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

WILLIAM HARRY MEECE — APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HON. JAMES WEDDLE, SPECIAL JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, to Hon. James Weddle, Special Judge, PO Box 307, Liberty, KY 42539-0307; Hon R. Brian Wright, Commonwealth Attorney, PO Box 658, Liberty, KY 42539-0658; Hon. Vince Yustas, Trial Counsel, DPA, 913 Lakeshore Parkway, Brandenburg, KY 40108; Hon. Jonathan Hieneman, 223 East Main Street, Campbellsville, KY 42718; and sent by messenger mail to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on November 12, 2008. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

Donna L Boyce

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond, as space permits, to arguments in the appellee's brief that warrant response. The failure of appellant to respond to any individual argument should not be taken as an indication Appellant believes the argument raised in his brief has no merit or less merit than any of the arguments that have been addressed. It simply means Appellant believes further argument beyond what was stated in his initial brief is unnecessary.

STATEMENT OF POINTS AND AUTHORITIES

Arguments

1. Allowing Statements Made As Part Of Guilty Plea.

Bill Meece challenged the introduction of these 2 statements at trial because they were made during plea discussions. TR 5 682; TR 9 1294-1300. Meece devoted 11 pages of his appellate brief to argument these statements should have been suppressed because they were part of the plea discussions. Appellee's outrageous claim that it is "undisputed that the plea discussions had ended in this case prior to appellant making any statement" is completely false. Meece has disputed this issue since December 2004.

As Meece pointed out in his original brief, the transcript of the 11/15 statement refutes appellee's oft-repeated assertion concerning the finality of the plea discussions. At the end of that statement, the prosecutor said the guilty plea had not yet been entered. During the plea proceeding the judge informed Meece the agreement was "conditioned on," among other things, "cooperating fully with the Commonwealth." VRA8, 11/15/04; 16:50:35. A term like "cooperating fully" necessarily implies further discussions concerning exactly what cooperation would be required in order to obtain the benefits of the agreement. Those would be plea discussions as that term is used in KRE 410 and Roberts v. Commonwealth, 896 S.W.2d 4 (Ky. 1995).

Appellee misreads Roberts, supra. BA 10. The statement this Court said had to be suppressed in Roberts was made ***after*** the defendant was told that he would not be charged as a persistent felony offender if he gave a complete, detailed, and truthful statement. Appellee does not point this Court to any term of Roberts' plea agreement that was discussed after the statement. The holding of this Court was the statement itself was part of the plea discussions because that was what the Commonwealth wanted in order to

follow through with its part of the agreement. There was no "agreement" until the Commonwealth received what it wanted: "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.'" Id. at 6.

Roberts is directly on point. The statements Meece made were part of the plea discussions as that term is used in Roberts. Under Roberts, statements that are part of the quid pro quo of the plea bargain are plea discussions. The statements by Meece were unquestionably part of the quid pro quo. Both the prosecutor and the judge said, on the record, the agreement was not final and would not be carried out unless Meece followed through with his end of the deal, which included giving these statements. Just as the statement in Roberts was required if he was to avoid being charged as a persistent felon, the statements here were required if Meece was to avoid facing the death penalty.

The trial judge completely ignored Roberts and based his decision solely on 6th Circuit case law. The court had no authority to ignore Roberts in favor of U.S. v. Marks, 209 F.3d 577 (6th Cir. 2000). On the contrary, he was required to follow Roberts and ignore Marks. SCR 1.040(7) provides in pertinent part, "On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Kohler v. Transportation Cabinet, 944 S.W.2d 146, 147 (Ky.App. 1997) (District Court order which failed to follow Kentucky Supreme Court precedent was void *ab initio*). "A [trial] court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996).

In a decision that carried such a catastrophic down side, Bill Meece had a right to rely on the published decisions of this Court for guidance in making that decision. While this Court may be free to change its interpretation of KRE 410, to do so in a way that would allow these previously inadmissible confessions to be introduced against Meece, completely without advance notice of this change in the law, would be fundamentally unfair. It would violate the due process and ex post facto prohibitions set forth by the U.S. Supreme Court in cases such as Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) (the Due Process Clause bars a state from achieving an ex post facto result by judicial construction), and Carmell v. Texas, 529 U.S. 513 (2000) (retrospective altering of an evidentiary principle violated the ex post facto clause). If this Court should be persuaded to overrule or alter its decision in Roberts, that change should only be applied prospectively. Defendants, like Meece, who have given statements in reliance on Roberts holding that statements made as part of the quid pro quo of the plea bargain are part of the plea discussions, should not have their reasonable expectations taken away from them after having given their statements.

