Commonwealth of Kentucky
Supreme Court
No. 2006-SC-00881-MR

WILLIAM HARRY MEECE — **APPELLANT**

v.

Appeal from Warren Circuit Court
Hon. James Weddle, Special Judge
Indictment No. 06-CR-00656

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 6th day of October, 2008, to Hon. James G. Weddle, Special Judge, Warren Circuit Court, P.O. Box 307, Liberty, Kentucky 42539; Hon. R. Brian Wright, Commonwealth's Attorney, P.O. Box 658, Liberty, Kentucky 42539; and Hon. Thomas M. Ransdell and Hon. Donna L. Boyce, Counsels for Appellant, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.

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INTRODUCTION

The Commonwealth responds to the direct appeal of William Harry Meece from the Warren Circuit Courts final judgment convicting appellant of three counts of murder, first degree robbery and first degree burglary and sentencing appellant to three death sentences.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On February 27, 2003, William Harry Meece was indicted for the murders, first degree burglary, and first degree robbery of Joseph Wellnitz, Elizabeth Wellnitz, and Dennis Wellnitz. Transcript of Record, hereinafter (TR 1 at 1-5). The indictment also charged appellant with complicity to commit each crime. (TR 1 at 6-10). Appellant's first trial commenced in November, 2004. However, after several days of jury selection the appellant, on November 15, 2004, motioned the court to withdraw his plea of not guilty and to enter a plea of guilty to all of the charges contained in the above indictment. (TR 5; 651). Under the terms of the plea agreement the Commonwealth recommended that the appellant be sentenced to life without the possibility of probation or parole for twenty-five years, and the appellant agreed to give truthful statements regarding his involvement in the cold-blooded murders of the Wellnitz family and to testify against his co-defendant Meg Wellnitz Appleton. (Id. at653-654). After giving two post-plea statements to authorities on November 15, 2004, and December 15, 2004, the appellant suddenly did a 180 degree turnabout and sought to withdraw his plea of guilty. (VR 5; 671).

After appellant's competency was established the trial court sustained appellant's request to withdraw his guilty plea and proceed to trial by order entered June 2, 2005. (TR 6; 772-774). Following an evidentiary hearing on July 31, 2006, the trial court ruled that the post-plea statements given by appellant on November 15, 2004, and December 15, 2004, would be admissible against appellant at trial. (TR 10; 1424). In both of these sworn statements the appellant acknowledged that he murdered the Wellnitz family and detailed the planning and carrying out of the crime. At trial these statements were utilized by the Commonwealth. (See Arguments I-III below).

In addition to his own admissions of guilt, the Commonwealth also presented the sworn statement of appellant's co-defendant, Margaret "Meg" Wellnitz. (VR12; 9/5/06, 1:45:00 *et seq*). During her video taped sworn statement, Ms. Wellnitz explained how the weapon used to kill her family was obtain by herself and the appellant. She further incriminated the appellant and herself for killing her parents and brother. (Id.). Appellant's ex-wife, Regina Meade, also gave testimony that directly incriminated the appellant in the murders of the Wellnitz family. (VR 10; 8/31/06, 4:41:08-5:10:33; VR11; 9/1/06, 9:20:35-1:42:36). The Commonwealth was also permitted to introduce appellant's subsequent Fayette County conviction for complicity to commit murder.

Following the presentation of the all of the evidence in this case the jury retired to deliberate and ultimately returned a verdict finding the appellant guilty of three counts of murder, first degree burglary, and first degree robbery. (TR10; 1462-1467). Thereafter, the penalty phase commenced, during which mitigation evidence and evidence of aggravating circumstances were presented to the jury. After considering all of the evidence and the arguments of counsel the jury found beyond a reasonable doubt that each of the three murders were committed while the appellant was engaged the commission of burglary in the first degree and robbery in the first degree. The jury also found beyond a reasonable doubt that the appellant committed the murders for purpose of receiving money or profit and that the acts of killing were intentional and resulted in multiple deaths. (TR 10; 1479-1489). Thus, the jury recommended the appellant be sentence to death for each of the three murders, and twenty years each for the robbery and burglary to be served consecutively for 40 years. (Id. at 1479-1492). The trial court entered its final judgment

convicting appellant of the above crimes and sentencing the appellant in accordance with the jury's recommendations on November 13, 2006. (TR 11; 1631-1638). Appellant's notice of appeal was filed on November 27, 2006. Additional facts will be developed below as needed to support the Commonwealth's arguments.

PRELIMINARY ARGUMENT

PRESERVATION--DEFAULT--WAIVER

The standard for review of unpreserved error in death penalty cases is set forth in Sanders v. Commonwealth, 801 S.W.2d 665 at 668 (Ky. 1991):

> Where the death penalty has been imposed, we nonetheless review allegations of these quasi [unpreserved] errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis. [Citations omitted.]

Also see Perdue v. Commonwealth, 916 S.W.2d 148, 154 (Ky. 1996); Tamme v. Commonwealth, 973 S.W.2d 13, 21 (Ky. 1998); Mills v. Commonwealth, 966 S.W.2d 473, 479 (Ky. 1999); Soto v. Commonwealth, 139 S.W.3d 827, 848 (Ky. 2004). *Cf.* West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989), *habeas corpus relief denied, sub nom.* West v. Seabold, 73 F.3d 81 (6th Cir. 1996). With respect to unpreserved errors, this Court may constitutionally require that the appellant demonstrate cause and prejudice or ineffective assistance of counsel. West v. Commonwealth, 780 S.W.2d at 602-603;

Murray v. Carrier, 477 U.S. 478, 485-496 (1986); Smith v. Murray, 477 U.S. 527, 535 (1985); Strickland v. Washington, 466 U.S. 668, 687-696 (1984). The United States Supreme Court has reiterated the rule that the constitutional right to effective assistance of counsel, even in a death penalty case, focuses on whether the defendant received a fundamentally fair trial, not a perfect trial. Lockhart v. Fretwell, 506 U.S. 364 (1993); Mickens v. Taylor, 535 U.S. 162, 165 (2002). *Also see* Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987). The record in this case reflects that counsel specifically objected to certain matters and did not object to others. Such action by trial counsel indicates that counsel decided not to object to the admission of such an item of evidence. See West v. Commonwealth, *supra*. Trial counsel's decisions on such matters are presumed reasonable under Strickland.

RCr 9.22 requires a contemporaneous objection to exclude evidence, unless the Court has ruled upon a fact specific, detailed motion in limine that fairly and adequately apprised the Court of the specific evidence (not a class of evidence) to be excluded and basis for the objection. Lanham v. Commonwealth, 2005 WL 2043703 (Ky. 2005), overruling in part, Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996); Davis v. Commonwealth, 147 S.W.3d 709, 722-723 (Ky. 2004). A motion for new trial does not convert an unpreserved error into a preserved error. Patrick v. Commonwealth, 436 S.W.2d 69 (Ky. 1968); Byrd v. Commonwealth, 825 S.W.2d 272, 273 (Ky. 1992). In some instances trial counsel for appellant objected on grounds different from those grounds that are asserted in appellant's brief; when the grounds presented to the trial court were different than the grounds presented to the appellate court, the issue has not

been properly preserved for appellate review. Todd v. Commonwealth, 716 S.W.2d 242, 247-249 (Ky. 1986); Tamme v. Commonwealth, 973 S.W.2d 13, 33 (Ky. 1998); Henson v. Commonwealth, 20 S.W.3d 466, 471 (Ky. 2000). Appellant must obtain a ruling by the trial court upon the motion or objection to preserve the issue for appeal. Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971); Thompson v. Commonwealth, 147 S.W.3d 22, 40 (Ky. 2004).

Finally, the Commonwealth would point out that on some unpreserved issues, appellant may contend that this Court should presume that the alleged errors are prejudicial. Under the Sanders standard there is no presumption of prejudice regarding unpreserved errors. Likewise, as a general rule, the federal courts in reviewing a death penalty conviction on direct appeal do not presume prejudice regarding unpreserved issues. United States v. Chandler, 996 F.2d 1073,1086 (11th Cir. 1993), opinion on collateral attack, Chandler v. United States, 218 F.3d 1035 (11th Cir. 2000)(en banc); Jones v. United States, 527 U.S. 373 at 388-395 and at 402-405 (1999). The U.S. Supreme Court has indicated that in reviewing unpreserved constitutional error, the harmless beyond a reasonable doubt standard does not apply. Johnson v. United States, 520 U.S. 461 (1997); United States v. Cotton, 535 U.S. 625 (2002); Jones v. United States, *supra*, upholding federal death sentence.

