9:19:46-9:38:38. Smith repeatedly testified while the death penalty would be difficult due to his father's recent death, he could consider each sentencing option in the authorized range. Id. He noted although it would be difficult to give death, he would not say "no way." Id. He stated if death was his verdict,

he could sign the death verdict as foreperson. Id. Over defense objection, the court, citing its observation of Smith, sustained the prosecution challenge for cause. Id.

Cassandra Watts. VR 5, 8/24/06, 11:29:15-11:48:03. Watts advised the court she personally did not believe in the death penalty but while she did not support it, she could consider it. Id. She again said she could consider it. Id. She said she would seriously consider it regardless of her personal views. Id. When asked if she could seriously consider death, she stated while she did not believe in taking life for a life, she would look at the evidence presented and give serious thought to it. Id. When asked if her beliefs would substantially impair her consideration of the death penalty, she replied she would have to look at the evidence presented--whether there was proof beyond a reasonable doubt, talk with the other jurors and give it some thought. Id. She guessed she would be able to sign a verdict of death as foreperson. Id. She cautioned she could not give death to someone who was innocent. Id. When pressed again whether she could seriously consider death, she stated she would not want to but it depended on what was presented. Id. She said death was one of the options and she would have to consider it even though she did not personally believe in it. Id. Asked once again if she could seriously consider the death penalty, she stated it all goes back to what evidence is presented and what other jurors say. Id. She pointed out someone may say something to make her see something in a different way and she would have to see what was presented, discuss it, see what people are thinking and go from there. Id. When asked if she could set aside her beliefs and do her duty to vote for the death penalty where the evidence warranted it, Watts said she would have to know what warrants the death penalty; she would have to know the rules. Id. When asked again if she could vote for

death if warranted, she again stated she could consider it depending on the evidence presented. Id. When asked for the twelfth time if she could consider and vote for death if warranted, she gave the court the answer it obviously sought and said she did not believe she could. Id. Over defense objection, the court, citing its observation of Watts' demeanor, sustained the prosecution challenge for cause. Id.

Kenneth Denham. VR 8, 8/29/06, 10:31:35-10:43:51. Denham stated he did not know if he could do the death penalty, that he thought he believed in it but here and now he was not sure. Id. He stated he could consider the death penalty but did not know if he could go through with it, if he could be the one who says who lives or dies. Id. He said he couldn't do that, said he would consider the death penalty, then said he did not think he could do it. Id. He stated if his family were the victims, he would hope the jury would give the death penalty and he would vote for death in that situation. Id. Finally, he advised it was possible he could vote for death. Id. Over defense objection, the trial court sustained the prosecution request to excuse Denham for cause. Id.

The Supreme Court has limited "a state's power broadly to exclude jurors hesitant in their ability to sentence a defendant to death." Morgan v. Illinois, 504 U.S. 719, 732 (1992). Not "all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986). The Court reaffirmed this principle in Gray v. Mississippi, 481 U.S. 648, 658-659 (1987): "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the

State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' ... To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the defendant.'"

The prosecution is only "entitled to have excused for cause a person who has such conscientious objection to the death penalty that he would never, in any case, no matter how aggravated the circumstance, vote to impose the death penalty." Grooms v. Com., 756 S.W.2d 131, 137 (Ky. 1988); Witherspoon v. Illinois, 391 U.S. 510 (1968). The "standard is whether the juror's views could 'prevent or substantially impair the performance of his duties as a juror in accord with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985). The "quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial jury' consists of." Id., 469 U.S. at 423. If a juror can follow the oath and instructions, her removal for cause violates the defendant's constitutional rights. Gray, supra.

In Gall v. Parker, 231 F.3d 265 (6th Cir. 2000)(*cert. denied* 533 U.S. 941 (2001)), the 6th Circuit held it was error for the trial court to have excluded a juror who was uncertain about the death penalty, expressed discomfort with it and was undecided about imposing it. The 6th Circuit found the juror was not "irrevocably opposed" to the death penalty simply because his decision would depend on the facts of the case. The juror's "uncertainty as to how the option of a death sentence would affect his decision should not have led to exclusion." Id. at 331. In Adams v. Texas, 448 U.S. 38 (1980), the Supreme Court reversed a conviction because prospective jurors were excluded "whose only fault

was to take their responsibilities with special seriousness as to acknowledge honestly that they might or might not be affected." Id. at 50-51.

Like the juror in Gall, Smith, Watts and Denham had reservations about the death penalty. But each stated that s/he would could consider it as a punishment depending on the facts heard during the trial. The death penalty is not supposed to be considered or imposed lightly. It must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Roper v. Simmons, 543 U.S. 551, 568 (2005)(internal cites omitted). The views of these three prospective jurors were entirely consistent with the constitutional limits for imposing the death penalty. Therefore, their views would not "frustrate the State's legitimate interest in administering [its] constitutional capital sentencing scheme[] by not following [her] oath[]." Wainwright v. Witt, supra at 423.

A trial court's decision on whether a juror possesses a "mental attitude of appropriate indifference" must be based on the totality of circumstances, not on a juror's response to a single question. Montgomery v. Com., 819 S.W.2d 713, 718 (Ky. 1991). When Smith's, Watts' and Denham's responses are viewed in their totality, it is clear they could honestly and conscientiously consider the death penalty and impose it if the circumstances warranted. They were not substantially impaired in deciding the facts and following the instructions and the law. Adams, at 45.

This error is not subject to harmless error review. Gray, at 668; Gall, supra. Reversal is required. § 1, 2, 3, 11, 26 KY Const.; 6th, 8th, 14th Amends., US Const.

16. Failure To Videotape Prospective Jurors During Individual Voir Dire.

Partially preserved. VR 6, 8/25/06, 9:30:00-9:33:44.

Prior to individual voir dire, the trial judge *sua sponte* advised the jury panel:

> Now, we are a court of record and everything that we do is videotaped and on audiotape. You will not be on videotape. I will have the camera locked so that when you're talking, giving answers to the questions, you will not be on the camera and you will not be on the videotape. Rest assured of that. VR 2, 8/21/06, 2:17:38-2:18:02.

The judge was correct that a circuit court is a court of record. In counties where court proceedings are videotaped, the videotapes are the official record. CR 98. As this Court stated in Deemer v. Finger, 817 S.W.2d 435, 437 (Ky. 1991), "We have adopted videotape technology as a means to further the ends of justice."

The ends of justice are thwarted, not furthered, when a court selectively videotapes proceedings, particularly in a death penalty case. There is a right, in a court of record, to record proceedings fully and fairly. A complete recording of the proceedings is an integral part of our judicial system, for both the trial and appellate courts.

The unfair prejudice of selectively videotaping individual voir dire became obvious when the trial judge was able use this practice to insulate from appellate review erroneous excusals for cause of clearly qualified prospective jurors by claiming the excusals were based on his observations of the jurors. VR 5, 8/24/06, 9:19:46-9:38:38, 11:28:15-11:48:03. See Arg 15. The defense objected to excusals based on demeanor of jurors who were not videotaped and requested jurors be videotaped for purposes of appellate review. VR 6, 8/25/06, 9:30:00-9:33:44. The court overruled the objection and motion, stating he gave his word to jurors that they would not be videotaped and it was not required anyway. Id.

The court's promise to the jurors was an empty one at best. Individual prospective jurors were shown on camera and identified by name repeatedly during the statutory qualification and group voir dire. VR 2, 8/21/06, 9:25:26-12:27:10; VR 8, 8/29/06, 1:54:53, 2:10:21, 2:15:40, 2:18:28, 2:23:05, 2:27:17, 2:28:55, 2:34:31, 2:46:25, 3:17:01. If anything, disclosures there were more personal or potentially embarrassing than anything said during individual voir dire. Whatever juror interest the court was trying to protect had to give way to Bill Meece's due process rights to make a record and to meaningful appellate review. 5th, 14th Amends., US Const.; § 1, 2, 11,15 KY Const.

The trial court's practice of not videotaping jurors during individual voir dire but ruling on excusals for cause based on its shielded observations of those jurors requires reversal for a retrial accompanied by customary due process features such as making a complete record that permits a meaningful appellate review.

17. Denial Of Defense Challenges For Cause.

Preserved by defense challenges for VR 4, 8/23/06, 9:19:42-9:32:42, 9:57:04-10:12:20; VR 8, 8/29/06, 10:01:04-10:14:57, 10:16:18-10:30:23.

Larry Watt. VR 4, 8/23/06, 9:19:42-9:32:42. Watt initially said he could consider the full range of penalties. Id. When questioned further, he stated if a defendant was convicted of multiple murders, he would give the death penalty. Id. He then backed off and said he would consider everything before deciding sentence. Id. Defense counsel's motion to excuse Watt for cause was overruled by the trial court. Id. Watt was removed from the jury by a defense peremptory. TR 10 1453.

Don Millis. VR 4, 8/23/06, 9:57:04-10:12:20. Like Watt, Millis initially said he could consider each of the penalty options. Id. Upon further questioning, he twice explained he would consider the death penalty first for multiple murders. Id. Millis said he would consider a defendant's background but it might not play a big part. Id. Echoing his original comments, Millis again agreed he could consider the entire range. Id. Defense counsel's motion to excuse Millis for cause was overruled by the trial court. Id. Millis was removed from the jury by a defense peremptory. TR 10 1453.

Shane Palmquist. VR 8, 8/29/06, 10:01:04-10:14:57. Palmquist said he could consider the full penalty range. Id. He explained he was an eye for an eye person and believed if someone was guilty; the penalty should fit the crime. Id. He stated death was the only appropriate sentence for a planned, intentional murder. Id. Palmquist witnessed and heard the incident that morning between defense counsel and Meece. Id. Palmquist repeated his initial claim he could consider the full penalty range. Id. Counsel's motion to excuse Palmquist for cause was overruled by the trial court. Id. Palmquist was removed from the jury by a defense peremptory. TR 10 1453.

Christy Higdon. VR 8, 8/29/06, 10:16:18-10:30:23. Higdon witnessed and heard the incident that morning between counsel and Meece. Id. She stated Meece was upset with one of his attorneys and while she did not hear what Meece said, she did hear what counsel said to him. Id. The incident left her with a bad, negative impression of Meece. Id. Higdon said it probably would not affect her deliberations but it could. Id. Counsel's motion to excuse Higdon for cause was overruled by the court. Id. The prosecutor argued Meece was not entitled to an excusal over a problem he created. Id. The court agreed. Id. Higdon was removed from the jury by a defense peremptory. TR 10 1453.

The court abused its discretion when it overruled counsel's challenges for cause on these 4 jurors. Meece exhausted all 14 of his peremptories, being forced to use 4 of those challenges on these four jurors. TR 10 1453. "A defendant has been denied the number of peremptory challenges allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause." Thomas v. Com., 864 S.W.2d 252, 259 (Ky. 1993); Shane v. Com., ___ S.W.3d___, 2007 WL 4460982 (Ky. 2008).

A defendant is guaranteed the right to a fair and impartial jury. 6th, 14th Amends., US Const.; §§ 2, 7, 11, KY Const.; RCr 9.36(1). To ensure this right, the defendant may challenge a juror for cause "[w]hen there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence." RCr 9.36(1).

Watt, Millis and Palmquist were substantially impaired as fair and impartial jurors because they could not give serious, meaningful and fair consideration to the full range of punishment. Jurors who express a predisposition to impose death in a multiple murder case cannot properly consider the full range of penalties and must be excused for cause. Springer v. Com., 998 S.W.2d 439, 456 (Ky. 1999); Shields v. Com., 812 S.W.2d 152, 153 (Ky. 1991); Grooms v. Com., 756 S.W.2d 131, 137 (Ky. 1988). It is interesting to contrast the trial court's firm refusal to excuse for cause jurors who leaned toward the death penalty with its quick excusal for cause of those who leaned away from the death penalty. Morris v. Com., 766 S.W.2d 58, 60 (Ky. 1989). See Arg. 18.

Millis was also substantially impaired due to his inability to truly give meaningful consideration to mitigation such as a defendant's background. In Grooms, supra at 134-138, this Court made it clear jurors who cannot consider mitigation cannot fully and

properly consider the entire penalty range. A sentencer's inability to fully consider mitigation or to give it full effect renders any resultant death sentence unconstitutional. Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987).

Palmquist and Higdon were substantially impaired and should have been excused for cause due to their exposure to the confrontation between Bill Meece and defense counsel. Higdon, in particular, stated witnessing this left her with a negative impression of Meece that could influence her. This prejudgment about the defendant impinges on the presumption of innocence as well as having a potentially deadly impact in sentencing.

The prosecution cannot prove this error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). In Fugate v. Com., 993 S.W.2d 931, 939 (Ky. 1999), this Court stated "[t]hat the right to a completely impartial jury is protected by Section Eleven of the Kentucky Constitution as well as the Sixth and Fourteenth Amendments to the U.S. Constitution." This Court further stated:

> Under all circumstances, we must conclude that the complex issue of whether to strike a juror for cause is a troubling one. Certainly, the question of the sound discretion of the trial judge must be given great deference. The exercise of the sound discretion of the trial judge must be accomplished consistent with the right of the defendant to a fair and impartial jury. Composition of the jury is always vital to the defendant in a criminal prosecution and doubt about unfairness is to be resolved in his favor. (Internal cites omitted). Id.

In this death penalty case, the court refused to sustain challenges for cause to these four prospective jurors on grounds so substantial that the failure to disqualify the jurors for cause must be viewed as an abuse of discretion. Meece exhausted all his peremptory challenges and therefore, the process deprived him of peremptory challenges. Under such circumstances, prejudice is presumed and Meece is entitled to a reversal because he was forced to use peremptory challenges against prospective jurors who should have been

excused for cause. Thomas, supra at 259 - 60. Reversal and a new trial are required. 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.; RCr 9.36(1).

18. The Refusal To Delete A Reference To Meece's Status As A State Prisoner From A Defense Exhibit.

This issue is preserved, as will be set out directly below.

During his direct examination of Bill Meece, defense counsel wished to introduce a pair of letters from Meece to Meg Appleton's attorney. Each of the letters, Def. Ex. 8-1 & 8-2, includes Meece's prison ID number and the prison name and address at the top center of the letter. Prior to introducing the letters defense counsel sought a ruling from the judge that the information showing that Meece was in prison when the letters were written could be covered up before the jury saw the letters. VR 15, 9/14/06, 2:41:50; 2:42:39. The prosecutor did not object to the introduction of the letters and made no statement concerning the covering of portions of the letters showing they were written while Meece was in prison. The judge deferred ruling on defense counsel's motion until after Meece's testimony and cross-examination by the prosecution. Id., 2:42:45.

After Meece's case was closed, counsel again asked about covering the information in the letters that showed Meece was in prison. VR 16, 9/15/06, 11:17:00. At that time the judge overruled the motion. Id., 11:18:17.

"[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485 (1978). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and

elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. U.S., 156 U.S. 432, 453 (1895). Absent an essential state interest specific to the trial which requires the disclosure of the defendant's prisoner status, the state may not inform the jury that the defendant is incarcerated. C.f., Holbrook v. Flynn, 475 U.S. 560, 569 (1986). In certain instances, information that the defendant is incarcerated while awaiting trial may be unavoidable. Where, for instance, another prisoner claims the defendant made incriminating statements to him. But there was no such state interest in the present case. The references to Meece's prisoner status in the letters could easily have been, and should have been, deleted. The failure to do so violated Meece's right to a fair trial and the presumption of innocence. This is especially true since the judge deferred his ruling until it was too late for defense counsel to make an informed decision about whether to introduce the letters if the consequence was disclosing that Meece was in prison. Reversal is required. §§ 2, 11, and 14, KY Const.; 6th, 8th, and 14th Amends., US Const.

19. Right To Jury Determination Of Aggravating Element Of Offenses Denied.

Unpreserved.

Meece was indicted, *inter alia*, for first degree robbery and burglary. TR 1 1-10. Both first degree robbery and burglary are aggravated forms of the offenses. Commentaries to KRS 515.020 and 511.020. The jury's finding of one of the possible statutory aggravators is critical as this element that differentiates first degree from second degree, which carries a lesser penalty and cannot be used as an aggravator to murder.