In addition, appellee ignores the critical distinction between Marks, supra, and U.S. v. Jones, 469 F.3d 563 (6th Cir. 2006), and the instant case. In both Marks and Jones, the defendants' statements were made to law enforcement agents, not to the attorney for the prosecuting authority. Meece's statements were made while the prosecuting attorney was present and actively participating in the discussions. Therefore, Meece's statements come within the terms of KRE 410(4), whereas the statements in Marks and Jones do not. In addition, in Jones, the use of the statement was expressly

provided for by a clause written into the plea agreement. Jones, 469 F.3d at 567. There was no corresponding written clause in the present case.

Appellee does not claim the introduction of these 2 confessions was harmless. Appellant stands by the argument regarding the obvious prejudice in his original brief.

2. Meece's Statements Were Not Voluntary.

Appellee argues Meece's statements were not the product of coercive police conduct. However, the U.S. Supreme Court recognized "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960). "A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" Id. Furthermore, the Court has said, "[T]he range of inquiry in this type of case must be broad, and ... the judgment in each instance be based upon consideration of 'the totality of the circumstances.'" Id. (quoting Fikes v. Alabama, 352 U.S. 191, 197 (1957).

Contrary to appellee's assertion, Bram v. U.S., 168 U.S. 532 (1897), has not been overruled. Even after Colorado v. Connelly, 479 U.S. 157 (1986), courts continue to find a confession involuntary if it is induced by promises of leniency. "Sufficiently coercive conduct normally involves subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, ***or the making of a promise that induces a confession***." U.S. v. Thompson, 422 F.3d 1285, 1296 (11th Cir. 2005).

In Griffin v. Strong, 983 F.2d 1540, 1543-1544 (10th Cir. 1993), the court found a jury's determination that promises of lesser punishment and physical protection made to a

defendant induced him to confess to the police required a finding, as a matter of law, that the induced confession was involuntary. There is no difference between that case and the present case. Both involve promises of leniency. Bill Meece's statements were undoubtedly induced by the promise he would receive a sentence less than death. But for that promise his statements would never have been made. Notably, Griffin was a §1983 case, where the former accused had the burden of proving his statements were involuntary. In the instant case, the prosecution bore the burden of proving Meece's statements were voluntary. Tabor v. Commonwealth, 613 S.W.2d 133 (Ky. 1981).

In Guidry v. Dretke, 397 F.3d 306 (5th Cir. 2005), the court affirmed the district court's grant of a writ of habeas corpus, under more stringent AEDPA standards, based on a finding the police told the defendant his attorney, who represented the defendant on an unrelated charge, said it was okay for him to speak with the police about the then-unsolved murder. It is simply not true for appellee to assert that inducements, promises, and false statements are not coercion that can render a statement involuntary.

The only significance in reading Meece his Miranda[1] rights prior to the statements, is that failure to give the warnings would have absolutely precluded the use of the statements at Meece's trial. It does not lead to any inference the statements were voluntary, and appellee has not cited this Court to any case that so holds. The giving of Miranda warnings does not extinguish the separate inquiry into the knowing and voluntary nature of the waiver, i.e., whether it was the product of intimidation, coercion, or deception; and whether it was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421 (1986). Bill Meece's statement following the Miranda warnings at the

beginning of the December statement, "Yeah I understand those rights, and this conversation is having to be made as part of an outstanding plea agreement," shows the waiver of those rights was not made voluntarily. VR 11, 9/1/06, 3:55:30.

Nor does it matter that Meece later was the party who broke the plea agreement. The statements had already been given by that time, based upon a promise of anticipated leniency.