HARMLESS ERRORS

Pursuant to RCr 9.24, the Commonwealth submits under the evidence in this case, that if any error has occurred, the error was harmless, regardless of the specific argument portion of this brief regarding each of the issues raised by appellant. As to non-

constitutional errors, see Commonwealth v. Chandler, 722 S.W.2d 899 (Ky. 1987); Estelle v. McGuire, 502 U.S. 62, 67 (1991). As a general rule the erroneous admission of evidence in violation of state law is not a federal constitutional error. As the United States Supreme Court noted in United States v. Hasting, 461 U.S. 499, 509 (1983), "[T]he Court has consistently made it clear that it is the duty of the reviewing court to consider the entire record as a whole and to ignore errors that are harmless, including most constitutional violations[.]" As noted in Rose v. Clark, 478 U.S. 570 at 576-577 (1986), "Where the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." Harmless error analysis even applies to instructional error omitting an element of the offense, which was objected to at trial, if the error was harmless beyond a reasonable doubt. Neder v. United States, 527 U.S. 1 (1999), finding that objected to omission of an element of the offense was harmless beyond a reasonable doubt. Harmless error analysis also applies to the penalty phase of death penalty trials. Clemons v. Mississippi, 494 U.S. 738, 744-745 (1990); Zant v. Stephens, 462 U.S. 862 (1983); Romano v. Oklahoma, 512 U.S. 1 (1994); Jones v. United States, 527 U.S. 373, 402-405 (1999); Brown v. Sanders, 126 S.Ct. 884, 890-894 (2006). With respect to any alleged erroneous comments by the prosecutor or a witness, an admonition to the jury to disregard is normally sufficient to cure any improper comments. See Greer v. Miller, 483 U.S. 756 (1987); Boyde v. California, 494 U.S. 370, 384-386 (1990); Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999) . In this case, appellant's counsel declined to request an admonition in some instances; the failure to request an admonition

is a matter of trial tactics and operates as a waiver which places the case in the same posture as if the admonition had been given. Barth v. Commonwealth, 80 S.W.3d 390, 396 (Ky. 2002), citing, United States v. Brawner, 32 F.3d 602, 606-607 (D.C. Cir. 1994); Soto v. Commonwealth, 139 F.3d 827, 861-862 (Ky. 2004). Therefore, the Commonwealth contends that appellant's convictions and sentences should be affirmed regardless of any errors that may have occurred during the course of the trial.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S POST-PLEA STATEMENTS.

The appellant alleges that the trial court erred by failing to suppress his incriminating statements given on November 15, 2004, and December 15, 2004. Although both statements were given after plea negotiations had ended, appellant nonetheless contends that the Commonwealth should not have been permitted to use those statements at trial pursuant to KRE 410. A review of the relevant facts confirms that the trial court properly found, ". . .that the post-plea statements are admissible and not made in the course of plea discussions." (TR 10 at 1425, citations omitted).

In relevant part KRE 410 provides that,

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (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.

(emphasis added). In this case it is apparent from the stipulations made by the parties, as well as, the appellant's own sworn testimony that the statements made on November 15, 2004, and December 15, 2004, were not made in the course of plea discussions.

On July 31, 2006, the trial court held an evidentiary hearing to determine whether appellant's post-plea statements should be suppressed. At that hearing appellant's basis for seeking suppression of his post-plea statements was that he believed the statements were part and parcel of the plea negotiation process. (VR 1; 7/31/06, 10:52:29). However, the parties stipulated to the following facts at the July 31, 2006, hearing:

(1) That the written plea offer and motion to enter a plea of guilty had been prepared and signed by all parties prior to appellant making any statement;

(2) No additional pleas discussions or negotiations regarding any term of the plea agreement were had after the written plea offer and motion to enter a plea of guilty were executed by the parties;

(3) Appellant, with counsel present, was informed of his Miranda rights and specifically informed that anything he said could later be used against him immediately prior to giving his November 15, 2004, statement;

(4) Appellant, with counsel present, was informed of his Miranda rights and specifically informed that anything he said could later be used against him immediately prior to giving his December 15, 2004, statement.

(VR 1; 6/31/06, 10:46:45-10:50:35). All of these facts were then expressly concede by appellant during examination under oath. (Id. at 10:56:23-11:14:25). Specifically, appellant agreed that the plea agreement was signed prior to him making his November 15, 2004, statement. (Id. at 10:56:47). Appellant also conceded that he was informed of his Miranda warnings prior to making either statement. (Id. at 10:57:35, 11:09:25). On cross-examination, appellant conceded that all negotiations regarding the plea ended after he signed the plea agreement and prior to his giving of any statement. (Id. at 11:05:52, 11:12:30). Thus, it is an established undisputed fact that all plea discussions had ended and the plea agreement was finalized prior to appellant making his November 15, 2004, and December 15, 2004, statements.

In U.S. v. Marks 209 F.3d 577, 582 (6th Cir 2000), the United States Court of Appeals for the Sixth Circuit analyzed a situation similar to the one present in this case in relation to Federal Rule of Criminal Procedure 11(e)(6), which is substantially identical to KRE 410(4), in a case arising out of the United States District Court for the Western District of Kentucky at Louisville. The Sixth Circuit affirmed the admission of the post-plea statements in Marks finding that,

> In any event, **statements made after a plea agreement is finalized are not "made in the course of plea discussions."** See United States v. Watkins, 85 F.3d 498, 500 (10th Cir.1996); United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir.1994); United States v. Davis, 617 F.2d 677, 685 (D.C.Cir.1979) ("Excluding testimony made after-and pursuant to-the agreement would not serve the purpose of encouraging compromise").
>
> Defendants made their statements to the FBI agent after they negotiated their plea agreements and pleaded guilty. Accordingly, Federal Rule of Criminal Procedure 11(e)(6)

does not apply, and their statements were admissible.

Marks, 209 F.3d at 582. (emphasis added). The Sixth Circuit reiterated this holding in U.S. v. Jones 469 F.3d 563, 567 (6th Cir. 2006), holding that, "[t]he case law is clear that **statements made to authorities pursuant to cooperation plea agreements are not protected because they are not 'made in the course of plea discussions**.' (quoting, Marks, supra at 582, emphasis added). Like the federal rule, KRE 410(4) only precludes the use of statement made in the course of plea discussions. Given that it is an undisputed that plea discussions had ended in this case prior to appellant making any statement, KRE 410(4) is not applicable and the trial court properly permitted the use of the post-plea statements.

Appellant's reliance on this Court's opinion in Robert v. Commonwealth, 896 S.W.2d 4 (Ky. 1995), is misplaced. In Roberts the defendant made incriminating statements prior to the finalization of the plea agreement, thus making Roberts factual distinguishable from the present case. Further, the two prong test espoused by the Fifth Circuit in U.S. v. Robertson, 582 F.2d 1356 (5th Cir. 1978), and adopted by this Court in Roberts supports the trial court's decision to permit use of the post-plea statements rather than the suppression of those statements. This Court explained the two-prong test to be used in determining whether a discussion should be characterized as a plea discussion as follows: "(1) Whether the accused's 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." In this case the appellant failed to exhibit "an actual subjective expectation to negotiate a plea" at the

time he made the November 15, 2004, or December 15, 2004 statements. As previously indicated above, appellant expressly conceded under oath that the terms of the plea were signed and finalized prior to his incriminating statements and that no plea negotiations occurred after his signing of the plea agreement. (VR 1; 6/31/06, 11:05:52, 11:12:30). These facts were also conceded by appellant's counsel via stipulations in open court. (Id.at 10:46:45-10:50:35). Having conceded that no plea negotiations occurred after the signing of the plea agreement, the appellant could not have expected to negotiate a plea at the time of his statements. To the extent appellant argues otherwise in his brief, any expectation he claims now to have must be unreasonable given the totality of the objective circumstances as conceded by the appellant and his counsel. Thus, the trial court properly overruled appellant's *pro se* motion to suppress the post-plea statements made on November 15, 2004, and December 15, 2004.

II.

APPELLANT'S STATEMENTS WERE MADE VOLUNTARILY.

Appellant argues that it his statement to authorities on November 15, 2004, and December 15, 2004, were involuntarily given. Specifically, appellant asserts the promise of a more lenient sentence and the alleged promise to an "extended" visit with his children overbore his free will. Thus, appellant argues that the Commonwealth should not have been permitted to make use of either statement at trial and that he was unfairly prejudiced by the trial court's failure to exclude these statements. However, the record reflects that visitation with Meece's children was not part of the agreement and that it was

the appellant who rejected the more lenient sentence offered by the Commonwealth by choosing to withdraw his plea.

The standard regarding voluntariness of a confession is set forth by the United States Supreme Court in Colorado v. Connelly, 479 U.S. 157 at 167 (1986):

> We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.

With respect to the issue of a *Miranda* waiver, the Supreme Court further explained in Colorado v. Connelly, 479 U.S. at 169-170:

> There is obviously no reason to require more in the way of a "voluntariness" inquiry in the Miranda waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, in which Miranda is based, is governmental coercion.

Subsequently, in Arizona v. Fulminante, 499 U.S. 279 at 285 (1991), the Court explained that Bram v. United States, 168 U.S. 532 (1897), no longer reflected the correct standard regarding voluntariness of a confession. The Court stated:

> Although the Court noted in Bram that a confession could not be obtained by "any direct or implied promises, however slight, nor by the exertion of any improper influence," Id., at 542-543, it is clear that this passage from Bram, which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion [that Fulminante's confession was involuntary]. [Citation omitted.]

In United States v. Rigsby, 943 F.2d 631 at 635 (6th Cir. 1991), the Sixth Circuit set forth in the standard to determine the voluntariness of a confession as follows:

> To support a determination that a confession was coerced, the evidence must establish that: (1) the police activity was

> objectively coercive; (2) the coercion in question was sufficient to overbear defendant's will; and (3) defendant's will was, in fact, overborne as a result of the coercive police activity. [Citations omitted.]

Also see Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994), rejecting involuntary confession claim and reversing U.S. District Court ruling to the contrary.

In Colorado v. Spring, 479 U.S. 564 at 574 (1987), the Supreme Court explained the constitutional requirements for a valid voluntary confession in part:

> Absent evidence that Spring's will was overborne and his capacity for self-determination critically impaired because of coercive police conduct, his waiver of Fifth Amendment privilege was voluntary under this Court's decision in Miranda. There is also no doubt that Spring's waiver of his Fifth Amendment privilege was knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him. The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.... The Miranda warnings protect this privilege by ensuring that the suspect knows that he may choose not to talk to law enforcement officials, to talk only with counsel present, or to discontinue talking at any time. Miranda warnings insure that a waiver of each right is knowing and intelligent by requiring that the suspect be fully advised of his constitutional privilege including the critical advice that whatever he chooses to say may be used as evidence against him. [Citations omitted.]