A robbery offense can be aggravated by a jury finding that the offender was "armed with a deadly weapon." KRS 515.020. In this case the jury was instructed that it must find beyond a reasonable doubt:

> A. That in Adair County, Kentucky, on or about February 26, 1993, he stole a Sentry Model 1170 fire safe from Joseph Wellnitz, Elizabeth Wellnitz, and/or Dennis Wellnitz;
>
> AND
>
> B. That in the course of so doing and with the intent to accomplish the theft, he used physical force upon Joseph Wellnitz, Elizabeth Wellnitz, and/or Dennis Wellnitz **with a firearm**;
>
> AND
>
> C. That when he did so, **he was armed with a firearm**. TR 10 1459 (emphasis added)

A burglary offense can be aggravated by a jury finding that the offender "is armed with...a deadly weapon" or he "causes physical injury" to a non-participant. KRS 511.020. In this case, the jury was instructed it must find beyond a reasonable doubt:

> A. That is Adair County, Kentucky, on or about the 26th day of February, 1993,...he entered or remained in the dwelling of Joseph Wellnits, Elizabeth Wellnitz, and/or Dennis Wellnitz without [] permission...
>
> AND
>
> B. That in so doing, he knew he did not have such permission;
>
> AND
>
> C. That he did so with the intention of committing a crime therein;
>
> AND
>
> D. That when in effecting entry or while in the dwelling or in immediate flight therefrom, he caused physical injury to Joseph Wellnitz, Elizabeth Wellnitz, and/or Dennis Wellnitz, and/or **he used a deadly weapon** against Joseph Wellnitz, Elizabeth Wellnitz, and/or Dennis Wellnitz;
>
> AND
>
> E. That Joseph Wellnitz, Elizabeth Wellnitz, and Dennis Wellnitz were not participants in the crime. TR 10 1458 (emphasis added)

Critically, the court's instruction on first degree robbery did not require the use of a deadly weapon; much less require a jury determination of whether a firearm was used and whether it was a deadly weapon. The court's burglary instruction did not require the jury to determine whether a firearm was used and whether it was a deadly weapon.

Rather, the court determined as a matter of law that it was a deadly weapon and did not submit that question to the jury.

Thacker v. Com., 194 S.W.3d 287, 290-291 (Ky. 2006), held the question of whether a weapon constituted a deadly weapon under KRS 500.080(4) was not a question for the trial court but, rather, must be submitted to the jury. This Court concluded being armed with a deadly weapon was an essential element of first degree robbery and that, in accordance with U.S. Supreme Court case law[6], the jury must ultimately determine all the essential elements of the offense. See also Wright v. Com., 239 S.W.3d 63, 67 (Ky. 2007). Both Thacker, at 291, which was out before this case was tried, and Wright, at 67-68, proffered proper instructions that would ensure the jury ultimately determines the essential elements of the offense and acts in accordance with the law.

The trial court's failure to submit a critical statutory element to the jury for its determination of whether the gun in question was a deadly weapon violated Meece's right to a jury determination of every element of the robbery and burglary offenses of which he was convicted. 5th, 6th, 14th Amends., US Const.; § 2, 11, KY Const.

This Court's opinions in Thacker, supra, and Wright, supra, overlook the distinction between trial error and structural error and, thus, mistakenly hold this error is subject to harmless error analysis. The U.S. Supreme Court explained this distinction in Arizona v. Fulminante, 499 U.S. 279 (1991). Trial errors are subject to harmless error analysis, while structural errors are not. Writing for the Court with respect to Section II

[6] In United States v. Gaudin, 515 U.S. 506, 510 - 515 (1995) and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Court held criminal convictions must rest on jury determinations the defendant is guilty of each and every element of the charged offense. In Gaudin, the Court rejected the idea a jury need only decide factual components of essential elements and held jurors are entitled to decide the entire essential element, including the application of law to fact. In Apprendi, the Court held, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to the jury and found to have been proved beyond a reasonable doubt.

of the opinion, Chief Justice Rehnquist defined a trial error as, "[E]rror which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 307-308. Chief Justice Rehnquist defined structural error as:

> ... structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in Chapman, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to public trial. Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Fulminante, 499 U.S. at 309-310 (citations omitted).

Under this definition, the failure of the jury to find an essential element is a structural error that defies harmless error analysis. Were it any other way, a judge could simply refuse to submit the case to a jury for its verdict any time s/he felt the defendant was guilty. The jury's verdict is a "basic protection" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence."

What this Court did by engaging in its harmless error analysis in Thacker and Wright, is fault the trial judge for substituting his opinion of what constitutes a dangerous instrument for the jury's opinion, and then turn right around and substitute its own opinion of what constitutes a dangerous instrument for that of the jury and the trial judge. This Court should overrule that portion of the Thacker and Wright opinions that permit any court (trial or appellate) to substitute its findings on essential elements for that of the

jury. The bottom line is, Meece is entitled to a **jury** verdict as to the essential elements of first degree robbery and first degree burglary. Reversal is required.

20. Improper Exclusion Of Mitigating Evidence.

Preserved. Avowal Defense EX 10 – 13; VR 17, 9/18/06, 2:49:58-2:52:16.

During the penalty phase, Bill Meece testified he had three children whom he last saw in December 2004. Id. at 2:46:00-2:49:58. Two photographs were introduced of Becky, Tori and Eli who, respectively, were 14, 13 and 10 years old at the time of trial. Id.; Defense EX 9. While the children's mother was less than cooperative in Bill's effort to maintain communication with his children, Bill was able to exchange loving letters with them while they were at summer camp. Id. The letters were typical of those exchanged by any parent of any child—the letters from the children expressed how they loved and missed their father and gave details about camping activities; Bill's letter to Tori expressed how he loved and missed her and showed his interest in her recent trip. Avowal Defense EX 10 – 13. The trial court, noting Bill had ample opportunity to bring these people in to testify, refused to allow the introduction of these letters that merely showed the love between Bill and his children. VR 17, 9/18/06, 2:49:58-2:52:16.

To impose a constitutionally valid sentence, a jury must be allowed to consider evidence such as this if it is to function as a "link between contemporary values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Gregg v. Georgia, 428 U.S. 153, 190 (1972). "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Id. at 203-204.

"A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262 (1976).

This Court has also held a defendant must be allowed great latitude in introducing evidence at the penalty phase. Smith v. Com., 599 S.W.2d 900, 911 (Ky. 1990). Even a declaration that evidence is "legally irrelevant" to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find it warrants a sentence less than death. McKoy v. North Carolina, 494 U.S. 433 (1990). The sentencer must be allowed to consider all "factors which may call for a less severe penalty [than death]." Lockett v. Ohio, 438 U.S. 586, 605 (1978). A juror "must have the opportunity to consider all available mitigating evidence." Wainwright v. Witt, 469 U.S. 412, 454 (1985).

Regardless of whether the proffered evidence comes within the hearsay rule, its exclusion constituted a violation of Meece's due process rights. Green v. Georgia, 442 U.S. 95, 107 (1979). The excluded evidence was highly relevant to critical mitigation and its reliability was unquestioned. "[T]he hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The court's position that "these people" should have been brought in to testify also failed to take into consideration the emotional and psychological hardship it would impose on Meece's young children to come in and, in effect, beg a jury for their father's life.

Bill Meece's rights were violated by the exclusion of this evidence. 8th, 14th Amends., US Const.; § 1, 2, 3, 11, 17, 26 KY Const. Reversal of his death sentences and a new penalty phase are required.

21. Penalty Phase Instructions Denied Reliable Capital Sentencing.

Preserved as to § A, B, C, D, F, J, K, L and M. VR 17, 9/18/06, 3:45:22-4:35:00.

"[The jury's] sentencing discretion...[must be] guided and channeled..." Proffit v. Florida, 428 U.S. 242, 258 (1976). Gregg v. Georgia, 428 U.S. 153, 193 (1976), mandates "careful instructions on the law and how to apply it." Bill Meece's penalty phase instructions (A 13-30) failed to comply with these constitutional imperatives. His rights to a fair trial, due process and reliable sentencing were violated. 6th, 8th, 14th Amend., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.

A. Refusal To Include LWOP. The court rejected Meece's request that LWOP be included in the authorized sentences the jury could impose. VR 17, 9/18/06, 1:10:41-1:11:27, 3:45:22-3:52:14; TR 10 1468-70; 11 1527-38; A 10-12. See Arg.6.

B. Non-Unanimous Mitigation. The court's instructions required the jury's verdict to be unanimous. TR 10 1473. Jurors were not instructed they could consider any mitigator they individually believed to be true even if all the other jurors did not find it to be true. Thus, a reasonable juror could have believed the whole jury had to unanimously agree upon a mitigator before it could be weighed against any aggravator in arriving at a sentence. Due to improper instructions, jurors might well have been precluded from considering relevant mitigation. This would have precluded jurors from giving mitigating evidence any effect whatsoever in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. Mills v. Maryland, 486 U.S. 367, 384 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990); Kordenbrock v. Scroggy, 919 F.2d 1091, 1110-11 (6th Cir. 1990); Gall v. Parker, 231 F3d 265, 322-329 (6th Cir. 2000). Studies of Kentucky capital jurors reveal that 75% of jurors who sat on a capital case believed mitigation had to be found

unanimously to be considered. Sandys, The Life or Death Decision of Capital Jurors: Preliminary Findings from Kentucky at 27. See A 32-61. Obviously, there is more than a substantial probability that Meece's jurors believed they must find mitigation unanimously to consider and give effect to it.

The constitutional standard for reviewing instructions is not what a court declares the instructions to mean but what a reasonable juror could have understood them to mean. Mills at 376. "In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." Id. Any doubt about the meaning of a death penalty instruction has to be resolved in favor of the accused. Id., 378. The requested instruction should have been given.

C. Written Mitigation Findings. Specification of the jury's findings regarding mitigation is essential to "meaningful appellate review." Proffitt, supra. Our statute requires such findings. "[T]he judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances...exist." KRS 532.025(1)(b). Smith v. Com., 599 S.W.2d 900, 912 (Ky. 1980) should be overruled. The requested instruction should have been given.

D. Refusal To Limit Consideration Of Aggravators. The instructions did not, as requested, specifically limit the jury's consideration of aggravating evidence to the facts enumerated in the instructions. The jury could have relied upon improper information or argument in reaching its verdict. The absence of "[S]uch a jury instruction contravenes the constitutional directive in Furman and its progeny that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and

selective imposition of the death penalty." Furman v. Georgia, 408 U.S. 238 (1972). See also Jordon v. Watkins, 681 F.2d 1067 (5th Cir. 1982).

E. Non-Statutory Aggravator Findings. Nowhere in the instructions was the jury required to make findings on non-statutory aggravators. The instructions did not require the jury to find the non-statutory aggravator of the brutality and cold-blooded nature of the murders, even though the prosecutor urged this factor specifically as a reason for the jury to impose the death penalty. This Court has held a death sentence can be based on non-statutory aggravation. See Jacobs v. Com., 870 S.W.2d 412, 419 (Ky. 1994). Because a non-statutory aggravating circumstance can support the imposition of an enhanced sentence, the jury has to be instructed it must formally find any such aggravator and find it beyond a reasonable doubt. Ring v Arizona, 536 U.S. 584 (2002).

F. Verdict Form. At the conclusion of the penalty phase, the court instructed the jury on authorized sentences. TR 10 1476, 1481, 1486. As can be seen from the verdict forms, only the LWOP/25 and death sentence verdict forms contain the language "We, the Jury, find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist in this case" with blank lines to write in the aggravator(s) found. TR10 1478-79, 1483-84, 1488-89. Thus, the finding of an aggravator resulted in signing either the LWOP/25 or the death sentence verdict form. Id. Such a verdict form is improper because it results in a directed verdict of death or LWOP 25 if an aggravator is found beyond a reasonable doubt. There was no way for the jury to complete and sign a verdict form finding an aggravating circumstance without fixing an aggravated penalty.

KRS 532.030(1) sets out the range of penalties available "when a person is convicted of a capital offense," and in addition to LWOP/25, LWOP and death, it

authorizes the lesser sentencing options of "a sentence of life, or to a term of not less than ...20 years." Sanborn v. Com., 754 S.W.2d 534, 545 (Ky. 1988), held finding an aggravator serves only to place the defendant in the class eligible for a sentence of death. The jury still has the discretion of deciding whether death is the appropriate sentence. The verdict forms removed that discretion from the jury deciding Meece's punishment. See Franks v. State, Okl. Cr., 636 P.2d 361, 366-67 (1981).

A jury can simply be provided with a separate verdict form upon which to write in any aggravators found beyond a reasonable doubt, along with separate verdict form setting out each setting out all of the sentences authorized. Thomas v. Com., 864 S.W.2d 252 (Ky. 1993). The requested verdict forms should have been used.

G. "For Profit." The court included in its instructions the KRS 532.025(2)(a)(4) aggravator "The Defendant committed the offense of Murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit." TR 10 1475, 1480, 1485. The court defined "for profit" as meaning "with a motive of 'a hope to obtain financial gain' or 'a hope to avoid financial loss.'" Id. This definition comes, not from the KRS, but from Cooper's Kentucky Instructions To Juries §12.06 where it is proffered in brackets as an alternative or additional instruction. In the Comment section, the author notes this definition came from an unnamed, unpublished case where this Court declined to address the sufficiency of this aggravator as applied to the facts. Id. Apparently, the propriety of the definition was neither raised nor addressed by this Court. Id. There simply is no basis for defining this aggravating factor beyond the statutory language which is plain and clearly understandable. The use of this unnecessary

and improper instruction only served to inject a level of vagueness and arbitrariness into the aggravator that rendered its use unconstitutional.

H. Non-Death Verdict Possible Even If Aggravators But No Mitigators Found. The court should have instructed the jury it could return a sentence of less than death even if it found aggravators and did not find the existence of any mitigators. Even when a jury finds an aggravating circumstance, a death sentence, or any enhanced sentence for that matter, is not required. Thompson v. Com., 147 S.W.3d 22, 48 (Ky. 2004); McKinney v. Com., 60 S.W.3d 499, 508 (Ky. 2001).

The 8th Amendment requires the provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg, supra at 190. The Eighth Amendment also imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The critical question is whether the message that the jury could impose a sentence other than death regardless of the jury's finding of aggravators, even if it found no mitigators, is one a reasonable juror could have drawn from the instructions given by the court. See Mills, supra at 375-376. Any claim that defense counsel was free to argue the message of such an instruction to the jury during closing argument is not an acceptable alternative since "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978).

Gall v. Com. 607 S.W.2d 97, 112 (Ky. 1980), recognized the propriety of instructing the jury "even though it might believe the aggravating circumstance

outweighed such mitigating circumstances it might find to exist, it still did not have to recommend the death penalty."

I. Reasonable Doubt. The court's reasonable doubt instruction stated, "If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment." TR10 1477, 1482, 1487. This instruction told the jury Meece could be sentenced to a lesser punishment only if there were a reasonable doubt death was the proper penalty. The instruction invaded the jury's province and created a substantial probability it believed it **should** impose death unless there was a reasonable doubt death was the appropriate punishment. The jury does not have to find beyond a reasonable doubt that death is either an appropriate or inappropriate penalty. Although a jury must find an aggravator beyond a reasonable doubt in order to consider whether death should be imposed, the question of punishment, even when aggravation is found, rests solely on twelve individual persons, none of whom are required to find that they have a reasonable doubt about death in order to reject it. The jury's death sentence may be the result of this coercive instruction.

J. Parole And Consequences Of Verdict. The jury should have been instructed if it sentenced Meece to death, he would be killed by lethal injection. Jurors should understand "death means death" and not simply that Meece would be removed from the community. Additionally, an instruction should have been given to accurately inform jurors about parole. The jury received limited parole eligibility information on only one of the sentences (and that was by virtue of its title) and was never told parole eligibility does not guarantee parole or that a defendant who is not paroled will remain in prison until his death. Such information is routinely provided jurors in even the most minor

felony cases. KRS 532.055(2)(a). Why is there "truth-in-sentencing" in all cases except for those where the defendant's life might be forfeited due to the jury's misconception about parole? See Shafer v. South Carolina, 532 U.S. 36, 39 (2001). The requested instruction should have been given.

K. Passion And Prejudice. KRS 532.075(3)(1) requires this Court to determine whether the death sentence was "imposed under the influence of...passion, prejudice or any other arbitrary factors. See California v. Brown, 479 U.S. 538 (1987). The requested instruction should have been given.

L. "Any Doubt." The Supreme Court has held the death penalty can be constitutionally imposed only if the procedures used assure a reliable determination that "death is the appropriate punishment in a specific case." Lockett, supra at 601. The jury should have been instructed that if any juror had "any doubt" as to the appropriate punishment, Meece should not be sentenced to death. See Palmore and Cooper, Kentucky Instructions to Juries, §§11.09. But Cf. Cooper, Kentucky Instructions to Juries, §12:04, and 12:08. The requested instruction should have been given.