The central consideration in determining whether a confession has been coerced "always involves this question: did the governmental conduct complained of 'bring about' a confession 'not freely self-determined?'" Shotwell Mfg. Co. v. United States, 371 U.S. 341, 348 (1963)(quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961)). There was no evidence that Bill Meece would have made these statements were it not for the promise that he would receive a lesser sentence and a visit from his children in exchange. Confessions induced by promises of leniency are involuntary.

3. Evidence Of Meece's Guilty Plea Introduced During Guilt Phase.

The references to Meece's guilty plea were contained in the statements he made to the prosecutor and police. Meece and his counsel moved to suppress those statements. Appellee claims this issue is not preserved because Meece moved to suppress the statements without specifically mentioning the content of those statements. The argument is absurd. A motion to suppress the contents of a statement is necessarily included within a motion to suppress the statement. Meece's motions in limine on the exclusion of this evidence were resolved by a written order of the court. TR 10 1424-1425. An additional objection during the trial was unnecessary to preserve this issue for appeal. KRE 103(d).

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

KRE 410 provides that "evidence of" a guilty plea that is later withdrawn "is not ... admissible against the defendant who made the plea." Contrary to appellee's apparent interpretation, this rule does more than simply exclude a certified transcript of the plea colloquy. The rule excludes all "evidence of" a withdrawn guilty plea. It should have prohibited the introduction of evidence of Bill Meece's withdrawn guilty plea in this case. KRE 410 excludes evidence of a withdrawn guilty plea irrespective of the good faith of the prosecutor or the actions of the defendant. Appellee's argument that the references to the guilty plea were brief might go to the degree of prejudice suffered by Meece, but it certainly does not go to the admissibility of the evidence. The evidence of the guilty plea was clearly inadmissible.

With respect to prejudice, it should be noted that the reference to the guilty plea in the 11/15/04 statement came at the end of the statement and the reference to the guilty plea in the 12/15/04 statement came at the beginning of the statement. The 12/15/04 statement was played first. So the first thing the jury heard was that Bill Meece had pleaded guilty, and the last thing they heard was that Meece had pleaded guilty. It is a well-document psychological phenomenon that when asked to recall a list of items in any order (free recall), people tend to begin recall with the end of the list, recalling those items best (the recency effect). Among earlier list items, the first few items are recalled more frequently than the middle items (the primacy effect). *See generally*, http://en.wikipedia.org/wiki/Primacy_effect. Therefore, the placement of the references to the guilty plea made it more likely that the jury would recall those references simply because of their primacy and recency.

In addition, these taped statements were not only played for the jury, but the jurors were furnished written transcripts so they could read along while listening to the tapes. VR11, 9/1/06, 3:44:08; VR13, 9/6/06; 3:57:45. The prosecutor's reference to the "formal plea in open court" was neither brief nor cryptic. The portion appellant quoted in his original brief was 87 words long. As for the omission of the word "guilty," it must be asked -- What other kind of "formal plea" would a defendant enter in a criminal case that had been pending for nearly two years after having just made a devastating admission to the prosecutor and 2 police officers, and after having just made an "agreement to cooperate fully?" VR13, 9/6/06, 4:49:39. Jurors are not mindless fools. They could connect the remaining dot and figure out this was a reference to a guilty plea by Bill Meece.

Without explanation, appellee declares Kercheval v. U.S., 274 U.S. 220 (1927), is irrelevant. Kercheval is directly relevant to the facts of this case as it prohibits the introduction of a withdrawn guilty plea at a subsequent trial. The fact that there are not more cases directly on point shows an overwhelming consensus among jurists that this type of evidence is forbidden.

4. Failure To Exclude K. D. Felice Testimony.

In his original brief, appellant raised 12 specific portions of K. D. Felice's testimony that were objected to during the suppression hearing and should not have been admitted at his trial. Appellee did not address any of these 12 portions of her testimony in its brief. Instead, counsel for appellee cuts and pastes non-illuminative comments about the scope of KRE 404(b). He then follows this up with a vacuous claim that all of the evidence was admissible to show how Meece prepared for and planned the murder,

but he never explains how any particular portion of this evidence actually accomplishes that purpose. Counsel for appellee also hints that some of the evidence, he does not say which part, was relevant to prove identity, knowledge, and intent. The Commonwealth has the burden of establishing a proper basis for admitting this type of evidence. Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995).