In this case the an evidentiary hearing was held on July 31, 2006, to determine whether appellant's post-plea statements should be suppressed . (VR 1; 6/31/06, 10:52:29). A summary of the evidence presented at that hearing can be found in Argument I of this brief. Following the evidentiary hearing the trial court entered an Order Overruling Defendant's Motion to Prohibit the Introduction of Statements Made

Pursuant to Plea Negotiations on August 29, 2006. (TR 10 at 1424). In that order the trial court made the following findings:

1. Defendant and the Commonwealth entered into a plea agreement on November 15, 2004.
2. The parties signed the plea agreement prior to the statements of November 15, 2004 and December 15, 2004 (hereinafter "statements").
3. Defendant entered a guilty plea in open court prior to making the statement of December 15, 2004.
4. The plea agreement was finalized prior to Defendant making the statements.
5. No plea discussions took place after the agreement was signed.
6. The statements were made in the presence of Defendant's attorney.
7. Defendant's visitation with his children is not part of the plea agreement.

(TR 10 at 1424-1425). All of these findings are supported by evidence presented during the July 31, 2006, hearing. (VR 1; 6/31/06, 10:52:29).

Further, the appellant expressly stipulated and testified to the fact that he was given his Miranda warnings prior to making either of his post-plea statements. (Id. at 10:57:35, 11:09:25). On cross-examination at the July 31, 2006, hearing the appellant conceded that the Commonwealth did not negotiate visitation with his children as part of the plea. (Id. at 11:09:58). Thus, it is evident that prior to giving either of his post-plea statements, the appellant had already negotiated, with the aid of counsel, and decided to give the statements as part of his plea agreement. At the time of the statements appellant

was represented by counsel, warned of his Miranda rights, and not made any additional promises in an attempt to coerce his statements. Moreover, when the appellant attempted to withdraw his plea alleging that he had lied in his prior statements and would no longer cooperate with the Commonwealth as required by the terms of his plea, the Commonwealth expressly stated that it **would not withdraw its plea offer**. (VRH 3; 5/31/05, 11:09:19). Thus, none of the promises made by the Commonwealth were ever withheld from the appellant. The cases relied on by the appellant all deal with situations in which police officers or other agents of the prosecution question a defendant in the absence of counsel and attempt to solicit cooperation by making promises that they had no intention keeping or no authority to even make. That is not the situation here.

In this case the appellant voluntarily, with the aid of counsel, negotiated a favorable guilty plea that only required him to provide truthful statements to the Commonwealth. The appellant then gave those statements in the presence of his defense counsel and after being again advised of his Miranda rights. The fact that appellant's post-plea statements were voluntary is the only conclusion possible. Simply because the appellant's attempt to manipulate the court and his decision to forego his favorable plea backfired, those are not grounds for finding his statements involuntary. For these reasons appellant's argument is without merit and must be rejected by this Court.

III.

APPELLANT WAS NOT DENIED THE PRESUMPTION OF INNOCENCE.

Appellant claims that it was reversible error for the trial court to permit the Commonwealth to admit evidence alluding to the guilty plea the appellant later withdrew.

Contrary to appellant's assertions, this issue was not presented to the trial court and thus, not preserved for appellate review. The motion and order to which the appellant cites deal solely with the admission of appellant's post-plea statements and the arguments presented in Argument I above. (See TR IX at 1294-1300; TR X at 1424-1425). Thus, with this argument appellant is simply grasping at straws.

First, appellant's guilty plea was never admitted at trial. Secondly, any references to a plea in either of appellant's post-plea statements were brief and cryptic. At no point on during the November 15, 2004, or December 15, 2004, statements does any party indicate that the appellant has or will plead guilty to the crimes charged in this case. In fact the references in those statements to a "plea" are so vague so as to be meaningless to a lay person. Since the jury obviously knew the appellant was currently being tried and they had repeatedly been instructed that the appellant was presumed innocent, the jury must have concluded, assuming that they even noticed, that any reference to a plea was a reference to appellant's not guilty plea or a plea on some completely separate matter. In either case, the playing of appellant's post-plea statements containing the vague references to a plea was not objected to by appellant's counsel at trial. Further, the only challenge to the admission of these statements pre-trial dealt solely with whether the statements were made as part of the pleas discussions between the parties. It is likely that the appellant did not object to the specific portions of the statements he now finds offensive because he intended to and in fact did attack the truthfulness of those statements on the stand. (VR15; 9/14/065, 2:39:00). Specifically, the appellant attempted to explain that he lied in those statements as part of a desperate attempt to delay being tried until he

could obtain more competent counsel and so he could facilitate an extended visit with his children. (Id.)

Ultimately, it is patently obvious that none of the cases cited by the appellant are controlling or even relevant to facts presently before this Court. Having miscalculated his ability to manipulate the judicial system to his favor, the appellant is now desperately looking for another turn at bat. Since appellant's guilty plea was not admitted as evidence against him at trial, and since any reference to a plea was too vague to cause any prejudice in light of the actual content of appellant's post-plea statements, this Court must find this claim of error to be completely without merit.

IV.

THE TRIAL COURT PROPERLY ADMITTED K. D. FELICE'S TRIAL TESTIMONY.

Contrary to appellant's assertions, the trial court properly admitted K.D. Felice's testimony at trial. Prior to appellant's first trial the Commonwealth, on November 1, 2004, provided written notice of its intent to introduce proof that appellant conspired to commit murder of an individual in Lexington, Kentucky, in 2002, and to admit statements appellant made to undercover police officer K.D. Felice. (TR5, 604-608). Following a hearing held on November 10, 2004, the trial court order the K.D. Felice evidence admissible finding that evidence to be "highly relevant." (TR V5 667). The trial court further found that probative value of the K.D. Felice evidence outweighed its prejudicial effect and that, "[a]lthough some of this evidence may be admissible under a different evidentiary rule, **it is clear that some of the evidence is admissible under 404(b) to establish preparation, plan, identity and motive**." Id. (emphasis added).

KRE 404(b)(1) allows evidence of other crimes, wrongs, or acts if offered to prove, "...**motive**, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (emphasis added). Additionally, this Court in Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998), held that, "[w]hile the rule [KRE 404(b)] describes some examples of other purposes, 'it states the 'other purpose' provision in a way that leaves no doubt that the specifically listed purposes are illustrative rather than exhaustive." (additional citations omitted). In English v. Commonwealth, 993 S.W.2d 941, 945 (Ky. 1999), this Court held that, "[t]he balancing of the probative value of such evidence [evidence of prior bad acts] against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge." (citing, Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970). The standard by which these decisions are reviewed is whether there has been an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996). In Phillips v. Commonwealth, 679 S.W.2d 235 (Ky. 1984), this Court held that when evidence of other crimes is admitted by the trial court, the reviewing court must consider all of the evidence to determine whether the accused was unduly prejudiced.

In this case all of the allegedly improper character evidence was properly admitted to aid the Commonwealth in proving how appellant prepared for and planned the Wellnitz murder. Many of the statements were also relevant to prove appellant's identity as the murderer, his knowledge of the Wellnitz murder, and his intent to commit murder. Further, it is highly unlikely, given the other evidence of appellant's guilt, that the admission of any or all of the statements identified in his brief unduly prejudiced the

appellant at trial. See Phillips, supra. Thus, the trial court properly exercised its discretion in overruling each of appellant's objections to statement listed in his brief.

V.

THE TRIAL COURT PROPERLY ADMITTED APPLETON'S TAPED STATEMENT.

On October 18, 2004, the appellant filed a motion in limine to prohibit the introduction of statement's made by Margaret (Meg) Wellnitz Appleton solely on the grounds that she was co-defendant to be tried separately and would not be available as a witness. Thus, appellant alleged that admission of Ms. Wellnitz statements would violate Crawford v. Washington, 541 U.S. 36 (2004). (TR 5 at 543-544). However, by the time appellant was tried for the murders of the Wellnitz family his co-defendant, Meg Wellnitz Appleton, had plead guilty, given a taped statement and testified at appellant's trial, which rendered appellant's prior motion moot. Otherwise, appellant claims that this alleged error was preserved by an objection at trial when the Commonwealth made its intention to play Ms. Wellnitz's prior inconsistent statement. While an objection for the record was in fact made, appellant's counsel indicated at the bench that the trial court had already ruled on this issue. (VR 12; 9/5/06, 11:44:38). Appellant's brief fails to provided a citation to where in the record the trial court had previously addressed this issue and unfortunately undersigned counsel has been unable to locate that prior ruling in the record. However, to the extent such a ruling is contained in the record on appeal the Commonwealth would ask this Court to give deference to the trial court's decision.

Ultimately, the record reflects that the Commonwealth questioned Ms. Wellnitz in detail regarding her December 31, 2004, statement given pursuant to her guilty plea. (VR

12; 9/5/06, 9:48:30-11:43:00). During her testimony Ms. Wellnitz made several statements which were inconsistent with he prior statement and asserted she was "high" at the time she gave her prior statement. Ms. Wellnitz also professed not to recall making several statements contained in her December 31, 2004, statement to police. (Id.) Thus, the Commonwealth was properly permitted to play her December 31, 2004, statement as a prior inconsistent statement under KRE 613 and 801A(a)(1) and to rebut the witness's claim of being "high" when the statement was given.

Any comment or statement about appellant being involved in sexual relationship with another man was brief and fleeting. (VR12; 9/5/06, 2:06:20). Thus, given the totality of the evidence presented against the appellant it is highly improbable that this statement had any effect on the outcome of the trial and must be deemed harmless at worst. (See Prefatory Argument Re: Harmless Error above). For these reasons the trial court did not err in permitting the Commonwealth to play Ms. Wellnitz prior inconsistent statement for the jury.