M. Failure to Explain Mitigation, Standard of Proof or that Mercy is Proper Consideration. The court's instructions do not define "mitigating circumstances" or make clear what role such evidence plays in a determination by the jury to decline to impose the death penalty. See Smith, supra at 538-539. The Constitution requires that "there is no reasonable possibility that the jury misunderstands its role in the capital sentencing procedure or misunderstands the meaning and function of mitigating circumstances." Peek v. Kemp, 784 F.2d 1479, 1493-1494 (11th Cir. 1986). In the case at bar, the jury was never even told that "mitigating" circumstances mean "that the law

recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment." Id. at 1494.

The jury must be allowed to base its decision to reject death on sympathy or mercy for the defendant. "The jury is permitted to consider mitigating evidence relating to the defendant's character and background precisely because that evidence may arouse 'sympathy' or 'compassion' for the defendant." People v. Lanphear, 680 P.2d 1081, 1083 (Cal. 1984). "This constitutionally mandated freedom to respond to sympathy aroused by mitigating evidence..." was not permitted by the court's instructions. Id. at 1084.

Further, the instructions did not specify the standard of proof regarding mitigation. The court should have instructed the jurors to find a mitigating circumstance if supported by either an "any evidence" or a "preponderance of the evidence" standard. Standards of proof and their precise delineation to the fact finder are indispensable components of the law. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979). In the absence of such an instruction, there is more than a substantial probability that jurors erroneously believe the burden is on a defendant to prove a mitigating circumstance beyond a reasonable doubt. The requested instructions should have been given.

Conclusion. A new penalty phase is in order.

22. The Denial Of A Meaningful Opportunity To Explain Why Meece Would Have Entered A Guilty Plea.

This issue is preserved. Appellant introduced the fax from attorney David Kaplan as Defendant's avowal exhibit 7; A-9.

After the prosecution introduced evidence that Meece had entered a prior guilty plea to the charged offenses, it became critical for Meece to offer a rational explanation

for the plea. Meece had 2 reasons for the guilty plea. The first was he thought his prior attorney was unprepared and he was going to get the death penalty at his jury trial due to her ineffectiveness. VR 15, 9/14/06, 2:32:40. The second reason was a carrot the prosecutor dangled in front of him in the form of a contact visit with his 3 children. VR Id., 2:34:20.

When it came time to offer tangible evidence to support Meece's testimony the visitation with his children was part of the package used to induce him to plead guilty, the prosecutor objected. VR 15, 9/14/06, 2:34:55. The evidence was a copy of a FAX received by the prosecutor 30 minutes before Meece entered the guilty plea in the Adair Circuit Court. A copy was given to Meece's then-defense attorney and Meece was provided with a copy 3 days after the plea. Def. Ex 7. The FAX was from Regina Meade's divorce attorney. The letter states if Meece would plead guilty, his wife would agree to allow him a visit with his children so he could explain to them why he would be spending the rest of his life in prison. The prosecutor objected, claiming that the FAX was hearsay. VR 15, 9/14/06, 2:34:55. The judge agreed and refused to allow Meece to introduce the FAX as an exhibit. Id., 2:37.00.

KRE 801A(b) provides:

> A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is: ...
>
> (2) A statement of which the party has manifested an adoption or belief in its truth;
>
> (3) A statement by a person authorized by the party to make a statement concerning the subject;
>
> (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; ... .

When Attorney Kaplan provided the prosecutor with Def. Ex. 7, he was acting as an agent of the prosecution because he was assisting the prosecutor in working out a plea agreement with Meece. That brings the statement in the FAX under the scope of KRE801A(b)(3) and (4). The statement was faxed to the prosecutor and given by the prosecutor to Meece, which was a clear indication the prosecutor was authorizing Kaplan to make a statement on the subject of whether Meece would receive a visit with his children. The statement also comes within the parameters of KRE 801A(b)(2). The prosecutor obviously manifested a belief in the truth of the statement because he gave a copy to the defense as an assurance Meece would receive a visit from his children. Moreover, in Meece's 12/15/04 statement, previously played for the jury, the prosecutor indicated he agreed he would do everything he could to see the visit with Meece's children would come to pass, and he felt he had kept his end of the bargain. VR 11, 9/1/06, 4:37:10. The FAX was not so much a statement by Kaplan as it was a statement by the prosecutor that he had secured Kaplan's assistance in meeting one of the negotiated terms of the plea agreement. It was not excludable by the hearsay rule.

Even if the FAX from Kaplan had not come within a recognized exception to the hearsay rule, Meece should have been permitted to introduce the FAX. In Chambers v. Mississippi, 410 U.S. 284 (1973) the Court held that, when necessary, a state hearsay rule must give way to the defendant's weighty right to present his defense. The Court said:

> Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional

> rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id., at 302. A defendant has a substantial right to present evidence in his defense that cannot be lightly discarded. "Whether rooted in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted). *See also*, United States v. Scheffer, 523 U.S. 303, 308 (1998); Michigan v. Lucas, 500 U.S. 145, 149 (1991); Taylor v. Illinois, 484 U.S. 400, 408 (1988); Rock v. Arkansas, 483 U.S. 44, 55 (1987).

The exclusion of this evidence was very prejudicial. Meece had to convince the jury he had a legitimate explanation for entering the guilty plea. The visitation agreement was clearly, and understandably, a big part of his motivation in entering that plea. He told the jury the visit was a part of the plea agreement, but the prosecutor testified during the cross-examination of Meece that the jury visit was not a part of the plea agreement. Wright said, "Isn't it true Mr. Meece, that the only thing to do with your children was that I wasn't going to interfere with you having visitation through your divorce attorney? VR 15, 9/14/06, 4:10:50. When Meece pointed out the prosecutor was aware of the FAX because it was sent to him, the prosecutor inferred that was not the case, "That's your testimony." Id., 4.11.50. Then the prosecutor testified, "The only agreement was that you were to offer a truthful statement and agree to cooperate against Meg Wellnitz, isn't that correct?"[7] Id., 4:12:00. In testifying as he did, the prosecutor substantially undercut Meece's defense that he entered his guilty plea to obtain a visit with his children. The

FAX would have impeached the position the prosecutor's claims and would have shown the jury the visit with the children was in fact a substantial part of the agreement, and if it was not, then at least Meece had been led to believe that it was part of the agreement. The FAX was a substantial part of Meece's defense and he was prejudiced by its exclusion. The prosecution cannot show that its exclusion was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 22 (1967). Reversal is required. §§ 2, 11, 14, KY Const.; 1st, 6th, 8th, 14th Amends., US Const.

23. Interference With Meece's Right To Consult With Counsel

Preserved. VH 3, 6/1/06, 2:53:24-3:05:02; VR 8, 8/29/06, 5:15:49-5:29:09; VR 15, 9/14/06, 2:34:55-2:37:56.

Prior to trial, the court agreed Bill Meece could proceed *pro se* without waiving his right to counsel. VH 3, 6/1/06, 2:53:24-3:05:02; VR 8, 8/29/06, 5:15:49-5:29:09. While he played no role other than defendant in front of the jury, he was permitted to be "heard by himself and counsel" in arguing matters to the court both before and during trial. § 11 KY Const; VH 3, 6/1/06, 2:49:27-2:51:37; also see bench conferences throughout the trial. During Meece's testimony in the guilt/innocence phase, he was attempting to establish that an extended visit with his young children was part of the plea agreement he reached with the prosecutor. VR 15, 9/14/06, 2:34:55-2:37:56. A bench conference was held about whether he would be able to introduce or testify about a letter confirming this was part of his plea agreement with the prosecutor.. Id. Meece was on the stand and did not participate in the argument to the court. Id. After the court excluded

[7] *See*, Holt v. Com., 219 S.W.3d 731 (Ky. 2007), concerning the propriety of the prosecutor testifying to facts that are otherwise unsupported by the record.

the evidence in question, Meece requested "a moment with my attorneys." Id. Although it was apparent this request was made pursuant to his "right to be heard by himself and counsel", the court refused to allow Meece to speak with counsel. Id.

Perry v. Leeke, 488 U.S. 272, 280-281, 284-285 (1989) holds:

> [W]hen a defendant becomes a witness; he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice....Our conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses. As a matter of discretion in individual cases,...or indeed, as a matter of law in some States, it may well be appropriate to permit such consultation We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

In Meece's case, while he may have been seeking advice or direction from counsel, it is more likely, in his *pro se* role and pursuant to his KY constitutional right "to be heard by himself and counsel," Meece wanted to advise counsel on an issue of great importance to him. Meece was not merely the defendant in this case.

This is an area where the Kentucky constitution and law are more expansive than the federal constitution. This Court has held repeatedly that "a trial judge's directive that prohibits counsel from conferring with his or her own witness during the trial is an abuse of discretion." Reams v. Stutler, 642 S.W.2d 586, 589 (Ky. 1982); Smith v. Miller, 127 S.W.3d 644, 646 (Ky. 2004); St. Clair v. Com., 140 S.W.3d 510, 544 (Ky. 2004).

The trial court's refusal to permit Meece to speak to counsel during a break in his testimony substantially prejudiced him and violated his rights under § 11 KY Const. Reversal is required.

24. Prohibition Of Attorney Communication With Regina Meade.

Preserved. VR 10, 8/31/06, 4:34:28-4:39:22; VR 11, 9/1/06, 9:13:00-9:13:27.

At the end of the day on 8/31/06, after 45 minutes of direct examination of Regina Meade, the prosecution announced it would "pass the witness...but have more later." VR 10, 8/31/06, 4:34:28. The court recessed until the next morning but announced it wanted to make clear no one could talk to this witness about her testimony because it was not proper. Id. at 4:35:07-4:39:22. The following morning, defense counsel objected to its inability to interview Regina the night before, noting they had a right to do so and the court's order interfered with their preparation. VR 11, 9/1/06, 9:13:00-27.

This Court held it to be an abuse of discretion to"prohibit[] counsel from conferring with his own witness...when a recess was called." Reams v. Stutler, 642 S.W.2d 586, 589 (Ky. 2004). Also see Smith v. Miller, 127 S.W.3d 644, 646 (Ky. 2004). This Court also upheld a trial court's denial of a defense request for an order prohibiting the prosecution from communicating with a witness it called during any trial recesses in the course of his testimony. St. Clair v. Com., 140 S.W.3d 510, 544 (Ky. 2004). Since witnesses do not belong to either party, it clearly was an abuse of discretion for the trial court to prohibit defense counsel from interviewing Regina during the over-night recess. In United State v. Scharstein, 531 F.Supp 460, 463-64 (E.D.Ky. 1982), the court held:

> It has been held that to deprive a party...of the right to consult with counsel as the trial proceeds is to infringe its right to due process of law. This court believes that similar considerations apply to the right of a party to have his counsel free to discuss with prospective witnesses developments in the case, including the testimony of other witnesses.

Regina Meade was a critical witness. Counsel needed to interview her as part of their trial preparation. Their effective cross-examination of this critical witness was key

to proper representation of Bill Meece. Meade potentially was also a witness Meece could have called as part of his case. Either way, an interview with her would have enhanced counsel's representation and the presentation of Meece's defense. In contrast, the prosecutor, who had temporarily passed the witness the previous afternoon when she was not testifying as he hoped, was granted permission to have her review her two prior statements before continuing his examination of her. VR 11, 9/1/06, 9:13:27-9:18:00.

The trial court's prohibition of attorney communication with Regina Meade during an overnight recess substantially prejudiced Bill Meece and denied his rights to due process, effective assistance of counsel, a fair trial and a reliable sentencing hearing. 6th, 8th, 14th Amends.; US Const.; § 1, 2, 11, 17 KY Const. Reversal is required.

25. No Hearing On Juror Prejudice

Preserved. TR 11 1624-1626.

After final sentencing, WLEX TV ran an interview with one of the jurors from Meece's trial. TR 11 1624-1626. In the interview, the juror admitted to disregarding the court's admonishments and having formed, and possibly expressed, an opinion that Meece was guilty prior to hearing evidence in the case. Id. Meece filed a motion for a new trial based on this misconduct and asked the court to compel the presence of the juror and the taped interview for a hearing on the matter. Id. No hearing was ever held.

The 6th Amend., US Const., and § 7 and 11, KY Const., guarantee the criminally accused a trial by an impartial jury. The 5th and 14th Amends., US Const., and § 2, 3 and 11, KY Const., guarantee no person shall be deprived of life or liberty without due process of law. Further, a fair trial is a component of due process and an impartial jury is

a requirement of a fair trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961); Murphy v. Florida, 421 U.S. 795, 799 (1975).

Meece's convictions and death sentences cannot stand if he was denied his right to a fair trial by an impartial and unbiased jury. The court easily could, and should, have resolved this troubling allegation by viewing the news broadcast in question and asking the juror if his responses were accurately reflected in the interview. The court's failure to hold a hearing may well have allowed unconstitutional convictions and death sentences to stand. This denial of due process and trial by an impartial jury requires reversal.

26. The Exclusion Of Evidence Of An Alternate Perpetrator.

Preserved by avowal testimony of Diane Haynes. VR 14, 9/7/06, 10:44:55.

Haynes was a Wellnitz family friend. She was living in their house shortly before they were killed because she had just moved back from Florida. VR 14, 9/7/06, 10:33:30. Haynes had moved into her own home a night or two before the Wellnitz's were killed. Id., 10:34:00. She testified that the Wellnitz's did not routinely lock their front door. Id., 10:35:50.

The judge sustained an objection to a telephone conversation Haynes overheard at the Wellnitz residence in the days before their deaths based on relevancy and hearsay. VR 14, 9/7/06, 10:37:21. On avowal, Haynes testified in the days before their deaths she was in the Wellnitz family room with Joe and Beth and Joe took a phone call. Id., 10:44:55. Someone was upset with him about some animals. Joe spoke to Beth about it. Id. She could tell that something was not right with the call. Id., 10.45.48. Afterward, they said someone was going to do something to hurt the veterinary clinic. Id.

In McGregor v. Hines, Ky., 995 S.W.2d 384, 388 (1999), the Court said "It is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right." A trial court may only infringe upon this right when the defense theory is "unsupported," "speculat[ive]," and "far-fetched" and could thereby confuse or mislead the jury. Com. v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). This Court held a defendant has a right to present evidence of an alternate perpetrator in Beaty v. Com., 125 S.W.3d 196 (Ky. 2004), and Blair v. Com., 144 S.W.3d 801 (Ky. 2004).

The fact someone else may have had a motive to commit these crimes was critical to Bill Meece's defense. It was the missing link that made Appleton's denials; Meece's denials and the circumstantial evidence make sense. In his closing argument, the prosecutor chastised the defense for never presenting a theory of any other person who may have committed the crimes. VR 16, 9/15/06, 1:51:00. The prosecution cannot show the exclusion of this evidence caused no harm to Meece's defense to these charges. Reversal is required. §§ 2, 11, and 14, Ky. Const.; 6th, 8th, and 14th Amends., U.S. Const.

27. The Failure To Suppress Meece's Statement To Dell Jones.

Preserved. TR 7 917-922. Meece's motion to suppress was overruled. TR 10 1431-1433.

Dell Jones was a polygraphist with the Lexington Police Department. In 1993, Meece agreed to a polygraph and was taken to Jones under the pretext he was going to be asked about a Browning Hi-Power gun he had discussed with the police. Jones hooked Meece up to the polygraph machine and did a pre-polygraph interview. When the

questioning strayed to the subject of the Wellnitz murders, Meece attempted to end the interview. Jones recognized Meece had made a clear assertion of his right to end the interview. VR1, 8/11/06, 5:41:15. Nevertheless, the interview continued for at least an additional 13 minutes, perhaps longer. Id., 5:37:13, 5:38:09, 5:41:15.

In Miranda v. Arizona, 384 U.S. 436, 474 (1966), the Court held that "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." In Michigan v. Mosley, 423 U.S. 96, 104 (1975) the Court held that the individual's request to end questioning must be "scrupulously honored." Any statements Meece made after the assertion of his right to end questioning were inadmissible under Miranda and its progeny.

Astonishingly, the trial court held that all of Meece's statements to Dell Jones were admissible because they were "voluntary." TR 10 1432. The court apparently did not consider the obvious fact that statements made after the assertion of the right to end questioning were required to be suppressed pursuant to Miranda.