One of the most fundamental aspects of due process is actual notice of the issues to be decided. "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Lankford v. Idaho, 500 U.S. 110, 121-122 (1991). Appellant does not consider appellee's argument adequate to provide real notice of its argument. That could be because appellee has no response to appellant's argument and is hoping this Court will fill the void. Nevertheless, appellant considers this issue too important to forego a reply to the specific issues appellant raised in his brief.

1) The Silhouette Target - This clearly does not show preparation, plan, motive, knowledge or intent. The only fathomable purpose is identity, in that Felice said there was an upper body spray on the target. The value of this observation is nil since silhouette targets only depict the upper body. Also, to prove identity through a pattern of conduct, there would need to be proof that the Wellnitzes were shot with an upper body spray and that an upper body spray pattern was so unique that it could be called a signature crime. Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky.1994). Neither of which was shown in this case. **2) The Dry-Firing at Felice** - Appellant cannot see how this shows preparation, plan, motive, identity, knowledge or intent. Its sole probative value is to show Meece is a reckless person with a propensity toward guns and violence.

3) Experience with Lying - Appellant cannot see how this shows preparation, plan, motive, identity, knowledge or intent. This was character assassination before Meece even testified. **4) Killing Marshals** - Appellant cannot see how this shows preparation, plan, motive, identity, knowledge or intent. It does show a propensity for violence and thoughts of committing unrelated homicides. **5) The Police Will Hunt You Down Statement** - Appellant cannot see how this shows preparation, plan, motive, identity, knowledge or intent. The impermissible inference is explained in appellant's original brief. **6) Placing Evidence in a Dumpster** - Appellant cannot see how this shows motive, identity, knowledge or intent. Appellant explains in his original brief why this does not relate to preparation or plan, and why the entirety of the statement does not even arguably fit within that exception. **7) How To Act After Murdering** - Appellant cannot see how this shows motive, identity, knowledge or intent. Nor does it show preparation or plan with respect to the Wellnitz murders. Since the question was raised by Felice in an effort to get an incriminating response, and the response given was the only logical answer, appellant submits the probative value of this evidence is greatly outweighed by its prejudice. Any law-abiding, intelligent person would have given the same answer to that question. **8) The 124 Grain Comment** - Appellant cannot see how this shows preparation, plan, motive, knowledge or intent. Nor should this comment have been allowed to show identity. This weight bullet is not so uncommon that Meece's remarks lead to a rational inference that he killed the Wellnitzes. Bell, supra. It is one of the most popular weights for 9mm bullets. **9) Comments About Head Shots** - Appellant cannot see how this shows preparation, plan, motive, knowledge or intent. Nor should this comment have been allowed to show identity. A gunshot wound to the head is not a

signature crime. In addition, this subpart undermines any argument under subpart 1 that Meece's shooting style was an upper body spray. Felice asked how to kill her fictitious husband, and she got the answer that any intelligent person willing to give her an answer would say. The prejudice of this response greatly outweighs its probative worth. KRE 403. **10) The Smell of Cordite and Fresh Blood** - Appellant cannot see how this shows preparation, plan, motive, identity, or intent. Appellant cannot see any connection between this statement and knowledge of the Wellnitz murders other than baseless speculation. Any possible probative value is greatly outweighed by unfair prejudice. **11) Shocked Look On Faces** - Appellant has the same reply as to number 10, supra. The prejudice was even greater and the probative value no greater for this subpart. **12) Instructions For Killing Husband** - Appellant cannot see how this shows preparation, motive, identity, knowledge or intent. Appellant submits that it does not show plan, since it involves a completely unrelated, fictitious homicide, and the small portion concerning the dumping of evidence in a dumpster could, and should, have been separated from the other 1:45 of this portion of testimony.

This evidence was not like Massiah v. U.S., 377 U.S. 201 (1964), although the method used to obtain the statements was similar. In Massiah, the statements obtained directly incriminated the defendant on the charged offenses. The Supreme Court held the statements had to be suppressed because the surreptitious recording was a more serious imposition than interrogation by a government agent. Id. at 206. Felice's discussions with Meece were not about the Wellnitz murders at all. They were on topics she chose in a discussion she led. This evidence was used simply to show Meece's bad character. The only conclusions that can be drawn from the 12 specific portions of Felice's

testimony are the impermissible inferences that someone who talks about killing cops, talks about killing people, carries a gun, dry fires it at someone, brags about being a liar, etc., is exactly the same type of person who would might do something horrible like kill the Wellnitzes.