VI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Appellant argues that the trial court erred in failing to include in the instructions during the sentencing phase an instruction on life without the possibility of parole (LWOP). However, the record reveals that appellant, on several occasions, expressly waived LWOP as a sentencing option. Thus, the trial court properly instructed the jury.

Because the charged offenses in this case occurred prior to the enactment of LWOP as a sentencing option, the appellant must consent to LWOP as a sentencing

option before it may be included in the instructions at trial. KRS 446.110. During a hearing held on September 21, 2004, the appellant expressly indicated that he did not want LWOP included as a sentencing option. (VRH2; 9/21/04, 10:56:08). On May 31, 2005, the appellant again reiterated that he understood the available penalties and still did not want LWOP included as a sentencing option. (VRH3; 5/31/05, 11:06:19-11:07:35). On the first day of jury selection the appellant executed and filed with the trial court a written "Notice-Of Election" indicating that he did not wish to have LWOP included as a sentencing option. (TR 10 at 1414). Because of appellant's repeated refusal to consent to having LWOP included as a sentencing option, the jury during voir dire was not examined with regard to their ability to consider that sentence or to consider the more serious penalty of death if LWOP is included as a sentencing option.

Although all of the jurors were asked whether and indicated that they could consider sentencing the appellant to a term of years, life without the possibility of parole for 25 years, and death, it is not safe to assume those same jurors would automatically be able to consider life without the possibility of parole. It is quite possible that a juror would believe incarceration without any possibility of parole to be harsher than death. Further, it is likely that many jurors would not be able to seriously consider a sentence of death if given the option of guaranteeing that the appellant would never be released on parole. Regardless, it is likely inclusion of LWOP in the available range of punishment would have impacted the ability of many prospective jurors to consider the full range of punishment. For these reasons the trial court properly found that it would be error to

include an LWOP instruction when the jury had not be examined as to their ability to properly consider that penalty option. (VR 17; 9/18/06, 3:48:28-3:49:28).

VII.

INTRODUCTION OF MEG WELLNITZ GUILTY PLEA DID NOT CONSTITUTE REVERSIBLE ERROR.

Appellant argues that his substantial rights were violated by the Commonwealth's improper introduction of Meg Wellnitz Appleton's guilty plea. However, the admission of this testimony was not objected to at trial and is thus, unpreserved for appellate review. Because it is unpreserved, it is simply not enough for the appellant to claim prejudice, but the appellant must be required to demonstrate for the reviewing court how the unpreserved error unfairly prejudiced him so as to deprive him of a fundamentally fair trial. (See Preliminary Argument re: Preservation above).

During the its direct examination of Meg Wellnitz Appleton the Commonwealth questioned Ms. Wellnitz about prior statements she had made. On at least three occasions Ms. Wellnitz attempted to explain her prior statements by saying she said what she had to say to get a plea bargain. (VR 12; 9/5/06, 10:10:02, 10:10:33, 10:32:02). None of these comments regarding her plea were solicited by questioning by the Commonwealth. However, on redirect the Commonwealth briefly followed up on Ms. Wellnitz testimony regarding her plea in an effort to impeach her testimony that she was not involved in any plan to kill her parents. (Id. at 11:38:00). The cases cited by the appellant in support of his argument stand only for the proposition that a co-defendant's guilty plea should not be offered by the Commonwealth except when it can be used to

impeach the co-defendant's credibility. See Parido v. Commonwealth, 547 S.W.2d 125 (Ky. 1977). In fact Tipton v. Commonwealth, 640 S.W.2d 818, 820 (Ky. 1982), this Court noted that, "Parido, supra, left open the possibility that evidence of the plea could be introduced to impeach the co-indictee." Given that Ms. Wellnitz's testimony was not objected to at trial, it is clear that the Commonwealth had a permissible purpose in discussing her plea and the failure to object was clearly trial strategy on the part of appellant's counsel.

VIII.

THE TRIAL COURT PROPERLY EXCLUDED HEARSAY TESTIMONY OFFERED BY APPLETON DURING CROSS-EXAMINATION.

Appellant complains that he was unfairly prejudiced by his inability to question Meg Wellnitz about her reasons for pleading guilty to complicity to the murders of her family. Specifically, the appellant argues that Ms. Wellnitz should have been able to relate hearsay statements her attorney allegedly made to her to explain the effect those statements had on her and why she entered the plea. This is substantially the same argument made by counsel at trial. (VR 14; 9/13/06, 2:52:00, 3:11:00). However, the trial court properly excluded the blatant hearsay offered by appellant.

Basically, Ms. Wellnitz wanted to and was allowed to testify that she plead guilty because based on the advice of counsel she felt she could not get a fair trial, she would be sentenced to death, and her grandmother would be asked to plead for her life in front of a jury. (Id. at 2:53:00, 3:13:00 *et seq*). Additionally, appellant's counsel desired to have Ms. Wellnitz retell how her counsel allegedly told her everyone, including the sheriff, the

prosecuting attorney, the trial judge, etc., were lying or willing to permit lying in order to convict her. (Id. at 2:49:00, 3:54:10 *et seq*). Clearly the purpose for soliciting this testimony was not to explain why Ms. Wellnitz had entered a guilty plea (because that had been effectively done without mention of these hearsay statements), but instead these statements were being offered in the hope a juror would believe that the prosecutor or other authorities were railroading Ms. Wellnitz and the appellant. Given this obvious purpose and appellant's ability to explain by Ms. Wellnitz entered her plea without the use of these statements, the trial court properly prevented this blatant and rank hearsay from being admitted at trial.

IX.

THE TRIAL COURT PROPERLY PERMITTED THE INTRODUCTION OF STATEMENTS MADE BY APPELLANT'S EX-WIFE, REGINA MEADE.

This issue is not preserved. Appellant argues that the trial court erred in permitting appellant's ex-wife, Regina Meade, to testify about statement appellant made to her during their marriage. Specifically, appellant claims that the communications between himself and Ms. Meade were confidential and not intended for disclosure to any other person. However, the record reflects that each statement the appellant made to Ms. Meade regarding knowledge or his involvement in the murders of the Wellnitz family were made without the expectation of confidentiality and thus, not protected by KRE 504.

This issue was addressed on several occasions by the trial court. (TR 2; 268-270; TR 9; 1318-1319). However, appellant points to five statements made at trial, at least four of which, were not previously addressed by the court. None of the five statements

were objected to at trial, thus the record refutes appellant's claim of preservation. Appellant first claims that Ms. Meade should not have been allowed to relate to the jury that at approximately 1:30 or 2:00 a.m. on the morning of the murders appellant told her he was going to get coffee with Meg Wellnitz. (VR 10; 8/31/06, 4:19:57). Appellant did not object to this statement and there is nothing about this comment that would suggest it was confidential. To the contrary, the very nature of the statement suggests that appellant would want his wife to confirm that he was up late studying and that he went out for coffee rather to the Wellnitz residence to kill the Wellnitz family.

The appellant next complains that Ms. Meade should not have been permitted to inform the jury that the appellant had told her not to talk to police or let them in the house. (Id. at 4:29:04). Although appellant claims that this statement was barred by the trial court's order entered on July 22, 2004, it is not clear from the record that the order referred specifically to the statement made by Ms. Meade at trial. (TR 2, 268). Presumably had this been the statement excluded or even one the appellant wanted excluded a contemporaneous objection would have been made. Regardless, the nature of the statement would suggest that had police arrived at her door, Ms. Meade would have indicated that her husband did not want her to speak to them. Thus, it is unlikely that this statement was intended to be confidential.

Next, the appellant complains that Ms. Meade should not have discussed his statements to her regarding "plausible deniability." (VR 11; 9/1/06, 9:28:59). Again, no contemporaneous objection was made. Appellant's failure to object to this statement is most likely due to the fact that Ms. Meade indicated that these statements were made after

she and the appellant were divorced. (Id. at 9:30:46). Since Ms. Meade and the appellant were not married at the time these statements were made, KRE 504 has no applicability.

Curiously, the appellant next complains that Ms. Meade indicated that she could not recall if appellant made statements about the murders in the presence of anyone else when they went to the Wellnitz residence to help Meg Wellnitz pack up after the murders. (Id. at 9:35:12). The fact that no statements were related to the jury probably explains why the appellant again did not object.

Finally, appellant argues that Ms. Meade should not have told the jury that when she met the appellant at age 16 he professed to be an ex-navy seal, or that he often spoke of where to shoot someone to kill them. (Id. at 10:43:00). Once again, the appellant failed to object, which is perfectly understandable given that Ms. Meade was not married to appellant immediately upon meeting him and that the comment regarding where to shoot someone was something appellant often said.

For these reasons it is obvious that this issue is completely frivolous.

X.

REGINA MEADE DID NOT GIVE PERJURED TESTIMONY.

Appellant argues that the he was unfairly prejudiced by the prosecutor's failure to correct Regina Meade's allegedly perjured testimony. Specifically, appellant complains that Ms. Meade indicated that she did not have any deals with the Commonwealth regarding her trial testimony and that she was not aware of any agreement between herself and the Commonwealth that she would not be charged with any crime. (VR 11; 9/1/06, 9:47:57-9:48:33).