At Meece's trial, Jones testified that at some unspecified time during the period of time that Meece was in his presence, Meece told him that 16 rounds had been fired at the scene and the person who committed the crimes was probably unprofessional because so many shots had been fired. VR 11, 9/1/06, 1:33:24.

The prosecution had the burden of establishing the admissibility of Dell Jones' trial testimony. Tabor v. Commonwealth, 613 S.W.2d 133, 135 (Ky. 1981). In this instance, the prosecution needed to establish Jones' testimony was a statement from Meece made prior to the assertion of his right to end questioning, and not after that

assertion. The prosecution did not establish that and it therefore failed in its burden of proving the statement was admissible.

This statement was very prejudicial. Wheat testified he had not released any information about how many shots had been fired. VR 11, 9/1/06, 11:38:41. The impression the jury was given was this was information only the killer could have known. The prosecution cannot show this was a harmless error. Chapman v. California, 386 U.S. 18 (1967). §§ 2, 11, and 14, KY Const.; 5th, 6th, 8th, and 14th Amends., US Const.

28. The Failure To Suppress Meece's Involuntary 1993 Statement To Wheat.

This issue is not preserved.

Meece gave a statement to the police at Randy Appleton's apartment in March 1993. This statement was coerced and should not have been used at Meece's trial. First, three officers were involved in the interview, Hancock, Sapp, and Wheat. VR 11, 9/1/06, 1:48:02. Hancock and Sapp are both physically imposing. Second, there were no warnings given as required by Miranda v. Arizona, 384 U.S. 436, 473 (1966). Third, Meece was only 20 years old at the time. VR 15, 9/14/06, 1:37:10. Fourth, the situation was inherently coercive because the police had already interviewed a number of Meece's peers, who were at the same location, and there was substantial peer pressure along with the police pressure to give a statement. Five, one of those peers was the daughter of the Wellnitzs and she would have grave suspicions if Meece did not cooperate with the police. Six, Meece's will was overborne by the coerciveness of the situation.

The determination of whether a statement is voluntary depends on whether the statement is the product of a free and rational choice. Greenwald v. Wisconsin, 390 U.S.

519 (1968). "The ultimate test of voluntariness lies in an examination of the totality of the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973). This requires an examination of both the "characteristics of the accused and the details of the interrogation." Id. at 226. In this case, the circumstances point unmistakably to the fact that this statement by Meece was not voluntary.

The Supreme Court has rejected the idea the introduction of an involuntary confession is immaterial even when other evidence establishes guilt or corroborates the confession. Spano v. New York, 360 U.S. 315 (1959). Nevertheless, this statement was harmful. It introduced Meece's sale of the Browning Hi-Power to an unnamed person. It is likely the jury disbelieved Meece's claim he was trying to protect the person's identity because of a prior felony conviction while thwarting a police investigation of a triple homicide involving the family of a girl he was dating. This error was not harmless. Reversal is required. §§ 2, 11, and 14, KY Const.; 5th, 6th, 8th, 14th Amends., US Const.

29. The Trial Court Erred When It Denied Meece His Right To Play The Complete "Felice Tapes."

This issue is preserved by Meece's request to play the entire tapes after the Commonwealth was allowed to play select portions of them. TR 8 1073-74. Although the Commonwealth chose to never actually introduce the tapes, Felice was allowed to read select portions of those tapes during her testimony. VR 13, 9/6/06, 10:30:30-2:48:11.

KRE 106 states "[w]hen a writing or recorded statement or part thereof is introduced by a party; an adverse party may require the introduction at that time of any other part ... which ought in fairness to be considered contemporaneously with it." KRE 106 is a rule of admission not exclusion. Soto v. Com., 139 S.W.3d 827, 865-866 (Ky.

2004). In Meadors v. Com., 136 S.W.2d 1066, 1068 (Ky. 1940), the appellate court discussed the principle upon which KRE 106 is based. The court stated:

> ...[N]o principle is better settled or more familiar than that if one party puts in evidence a part of the admission or conversation of the other, the latter is entitled to produce or draw out by cross-examination testimony concerning all that was said upon the occasion. It is patent that were the rule otherwise, unfairness might result. The development of the whole conversation or statement may not only be necessary to render the part produced intelligible, but the force and effect of a portion may be greatly modified or affected by the context or the connection in which that context was uttered. And in the case of the examination of a witness, particularly under circumstances in which this defendant was questioned, he may have cleared up an apparent contradiction as proved by some isolated question and answer. It is a rule of equal general recognition in the practice of criminal law that where the prosecution introduces statements of the defendant tending to show that he is guilty, he has the right, on cross-examination to elicit from the witnesses relating those statements the whole of the relevant and material subject matter, even though the statements so drawn out are self-serving or favorable to him. [citations omitted]. Commenting on the rule as to admitting all the prisoner said on the subject at the time of making a confession, the court wrote in Berry v. Commonwealth, 73 Ky. 15, 10 Bush 15 (1873): 'This rule is the dictate of reason as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime, but it is not reasonable to assume that the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation.'

"The principle underlying the rule of completeness is fairness. The rule was designed to prevent parties from distorting the admitted portions by taking them out of context and, to that extent, misrepresenting the whole of a statement by only introducing part of it." Warren v. U.S., 515 A.2d 208, 210 (D.C. 1986). *See also* Lawson, The Kentucky Evidence Law Handbook, §1.20(3)(c), (4th ed. 2003), stating, "sounder authorities have opted for admission [rather than exclusion as hearsay] on the ground that a use of parts of the writing or recording 'opens the door' for a use of other parts needed for context or explanation."

The prosecutor's questioning of Felice "fell far short of a complete picture of the circumstances of the interrogation" and the context of Meece's statements. See Crane v. Commonwealth, 726 S.W.2d 302, 308-309 (Ky. 1987) (Leibson, J. dissenting). The Commonwealth cannot prove the exclusion of the remainder of the tapes to place the statements in context was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Reversal for a new trial is required. §§ 2, 11, and 14, Ky. Const.; 6th, 8th, and 14th Amends., U.S. Const.

30. The Introduction Of Statements Meece Made To K. D. Felice Violated His 5th and 6th Amendment Rights.

Preserved by motion in limine, which was denied. TR 3 341-343; TR 5 666-668.

Meece moved to suppress statements he made to an undercover police officer, K. D. Felice, arguing the statements were made after a prior assertion his right to counsel and of his right to remain silent during custodial questioning. TR 3 341-343.

In 1993, Meece was interviewed by 3 police officers who asked him to take a polygraph concerning a gun. VRH 2, 10/8/04, 10:30:08. He agreed, but attempted to terminate the polygraph because the questions had nothing to do with the gun. Id., 10:33:57. The polygraph room was in the basement of the Lexington Police Dept. Id., 10:31:01. Polygraphist, Dale Jones, refused to disconnect Meece from the machine until he had signed a Miranda waiver form. It was 10 minutes from the time Meece requested to end the interview to when the waiver of rights form was presented for signing. VR 1, 8/11/06, 5:41:15. The entire time Jones was trying to convince Meece to continue the polygraph. Meece was still hooked up to the polygraph machine, when, under duress, he signed the form. Id., 5.38.19.

After several more minutes, Meece was unhooked from the machine. VRH 2, 10:35:00. By that time Meece was very upset. Id., 10:58:31. He left the polygraph room and went toward the elevator, the only way out of the basement of the police department. Lt. Jeff Hancock jumped from an adjacent room where he had been eavesdropping on the polygraph exam to block Meece's path to the elevator. Id., 10:43:24, 10:48:42. The police continued to interrogate him. Id., 10:31:38.

At that point there were various versions of what Meece told the police officers, all of which were a clear invocation of his 5th Amendment rights, and some of which were a clear invocation of his 6th Amendment rights as well. Meece testified, "To the best of my recollection, I remember saying, and quote, 'I have nothing to say to you without the presence of a lawyer.'" VRH 2, 10/8/04 10:31:52. Meece believed the police heard him say that because they let him leave. Id., 10:32:02. Meece repeated, "I do recall remembering that on my way out the door, that they weren't going to let me leave, that they had me boxed into a very small hallway and intended to interrogate me. And I did feel threatened and intimidated. And I said, 'I've got nothing else to say to you in the presence (sic) of an attorney." Id., 10:37:30. He did not say anything after requesting an attorney to the best of his knowledge. Id., 10:37:58. Major Jeff Hancock testified, "I remember one particular statement that [Meece] made, that, that we need to let him know when we came back around him that, or when we were coming back, any, any deviation from that would be considered an act of hostility on his part." Id., 10:43:58. Hancock denied any recollection of Meece requesting an attorney. Id., 10:44:20. He was unable to recall any of the conversation that took place before the police allowed Meece to leave the basement of the police station. Id., 10:50:15. Roy Wheat testified that when the

polygraphist got to the questions the police wanted to ask, Meece got very angry and "made the statement that he was leaving and at that time he left the room." Id., 10:54:56. Meece told the officers, "[H]e did not want to talk to us anymore unless we called and cleared it, so to speak, and that if we just showed up unannounced that he would consider it an act of hostility." Id., 10:55:41. Wheat denied that Meece said he would not talk to police without the presence of an attorney. Id., 10:56:15.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that prior to any custodial questioning, the accused must be advised of his right to remain silent, right to an attorney, etc. The Court went on to say, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473, 474. There is "no ritualistic formula or talismanic phrase [that] is essential in order to invoke the privilege against self-incrimination." See Emspak v. United States, 349 U.S. 190, 194 (1955).

Following Miranda, in Michigan v. Mosely, 423 U.S. 96 (1975) the Court held once the right to remain silent is invoked, this right must be scrupulously honored and the police may resume questioning only if the police act under the circumstances to respect fully the assertion by the suspect of this right. The Court said,

> The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." [citation to Miranda omitted.] Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.

Mosley, at 103-104. That is exactly what Bill Meece did. According to Meece, he told the police he would not speak to them without the presence of an attorney. *See* Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). According to the police, Meece told them he

did not want to speak to the police unless they gave him advanced notice of their coming to speak with him. The 5th Amendment required the police to "scrupulously honor" Meece's right to control when and under what conditions future questioning could occur.

In 1994, Meece was working at TruGreen ChemLawn. Roy Wheat decided to place a female undercover officer on the job with Meece to see if she could get him to make damaging admissions. The officer, K. D. Felice, rode around with Meece for 3 weeks under the pretense he was training her to be a salesperson. VR 13, 9/6/06, 2:01:57. She fabricated a story about wanting to kill her abusive husband in order to lure Meece into talking about killing people, etc. Id., 2:35:54 She was wired with a transmitter, and about 60 hours of conversations were recorded by the police. Id., 9:10:05. During the course of Felice's operation, Meece said many bad things that were recorded by the police, although none of his statements directly incriminated him in the Wellnitz murders. Felice's undercover operation ended when Meece went to the Lexington police and told them that she was trying to hire someone to kill her husband. VR 15, 9/14/06, 2:21:08.

Meece moved to suppress the testimony of Felice because the police did not honor the conditions he placed upon speaking with them, his assertion of his right to have counsel present when he spoke with them and his declaration that they needed to contact him in advance before any questioning. Unquestionably, the police did not scrupulously honor his requests as required by Mosley, supra. Exclusion of any evidence obtained through this type of police misconduct is the required sanction. Dickerson v. U.S., 530 U.S. 428, 449 (2000) (Scalia, J. dissenting).

The error in refusing to suppress Felice's testimony was unquestionably prejudicial. Felice's testimony was full of references to guns, ammunition, VR 13, 9/6/06,

2:09:33, descriptions of how to kill someone and get away with it, Id., 2:12:12, statements by Meece that he was a good liar, Id., 2:07:50, and an incident when Meece pointed a gun at Felice and pulled the trigger but it did not fire. Id., 2:09:00. That is just a fraction of the prejudice; her testimony lasted for 50 minutes. There is no way the Commonwealth can show her testimony was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 22 (1967). Reversal is required. §§ 2, 11, 14, KY Const.; 5th, 6th, 8th, 14th Amends., US Const.

31. Prejudicial Violation Of KRS 615.

Preserved. TR 4 465-469, 533; VRH 2, 10/8/04, 1:33:30-1:39:00; VR 9, 8/30/06, 9:26:45-9:28:00, 10:10:05-10:11:16.

Prior to trial, the prosecutor asked the court to permit an exception to KRE 615 to allow two former investigators, Roy Wheat and Dennis Benningfield, to sit with him at counsel table throughout the trial. TR 3 450-453.[8] The defense objected to Wheat being allowed to remain at counsel table, noting he would be in addition to the assistant prosecutor, the Commonwealth detective and former lead investigator Benningfield. TR 4 465-469. The defense also raised Wheat's credibility issues due to his "experiments" with case evidence as a private citizen as well as his personal use of some evidence and custody of official case records after his retirement. Id. The defense argued the request for Wheat to sit at counsel table was merely an effort to bolster his shaky credibility. Id.

[8] There were at least 5 lead investigators over the 10 years between the crime and trial. The "officer in charge" at trial was Mark Wesley. VR 15, 11:55:41-11:56:30. He had responsibility for the case for the 2 ½ years prior to trial. Id. Before Wesley, Joe Woods and, prior to Woods, Ken Hill had been the lead investigator. Id. Wheat was the original investigator until he retired in 1997. VR 11, 0/1/06, 11:39:00-20. Benningfield took over for 2 years after Wheat and then returned for a year 3 years later. VR 15, 9/14/06,

At trial, the defense renewed its objection to permitting both officers stay in the courtroom. VR 9, 8/30/06, 9:26:45-9:28:00, 10:10:05-10:11:16.

Roy Wheat was the most frequent prosecution witness, testifying 7 times over 3 days. Id. at 10:28:18-10:46:00, 2:56:33-3:50:22; VR 10, 8/31/06, 10:31:47-10:34:40, 11:27:56-11:32:00, 1:39:15-1:54:00, 3:35:20-3:50:00; VR 11, 9/1/96, 11:34:30-1:20:44. Wheat was able to hear every witness testify and then acted as a cleanup/bolstering witness over and over an over again, with each trip to the witness stand from counsel table bolstering his own credibility.

KRE 615 mandates separation of witnesses, upon request or on the court's own motion. Mills v. Com., 95 S.W.3d 838, 841 (Ky. 2003). Excepted from exclusion under the rule are 1) a party who is a natural person, 2) an officer or employee of a party which is not a natural person designated as its representative, or 3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. KRE 615. Traditionally, KY courts have interpreted KRE 615(2)—and its predecessor RCr 9.48—to permit the lead investigator to remain with the prosecutor. Johnson v. Com., 180 S.W.3d 494 (Ky. App. 2005); Dillingham v. Com., 995 S.W.2d 377, 381 (Ky. 1999). The trial court allowed Wheat to remain in the courtroom at counsel table along with Benningfield because KRE 615 "doesn't limit the number" who can be excluded from mandatory separation. VRH 2, 10/8/04, 11:14:48-11:26:53. Such an interpretation of the exception allows the exception to swallow the rule which is not what was envisioned when this Court rescinded RCr 9.48 and made the stricter KRE 615 the controlling rule on separation of witnesses. The court's interpretation also ignores the clear language and

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11:18:50-11:24:30. It is unclear who was in charge between Wheat and Benningfield or between Benningfield's 2 stints.

meaning of KRE 615(2): "**An officer or employee** of a party which is not a natural person designated as its representative" does not mean a cast of thousands or even two. The use of the singular clearly means one person. There were so many lead investigators at various times in this case; no one could even recall them all. Under the trial court's overly broad interpretation, all of them could have remained at counsel table.

Wheat's presence at counsel table in violation of KRE 615 bolstered his own credibility and provided him the opportunity, with each successive trip to the witness stand, to tailor his answers to make many witnesses appear more credible. This error undermined the fundamental fairness of Meece's entire trial and violated his right to due process. 6th, 14th Amends., US Const.; § 2, 11 KY Const. Reversal is required.

32. Improper Limits Placed On Individual Voir Dire.

Preserved. VR 2, 8/21/06, 4:38:06-4:52:13; VR 3, 8/22/06, 9:38:22-9:40:08.

The very first prospective juror individually voir dired was Jo Ann Thacker. VR 2, 8/21/06, 4:3`:34-4:53:05. The defense was not allowed to ask her what her feelings were about the death penalty or what purpose she thought the death penalty served. Id. at 4:38:50-4:42:20. The court sustained the prosecutor's objections to these questions and said jurors could only be asked if they could consider the full sentence range. Id. The trial court also refused to allow Tabor to be questioned about deterrence and the death penalty. Id. at 4:42:20-4:52:13. The defense was allowed to question Tabor about the specific mitigator of mercy over the prosecutor's objection, but after further consideration of the issue, the court announced jurors could not be questioned about specific mitigation. Id.; VR 3, 8/22/08, 9:38:22-9:40:08.