Even though appellee has failed to give this Court and appellant a response on the distinct subparts of this issue, this Court should address these subparts separately and cumulatively. The Court will then understand the overwhelming prejudice of allowing this evidence that had no real connection to the charged offenses.

5. Meg Appleton's Taped Statement.

The trial court's ruling on this issue was to allow the Commonwealth to play Appleton's entire statement. VR12, 9/5/06; 1:41:09. Appellee's reference to nearly 2 hours of videotape for unidentified inconsistencies with her trial testimony is tantamount to an admission the tape should not have been played. The prejudice in Meece being identified by Appleton as a homosexual and a Black Ops hit man is self-evident.

6. Refusal To Include LWOP As Authorized Punishment.

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. Instructions are never finalized pre-trial and it would be the height of arbitrariness to require a defendant to commit to penalty phase instructions before hearing any evidence. 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 adequate to ferret out any jurors who could not consider LWOP. Additionally, the trial court found none of the jurors who sat on this case to be substantially impaired in their ability to consider the death penalty. To whatever extent the LWOP option might make it less likely jurors would impose the death penalty, that is precisely why Meece was prejudiced when the court denied LWOP as an option. Bill Meece should have received the benefit of jury instructions including LWOP as a punishment option.

9. Refusal To Exclude Testimony Precluded By KRE 504.

Statements A, B and D were clearly addressed in pre-trial pleadings and/or raised in the pre-trial hearings held challenging the use of statements covered by marital privilege. TR 2 186-189, 204-206, 234-248; TR 8 1174-1179; VRH 4/20/04, 9:33:36-10:14:00; SVH 7/12/06, 1:21:00-1:48:22. This was adequate preservation despite the lack of an additional objection at trial. Lanham v. Commonwealth, 171 S.W.3d 14, 21-22 (Ky. 2005); Rice v. Commonwealth, 199 S.W.3d 732, 736 (Ky. 2006). Additionally, the appellee's preservation argument ignores well-established law to the contrary. 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).

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

The appellee misses the point of this issue. The unduly prejudicial error that occurred here is the prosecutor failed to correct Regina Mead's perjured testimony. The prosecutor knew he made a deal with Regina and sat there in silence while she

proclaimed there was no deal. Notwithstanding the appellee's mind-reading attempts with respect to Regina, it was the prosecutor's duty to correct her significant misstatement that, without correction, could have impacted the integrity of the trial and affected the judgment of the jury.

11. Refusal To Take Judicial Notice.

The appellee reads KRS 201 too narrowly. Under KRE 201, a court may properly take judicial notice of public records, including records of other courts. Polley v. Allen, 132 S.W.3d 223, 226 (Ky.App. 2004). The Court of Appeals' statements ("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.") were statements of adjudicative facts. Meece v. Meade, 200 WL 1195929 (Ky. App. 2006). The dismissal of the 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 Kentucky Court of Appeals is surely a reliable source of adjudicative facts.

12. Evidence Of The Browning Hi-Power.

Appellee misstates the holding in Bratcher v. Commonwealth, 151 S.W.3d 332 (Ky. 2004). Bratcher does not say that fruits of investigations conducted based on information divulged during plea discussions are admissible. It says that statements about the plea discussions made to third persons who are not part of the plea discussions are admissible.

Appleton did not bring up the name "Sports Unlimited" or the name "Browning Hi-Power" in her statement. This Court can listen to that statement. The name "Sports Unlimited" was brought up by the prosecutor, Brian Wright. CW Ex 47 at 11:58:18. The brand of the weapon was never mentioned. This evidence never would have been discovered if it had not been disclosed by Meece's attorney during plea discussions. The KSP ballistics expert, Warren Mitchell, had tested a Tokarev firearm and found its rifling pattern so similar that he believed the barrel of the murder weapon had been produced on the same machine either right after the Tokarev or in close proximity. VR 1, 8/11/06, 2:27:55; Def. Ex. 2. Following that testing, he compiled a "list" of potential weapons that contained only 2 brands of firearms, Tokarev and Norinco. Def. Ex. 2; VR1, 8/11/06, 2:21:00. The police were not even looking for a Browning Hi-Power until Meece's attorney divulged that information.