In June of 2003, the Commonwealth filed discovery materials indicating that the Commonwealth had agreed not to charge Ms. Meade for previously making false or misleading information about her knowledge of the Wellnitz murders in exchange for her agreement to cooperate truthfully in the investigation and prosecution of this case. (TR 1; 97-98). KRS 523.020 (1) defines perjury in the first degree as making, ". . .a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law." Thus, in order for Ms. Meade to have committed perjury she would have had to believe while on the witness stand she was giving false information. Although one would expect Ms. Meade to know whether she had a deal with the Commonwealth, it is quite possible that she did not understand or recall what transpired during her October 24, 2002, conversation with authorities. This is especially true given that the Commonwealth represented to the Court that as far as he could tell Ms. Meade had little if any criminal involvement in the crime. (VR 1;3/24/04, 1:27:05). Thus, it may very well be that Ms. Meade did not perceive a deal not to prosecute for past conduct to be necessary given she had not committed any past criminal act.

Further, Ms. Meade's testimony could have and should have been cleared up by appellant's counsel. The discovery in which the deal is described was provided to appellant and is contained in the record. Ultimately, the failure by any party, even assuming the Commonwealth had some duty, to flesh out Ms. Meade's testimony was harmless. Appellant's counsel sufficiently challenged her credibility via cross-examination and the other evidence supporting appellant's guilt is substantial. Thus, any error that may have occurred is harmless.

XI.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN REFUSING TO TAKE JUDICIAL NOTICE OF A PROSECUTOR'S OPINION.

Appellant argues that the trial court erred when it failed to take judicial notice of a opinion of the Court of Appeals issued in a visitation rights appeal indicating that charges of rape against the appellant leveled by his ex-wife and Commmonwealth witness Regina Meade had been dismiss on the motion of a county attorney because Meade had not been truthful in her statement concerning the alleged rape. However, the record clearly refutes appellant's allegations and reveals that the appellant has not accurately informed this Court of what action the trial court actually took on appellant's pre-trial motion to take judicial notice.

On June 1, 2006, the trial court conducted a hearing during which it heard appellant's motion to take judicial notice of a Court of Appeals opinion issued in visitation rights appeal involving the appellant and his ex-wife Regina Meade. Specifically, the appellant asked the trial court to take judicial notice of background information contained in that opinion indicating that Ms. Meade had made a criminal complaint against the appellant and that that complaint was ultimately dismissed on a motion of the county attorney because he believed Ms. Meade had not been truthful in the complaint. (VRH 3; 6/1/06, 2:20:50). Appellant conceded that he wanted to use the opinion to impeach Ms. Meade's credibility at trial. (Id. at 2:22:50). The trial court indicated that it would take judicial notice of the Court of Appeals' opinion and that the charges levied at appellant by Ms. Meade were dismissed on motion of the

Commonwealth. (Id. at 2:28:54-2:30:35). However, the trial court indicated that it would not take judicial notice of the Commonwealth's reason when that reason appeared to simply be an opinion. (Id.) This ruling is perfectly consistent with KRE 201.

Pursuant to KRE 201(a) Kentucky's evidence rule regarding judicial notice is expressly limited to judicial notice of adjudicative facts. Adjudicative facts are typically facts that are not subject to reasonable dispute and are determined through the process of adjudication. See Black's Law Dictionary, at 42 (6th ed. 1990). Whether or not Ms. Meade had been truthful in her criminal complaint against the appellant was not an adjudicated fact that was no longer subject to reasonable dispute. The Court of Appeals opinion stemmed from a domestic matter concerning visitation rights. Nothing in the opinion indicates that a trial court had adjudicated, or formally found, that Ms. Meade had not been truthful. The portion of the opinion quoted in the appellant's brief merely related a county attorney's opinion or motivation for dismissing the criminal complaint. KRE 608(b) does not contemplate that prior to any foundation being laid a party can seek to impeach the credibility of a witness through the admission of disputed facts admitted via judicial notice.

In this case the trial judge indicated he would take judicial notice of the proffered opinion and the adjudicated fact that a criminal complaint levied by Ms. Meade against the appellant was dismissed on a motion by the Commonwealth. (Id. at 2:28:54-2:30:35, 2:32:38). However, the trial court properly held that it would not allow the appellant to impeach the credibility of Ms. Meade pretrial without first laying a proper foundation. (Id.) Assuming a proper foundation for impeachment under KRE 608 at trial, the trial

court indicated that it would then consider the impeachment evidence offered by the defense. (Id.) Further, nothing in the trial court's ruling precluded the appellant from subpoenaing the County Attorney that chose to dismiss the criminal complaint in question to testify at trial. (Id. at 2:30:58).

Given that the trial court's rulings were perfectly consistent with the Kentucky Rules of Evidence and given that the appellant was not deprived of the opportunity to impeach the credibility of Ms. Meade's testimony with the fact that a criminal complaint she levied against the appellant was dismissed, it is patently obvious that no error occurred. However, should this Court disagree and find error in the trial court's refusal to take judicial notice of facts not properly adjudicated before any court, that error must be deemed harmless under RCr 9.24.

XII.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE BROWNING HI-POWER PISTOL.

The appellant argues that the Commonwealth should not by been permitted to admit any evidence of the Browning Hi-Power 9mm pistol obtained by the appellant and Meg Wellnitz Appleton from Sports Unlimited in Lexington, Kentucky. To support this argument the appellant alleges that the only way authorities discovered any evidence regarding that weapon was due to statements made by appellant's counsel during plea negotiations. (Appellant's Brief at 48; VR; 8/11/06, 5:29:00). However, after an evidentiary hearing held on August 11, 2006, the trial court found that Meg Wellnitz

Appleton gave a statement to authorities in which contained sufficient information leading to the discovery of the Browning Hi-power pistol.

During the August 11, 2006, evidentiary hearing, Meg Wellnitz's December 31, 2004, statement was admitted into evidence and played into the record. (VR; 8/11/06, 3:18:24). During that statement Ms. Wellnitz acknowledged buying the gun from Sports Unlimited in Lexington, Kentucky, using the fake I.D. of April Begley. (Id.) From its viewing of that statement and Ms. Wellnitz' in court testimony the trial court found that,

> Upon hearing the testimony of Meg Wellnitz the Court finds that Ms. Wellnitz divulged the information leading to discovery regarding the purchase of the Browning Hi Power handgun during her December 31, 2004 statement.

(TR X at 1431-1432). Further, the trial court rejected appellant's argument to the extent that it would prevent Commonwealth from making use of information shared during plea negotiations. In Bratcher v. Commonwealth, 151 S.W.3d 332, 343 (Ky. 2004), this Court expressly found that, "Only the statements made during negotiations are protected," by KRE 410. In line with that holding the trial court indicated that,

> Additionally, the Court disagrees with Defendant's argument that if said discovery is the "fruit' of plea negotiations it is inadmissible. Although KRE 410 does limit the admissibility of a statement made in the course of formal plea proceedings, investigative work derived from the statement and producing discovery is not excluded by the rule.

(TR X at 1432).

Since Ms. Wellnitz disclosed sufficient information in her December 31, 2004, to lead to discovery regarding the purchase of the Browning Hi-power pistol, the trial court properly overruled appellant's motion to suppress this evidence. Further, given this

Court's decision in Bratcher, supra, it apparent that although statements exchanged during plea negotiations would not be admissible under KRE 410, discovery made from investigative work derived from those statements could be used against the appellant.

XIII.

APPELLANT WAS NOT PREJUDICED BY ANY ALLEGED HEARSAY STATEMENT INTRODUCED AT TRIAL.

Appellant argues that the trial court erred when it improperly admitted five instances of hearsay evidence at trial. Importantly, the appellant concedes that the first four instances of hearsay complained about in his brief are not preserved. The record in this case reflects that counsel specifically objected to hearsay on certain occasions and did not object to others. Such action by trial counsel indicates that counsel decided not to object to the admission of what appellant now alleges to be inadmissible hearsay. See West v. Commonwealth, *supra*. Trial counsel's decisions on such matters are presumed reasonable under Strickland v. Washington, 466 U.S. 668, 687-696 (1984). For that reason the first four instances of alleged hearsay will not be specifically addressed, other than to say the admission of those statements, if error, was harmless given the overwhelming evidence of appellant's guilt.

The final allegation of inadmissible hearsay occurred during the testimony of Torston Rhodes, an engineer for the Sentry Safe Company. However, appellant did not object to Mr. Rhodes testimony on hearsay grounds until Mr. Rhodes had been excused from the witness stand. (VR 13; 9/6/06, 3:51:18). Further, the basis for appellant's objection were Mr. Rhodes answers to his cross-examination, in which Mr. Rhodes

conceded that some of his testimony was based on information received from other employees of the Sentry Safe Company. (Id.) First, appellant's objection was not contemporaneous and thus, this claim of error is not properly preserved. Second, the trial court properly exercised its discretion in finding that the witness, as director of engineering for Sentry Safe Co., was qualified to express an opinion about his company's past practices. (Id. at 3:52:00). Thus, there was no error in the admission of Mr. Rhodes testimony.

XIV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF WICCA WORSHIP AND THE OCCULT.

Appellant argues that it was improper for the Commonwealth to elicit any testimony regarding his interest in the occult or more specifically Wicca. Although the appellant claims that this error is partially preserved by his post-trial motion for new trial, the case law is clear that a motion for new trial does otherwise unpreserved errors into errors properly preserved for appellate review. Patrick v. Commonwealth, 436 S.W.2d 69 (Ky. 1968); Byrd v. Commonwealth, 825 S.W.2d 272, 273 (Ky. 1992). By failing to contemporaneously object to questions involving the occult and/or Wicca worship or practices, the appellant failed to preserve this issue for appeal.

Additionally, the record in this case reflects that counsel specifically objected to what he believed to be improper character evidence on certain occasions and did not object to others. Such action by trial counsel indicates that counsel decided not to object to the admission of what appellant now alleges to be inadmissible hearsay. See West v.