In order to secure a fair and impartial jury, a defendant's right to question prospective jurors as to the biases and prejudices cannot be abridged. The right to an impartial jury is basic to our system of justice. Duncan v. Louisiana, 391 U.S. 145 (1968). The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." Ham v. South Carolina, 409 U.S. 524 (1973) (Marshall, J., concurring).

Morgan v. Illinois, 504 U.S. 719, 729-730 (1992) stated: "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." "Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

A fair jury cannot be formed in a vacuum. "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. It follows, then, that a requested question should be asked if an anticipated response would afford the basis of a challenge for cause." United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973). Clearly, counsel's questions here about juror's feelings about the death penalty and their perceptions about its purpose could have prompted answers that would have provided for the bases for

challenges for cause as they would have fleshed out the opinions of the jurors more completely and fully and allowed also for the more intelligent use of peremptory strikes.

"The purpose of voir dire is to determine whether a juror possesses necessary qualifications, whether he has prejudged the case, and whether his mind is free from prejudice or bias so as to enable a party to ascertain whether a cause for challenge exists, and to ascertain whether it is expedient to exercise the right of peremptory challenge." Sizemore v. Com., 306 S.W.2d 832, 834 (Ky. 1957). This implies an inquiry sufficient to ascertain whether a challenge for cause exists with regard to members of the jury venire.

Indeed, this Court said in Shields v. Com., 812 S.W.2d 152, 153 (Ky.1991), "A meaningful voir dire examination by both sides is a sine qua non to the seating of a fair and impartial jury." "A wide latitude is allowed counsel in examining jurors on their voir dire." Webb v. Com., 314 S.W.2d 543, 545 (Ky. 1958). United States v. Johnson, 584 F.2d 148, 155 (6th Cir. 1978), held it is reversible error if, by unduly restricting voir dire, the peremptory challenge right is substantially impaired. Furthermore, an error in refusing to allow a proper question that could have formed the basis for a challenge for cause is not subject to harmless error analysis. Blount, supra, 479 F.2d at 651. See also, United States v. Hill, 738 F.2d 152 (6th Cir. 1984).

Further, Meece had a statutory right to voir dire jurors individually regarding mitigation. KRS 532.025 (2) provides "in all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances... otherwise authorized by law and any of the following statutory...mitigating circumstances which may be supported by the evidence." As a matter of due process under both the state and federal constitution, a

juror must be able to follow the law. KRS 532.025 is clear and unambiguous. Mitigation by definition is a reason to give a lesser punishment. By statute, a juror must be able to consider the statutory and non-statutory mitigation offered by the defendant, and consider it a reason to give a lesser punishment. Therefore, a defendant is entitled to question prospective jurors concerning their consideration of mitigation evidence.

It has long been recognized "in capital cases the fundamental respect for humanity underlying the Eighth amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." Woodson v. North Carolina, 428 U.S. 280 (1980)(emphasis added). In the instant case, the trial court prohibited counsel from questioning jurors about whether they could consider mitigation such as mercy.

Eddings v. Oklahoma, 455 U.S. 104 (1982), held in addition to not being precluded from considering as mitigation any aspect of the defendant's character, the sentencer also may not refuse to consider any relevant mitigation. The only way to determine a juror's view on specific mitigation is to ask them. Counsel wanted to inquire of jurors whether or not they would consider all mitigation as having the same value. Under Eddings, if any of these jurors said they would not, they would have been excluded for cause based on their inability to consider the mitigating offered by the defendant. It was clear error to prevent counsel from asking jurors about their opinions on mitigation.

The limitations placed upon defense counsel during the individual voir dire denied Meece his constitutional right to a fair and impartial jury and his right to an adequate voir

dire so he could exercise his peremptory challenges and make challenges for cause in a meaningful and intelligent way. KY Const., §§ 2, 3, 7, 11, 17; US Const. 5th, 6th, 8th, 14th Amends. Reversal is required.

33. Failure To Excuse Unqualified Jurors.

Unpreserved. In addition to the unqualified prospective jurors the defense unsuccessfully challenged for cause and removed by peremptory strikes, see Arg. 17, there were 4 unqualified jurors who convicted Bill Meece and sentenced him to death.

Charles Cohron. VR 3, 8/22/06, 10:10:15–10:27:39. After giving the routine answer that he could consider the full sentence range, Cohran stated if he found Meece guilty of murder, he would pick one of the top two sentences. Id. When asked again if he could consider all 4 sentencing options, Cohron said yes to the 3 highest but could only consider 20 to 50 depending on the case. Id. He finally said he could consider the minimum if there was something really influential in why the murder occurred. Id.

Melissa Johnson. VR 3, 8/22/06, 2:05:37–2:20:05. Johnson had been exposed to considerable publicity about the case. Her then jumbled recollection about the publicity was a sister or daughter of the victims had pled guilty, recanted and recently changed her plea. Id. Of course, the only changed guilty plea was that of Bill Meece.

Brad Harrell. VR 3, 8/22/06, 3:15:48–3:23:42. Harrell was unable to unqualifiedly say he could consider mitigation. He could only say it was possible he might consider mitigation. Id.

Jamie Miller. VR 3, 8/23/06, 10:13:28–10:22:58. Like Harrell, Miller was unable to state an unqualified willingness to consider mitigation. She could only say she probably would be willing to consider it. Id.

Once a state provides for trial by jury, the Due Process Clause of the 14th Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). The failure to afford a defendant a panel of impartial jurors "violates even the minimal standards of due process." Id. Section 11 of the KY Constitution and RCr 9.36(1) also guarantee a defendant a "trial by an impartial jury." RCr 9.36(1) provides, "When there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror **shall** be excused as not qualified." RCr 9.36 is not discretionary. In using the word "shall," it requires an excusal for cause any time there is a reasonable ground to believe a juror is not qualified. Moreover, the trial court should resolve all doubts as to the competency of a juror in favor of the defendant. Calvert v. Com., 708 S.W.2d 121, 123 (Ky. App. 1986).

Cohron, Johnson, Harrell and Miller all sat on the jury that convicted Bill Meece and sentenced him to death. TR 10 1453, 1513. All four were substantially impaired as fair and impartial jurors. Cohron could not give serious, meaningful and fair consideration to the entire sentence range. His predisposition to impose death or LWOP/25 required his excusal for cause. Springer v. Com., 998 S.W.2d 439, 456 (Ky. 1999); Shields v. Com., 812 S.W.2d 152, 153 (Ky. 1991); Grooms v. Com., 756 S.W.2d 131, 137 (Ky. 1988). Johnson was substantially impaired due to her knowledge about the withdrawn guilty plea. Her confusion about who entered and then withdrew a guilty plea

would have quickly dissipated at trial. Harrell and Miller were impaired due to their inability to fully consider mitigation. Grooms, supra, Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987).

It was the court's duty to remove these jurors when their answers during voir dire established their disqualification. See Frazier v. United States, 335 U.S. 497, (1948)("'[I]n each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality.' Accordingly, **the presiding trial judge** has the authority and **responsibility**, either **sua sponte** or upon counsel's motion, to dismiss prospective jurors for cause." United States v. Torres, 128 F.3d 38, 43 (2nd Cir. 1997)(emphasis added). Furthermore, although the right to an impartial jury can be waived, the waiver must be voluntary, knowing, and intelligent. Jackson v. Com., 113 S.W.3d 128, 131 (Ky. 2003) ("[I]n order to effectuate a valid waiver, the defendant must knowingly, voluntarily, and intelligently waive the right to an impartial jury, [] the Commonwealth must consent, and [] the trial court must approve.") Meece did not waive this right knowingly, voluntarily, and intelligently.

This is a structural error in the trial mechanism, and is not subject to harmless error review. Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001); Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992). Accordingly, Meece's convictions must be reversed for a new trial. § 2, 11, 17, KY Const.; 6th, 8th, 14th Amends., US Const.

34. Introduction Of Prejudicial, Cumulative Photographs.

Unpreserved.

With the very first two witnesses, six diagrams of the crime scene were introduced and used during testimony with details about location of the bodies and other pieces of evidence. VR 9, 8/30/06, 10:35:18-10:44:00, 10:48:55-10:58:40; CW EX 1-6. Cause of death was not in dispute and was established by the coroner. VR 9, 8/30/06, 1:41:58-1:46:04. Two videotapes were made of the crime scene, one by the coroner and one by KSP. Id. at 1:46:20-1:47:50. CW EX 14 & 15. The tape made by KSP, with repeated shots of the three victims, was played for the jury during the testimony of the coroner. Id. at 1:50:12-2:09:20; CW EX 15. The KSP detective who prepared that video testified shortly thereafter and introduced, described, and showed on a large projection screen multiple photographs of each victim. Id. at 2:56:33, 3:09:17-3:10:55, 3:24:40-3:28:28; 3:31:00-3:35:49, 3:37:40-3:38:30; CW 16-10, 16-11, 16-12, 16-13, 17-7, 17-10, 17-12, 17-15, 17-16, 18-1, 18-8, 18-9. In addition to the six KSP scene diagrams, testimony of the coroner, the KSP crime scene videotape and the 12 photographs of the victims at the crime scene, medical examiner Barbara Weakley-Jones testified extensively about the wounds to each body and introduced 8 enlarged wound charts as well as 19 autopsy photos of Joe, Beth and Dennis Wellnitz. VR 10, 8/31/06, 9:38:38-10:17:20; CW EX 21-1to3, 23-1 to 2, 25-1 to 3, 20-1, 20-2, 20-3, 20-4, 22-1, 22-2, 22-3, 22-4, 24-1, 24-2, 24-3, 24-4, 24-5, 24-6, 24-7, 24-8, 24-9. 24-10, 24-11. Finally, in his penalty phase closing argument, the prosecutor stood an arm's length from the jurors and once again shared with them crime scene and autopsy photos of the Wellnitz family while he urged a sentence of death. VR 17, 9/18/06, 5:13:12-5:14:55.

None of these gruesome and repetitive photographs and videotapes were necessary to prove a point in controversy. There was no dispute about any of the

particular injuries or how the victims died. The only question was whether Bill Meece was responsible for their deaths. With the very first two witnesses, diagrams of the crime scene were introduced and used during testimony with details about location of the bodies and other pieces of evidence. VR 9, 8/30/06, 10:35:18-10:44:00, 10:48:55-10:58:40; CW EX 1-6. Photographs and videotapes of the Wellnitz family's bodies at the crime scene were unnecessary, and even after those were shown to the jury, more photographs from the medical examiner's office were introduced.

This Court has found it reversible error to introduce gruesome photographs which are likely to arouse the passions of the jury and have little or no probative value. Ice v. Com., 667 S.W.2d 671, 676 (Ky.1984). In Holland v. Com., 703 S.W.2d 876, 879 (Ky.1986), this Court reversed due to the introduction of gruesome color photographs of the deceased that went "beyond demonstrating proof of a contested relevant fact." In that case, as in this one, all necessary facts were established by the testimony of witnesses without the need for photography or videotape. Id.; Clark v. Com., 833 S.W.2d 793, 794-95 (Ky.1992); and Funk v. Com., 842 S.W.2d 476, 479 (Ky.1993).

Certainly the repetitive nature of the photographs and videotapes was objectionable. In Morris v. Com., 766 S.W.2d 58, 61 (Ky.1989) this Court held that the prosecution should not be allowed to "overwhelm the jury with repetitive photographs." There can be little doubt this occurred at Bill Meece's trial.

The introduction of these photographs and videotapes was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24-25 (1967). They were shown during testimony of multiple witnesses and during the penalty phase closing argument. Meece was denied due process and a reliable determination of his sentences pursuant to

the 5th 6th 8th 14th Amends., US Const.; § 2, 7, 11, 17, KY Const., by the admission of the irrelevant, repetitive, gruesome and inherently inflammatory photographs and videotapes. This Court must reverse.

35. Improper Use Of Unauthorized Aggravators To Enhance Death Sentence.

Preserved. TR 4 549-554; TR 5 616; VRA 1, 11/1/04, 11:14:25-11:15:02.

In a Kentucky murder case, an aggravator increases the potential statutory maximum punishment from life imprisonment, under KRS 532.030(1), to a range which also includes three additional and more severe punishments: LWOP/25, LWOP, and death. KRS 532.025(3). The aggravators enacted by the Kentucky General Assembly are listed in KRS 532.025(2)(a). An aggravator is the basis for increasing the prosecutor's entitlement to a particular kind, degree, or range of punishment.

The prosecution filed a Notice of Statutory Aggravating Circumstances a month following the return of the indictment. TR 15-16. This notice indicated the prosecution's intent to rely on four aggravators found in KRS 532.025(2)(a): the offense of murder was committed while the offender was engaged in the commission of robbery in the first degree; the offense of murder was committed while the offender was engaged in the commission of burglary in the first degree; the offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value or for other profit; and the offender's act or acts of killing were intentional and resulted in multiple deaths. Id. However, the Grand Jury did not return an indictment that charged the murders were aggravated by these penalty enhancers. TR 1–10.

Both the indictment and notice failed to satisfy 14th Amend. due process or 6th Amend. notice guarantees. Jones v. United States, 526 U.S. 227, 243, n.6 (2000), held that under the due process clause and notice and jury trial guarantees of the 6th Amend. "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment...." See also Apprendi v. New Jersey, 530 U.S. 466 (2000). These principles apply to aggravators in death penalty cases. Ring v. Arizona, 536 U.S. 584, 602 (2002).

The formality, timing and specificity of notice mandated by the US Constitution were not met in Meece's case. Additionally, the indictment failed to give the court jurisdiction to try Meece for aggravated murder and subject him to enhanced penalties.

While the 14th Amend. has not yet been construed to include the 5th Amend. requirement of indictment by a grand jury, see Apprendi at 477, n. 3, the Ky. Const. §12 requirement of an indictment is co-extensive with the 5th Amend. right. Once a state extends the grand jury right, it must comply with the commands of the 14th Amendment equal protection clause. Rose v. Mitchell, 469 U.S. 545, 557 (1979); Evitts v. Lucey, 469 U.S. 387 (1985). Thus, §12, KY Const., and the 5th and 14th Amends. all require that facts that increase the maximum penalty for a crime must be charged in the indictment.

Even though the requirement of grand jury indictment has not been applied to the states by the Supreme Court, Illinois has applied Apprendi and held prosecutions for enhanced sentences require grand jury indictment on enhancement facts. People v. Lucas, 746 N.E.2d 1211 (2001), appeal denied by People v. Lucas, 755 N.E.2d 481 (2001). New Jersey has applied Ring to require, under that state's constitution, that aggravators must be submitted to and found by the grand jury, as reflected by the indictment, in order

to render the defendant eligible for the death penalty. State v. Fortin, 843 A.2d 974 (N.J. 2004). See also State v. Apao, 586 P.2d 250, 257-258 (Hawaii 1978).

An indictment that does not charge the aggravator in addition to the underlying murder, implicitly does not "unmistakenly" charge all the necessary elements of aggravated murder. See Thomas v. Com., 931 S.W.2d 446 (Ky. 1996); Jackson v. Com., 20 S.W.3d 906 (Ky. 2000)(PFO enhancement charge under KRS 532.080 must be alleged by indictment). Malone v. Com., 30 S.W.3d 180, 183 (Ky. 2000), held:

> Jurisdiction is a court's power to decide a case. As a prerequisite for presiding over a case, a court must have jurisdiction of the subject matter of an offense....A criminal prosecution requires the existence of an accusation charging the commission of an offense. Such an accusation either in the form of an indictment or an information, is an essential requisite of jurisdiction. In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in cases where the individual consents.

Accordingly, unless the indictment is waived by the defendant, the circuit court's jurisdiction is defined and limited to the offenses validly charged in the indictment. See State v. Trusty, 919 S.W.2d 305, 309-310 (Tn. 1996). This is a matter of fundamental constitutional law, not just Kentucky constitutional law. See, e.g., Ex Parte Bain, 121 U.S. 1, 12-13 (1960) ("an indictment found by a grand jury [is] indispensable to the power of the court to try petitioner for the crime with which he was charged"); Stirone v U.S., 361 U.S. 212, 217 (1960)("court cannot permit a defendant to be tried on charges that are not made in the indictment against him"). Federal constitutional law also requires that the indictment be valid to convey jurisdiction for sentencing. See, e.g., U.S. v. Cotton, 261 F.3d 397, 404-405 (4th Cir. 2001).