15. Improper Excusal For Cause Of Jurors Qualified To Decide This Case. & 16. Failure To Videotape Prospective Jurors During Individual Voir Dire.

This Court is urged to view the videotapes of these three prospective jurors. The appellee's selective description of each juror's answers is not reflective of what each had to say. It is not unusual or problematic, and certainly not prohibitive for a prospective juror to be hesitant about sentencing another person to die. That feeling is not grounds for excusal for cause. Morgan v. Illinois, 504 U.S. 719, 732 (1992); Lockhart v. McCree, 476 U.S. 162, 176 (1986); Gray v. Mississippi, 481 U.S. 648, 658-659 (1987); Gall v. Parker, 231 F.3d 265 (6th Cir. 2000)(*cert. denied* 533 U.S. 941 (2001). It would be hard to find two more thoughtful and clearly qualified jurors than Smith and Watts. See Brief for Appellant at 59-60. Smith, despite thinking it would be difficult to give death, said he could consider the entire sentencing range, would not say "no way" to death and could

sign the death verdict as foreperson if death was his verdict. VR 5, 8/24/06, 9:19:46-9:38:38. Watts was not stupid and was not confused. She stated her views clearly and consistently in the face of being questioned over and over and over again. Id. at 11:29:15-11:48:03. The persistent—harassing—questions eventually sent its intended message to Watts, but her overall responses demonstrated she was well-qualified to sit as a juror in this capital case. Id.

The appellee claims Meece attempts to disparage the trial court's motives in not videotaping jurors during individual voir dire. Nothing could be further from the truth. There is no reason to think the trial court had any bad motive, but the very real impact of the practice is to insulate from appellate review erroneous excusals for cause of juror such as Smith and Watts, who were qualified but excused based on the trial court's observation of their unrecorded demeanor.

17. Denial Of Defense Challenges For Cause.

The appellee claims this error is harmless because this was a capital case and Meece was given extra peremptories. This argument ignores the significant fact the prosecutor also received identical extra peremptories. This Court's recent holding in Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2008), was "designed not only to insure an impartial jury, but to ensure a 'level playing field' in the selection of a jury." The trial court's refusal to excuse unqualified prospective jurors for cause tipped the playing field by forcing Meece to remove them with peremptory challenges. The appellee's attempts to assert harmless error are answered by Shane, which held it is a violation of a "substantial right when a defendant uses all his peremptory strikes and was forced to use one of them on a juror who should have been struck for cause:"

> If a right is important enough to be given to a party in the first instance, it must be analyzed to determine if it is substantial, particularly where deprivation of the right results in a final jury that is not the jury a party was entitled to select. Here, the defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of Batson v. Kentucky, 476 U.S. 79 (1986); this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that no jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.
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> An error affecting the fundamental right of an unbiased proceeding goes to the integrity of the entire trial process. While the federal courts may not regard peremptory strikes as a Constitutional guarantee to either litigant, prior Kentucky law has determined that it is a substantial right when a defendant uses all his peremptory strikes and was forced to use one of them on a juror who should have been struck for cause. To do anything less is to make a mockery of the very rules and procedures created by this Court, and indeed does allow a trial court to commit error under the Morgan holding that is not subject to correction because all the jurors who sat were qualified. Qualified or not, that is not the jury the defendant was given a fair opportunity to acquire. Shane, 340.
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> Thus, the correct inquiry is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court who abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right. Harmless error analysis is simply not appropriate where a substantial right is involved, and is indeed logically best suited to the effect of evidence on a verdict, though some procedural errors may also be reviewed in this light. Here, the defendant did not get the trial he was entitled to get. Shane, 341.

Prejudice is presumed and reversal is required.