Commonwealth, *supra*. Trial counsel's decisions on such matters are presumed reasonable under Strickland v. Washington, 466 U.S. 668, 687-696 (1984). Nonetheless, should this Court find it was error for evidence of Wicca or the occult to be admitted at appellant's trial, any error, was harmless given the overwhelming evidence of appellant's guilt.

XV.

THE TRIAL COURT DID NOT ERR IN EXCUSING VENIREMEN DANNY SMITH, CASSANDRA WATTS, AND KENNETH DENHAM, FOR CAUSE.

Appellant argues the trial court erred when it dismissed veniremen Danny Smith, Cassandra Watts, and Kenneth Denham, for cause. The trial court did not err. The issue is whether these veniremen held views that "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." Wainwright v. Witt, 469 U.S. 412, 414 (1985). Since this is a death penalty case, the above mentioned veniremen were not eligible to serve if their personal views would not allow them to follow the law and impose the death penalty. Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994); Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985).

The determination of whether to exclude a venireman for cause lies within the sound discretion of the trial court and will not be reversed absent a showing that the exercise of this discretion was clearly erroneous. Grooms v. Commonwealth, 756 S.W.2d 131, 134 (Ky. 1988); Simmons v. Commonwealth, 746 S.W.2d 393, 396 (1988). A juror should be dismissed for cause only if the juror cannot conform his or her views to

the requirements of the law and cannot render a fair and impartial verdict. Mabe v. Commonwealth, supra. "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958).

Prospective juror Danny Smith was read a list of possible sentences before he was then asked if he could give serious, meaningful consideration to each possible sentence. Mr. Smith immediately indicated that this was very difficult for him and that he had a problem with the death penalty. (VR 5, 8/24/06, 9:19:02-9:25:25). Mr. Smith then elaborated that he had recently lost his father and that it would be very difficult for him to give serious consideration to the death penalty. (Id. at 9:25:50). When questioned by the Commonwealth Mr. Smith continued to state that it would be difficult for him to consider imposing a sentence of death and that he did not believe he sign a verdict recommending death if he were to be elected foreperson. (Id. at 9:28:00-9:30:56). Appellant's counsel attempted to rehabilitate Mr. Smith by asking if there was any gruesome set of facts for which he would consider the death penalty appropriate. Mr. Smith indicated that he could not say there were no set of facts for which he may consider the death penalty, but again cautioned that it would be very difficult for him to ever consider death. (Id. at 9:32:39). In accordance with Wainwright, supra, the trial court correctly found that based on the totality of Mr. Smith answers and his own personal observations Mr. Smith's ability to consider the entire range of punishment would be prevented or substantially impaired. (Id. at 9:37:17). Thus, the trial court properly exercised its discretion in striking Mr. Smith for cause.

Cassandra Watts initially indicated that she did not personally believe in the death penalty; however, upon further inquiry she indicated that she could consider all possible sentences, including the death penalty. (VR 5, 8/24/06, 11:29:49). Because of her personal opposition to the death penalty, both the Commonwealth and the trial judge, inquired into Ms. Watts ability to seriously consider the full range of sentences. Although she continued to indicate that she would consider the death penalty, Ms. Watts also continued to qualify that response indicating that she still did not believe in taking a life for a life. (Id. at 11:33:2511:35:56). From the totality of Ms. Watts response it became readily evident that she did not truly understand what the Commonwealth or the Court truly meant by "serious consideration." This is evident from the fact that Ms. Watts failed to ever indicate that there was any situation in which she could impose a death sentence. (Id. at 11:29:49-11:47:57). Once the trial court explained itself in terms Ms. Watts could more easily understand, Ms. Watts conceded that she did not believe she would ever be able to impose a sentence of death given her personal religious beliefs. (Id. at 11:29:49-1:47:57,11:43:00). If a juror is unable to declare whether she can or cannot impose the death penalty, the trial court may properly exclude her. Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) (overruled on other grounds in Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981)); Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky. 1991) (overruled on other grounds in Lawson v. Commonwealth, 53 S.W.3d 534, 544 (Ky. 2001)). The trial court was able to observe Ms. Watts demeanor and credibility in answering voir dire questions. Thus, the trial court properly exercised its discretion when striking Ms. Watts for cause finding that she held personal religious

beliefs that, "would prevent or substantially impair," her ability to seriously consider the entire range of sentences and perform her sworn duties. See Wainwright, supra at 414.

Not only did prospective juror Kenneth Denham express serious reservations about considering and/or imposing a sentence of death, Mr. Denham also indicated that he possessed prior knowledge of appellant's crime and had formed an opinion that the appellant was guilty. (VR 8; 8/29/06, 10:33:25-10:36:58). Although Mr. Denham indicated that he could set aside his prior opinion of guilt and be impartial, this Court's opinion in Montgomery v. Commonwealth, 819 S.W.2d 713, 716 (Ky 1991), would seem to require that Mr. Denham be stricken for cause. In relevant part this Court in Montgomery held as follows:

> **Of the jurors who actually sat in the case, at least four,** Kenneth Jones, Jerry Riley, James Suitor and William Rogers, **answered questions acknowledging not only familiarity with the pretrial publicity surrounding the case, but also that they had formed opinions as to the appellants' guilt. In each instance they asserted they believed they could put aside their preconceived opinions and be impartial, but, perhaps individually, and certainly collectively, these answers fail to meet the standard for a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Section 11 of the Kentucky Constitution. Mere agreement to a leading question asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court's obligation to provide a neutral jury,**

Id. at 716. Given that Mr. Denham unequivocally indicated knowledge of the crime and of the fact that he had formed and opinion as to appellant's guilt, the trial court properly exercised it discretion in striking Mr. Denham for cause.

For the reasons above appellant's allegations of error are completely without merit and therefore, this Court must affirm appellant's convictions and sentence.

XVI.

THE FAILURE TO CAPTURE JURORS' IMAGES ON VIDEO DURING INDIVIDUAL VOIR DIRE WAS NOT ERROR.

Appellant argues that the trial court erred when it failed to capture the images of prospective jurors during parts of individual voir dire. Although it is true that the physical image of the jurors is not capture during portions of voir dire, each juror's identity and the content of their responses to questioning was captured via audio recording. (VR 5 & 8 ; 8/24/06-8/29/06). Thus, the appellate record was properly preserved and the appellant did not suffer any prejudice from the failure to capture the physical images of jurors during individual voir dire.

The appellant attempts to disparage the trial court's motives for protecting the individual jurors, by accusing the trial court of selectively videotaping individual voir dire in an effort to, "...insulate from appellate review erroneous excusals for cause. . . by claiming the excusals were based on his observations of the jurors." (Appellant's Brief at 64). The appellant and counsel were physically present during individual voir dire and were physically in the presence of the prospective jurors in this case. During that time appellant and his appointed counsel had more than enough time to observe the appearance and demeanor of the individual jurors along with the trial judge and prosecuting attorneys. Thus, any disagreement appellant or his counsel had with the trial court with regard to juror observations could have easily been articulated for this Court and captured

on the video record. However, appellant fails to indicate any observation made by the trial court that he takes issue with and even fails to identify in this argument the jurors purportedly struck by cause solely on trial court's person al observations. Thus, it is apparent that this issue is wholly without merit.

Further, even a cursory review of the appellate record reveals appellant's failure to accurately characterize the trial court's motives for striking jurors for cause. In his brief the appellant cites to portions of the record where the trial court allegedly struck "clearly qualified prospective jurors by claiming excusals were based on his observations of the jurors." (Appellant's Brief at 64, citing VR5; 8/24/06, 9:19:46-9:38:38; 11:28:15-11:48:03). However, the cited portions of the video record reveal that each of the prospective jurors struck for cause were struck for other reasons merely confirmed by judicial observation. For further explanation as why these jurors were properly struck, please refer to the prior argument contained in Argument XV of this brief.

XVII.

THE TRIAL COURT PROPERLY REFUSED TO EXCUSE VENIREMEN LARRY WATT, DON MILLIS, SHANE PALMQUIST, & CHRISTY HIGDON.

Appellant argues that the trial court erred in overruling his motions to dismiss veniremen Larry Watt, Don Millis, Shane Palmquist, and Christy Higdon, for cause. Appellant used peremptory challenges to remove all veniremen from the venire. As a result, appellant argues that he was deprived of his full allotment of peremptory challenges. See Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007). Appellant's reliance upon Shane is misplaced. Shane is violated **ONLY** when the trial court errs in

refusing to grant a motion to strike for cause and the moving party then must use a peremptory challenge to remove that venireman. The trial court did not err when it overruled appellant's motions to strike for cause concerning the above mentioned veniremen. Thus, there was no Shane violation.

Further, Shane was a non-death case where the defendant was given 9 peremptory challenges per RCr 9.40(1),(2). Fourteen jurors sat in this trial. (VR 8; 8/29/06, 5:01:24). Thus, appellant, too, should have been given 9 peremptory challenges per RCr 9.40(2). But, because this was a death case, the trial court gave, and the appellant used, 14 peremptory challenges. (TR 10 at 1453). Thus, the appellant was given more strikes than he was entitled per RCr 9.40. Appellant claim of error and prejudice rings hollow when he was given 5 extra peremptory challenges. Shane is distinguishable on the facts and not applicable.

The real issue before the Court is whether the four veniremen mentioned above held views that "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." Wainwright v. Witt, 469 U.S. 412, 414 (1985). The determination of whether to exclude a venireman for cause lies within the sound discretion of the trial court and will not be reversed absent a showing that the exercise of this discretion was clearly erroneous. Grooms v. Commonwealth, 756 S.W.2d 131, 134 (Ky. 1988); Simmons v. Commonwealth, 746 S.W.2d 393, 396 (1988). A juror should be dismissed for cause only if the juror cannot conform his or her views to the requirements of the law and cannot render a fair and impartial verdict. Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994). "It is the probability of bias or prejudice

that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958).