The defect in the indictment here is the failure to state essential elements of the offense and to reflect that a grand jury considered and found aggravating factors to

support penalty enhancement. This was required by Jones, Apprendi, and the state and federal constitutions. This defect rendered the trial court without jurisdiction to sentence Meece to any aggravated sentence and requires that his death sentences be vacated. Cotton, supra; U.S. v. Thomas, 274 F.3d 655 (2nd Cir. 2001); U.S. v. Buckland, 259 F.3d 1157 (9th Cir. 2001); U.S. v. Sanchez, 269 F.3d. 1250 (11th Cir. 2001).

Clearly, a KRS 532.025(2)(a) aggravator does not confer a mere recidivist status.[9] Because Kentucky is a non-weighing death penalty state,[10] aggravators listed in KRS 532.025(2)(a) are requisite factual elements that must be found by a jury beyond a reasonable doubt before murder, with a sentence range of 20 years to life, can be elevated to aggravated murder with a sentence range of 20 years to life, LWOP/25, LWOP or death. Because the finding of an aggravator operates in Kentucky to significantly increase the penalty range, the aggravator must be charged in the indictment if the prosecution wishes to use that factor to enhance murder to aggravated murder and thereby increase the potential penalty range.

Bill Meece has been denied his rights under the 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 12, 17, 26, KY Const. This Court must remand for resentencing to a non-aggravated sentence.

36. Bill Meece's Death Sentences Are Arbitrary And Disproportionate.

This issue is unpreserved but its review is mandated under KRS 532.075.

Meece's death sentences are unconstitutional considering the particular circumstances of his case and Meece himself, as well as comparing his case with similar

[9] Although, Kentucky requires that even recidivism be charged by indictment. KRS 532.080; Price v. Com., 666 S.W. 2d 749, 750 (Ky. 1984); Jackson v. Com., supra.

cases. Smith v. Com., 599 S.W.2d 900, 912 (Ky. 1980), stated "each and every mitigating circumstance, by reason that it is mitigating, is pitted against aggravating circumstances." It is implicit in our sentencing scheme death will not result unless aggravation outweighs mitigation. In Meece's case, the aggravation does **not** outweigh the mitigation.

There is compelling mitigation in this case. Bill Meece's birth parents were a bipolar, paranoid, schizo-affective mother and a violent, suicidal ex-marine father who drank. VR 17, 9/18/06, 1:29:23-1:38:38, 1:41:21-2:01:47, 2:38:27-3:06:00. Bill's mother Jennette left his father John before Bill was born. Id. Bill never met, much less knew, his father. Id. When Bill was ten months old, Jennette left him with her mother Clara. Id. The two additional voices Jennette acquired when Bill was born were jealous of him and urged her to kill him. Id. She fled because she feared she might follow their directives. Id. Bill knew Clara to be his mother and knew Jennette as his sister. Id. He briefly met Jennette when he was five and she returned home to sign papers for his adoption. Id. Bill was raised by Clara who became very ill when he was eight. Id. At 8 or 9, Bill was already demonstrating a great imagination, making up stories and lies about himself. Id. Jennette returned home and cared for her mother, who suffered greatly, until she died when Bill was twelve. Id. Bill was very close to Clara and upset about her death to the point of losing a great deal of weight. Id. Jennette and Bill stayed in Florida two more years until she announced people were out to get her and they had to go. Id. They moved to Lexington, KY where Jennette assumed the identity of her sister and became Bill's Aunt Flo for the next 15 years. Id. Aunt Flo shared her paranoia with Bill, hiding her own identity, keeping him out of school initially and warning him not to talk to people. Id. He had few friends at school and dropped out shortly. Id. His mother

[10] Sanders v. Com., 801 S.W.2d 665, 683 (Ky. 1990).

enrolled him as a non-degree student at UK when he was sixteen and he later attended Lexington Community College. Id. When he was 16 or 17, Regina Meade moved in with Bill and his mother. Id. They married several years later and had three children, two daughters and a son. Id. In 1994, Jennette/Flo moved to Alaska for a while and then went to New Mexico when her voices urged her to move to Albuquerque and indiscriminately shoot as many men as possible. Id. Fearing she might follow the voices, Jennette/Flo robbed a bank in the hope she'd be sent to prison. Id. At age 50, her mental illness was finally diagnosed and treated. Id. From things Bill said to her when he was young, Jennette/Flo believed he also had voices and was mentally ill. Id. Like his mother, Bill was industrious, willing to work and always had one or more jobs. Id. The Eastern KY Correctional Complex librarian testified about Bill's excellent work ethic and dependability in his job as law clerk. Id. at 2:21:45-2:30:00. Bill has had a loving, caring, affectionate and protective relationship with his three children. Id. at 2:16:22-45.

Additionally, other cases with similar or worse offenses and aggravating factors have not resulted in a death sentence: Reyes v. Com., 764 S.W.2d 62, 62-63 (Ky. 1989)("one of the most heinous and infamous in Christian County history;" murder, attempted murder, first degree robbery and two counts of first degree sodomy; while in custody awaiting trial, Reyes escaped – life sentence); Com. v. Phon, 17 S.W.2d 106 (Ky. 2000) (2 execution-style murders, first degree assault, first degree robbery, first degree burglary - life without parole). Meece's death sentences cannot stand because many others who "deserve" capital punishment as much, or more than he have escaped it. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

The intra-case disproportionality is also concerning. Meg Wellnitz Appleton, who initiated and orchestrated the plan to kill her entire family, was given a sentence of LWOP/25. VR 12, 9/5/06, 11:38:40–11:39:32. Regina Meade, who participated in the planning, lied to the police, received stolen property and tampered with physical evidence, was never even charged. TR 1 97; VRH 1, 3/24/04, 1:23:50–1:28:48. The prosecutor, involved law enforcement officers and Joe Wellnitz's brother agreed LWOP/25 plus 40 years was an appropriate sentence for Meece's involvement in the killings. TR 5 653-654. To uphold the conclusion that death is the appropriate punishment for Meece based on this set of facts violates principles of fundamental fairness and justice.

For the state to pass over more "deserving" defendants, and strike randomly at Bill Meece, indicates our legal system functions more akin to the whims of a monarchy than to the logically deliberate actions of a just society. In Bush v. Gore, 531 U.S. 98 (2000), the Court found a state's election ballot-counting scheme violated equal protection guarantees where the standard for what constituted a valid vote varied from county to county within the state, and where some counties had no set standard which they applied to all of its own ballots. The same court which decided Bush v. Gore has mandated a state must use a rational standard in deciding who lives and who dies at the hands of the state. Kentucky has no rational standards for making such decisions and for avoiding the "arbitrary and disparate treatment" condemned by Bush v. Gore.

Just as a state may not value one person's vote over that of another, Bush v. Gore, supra at 104-105, so must a state have a means of making sure it does not value one

person's life over that of another "by . . . arbitrary and disparate treatment," Id. This is a matter of both state and federal constitutional equal protection.

Bill Meece's death sentences are arbitrary and disproportionate considering his mitigation, the circumstances of his case, and other cases in which death was not imposed for similar or worse crimes with less compelling mitigation. His death sentences must be reversed. § 1, 2, 3, 7, 11, 17, 26, KY Const.; 8th, 14th Amends., US Const.

37. Reciprocal Use Of Aggravating Factors.

This issue is not preserved, but is reviewable under Sherley v. Com., 558 S.W.2d 615 (Ky. 1977); Gunter v. Com., 576 S.W.2d 518 (Ky. 1978).

The jury and court imposed 3 death sentences on Meece for the murders of Joe, Beth and Dennis Wellnitz. TR 11 1631–1638. Those death sentences were based an artificial inflation of aggravating factors by the jury's duplicative use of several aggravators.

The jury found the aggravator of the "Defendant's act or acts of killing were intentional and resulted in multiple deaths." TR 10 1479, 1484, 1489. In imposing a death sentence for Joe Wellnitz, the jury had to find that his killing was intentional and resulted in the deaths of Beth and Dennis Wellnitz. In imposing a death sentence for Beth, the jury had to find her killing was intentional and resulted in the deaths of Joe and Dennis. In imposing a death sentence for Dennis Wellnitz, the jury had to find that his killing was intentional and resulted in the deaths of Joe and Beth.

In this Commonwealth, the fact that an offense of murder was intentional and resulted in multiple deaths is a statutory aggravator which may support the imposition of

the death penalty. KRS 532.025(2)(a)(6). However, the doctrine of mutually supporting aggravating factors precludes the imposition of multiple death sentences based on the reciprocal use of the aggravator of "multiple murder." Burden v. State, 297 S.E.2d 242 (Ga. 1982); Putnam v. State, 308 S.E.2d 145, 153 (Ga. 1983).

Similarly, the jury's findings and use of the aggravators of "murder...was committed while the offender was engaged in the commission of...robbery in the first degree" and murder "committed...for the purpose of receiving money or any other thing of monetary value, or for other profit" resulted in further double-counting of aggravating factors. TR 10 1479, 1484, 1489. Meece's alleged pecuniary motive constitutes only one aggravating factor. Provence v. State, 337 So.2d 783 (Fla. 1976).

In cases such as Meece's where overlapping aggravators are found by the jury, there is an artificial inflation of aggravating factors which creates a significant risk the jury may give undue weight to the mere number of aggravators found. This unduly increases the risk of the jury arbitrarily and unconstitutionally imposing the death penalty. See United States v. McCullah, 76 F.3d 1087, 1111-1112 (10th Cir. 1996); Jones v. United States, 527 U.S. 373, 398 (1999) [assuming the use of duplicative aggravating factors to be constitutional error]. When the same aggravating factor is counted twice, "the defendant is essentially condemned 'twice for the same culpable act', which is inherently unfair." McCullah, supra. This Court should construe the aggravating factors in KRS 532.025(2)(a) in a way that minimizes those cases in which multiple aggravators will apply to the same conduct; thereby reducing the risk duplicative use of aggravators will unduly prejudice a capital defendant. If the aggravators listed in KRS 532.025(2)(a)

are to "genuinely narrow the class of persons eligible for the death penalty," this rule of construction must be applied. Zant v. Stephens, 462 U.S. 862, 877 (1983).

Meece was substantially prejudiced by this constitutional violation. While KRS 532.025 does not require an "express 'weighing' of aggravating verses mitigating circumstances," Sanders v. Com., 801 S.W.2d 665, 683 (Ky. 1990), a Kentucky capital case, found aggravating circumstances and mitigating circumstances are weighed, and "weighed against each other" by the jury. Ex parte Farley, 570 S.W.2d 617, 627 (Ky. 1978). By artificially increasing the number of aggravators, the trial court skewed the sentencing process the imposition of the most severe punishment by placing a "thumb [on] death's side of the scale." Stringer v. Black, 503 U.S. 222, 232 (1992).

Such multiple use of aggravating factors violates Meece's right to reliable, rational sentencing, right to be free from cruel and unusual punishment, and the prohibition against double jeopardy. 5th, 8th, 14th Amends., US Const.; § 1, 2, 3, 11, 13, 17, 26, KY Const.; KRS 505.020. This Court should vacate his death sentences and remand his case for a new capital sentencing hearing.

38. Reuse Of Burglary and Robbery Convictions As Aggravators.

Unpreserved. Meece was convicted of first-degree burglary and first-degree robbery. TR 10 1466, 1457. These convictions were then used to aggravate the murder convictions in the penalty phase. TR 10 1472–1512. In Bowling v. Com., 942 S.W.2d 293, 308 (Ky.1997), this Court held "[s]imply because the aggravating circumstance duplicates one of the underlying offenses does not mean that the defendant is being punished twice for the same offense." This holding should be reconsidered.

Both the KY and US Constitutions provide no one should, for the same offense, be exposed twice to "jeopardy of his life or limb." §13, KY Const.; 5th, 14th Amends., US Const.; Benton v. Maryland, 395 U.S. 784 (1969). Using these convictions as aggravators to increase the punishment for murder from imprisonment to the death penalty constitutes a second prosecution for the same offense after conviction. See Ashe v. Swenson, 397 U.S. 436 (1970); Brown v. Ohio, 432 U.S. 161, 166, n. 6 (1977).

The reuse of the convictions for burglary and robbery in the penalty phase artificially inflates the particular circumstances of the crime and strays from the requirement that the state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). See Arg. 37. The Constitution requires the capital sentencing procedure be one that "guides and focuses the jury's objective consideration of the individual offense and the individual offender before it can impose a sentence of death." Jurek v. Texas, 428 U.S. 262, 274 (1976). That requirement is not met when the prosecution is allowed to cumulate the negative circumstances of the offense through violation of the provisions against multiple prosecutions. Bill Meece's death sentences must be reversed.

39. The Death Penalty Is Unconstitutional.

KRS 532.075 mandates this Court review imposed death sentences to determine whether they are arbitrary, disproportionate or invalid.

A. Failure To Narrow The Class Of Persons Eligible For The Death Penalty. The 8th Amendment requires a state's scheme properly establish a threshold below which the death penalty cannot be imposed. That procedural structure must include rational

criteria to narrow the decision-maker's judgment as to whether a particular defendant meets the threshold. If the criteria are applicable to every murderer, then the statutory scheme and criteria are unconstitutional. Tuilaepa v. California, 512 U.S. 967 (1994); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Zant v. Stephens, 462 U.S. 862 (1983); Walton v. Arizona, 497 U.S. 639 (1990); Jacobs v. Com., 870 S.W.2d 412 (Ky. 1994). This Court's interpretation of KRS 532.025 in Jacobs,[11] renders the Kentucky death penalty scheme unconstitutional.

KRS 532.010(1) provides that capital offenses are specific types of felonies and have a specific sentencing statute, KRS 532.030(1). Jacobs, at 420. KRS 532.030(1) provides that any person convicted of a capital offense may have his punishment fixed at death, LWOP/25, LWOP, life, or imprisonment for not less than 20 years. Murder is defined as a "**capital offense**," not a **Class A felony**; therefore, the death penalty or LWOP or LWOP/25 are applicable sentences. KRS 507.020.

Previously, KRS 532.020 did not mean that **all** murders, which by statute are capital offenses, were death eligible. Statutory aggravators were presumed to have to exist and be found beyond a reasonable doubt before the death penalty, LWOP or LWOP/25 could be imposed. The final sentence of KRS 532.025(3) reads as follows:

> In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty, or imprisonment for life without benefit of probation or parole, or the sentence of life without benefit of probation or parole until the defendant has served a minimum of 25 years of his sentence, shall not be imposed.

Jacobs, however, following Harris v. Com., 793 S.W.2d 802 (Ky. 1990), changed the landscape. In Harris, the appellant argued he could not be sentenced to LWOP/25

[11] This Court's opinion in Jacobs was written before the General Assembly amended KRS 532.030 to include life without parole and KRS 532.025 to include a "domestic violence" aggravator. Even with these amendments, the same logic applies.

because the jury had not found one of the "aggravating circumstances enumerated in KRS 532.025(2)(a)." This Court found Harris had "overlook[ed] the introductory language of that subsection," which authorized judge and jury to "consider 'any aggravating circumstance otherwise authorized by law.'" Harris, at 805.

In Jacobs, this Court held the last sentence of KRS 532.025(3) to have been "inartfully drafted" and having made this observation, negated it completely, stating: "[t]herefore, the jury's consideration of aggravating circumstances was not limited to one exactingly and specifically enumerated in this statute." Jacobs, at 420. This Court could only have meant that both judge and jury were authorized to consider non-statutory aggravating circumstances as well. Non-statutory aggravators are not "enumerated" in the statute and are "otherwise authorized by law." This Court pointed out that a specific sentencing statute; KRS 532.030(1) governs capital offenses. That statute provides:

> [w]hen a person is convicted of a capital offense, punishment may be fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence. . . . KRS 532.030(1); Jacobs, at 420.

In the absence of the final sentence of KRS 532.025(3), combined with the continued applicability of KRS 532.030, the question "Are all murder defendants 'death eligible' post-Jacobs?" must be answered in the affirmative. The only circumstance making a person death-eligible in Kentucky is his conviction for murder. This is contrary to Tuilaepa, supra. See also Arave v. Creech, 507 U.S. 463, 474 (1993).

The final sentence of KRS 532.025(3) formerly would have limited the criteria for death eligibility to those aggravating circumstances set out in KRS 532.025(2). However, with the elimination of that subsection in Jacobs and the continued applicability of KRS

532.030, **every** defendant charged with a capital offense is "death eligible" even if **only** non-statutory aggravation—a factor not "enumerated in KRS 532.025(2)—is present in the case. This runs afoul of the 8th and 14th Amendments and the prohibition against mandatory death sentences. See Woodson v. North Carolina, 428 U.S. 280 (1976).