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

The error presented in this issue is more than just an instructional error. The instructions did not merely omit an element, they omitted the element that differentiates first and second degree robbery/burglary. The second degree offenses not only carry a

lesser penalty, they also cannot be used as aggravators to elevate regular murder to a death penalty offense. Therein lays the prejudice. In this case, speculation by this Court directed toward making a finding the jury never made not only convicts Meece of higher degrees of robbery and burglary, it injects an unacceptable degree of unreliability into death sentences based on those offenses/aggravators.

20. Improper Exclusion Of Mitigating Evidence.

In death penalty cases, prosecutors routinely introduce evidence extolling the virtues of the murder victims, the love their family had for them and the impact of their loss. This Court has repeatedly found such evidence relevant and proper. McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984); Hilbert v. Commonwealth, 162 S.W.3d 921, 927 (Ky. 2005). In light of that, it is curious the appellee argues the good relationship Meece had with his children and their love for him was self-serving and irrelevant to his character. In the broadest sense, all mitigating evidence is self-serving. If the love survivors have for their murdered family member is relevant, it is impossible to argue the love of Meece's children did not reflect something about his character. The jury should have been permitted to hear this relevant evidence.

22. Denial of Opportunity To Explain Guilty Plea.

Appellee is clearly wrong when it argues that appellant could be prohibited from introducing this evidence because the trial judge had made an erroneous finding that the visit with Meece's children was not part of the plea agreement. In Crane v. Kentucky, 476 U.S. 683 (1986), the Court found that a defendant has a constitutional right to put on evidence that his confession was not voluntary even though the trial court had found, as a matter of law, the confession was voluntary. The legal principle is the exact same as in

this case. You cannot exclude evidence that is material to the defense simply because it contradicts a ruling by the trial judge. Meece had a right to introduce this evidence to prove his defense and to impeach the prosecutor's testimony.

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

Meece was not merely the defendant in this case. Regardless what term is used to describe Meece's role at trial, he was permitted to be "heard by himself and counsel" in arguing matters to the court both before and during trial. VH 3, 6/1/06, 2:49:27-2:51:37. The bench conferences throughout the trial demonstrate he was acting in this role and, in this role, he had the right to speak with counsel during the break in his testimony.

25. No Hearing On Juror Prejudice.

The appellee argues that DPA had a duty to investigate the information about the juror who reportedly advised WLEX TV s/he had formed an opinion about his guilt prior to hearing evidence and that DPA should substantiate the particulars of this investigation in its reply brief. Any DPA post-trial investigation, as the appellee well knows, would be outside the appellate record. The appellee's argument attempts to divert this Court's attention from the legitimate issue raised here. This issue was properly raised before the trial court and the court's failure to hold an evidentiary hearing on the matter was error.

27. Failure To Suppress The Statement To Dell Jones.

Appellee does not address the issue raised by appellant. Aside from the question of voluntariness, there was a Miranda[2] violation that occurred here. Meece was taken by a group of police officers to a secured part of the Lexington Police Headquarters. VRH2, 10/8/04, 10:35:00. He was not free to leave unless he was escorted by a police officer.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

VRH2, 10/8/04, 10:55:25. It was a custodial interrogation, just as surely as the custodial interrogation in Dunaway v. New York, 442 U.S. 200, 212-213 (1979).

The prosecution had the burden of showing that any statement it intended to introduce at Meece's trial was after the giving of Miranda warnings, and before Meece asserted his right to cut off questioning. Tabor v. Commonwealth, 613 S.W.2d 133, 135 (Ky. 1981). Appellee refused to answer the straightforward issue appellant raised because the trial prosecutor never proved the statement concerning the 16 rounds of ammunition was made after the Miranda warnings were given and before Meece attempted to cut off questioning.

Appellee does not claim this error was harmless. Appellant submits that it was very damaging since the jury was given the impression this was information only the killer could have known.

30. Failure To Exclude Statements to K. D. Felice.

The only findings made by the trial court in its order denying the motion to exclude these statements were conclusions of law. The court said, "Based upon the testimony the court hereby finds that Defendant did not invoke his Sixth Amendment right to counsel or his Fifth Amendment right to remain silent." TR 4 530. Conclusions of law regarding a motion to suppress are reviewed by an appellate court de novo. Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000). Concerning the facts, the trial court simply repeated the testimony at the suppression hearing, including Meece's testimony that he "expressly stated to police, 'I have nothing to say to you without the presence of a lawyer.'" TR 4 529. The trial court made no findings of fact.