Larry Watt was presented with a list of the possible penalties in this case and was asked by the trial court whether he could give serious, meaningful consideration to each of the listed penalties. Mr. Watts indicated that he could in fact consider the full range of penalties. (VR 4; 8/23/06, 9:22:05). The trial court then inquired as to each of the possible penalties individually and Mr. Watts again indicated that he could consider each possible penalty. (Id. at 9:22:05-9:22:59). Despite leading questions from appellant's counsel, Mr. Watt twice indicated that he would not fixate on any particular penalty, but would wait until after he heard all of the evidence before considering which penalty would be appropriate. (Id. at 9:23:59, 9:24:30). Appellant's counsel specifically asked Mr. Watt if he had a situation of willful, multiple murders would he initially start with a penalty of death and have to be convinced otherwise. Mr. Watt indicated no he believed a defendant should get a fair trial. (Id. at 9:24:00-9:24:30). At that point appellant's counsel corrected Mr. Watt and suggested that the death penalty must be imposed because the defendant in his scenario had already been given a fair trial and found guilty. At that point Mr. Watt agreed with appellant's counsel that the death penalty should be imposed. (Id. at 9:24:48). The Commonwealth then inquired whether Mr. Watt was willing to seriously consider each of the available punishments, and whether, if instructed by the court, to give consideration to a term of years. Mr. Watt unequivocally answered that he would follow the court's instructions and consider the full range of penalties including a term of years. (Id. at 9:26:41-9:27:20). The trial court agreed with the Commonwealth

that defense counsel's ability to lead Mr. Watt to a specific scenario where he may desire to impose a death sentence did not diminish Mr. Watt's continued assertion that he could an would consider all penalty ranges. Thus, the trial court properly exercised his discretion and overruled appellant's motion to strike for cause.

Like all prospective jurors Don Millis was read a list of possible sentences before he was then asked if he could give serious, meaningful consideration to each possible sentence. Mr. Millis unequivocally answered that he could give serious, meaningful consideration to all of the possible sentences. (Id. at 9:59:27-10:01:02). He then indicated in response to questions by defense counsel that he accepts the concept of individualized sentencing and that he did not believe a person convicted of multiple aggravated murders should automatically receive the death penalty. (Id. at 10:03:45). Although Mr. Millis conceded that absent compelling mitigation the death penalty might be a first choice or starting point, it would not be automatic and other possible penalties would have to be considered. (Id. at 10:04:22). Despite defense counsel efforts to put words in his mouth, Mr. Millis indicated that he would consider the appellant's background a possible mitigating factors and persisted that he could and would consider the full range of penalties. (Id. at 10:06:00-10:09:21).

Shane Palmquist, a professor in the Engineering Department at Western Kentucky University, indicated that he both understood the full range of penalties and that he could and would give serious, meaningful consideration to the full range of penalties if chosen to be part of the jury. (VR 8; 8/29/06, 10:01:33-10:04:02). In response to questioning by appellant's counsel Mr. Palmquist again reiterated his willingness to consider the

minimum penalty and explained that he believed that if a person is convicted of the crime that the punishment should fit the crime. (Id. at 10:06:50-10:07:20). Then through leading questions appellant's counsel skillfully got Mr. Palmquist to agree with him that the death penalty was the only appropriate sentence for someone guilty of deliberate, intentional, and planned murders of multiple victims. (Id. at 10:08:00). However, when questioned by the Commonwealth Mr. Palmquist explained that he would not foreclose imposing any penalty within the penalty range before knowing the actual facts of the case. (Id. at 10:11:10). He also indicated that he could and would consider the entire range of penalties if instructed to do so by the judge. (Id. at 10:10:15). Based on the totality of his answers and the trial court own observations of Mr. Palmquist, the court properly found Mr. Palmquist to be a very intelligent individual that was willing and capable of following the court's instructions. (Id. at 10:12:49). Thus, the trial court properly exercised its discretion when overruling appellant's motion to strike Mr. Palmquist for cause.

On the morning of August 29, 2006, appellant caused a disturbance when he entered the courtroom by making unsolicited statements to the prosecuting attorney. Prospective juror Christy Higdon was present in the courtroom and witnessed this disturbance. (Id. at 10:19:57). Ms. Higdon explained that she did not hear what appellant said but could tell he was, "upset with the other lawyer." She noticed that appellant's counsel made comments to the appellant but could not recollect what those statements were. (Id. at 10:19:57). Ms. Higdon indicated that what she witnessed did give her a negative impression of the appellant, but stated that it would probably not affect how she

judged the appellant if picked for the jury. (Id. at10:20:51). Otherwise, Ms. Higdon clearly articulated her ability to give serious and meaningful consideration to the full range of penalties and her willingness to give meaningful consideration to mitigation evidence. (Id. at 10:17:11-10:19:01, 10:22:18, 10:23:30). The trial court rejected appellant's motion to strike for cause finding properly finding that Ms. Higdon was highly educated and intelligent individual that would make an outstanding juror. Any negative residual impact left on her by what she witnessed in the courtroom was solely caused by the appellant and the trial court believed that the appellant should not be permitted to receive a benefit for his failure to control his behavior in the presence of potential jurors. (Id. at 10:27:30-10:29:15). Thus, the trial court properly exercised his discretion and overruled appellant's motion to strike Ms. Higdon for cause.

For the reasons above appellant's allegations of error are completely without merit and therefore, this Court must affirm appellant's convictions and sentence.

XVIII.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION TO COVER PRISON INFORMATION CONTAINED ON CERTAIN LETTERS.

During examination of Mr. Meece, his attorney sought to mark and use two photocopies of letters Meece wrote to Meg Wellnitz's attorney purportedly informing the attorney of his plan to give false statements in exchange for a guilty plea. (VR 15; 9/15/06, 2:40:10). The letters were marked and shown to the appellant who then identified them as the letters he sent to Ms. Wellnitz's attorney. (Id. 2:40:50). At that point appellant's attorney realized that information indicating that the appellant was

incarcerated at Eastern State Correctional Complex was contained on the top of the letters and sought to had that portion covered or redacted. (Id. at 2:41:40). Both the Commonwealth and the trial court believed counsel had opened the door pretty wide and the trial court deferred ruling until after the Commonwealth had cross-examined appellant. (Id.) The following day after the close of all proof and immediately following defense counsel's closing argument, appellant's counsel sought to have the trial court to rule on his motion to redact or cover portions of the above described letters. (VR 16; 9/15/06, 11:17:00). The trial court had no recollection of those exhibits being admitted and ultimately overruled appellant's motion. (Id.).

Appellant now claims that it was reversible error for the trial court to deny this untimely request to redact a portion of two letters described above. However, it was evident throughout appellant's testimony that he was incarcerated while awaiting trial. Thus, the appellant suffered no prejudice from his counsel's failure to redact portion of the letters before marking them as exhibits and using them at trial and no reversible error occurred.

XIX.

THE INSTRUCTIONS PROPERLY REQUIRED THE JURY TO FIND THE ELEMENTS OF FIRST-DEGREE BURGLARY AND FIRST-DEGREE ROBBERY.

Meece admits non-preservation of this issue. The reason for Meece's failure to preserve this matter is obvious.

Burglary

Burglary is elevated to the first degree in either of two ways. Infliction of physical injury is one way. KRS 511.020. Using a deadly weapon is an alternative method. *Id.*

The evidence of physical injury was abundant and uncontested. So was the evidence that a deadly weapon was used. Meece shot and killed all three of his burglary victims. The burglary instruction required the jury to find that Meece inflicted physical injury. (TR Vol. 10, p. 1458). Meece's brief avoids discussion of this stand-alone basis for elevating his burglary conviction to the first degree. Meece's brief tries to confine attention to the alternative element of a deadly weapon having been used. The burglary instruction in Meece's case included this alternative. (*Id.*). The evidence supported this alternative. There was no error.

Meece's brief notes that Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006) and Wright v. Commonwealth, 239 S.W.3d 63 (Ky. 2007) now require juries to be instructed that firearms are deadly weapons. (In both cases the Court explained that a U.S. Supreme Court decision seemed to require talking down to jurors in this manner. Also in Thacker and Wright, the Court found harmless this failure to have instructed adult citizens on the common knowledge that firearms are deadly weapons.) Meece's brief tries to stretch Thacker and Wright even farther. As stated in the instructions, the alternative element elevating Meece's burglary to the first degree (apart from physical injury) was that he "used a deadly weapon." (TR Vol. 10, p. 1458). According to

Meece's unpreserved argument, the burglary instruction should have mentioned firearms as examples of deadly weapons so that they could be defined as such. Trial defense counsel were not required to advance such a strained argument. Meece's claim is unpreserved and should be rejected on that basis.

Robbery

Robbery is elevated to the first degree in either of two ways. The use of physical force is one way. KRS 515.020. Being armed with a deadly weapon is an alternative method. *Id.* The evidence of physical force was abundant and uncontested. The evidence that Meece was armed with a deadly weapon was overwhelming. Meece shot and killed all three of his robbery victims. The robbery instructions required the jury to find that Meece used physical injury. (TR Vol. 10, p. 1459). Meece's brief avoids discussion of this stand-alone basis for elevating his robbery conviction to the first degree. Meece's brief tries to confine attention to the alternative element of a deadly weapon having been used. The robbery instruction in Meece's case included the commonly understood equivalent this alternative ("firearm"). (*Id.*). The evidence supported this alternative. There was no error.