Also see Arg. 37 on Reciprocal Use Of Aggravating Factors.

B. There Is Insufficient Statutory Guidance For Imposition Of The Death Penalty.

A constitutionally mandated aspect of any procedure allowing for intentional taking of a life by the state is the sentencer must be given meaningful guidance. The sentencer must consider the character and record of the individual offender and the circumstances of the particular offense. Only through legislative guidance can there be an avoidance of "a substantial risk that [the death penalty] would be imposed in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153 (1976).

Because "death is a different kind of punishment from any other which may be imposed in the country," Gardner v. Florida, 430 U.S. 349, 357 (1977), mandates statutory schemes set up to allow the state to take life must provide for "a greater degree of reliability" in assessing death as punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). To ensure this "greater degree of reliability," the Supreme Court has gone to great pains to insist that the states which desire to impose the death penalty implement "procedures that safeguard against the arbitrary and capricious imposition of death sentences." Roberts v. Louisiana, 428 U.S. 325, 334 (1976). The statutory scheme pursuant to which Meece was sentenced to death provides no standards to guide the sentencer "in its inevitable exercise of power to determine which murders [*sic*] shall live and which shall die." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

There are numerous problems with Kentucky's statute. It does not require the indictment to charge a capital crime by charging the aggravators. (See Arg. 35). It permits conviction and execution of the factually and legally innocent. It does not provide directions to the court and/or jury on how it should hear and resolve "additional evidence in extenuation, mitigation and aggravation of punishment." There are no directions providing which evidentiary standard shall be used in determining when mitigating factors exist. There is no guidance on how to weigh the mitigators against aggravators. For that matter, there is no requirement that mitigators and aggravators even be weighed against each other. There is absolutely no requirement that the judge or jury be required to make a finding regarding the existence of any mitigating factors.

Additionally, the statute allows the prosecution to introduce, during the guilt or penalty phase, non-statutory factors which aggravate the sentence. The statute may limit consideration of the defendant's character and background to those mitigating circumstances specifically enumerated. The following mitigating circumstances are unconstitutionally vague: KRS 532.025(2)(b)(1) (What is a "significant history of prior criminal activity"?). KRS 532.025(b)(8) (Who is "young" and who is not young?)

Aggravators are vague as well, either on their face, KRS 532.025(2)(a)(1), or as applied. KRS 532.025(2)(a)(2), 532.025(2)(a)(3), 532.025(2)(a)(7).

That such crucial and outcome-determinative questions remain unanswered under KRS 532.025 establishes the lack of proper guidance to determine [who] shall die. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). As such, any penalty of death imposed under such an infirm scheme cannot be carried out under the 5th, 6th, 8th, 14th Amends., US Const.;§2, 7, 11, 17, KY Const.

C. The Death Penalty As Applied In Kentucky Is Discriminatory. Furman v. Georgia, 408 U.S. 238, 310 (1972) held the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." The weakness exposed in Furman was the death penalty was "wantonly" and "freakishly" imposed. The arbitrariness and discrimination which the Court found in Furman continues to exist in Kentucky, notwithstanding more than 30 years of supposed "guided discretion."

The Supreme Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), does not foreclose this claim that the death penalty in Kentucky is arbitrarily applied, in view of Kentucky's required statutory review. Furman's holding that the death penalty may not be wantonly or freakishly applied remains valid.

Nothing is more offensive to constitutional principles than for a citizen to be selected for death because of his race or that of the victim. Yet, race is a predictor of the outcome in death penalty cases. Studies proving this has been the Kentucky experience, were scrutinized by the U.S. General Accounting Office (GAO), as to their methodology and then were approved for inclusion in a 1990 Report to the Senate and House Committees on the Judiciary as to whether race of either the victim or the defendant influences the likelihood defendants will be sentenced to death. The research on Kentucky's experience found that, between December 22, 1976, and December 31, 1991:

> Blacks accused of killing Whites had a higher than average probability of being charged with a capital crime (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders. This finding remains after taking into account the effects of differences in the heinousness of the murder, prior criminal record, the offender, and the probability that the accused will not stand trial for a capital offense. Kentucky's "guided discretion" system of capital sentencing has failed to eliminate race as a factor in this process.

Keil, Thomas and Gennaro F. Vito, "Race and the Death Penalty in Kentucky Murder Trials: 1976-1991", American Journal of Criminal Justice, Vol. 20, No.1, (1995); "Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing Research Indicates Pattern of Racial Disparities", US GAO, February 1990. Of the 37 persons currently on death row, 19% are African-American or Hispanic while those groups comprise only 9.5% of the state's population.

Race is not a permissible basis on which to decide who lives and who dies. A death penalty scheme is unconstitutional if it allows race to be so used, because race is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," Furman, supra, at 313; Turner v. Murray, 476 U.S. 28, 35-36 (1986). See also §§ 1, 2, 3, 17, KY Constitution; KRS 532.300. Because our capital punishment scheme is unable to eliminate this racial bias, and because even the Supreme Court has virtually conceded that fairness and rationality cannot be achieved in the administration of the death penalty, our capital punishment scheme is unconstitutional. McClesky v. Kemp, 481 US. at 279, 313, note 37.

In addition to race, there is a strong prejudice shown in regard to the gender of the defendant. As of June 30, 2007 there were 49 women on death row (NAACP Legal Defense Fund). This constitutes 1.4% of the total death row population of about 3,444 persons and less than 0.1% of the approximately 50,000 women in prisons in the United States. Since 1976, 11 women have been executed in the U.S.[12]

This Court has a duty to review whether the death penalty was imposed arbitrarily. KRS 532.075(3)(a). The race of the victim and the gender of the accused and

[12] Source: Death Penalty Information Center, http:\\deathpenaltyinformationcenter.org.

victim are impermissibly arbitrary bases for determining who should receive the ultimate penalty. 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.

D. Prosecutorial Discretion Makes Arbitrariness Inherent. This Court can take judicial notice that most capital indictments are resolved by a plea. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the cases in which it is not...." Furman, supra.

Prosecutors have unlimited discretion whether to seek death in a given case. There are no statewide guidelines and no procedures for pretrial judicial review of the prosecutorial decision in contrast to the practice in other states. See State v. Watson, 312 S.E.2d 448, 451-52 (NC 1984); State v. McCrary, 478 A.2d 339 (NJ 1984); Ghent v. Superior Court, 153 Cal.Rptr. 720, 727-28 (CalApp 1979). When the vast majority of capital indictments are plea bargained, that decision represents the most important decision in the sentencing process. Nowhere in Kentucky's legal system is there more absolute and arbitrary power over the lives and liberty of criminal defendants than in the prosecutor's authority to plea bargain a capital indictment downward.

Of the 36 men and 1 woman on KY's death row, 16 (43%) came from 2 counties. The decision to impose death depends not just on what crime has been committed, but on which side of the street the defendant happened to be standing. Kentucky has 60 judicial districts and 60 prosecutor/decision makers, each with different values, motivations and influences. With no requirement to examine both sides of the "scale," no uniform standards to guide the decision-making process and no judicial check on the prosecutor's discretion, the selection of who will be subject to capital prosecution is influenced by

diverse political factors which cause the system as a whole to be arbitrary and capricious. 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.

E. There Is A Danger Of Executing The Innocent. There is a growing awareness of an unacceptably high rate of wrongful conviction in capital cases. At least 126 persons have been freed from death sentences after evidence of their innocence emerged. Of that total, nearly 43% were on death row anywhere from 10 to 33 years before this happened.[13] There is no way to tell how many of the 1099 people executed since 1976 also may have been innocent. See Herrera v. Collins, 506 U.S. 390, 417-418 (1992). There are "serious questions" about whether the death penalty is being fairly administered in the United States. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," Supreme Court Justice Sandra Day O'Connor said in a Minnesota speech. *Minneapolis Star Tribune*, 7/3/01. The Furman demand that the government fix the arbitrariness and capriciousness of death sentencing has not been realized. Instead, Justice White's premonition in his concurrence in Gregg v. Georgia, supra at 226, that "[m]istakes will be made and discriminations will occur which will be difficult to explain," has come true. The fallibility of the death machinery is no longer a matter of mere speculation; it is a proven fact. Such mistakes require this Court to hold our death penalty scheme unconstitutional. 5th, 6th, 8th and 14th Amends., US Const. and § 1, 2, 3, 7, 11, 17, 26, KY Const.

F. Conclusion. One reason capital punishment gets meted out in an arbitrary, capricious and disproportionate way is the rules, which have evolved in an ostensible attempt at achieving rationality, are so complicated and confusing that decisions end up

being made on some more simple basis, outside the rules. Flamer v. Delaware, 68 F.3d 736, 772 (3rd Cir., 1995) (Judges Lewis, Mansmann, and McKee dissenting).

The complexity of the capital punishment system has rendered that system unreliable to validly decide who should live and who should die. It has also made the process so cumbersome and time-consuming that, as we slog through years of complicated appellate and post-conviction procedures, the condemned person is subjected to the cruelty, inhumanity, and degradation of suffering many years under sentence of death. That condition is itself an unconstitutional punishment. See Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Justice Stevens respecting denial of certiorari); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting); Knight v. Florida, 120 S.Ct. 459, 462-463 (1999) (Breyer, J., dissenting from denial of certiorari).

Former Supreme Court Justice Blackmun was "morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can save the death penalty from its inherent constitutional deficiencies." Callins v. Collins, 510 U.S. 1141 (1994), (Blackmun, J., dissenting). The "inherent constitutional deficiencies" include our inability to reconcile the competing constitutional requirements of across-the-board rationality and consistency and fairness and individualized sentencing, which is exacerbated by the fact that the federal courts have been hamstrung by Congress, (see, the federal Anti-Terrorism and Effective Death Penalty Act), and the Supreme Court itself, (see, Teague v. Lane, 489 U.S. 288 (1989); McCleskey v. Kemp, supra; Herrera v. Collins, supra.; and Coleman v. Thompson, 501 U.S. 722 (1991)), from being effective forums for remedying federal constitutional errors.

In a dissenting opinion in Moore v. Parker, 425 F.3d 250, 268-270 (6th Cir.2005), Judge Martin summed up many of the constitutional problems with the death penalty. Based on his 25 years on the 6th Circuit and his review of many death cases, he concluded "only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair. . . .[L]est there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce." Id. This Court should conclude, like Judge Martin, that the death penalty is a farce and that it is unconstitutional for all of the reasons stated above. Because it is unconstitutional, Meece's death sentences must be reversed. 5th, 6th, 8th and 14th Amends., US Const. and § 1, 2, 3, 7, 11, 17, 26, KY Const.

40. Death Qualification Of Jurors Is Unconstitutional.

Unpreserved. The process of death qualification offends basic principles of justice. Notwithstanding Lockhart v. McCree, 476 U.S. 162 (1986), Buchanan v. Kentucky, 483 U.S. 402 (1987), and Wilson v. Com.., 836 S.W.2d 872, 890 (Ky. 1992), the process of death qualification violates fundamental guarantees of equal protection and due process, and denies a defendant a representative jury of his peers. 5th, 6th, 8th, 14th Amends., US Const.; §§ 2, 3, 7, 11, 17, 26, Ky. Const. The excusal for cause of 27 prospective jurors because of their beliefs on the death penalty violated these constitutional provisions. VR 3, 8/21/06, 5:14:39-5:18:10; VR 3, 8/22/06, 9:24:04-9:34:49, 9:52:06-9:57:30, 1:56:40-2:04:30, 3:25:20-3:30:16, 4:06:55-4:12:02; VR 4, 8/23/06, 11:32:37-11:37:28, 1:56:24-2:00:49; VR 5, 8/24/06, 9:13:45-9:18:51, 9:19:46-9:38:38, 11:28:15-11:48:03; VR 6, 8/25/06, 10:14:40-10:24:08, 10:48:40-10:50:00,

1:52:04-1:58:50, 3:12:28-3:17:00; VR 7, 8/25/06, 3:48:42-3:52:00, 3:52:56-3:56:30; VR 7, 8/28/06, 9:45:13-9:49:15, 10:29:46-10:33:30, 10:34:17-10:45:30, 10:46:30-10:50:15, 2:30:40-2:33:58; VR 8, 8/29/06, 9:51:47-9:55:22, 9:56:23-9:59:52, 10:31:35-10:43:51, 11:25:00-11:31:36, 2:23:05-2:27:17.. This Court should bar or limit this religious/philosophical/political litmus test-this pledge of allegiance to death-which has no place in an American courtroom. Meece requests a new sentencing trial.

41. Improper Excusals For Cause Based On Religious Beliefs.

This issue is preserved. TR 8 1137-1145; TR 9 1320; SVH 7/12/06, 4:35:32-4:44:18; VR 3, 8/22/06, 9:35:05-9:37:02.

Prior to trial, the defense filed a motion seeking to preclude the trial court from excluding for cause those jurors with religious beliefs or religious affiliations that would preclude them from imposing a death sentence. TR 8 1137-1145; SVH 7/12/06, 4:35:32-4:44:18. The trial court denied the request. TR 9 1320. The objection was renewed during individual voir dire. VR 3, 8/22/06, 9:35:05-9:37:02.

During individual voir dire, it became apparent numerous jurors professed they could not impose a death sentence based on religious beliefs. Thirteen prospective jurors were excused due to these religious beliefs. VR3, 8/22/06, 9:24:04-9:34:49, 3:25:20-3:30:16, 4:06:55-4:12:02; VR 4, 8/23/06, 11:32:37-11:37:28; VR 5, 8/24/06, 11:28:15-11:48:03; VR 6, 8/25/06, 1:52:04-1:58:50, 3:12:28-3:17:00; VR 7, 8/28/06, 9:45:13-9:49:15, 10:29:46-10:33:30, 10:34:17-10:45:30, 10:46:30-10:50:15, 2:30:40-2:33:58; VR 8, 8/29/06, 9:56:23-9:59:52. For example, Roberta Walton testified she read the Bible and knew what it said. She didn't think the death penalty was the answer because it did not

allow the person to change his ways and if you were a Christian, you had to forgive. VR 3, 8/22/06, 9:24:04-9:34:49.

In Parrish v. Com., 121 S.W.3d 198, 202-203 (Ky., 2003), this Court held it was not error for a trial judge to inquire into the religious beliefs of prospective jurors and such questions did not infringe on or permit the improper use of peremptory strikes. Meece would respectfully ask this Court to reconsider the broader issue raised here.

The 1st Amend., US Const., deals with the freedoms of religion, of speech, of the press, of assembly, and to petition the government for redress. Within that text, the religion clauses are short and sweet: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The KY Constitution has an entirely separate section on freedom of religion, and the rights guaranteed in it are much different and much broader than the rights set forth in the federal constitution, and thus had serious implications for jury selection in Meece's case. The Kentucky Constitution safeguards religious liberty and participation in the civic life of the community with a series of guarantees different in text and structure from the Establishment and Free Exercise Clauses of the 1st Amendment:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; **and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.** (Emphasis added). § 5, KY Const.

The Kentucky Constitution, therefore, protects not only the **exercise** of religion, which the federal constitution protects, but it also protects religious **beliefs** and **the rights of conscience**, whether or not the individual person ever overtly exercises those beliefs and matters of conscience. These are broad rights indeed.

The focus of the KY Constitution is not only upon the exercise of religion. The focus is equally, or perhaps even more so, on the exercise of civil rights, privileges and capacities. Not only is religious activity protected, as in the federal constitution, but civic activity is protected against denial or diminishment on grounds of religious belief. Our state constitution addresses the right of the religiously-scrupled to participate fully in civil society, as fully as do those individuals who are not comparably scrupled.

No person's civil rights, privileges or capacities may be taken away, or in anywise diminished or enlarged, on account of a person's belief or disbelief of any religious tenet, dogma, or teaching. Taking part in the judicial process, as a juror, is a civil right, which can validly be taken away on grounds of, for example, felony convictions, lack of citizenship, or recent jury service. However, the civil right to serve as a juror in Kentucky cannot be taken away on grounds of religious belief.

As detailed above, there were prospective jurors in Meece's case who opposed capital punishment on religious grounds. Such jurors should not have been denied their civil right to serve as jurors just because of their religious beliefs. Such constituted a violation of the KY Constitution.