Since there were no findings of fact, none of the trial court's order is "conclusive" concerning this issue.

Appellee concedes, and everyone agrees, that Meece invoked his right to remain silent and cut off questioning at the polygraph in 1993 after being questioned about the Wellnitz murders. Appellee's Brief at 67. Michigan v. Moseley, 423 U.S. 96, (1975), held that if an individual expresses his desire to remain silent, all interrogation must cease, and the police may not reinitiate questioning unless 4 conditions are met: (1) at the time the defendant invoked his right to remain silent, the questioning ceased; (2) a substantial interval passed before the second interrogation; (3) the defendant was given a fresh set of Miranda warnings; and (4) the subject of the second interrogation was unrelated to the first. Id. at 104-05. *See also* U.S. v. Alexander, 447 F.3d 1290, 1294 (10th Cir. 2006). The questioning by Felice fails at least 2 of these conditions. She did not give Meece a fresh set of Miranda warnings, and the subject matter of her questioning was related to the subject matter over which Meece invoked his right to remain silent, i.e., the Wellnitz murders. Consequently, all statements Meece made to Felice should have been suppressed.

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

The arbitrariness of Bill Meece's death sentences is best demonstrated by the fact the appellee feels compelled to discuss only mitigation (motherless, lost childhood and minimal criminal record) and a victim (Sherry Bland) from another case which has nothing to do with Bill Meece's argument or case. See Brief for Appellee at 86. The actual mitigation in Meece's case is unusually compelling and that, combined with the intra-case disproportionality, call for a sentence of less than death.

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

Appellee argues Baze v. Rees, __ U.S. __, 128 S.Ct. 1520 (2008), is dispositive. But Baze requires this Court to address and adopt a legal standard for the type of challenge raised here. The plurality opinion in Baze laid out a legal standard, but that opinion was joined only by three Justices. Three other Justices believed the legal standard articulated by the dissent should apply. When there is no majority opinion, the concurring opinion resting on the narrowest ground controls. See Marks v. U.S., 430 U.S. 188, 193 (1977). Here, there may be no concurring opinion on narrower grounds with regard to the legal standard. Justice Alito's concurring opinion (he was also part of the plurality) adopted the plurality's legal standard in its entirety. Justice Stevens never said which legal standard he believes applies, expressly noting his viewpoint applied under the plurality opinion and under the dissenting opinion. Justice Thomas and Justice Scalia's opinion stated a method of execution can be cruel and unusual punishment only if it intentionally inflicts pain - - a viewpoint not only rejected by the other seven Justices, but also incompatible with the plurality opinion because it would, in essence, reverse the plurality by saying that an inmate could not prevail under circumstances in which the plurality said the inmate could. This leaves the Baze Court with a 3-3 split concerning the legal standard that applies to challenges like the one before this Court.

While Baze upheld the constitutionality of our lethal injection protocol as written, the Court made clear it was doing so on the record before it, thereby leaving open the door for a death-sentenced inmate who can make a stronger showing that our lethal injection protocol is unconstitutional to prevail under the legal standard laid out in Baze. Similarly, the Baze Court made clear its opinion was only dealing with the

constitutionality of the protocol as written, not as implemented, and that particular safeguards within the protocol ensure that the risk of pain is not sufficient to establish an 8th Amendment violation. The value of those safeguards goes only so far as they are actually implemented when carrying out an execution by individuals who are adequately credentialed in doing so and fully understand the roles they are charged with carrying out. The Baze Court repeatedly referenced "maladministration" of an execution protocol as something that could give rise to a constitutional violation under the legal standard it was establishing. Baze, supra at 1537.

As Baze ruled, in no uncertain terms, "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." Baze, supra at 1533. Whether because of information not presented in Baze or because of how the protocol is actually applied, that constitutionally unacceptable risk will exist if William Meece is executed and must be resolved as part of this case. If this Court does not declare lethal injection unconstitutional, it should at least adopt a standard to determine when it is. The case should then be remanded for proceedings consistent with that standard.

CONCLUSION

The judgment of the Warren Circuit Court should be reversed.

Respectfully submitted,

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