Jury service free from religious discrimination is a central and fundamental civic privilege. Jury service is a critical part of being a citizen. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant

opportunity to participate in the democratic process." Powers v. Ohio, 499 U.S. 400, 409 (1991). See also, Green v. United States, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting) (jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people).

Under the 1st Amend., US Const., also, religiously-scrupled opponents to state killing should be allowed to participate as jurors in death penalty trials. Meece urges this federal constitutional argument as well as the state constitutional argument fleshed out more fully above. The primary emphasis being on the state constitution is merely a product of the state constitutional provision's terms being so much more expansive.

In Pierce v. Com., 408 S.W.2d 187 (Ky. 1966), Pierce urged his conviction should be set aside because the jurors in his case had been sworn in using an oath which contained the phrase, "so help me God". He claimed his constitutional rights had been violated. (The opinion does not specify what constitutional rights he had asserted). Although this case involved the defendant's rights, as opposed to the jurors' rights, the holding is nevertheless interesting. The Court held: "Since in the circumstances here presented no juror was compelled to take a particular form of oath against his will, **no one was excluded from jury service for any reason related to the oath**, and no religious qualification was imposed on jurors, we do not see how the appellant could possibly claim his rights were violated." Id., at 188, (emphasis added). What would have been the result if a **juror** had been excluded?

In Kentucky Commission on Human Rights v. Kerns Bakery, Inc., 644 S.W.2d 350 (Ky.App. 1982), an employee objected on religious grounds to working on Sunday, and the court upheld a requirement that the employer accommodate that employee by

transferring him to a non-Sunday job or excusing him from Sunday work. If private employers can be compelled to rearrange their work schedules to accommodate employees' religious beliefs, then how much more must the state itself make reasonable accommodation so all persons can participate in civic life?

Meece has standing to raise this matter of third parties' constitutional rights. The situation is similar Batson v. Kentucky, 476 U.S. 79 (1986), where Batson argued the equal protection clause is violated when a prosecutor uses peremptory strikes to exclude blacks from a jury. The high court noted, "(a)s long ago as Strauder v. West Virginia, . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. (Citations omitted). The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. (Citations omitted). Batson, supra at 87. The principle was made explicit in Powers v. Ohio, supra, and J.E.B. v. Alabama, 511 U.S. 127 (1994) (sex-based peremptory strikes also violate constitutional protections). In Powers, the court held a white criminal defendant has standing to raise the black venire persons' third-party equal protection claim. The court based its reasoning in part upon the facts that (a) discrimination against potential jurors "casts doubt on the integrity of the judicial process", Powers, supra at 411, (b) "both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom," Id. at 413, (c) the criminal defendant "will be a motivated, effective advocate for the excluded venirepersons' rights", Id., at. 414, and (d) the barriers to a suit by an excluded juror, who has no opportunity to be heard at the time of his or her exclusion, are daunting, Id.

Numerous jurors were excused based on religious beliefs that would not permit imposing the death penalty. This violated Meece's constitutional rights. § 2, 3, 5, 7, 11, 17, KY Const. 1st, 5th, 6th, 8th, 14th Amends., US Const. His sentence must be reversed.

42. Denial Of Access To Data And Method Of Proportionality Review.

Proportionality review is mandated by KRS 532.075.

A. Proportionality Review As Conducted By This Court is Flawed.

Kentucky has set up a proportionality review process. KRS 532.075(3)(c). Once such a review is established by state statute, it must be applied constitutionally to comport with due process. Greer v. Mitchell, 264 F.3d 663, 691 (6th Cir. 2001). Evitts v. Lucey, 469 U.S. 387, 401 (1985), held "when a state opts to act in a field where its actions have significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and in particular, in accord with the Due Process Clause."

Under KRS 532.075(l), "[w]henever the death penalty is imposed for a capital offense. . . .the sentence shall be reviewed on the record by the Supreme Court." "With regard to the sentence, the court shall determine. . . .[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3)(c). The problem with Kentucky's review process is this Court does not compare cases in which the death penalty was imposed to "the penalty imposed in similar cases." This Court's universe has been limited solely to those cases in which the death penalty was imposed; not to other "similar cases" in which death was not imposed. It is also limited to only those cases which have been affirmed on appeal. Halvorsen v. Com., 730 S.W.2d 921, 928 (Ky. 1987).

The constitutional flaw in this Court's review is, despite having ready access through its own records to other cases with similar aggravators where a death sentence was not returned, it fails to take those particular "similar cases" into consideration. As such, not only is this Court's scope unconstitutionally limited, but the entire procedure mandates a finding of proportionality. It renders the review process meaningless in violation of the Due Process Clause and the 8th Amend. As noted in Arg. 36, a comparison of Meece's case to other similar cases in which death was not imposed could lead this Court to a very different conclusion about the appropriateness of his sentence.

North Carolina has a similar proportionality review statute. See State v. Young, 325 S.E.2d 181 (N.C. 1985). In carrying out its proportionality review, however, the North Carolina Supreme Court recognized it cannot examine only cases in which the death penalty was returned. Accordingly, in carrying out its review, it compares the death penalty case before it with all cases that it has reviewed on appeal containing the same factual predicate whether the death penalty was imposed or not.

Likewise, New Jersey has a proportionality review statute.[14] In State v. Loftin, 724 A.2d 129 (N.J. 1999), the New Jersey Supreme Court articulated its analysis of the various proportionality review processes used by other courts to determine which method it should adopt. In dismissing the process used by Kentucky, of limiting the scope of those cases reviewed only to other cases in which the death penalty was actually imposed, the court proclaimed such review "inadequate." Id. at 146. The court concluded "it was self-evident that the universe for proportionality review must, at a minimum, include all penalty-trial cases [i.e. those similar cases in which a penalty phase was conducted]." Id. at 146 (citations

[14] In December 2007, in the ultimate proportionality review, New Jersey lawmakers became the first in the nation to abolish the death penalty since the U.S. Supreme Court restored it in 1976.

omitted). Ultimately the New Jersey court chose to include all death-eligible homicides (even those in which the death penalty was not sought by the prosecution) in the statistical universe of their proportionality review, stating, "[W]e determined that our mandate to prevent arbitrariness in death sentencing should extend to review of prosecutorial decisions whether to seek the death penalty." Id. at 146 (citations omitted). See also State v. Cooper, 731 A.2d 1000 (N.J. 1999).

Due process demands this Court expand its universe to all similar cases, whether death was imposed or not, so there can be a meaningful proportionality review of Meece's death sentences. See Correll v. Com., 352 S.E.2d 352, 360-361 (Va. 1987) ("similar cases" include "all capital cases presented to this court under the current capital-murder statutes, including those in which life sentences were imposed"); Harvey v State, 682 P.2d 1384, 1385 (Nev. 1984) ("similar cases" include "all capital cases, as well as appealed murder cases in which the death penalty was sought but not imposed"). See also White v. State, 81 A.2d 201, 212-215 (Md. 1984); State v. Jeffries, 132 717 P.2d 722, 740 (Wash. 1986); State v. Neal, 796 So.2d. 649 (La. 2001).

When conducting proportionality review in Young, supra, the North Carolina Supreme Court recognized in 26 cases involving murder during the course of a robbery, jurors returned death verdicts only 3 times. Accordingly, it held the sentence of death for Young was disproportionate. Yet, if this Court were reviewing the same case, it would have only compared the death sentence on review to those 3 cases in which the death penalty was returned and, of course, found the sentence proportionate. The Kentucky proportionality review process simply ensures a death sentence will **always** be found proportionate as long as there has been one other death penalty appeal with an identical aggravating factor. This is

clearly not "in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, supra.

Finally, "[i]n order to ensure that a death sentence has not been arbitrarily or capriciously imposed, the states must provide 'meaningful appellate review.'" Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Parker v. Dugger, 498 U.S. 308, 321 (1991). ("[M]eaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime.'" (citation omitted) (original emphasis)). Kentucky's proportionality review, which is an integral part of the appellate review of a death sentence, does not perform this function, although the statute requires this Court to evaluate "similar cases, considering **both the crime and defendant**." KRS 532.075(3)(c) (emphasis added). This Court compares and analyzes only the nature of the crimes and aggravators involved.

Despite the mandates of KRS 532.075, in none of the published opinions of this Court has there been any discussion of the defendant's background and character as having a bearing on the proportionality of the sentence of death. That this is a part of the proportionality review has been noted, but no analysis has been provided. See, e.g., Woodall v. Com., 63 S.W.3d 104, 133 (Ky. 2001) By way of contrast, Florida, which has judge sentencing based on a jury recommendation, requires the trial court to specify the mitigating as well as the aggravating circumstances that were found to be present in the case, and the Florida Supreme Court has relied upon these findings to reverse numerous death sentences on proportionality grounds.[15] The failure to consider the "nature of the

[15] See, e.g., State v. Fitzpatrick, 527 So.2d 809 (Fla. 1988); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990); Hegwood v. State,

defendant" as well as the circumstances of the crime for proportionality review does not comport with the "fundamental respect for humanity underlying the Eighth Amendment." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

B. Inability To Obtain Access To KRS 532.075(6) Data. Access to this data is imperative because decisions about the appropriateness of Meece's death sentences will be made without disclosure of vital information and without the participation of counsel or argument. This offends the 6th, 8th, 14th Amends., US Const. See Gardner v. Florida, 430 U.S. 349, 360 (1977); Harris by and through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1286-91 (W.D.Wash. 1994). Indeed, KRS 532.075(5)(b), requires this Court to reference similar cases and gives authority to set aside and remand the case for resentencing "based on the record and argument of counsel" with regard to disproportionality. It is impossible to do that in a vacuum. Meece is indigent and unable to collect complete records of all previous actual or potential death penalty cases. Therefore, he also has been denied equal protection of the law. See Griffin v. Illinois, 351 U.S. 12 (1956).

43. Lethal Injection And Electrocution Are Cruel And Unusual Punishment.

This issue is not preserved.

"Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). Meece was sentenced to death by lethal injection. KRS 431.220(1)(a). The crucial factor in assessing whether lethal injection violates the prohibitions against

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575 So.2d 170 (Fla. 1990); Downs v. State, 574 So.2d 1095 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990);

cruel and unusual punishment is whether, as a method of execution, it is contrary to the "evolving standards of decency that mark the progress of a maturing society[.]". Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

To meet the "evolving standards of decency" test a mode of execution must ensure a quick and painless death. This principle stems from the recognition that the 8th Amendment prohibits "the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion). Punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering [.]" Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947). Thus, for the condemned to suffer a lingering or painful death violates the constitutional prohibitions against cruel and unusual punishment.

This mode of execution does not comport with 8th Amend. and §17 requirements because of the substantial likelihood it will result in undue pain and suffering. There are numerous instances of botched executions using lethal injections. See Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 139-141 (2002) (Table 9); Radelet, *Post-Furman Botched Executions*, at http://www.deathpenaltyinfo.org/article.php?scid=8&did=478 (providing information on 28 well known botched lethal injections in various states including at least 8 executions where the inmate was conscious); Stephen Trombley, *The Execution Protocol*, (1992).

Lucas v. State, 568 So.2d 18 (Fla. 1990); McKinney v. State, 579 So.2d 80 (Fla. 1991).

Kentucky carries out lethal injections by injecting: 1) sodium thiopental; 2) pancuronium bromide; and, 3) potassium chloride. Sodium thiopental is a short-acting barbiturate that begins to wear off almost immediately. Sodium thiopental was first adopted as part of the lethal injection protocol at a time when it was used for surgical procedures, but it has since been replaced in surgical settings by propafol. Pancuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscle movements, but has no impact on the ability to feel pain. It prevents a person from speaking, moving, or expressing any other outward signs of pain or consciousness, but is extremely agonizing in a conscious person as the inflicted person suffocates just as if he or she was drowning with weights on his or her body to prevent movement. Potassium chloride, otherwise known as road salt used to melt ice, is injected to cause cardiac arrest, but is excruciatingly painful in a conscious person.

When used in lethal injections, sodium thiopental serves the purpose of rendering the condemned inmate unconscious. Pancuronium bromide is supposed to stop respiration, and potassium chloride is supposed to cause cardiac arrest. Because potassium chloride stops the heart from beating, death can and would be caused without the use of pancuronium bromide- -a drug that is not permitted to be used to euthanize animals. Other than to pronounce death, doctors are not involved in Kentucky lethal injections, and the chemicals are injected from a room adjacent to the execution chamber.

Manufacturers warn that without careful medical supervision of dosage and administration, barbiturates can cause "paradoxical excitement" and can heighten sensitivity to pain. See Physicians Desk Reference, 50th Ed., 438-40. Manufacturers warn against administration by IV injection unless a patient is unconscious or out of control.

Id. An inmate's weight, physical condition and age are critical when adjusting dosage. Because doctors are prohibited from participating in the administration of lethal injection, KRS 431.220(3), proper consideration of these factors is not assured. There is a great risk of unnecessary, wanton infliction of severe pain and suffering. Lethal injection is "error prone" under the best of circumstances and can leave prisoners paralyzed but conscious during a painful death.

Indeed, the Federal District Court for the Middle District of Tennessee recently held unconstitutional that state's protocol for lethal injection, which includes the same three drug combination as Kentucky's. The court said the three drug lethal injection presents "a substantial risk of unnecessary pain" because, if the drugs are not administered with proper anesthesia, the result can be "a terrifying, excruciating death." Harbison v. Little, 511 F.Supp.2d 872, 883 (M.D.Tenn. 2007).

Should this Court hold that lethal injection is forbidden constitutionally as a method of execution, KRS 431.223 requires that a prisoner be executed in the manner in existence before the lethal injection statute was enacted--electrocution. But electrocution is also a cruel and unusual punishment. Execution by electrocution involves a reversion to the penal style of a preceding era; the condemned prisoner:

> cringes, leaps, and fights the straps with amazing strength. The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire . . . sounds like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber . . . the prisoner almost literally boils. . . .The body frequently is badly burned and disfigured.

Glass v. Louisiana, 471 U.S. 1080, 1087-88 (1985) (internal citations omitted) (Brennan, J., dissenting from the denial of certiorari on the constitutionality of electrocution).

As many legislatures and courts have recently concluded, "[t]here comes a time when the Constitution must say 'enough is enough.'" Id. Legislatures have consistently abandoned this archaic method. The Georgia Supreme Court, has held electrocution violates the 8th Amendment. No other country currently uses electrocution as a form of punishment. Only Nebraska out of 40 death penalty jurisdictions including the federal government and the military employs electrocution as the sole method of execution. Kentucky, like Georgia, should abolish execution by electrocution for all time.

Section 17 of the KY Constitution forbids the use of cruel punishment. "Punishments are deemed cruel when they involve torture or a lingering death...." In re Kemmler, 136 U.S. 436, 447 (1890). The prohibition against cruel and unusual punishment embraces unnecessary mental as well as physical pain and suffering during the execution process. Weems v. U.S., 217 U.S. 349, 370 (1909). Central to the analysis is the **risk** of inflicting substantial and prolonged pain. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) and Hellings v. McKinney, 509 U.S. 25, 36, (1993). Though Kentucky may not be constitutionally obliged to make executions absolutely pain-free, significant, conscious pain that lasts for more than a few seconds is constitutionally intolerable. See Fierro v. Gomez, 865 F.Supp. 1387, 1413 (N.D. Cal. 1994). This Court should rule lethal injection and electrocution violate the 8th Amendment and §17 prohibitions against cruel and unusual punishment and vacate Meece's death sentence.

44. Residual Doubt Bars Death Sentence.

Residual doubts about a capital defendant's guilt or moral culpability can be considered and legitimately support a sentence less than death. Lockhart v. McCree, 476 US 162, 181-182 (1986). This Court has acknowledged the existence of a genuine, if not reasonable, doubt about guilt is a proper and necessary factor to consider in determining whether death is appropriate by inclusion of item C (11) in the judge's report, asking whether the evidence "forecloses all doubt respecting the defendant's guilt?". Because a jury verdict and the truth are not unerringly synonymous and a genuine doubt exists about Meece's guilt, imposition of a death sentence violates the 8th, 14th Amendments, US Constitution; § 2, 3, 11, 17, 26, KY Constitution. This Court should reduce the death sentences to some form of life imprisonment.

45. Cumulative Error.

The cumulative effect of the prejudice from all of the errors requires reversal. Funk v. Com., Ky., 42 S.W.2d 476, 483 (1993); Sanborn v. Com., Ky., 754 S.W.2d 534, 542-549 (1988); 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.

Conclusion

The judgment of the Warren Circuit Court should be reversed.

Respectfully submitted,

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