Again, Meece's brief notes that Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006) and Wright v. Commonwealth, 239 S.W.3d 63 (Ky. 2007) now require juries to be instructed that firearms are deadly weapons. Meece's brief urges this Court to overrule the harmless error anaylsis used in Thacker and Wright. Meece's public defender agency wants this Court to find "structural error", *i.e.*, automatic reversible

error even without a showing of prejudice, in the failure to instruct on the universally known fact that a firearm is a deadly weapon. Meece's argument is contrary to established law. In Wright, *supra*, 239 S.W.3d at 68, this Court cited not only Thacker, *supra*, 194 S.W.3d at 291 but also Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) as authority that, "An error regarding an erroneous jury instruction that omits an essential element of the offense is subject to harmless-error analysis." In Wright this Court also said, "In this matter it is beyond question that the jury would have found the pistol carried by Appellant to be a deadly weapon." 239 S.W.3d at 68. Also, on the same page of its unanimous opinion in Wright, this Court said:

> Not only is it common knowledge that pistols are deadly weapons, but the pistol in this case was fired, seriously injuring Hubbs. Thus, the error is harmless.

Meece's brief does not acknowledge the quoted language in Wright or the very existence of the U.S. Supreme Court decision in Neder v. United States, *supra*.

Meece's argument to this Court is parsed, quilted, and completely unpreserved for appellate review. Trial defense counsel were not required to object or tender instructions in accordance with the strained argument conjured by Meece's appellate counsel in afterthought. Meece's newly found complaint about the jury instructions should be rejected on the ground of non-preservation.

XX.

MEECE WAS NOT ENTITLED TO INTRODUCE HEARSAY.

Meece wrote some self-serving letters while awaiting trial for his three capital murders. The letter expressed Meece's love for his three children. During sentencing Meece was allowed to testify with regard to his love for his children and to the fact that he exchanged loving letters with his children while they were at summer camp. (VR 17; 9/18/06, 2:46:00). Meece's attempt to introduce the letters as an exhibit during the sentencing was denied.

The letters were properly excluded because they were self-serving hearsay. The trial court observed that none of the children testified and that the appellant had been given ample opportunity to subpoena any witness for trial. However, testimony by Meece or by the children would not have excepted the letters themselves from the hearsay rule. See KRE 801A ("Prior statements of witnesses and admissions").

The letters were also irrelevant. This is an independent basis for upholding the trial court's ruling. Evidence offered in mitigation must bear on the defendant's character, record, or criminal circumstances. Lockett v. Ohio, 438 U.S. 586 (1978). Also see Stanford v. Commonwealth, 734 S.W. 2d 731, 789 (Ky. 1987). Otherwise it is irrelevant and therefore inadmissible. In Lockett the U.S. Supreme Court found that, "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence

not bearing on the defendant's character, prior record, or the circumstances of his offense. Lockett, 438 U.S. at 605, n. 12.

Meece's brief provides nothing but sound bites and fragmented quotations from several cases. Examination of those cases reveals that only general principles are stated. None of the cases cited in Meece's brief actually support his argument for abandonment of the evidentiary rules. For these reasons the trial court properly excluded the proffered letters as inadmissible hearsay. Further, the letters did not speak directly to appellant's character. Rather, the letters simply were being offered in an attempt to bolster appellant's already offered testimony. Thus, no error occurred.

XXI.

THE PENALTY PHASE INSTRUCTIONS INSURED A CONSTITUTIONALLY RELIABLE DEATH SENTENCE.

Appellant argues that the penalty phase jury instructions were constitutionally deficient and produced an unreliable sentence. The penalty phase instructions herein were constitutionally sufficient and produced a reliable sentence. The United States Supreme Court has afforded the States substantial discretion in structuring capital sentencing proceedings, with only a few narrow, specific limitations. Romano v. Oklahoma, 512 U.S. 1 (1994); Tuilaepa v. California, 512 U.S. 967 (1994).

Appellant concedes his argument was not preserved for appellate review. That being the case, the standard of review for this issue is provided for in Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1981).[1]

A. Refusal to Include LWOP: As previously argued appellant, on several occasions, expressly waived LWOP as a sentencing option. (See Argument VI of this Brief). Because of appellant's express desire that LWOP not be made a sentencing option the jury was not questioned about their ability to consider that sentence along with the other available sentences during voir dire. Thus, the trial court properly held it would not be proper to instruct the jury on a sentencing option for which they were never questioned.

B. Non-Unanimous Mitigation: Appellant argues "[j]urors 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." Brief for Appellant, p. 104. Appellant then cites a survey that is not part of the record. The Court must ignore this survey.

This Court has previously ruled that the mitigating circumstance instruction used herein does not mislead the jury into thinking they must be unanimous in deciding the [non-]existence of each, particular mitigating circumstance without an additional instruction. Bowling v. Commonwealth, 873 S.W.2d 175, 180 (Ky. 1993), *habeas*

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[1]This standard of review is spelled out in the "Preliminary Argument: Preservation-Default-Waiver" section of this Brief and will not be restated in this Argument.

denied, sub. nom., Bowling v. Parker, 344 F.3d 487, 502-503 (6th Cir. 2003); Caudill v. Commonwealth, 120 S.W.3d 635, 674-675 (Ky. 2003); Soto v. Commonwealth, 139 S.W.3d 827, 870 (Ky. 2004).

C. Written Mitigation Findings. Appellant argues the jury should have been instructed to reduce to writing its findings concerning mitigation. The jury is required, per KRS 532.025(3), to reduce to writing its findings concerning aggravating factors. No such requirement exists in regards to mitigating factors. Smith v. Commonwealth, 599 S.W.2d 900, 912 (Ky. 1980). Appellant has shown no compelling reason why Smith should be overruled. The Court must decline appellant's request to overturn Smith.

D. Refusal To Limit Consideration of Aggravators. Appellant's claim that the instructions did not specifically limit consideration of aggravating evidence to the facts enumerated in the instructions is vague and unsupported by the record. The instructions, without any objection or concern from the appellant, expressly listed the aggravating circumstances the jury could find if the evidence support such a finding beyond a reasonable doubt. (TR 10; 1475, 1480, 1485). Thus, the jury was properly instructed and no error occurred. Further, a word search of the U.S. Supreme Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972), indicates that quotation found in appellant's brief on pages 77-78 was not contained within that opinion.

E. Non-Statutory Aggravator Findings. Appellant complains the jury was not instructed that it had to find any non-statutory aggravating circumstances beyond a reasonable doubt. 'A capital sentencer need not be instructed how to weigh any particular

fact in the capital sentencing decision. Tuilaepa v. California, 512 U.S. 967, 979-980 (1994).

F. Verdict Form. Appellant argues the penalty phase verdict forms were improper. He argues "[t]here was no way for the jury to complete and sign a verdict form finding an aggravating circumstance without fixing an aggravated penalty." In support of his argument, Appellate cites Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993). In Thomas, the appellant presented 34 assignments of error. Assignment of error number 30 read: "[t]he penalty phase verdict form was improper because it required imposing the death penalty if the jury found an aggravating circumstance." Id at p. 254. The Court found merit in Thomas' arguments 5, 19, 20, 21, 22 and 23. Regarding the remaining assignments of error, including number 30, the Court held: "[T]he Majority has concluded that some are unpreserved and the rest involved no error, or at worst, harmless error." Id. The majority opinion did not otherwise address the issue of the verdict form.

In Thomas, Justice Leibson wrote a four-part Opinion concurring in part, dissenting in part. In his dissent, Justice Leibson addressed the issue of the verdict form. No other justice joined in this dissent. Justice Leibson stated that "there is no reason why" the verdict form should not separate the finding of aggravating circumstances from the forms affixing punishment at death or life without possibility of parole for 25 years. Id at 264. A one-justice dissent is not the law of the Commonwealth. The trial court did not err.

G. Definition of "For Profit." Appellant irrationally complains, for the first time, of the trial court's decision to follow Justice Cooper's treatise on instructions in defining "for profit." Importantly, the appellant fails to point out anything inaccurate with the trial court's definition of the term or how the definition in any way prejudice him at trial. Thus, the trial court's decision to utilize the definition for the phrase "for profit" as suggested in Cooper's Kentucky Instructions To Juries §12.06 was not error.

H. Non-Death Sentence With Finding of Aggravators. Appellant complains the instructions failed to inform the jury that they could return a non-death sentence even if they found the existence of statutory aggravators. "There was no need to instruct the jury that it could impose a life sentence even if it found an aggravating factor beyond a reasonable doubt." Caudill v. Commonwealth, 120 S.W.3d 635, 674 (Ky. 2005); Bussell v. Commonwealth, 882 S.W.2d 111, 113 (Ky. 1994). The instructions did not violate appellant's due process rights or reliable sentencing rights. Smith v. Commonwealth, 599 S.W.2d 900 (Ky. 1980).

I. Reasonable Doubt. Appellant argues the trial court's reasonable doubt instruction concerning the death penalty coerced or mislead the jury into believing it must impose the death penalty. The mechanics of appellant's argument resemble a tautology in that it is composed of simpler statements in a fashion that makes it seem true whether the simpler statements are true or false. Parrish v. Commonwealth, 121 S.W.3d 198, 206 (Ky. 2003). "The instructions do not violate the statutory system, nor do they invade the province of the jury . . . The instruction allowed the jury to consider options other than

death, even when a finding is made as to aggravating circumstances." Id at 207, citing Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992).

J. Parole and Consequences of Verdict. Appellant argues the jury should have been instructed that "death means death." He also argues that the jury should have been told that appellant would not be eligible for parole. Appellant cites no case law holding that the jury should be so instructed. Appellant's argument is an affront to common sense. "We've got to give the jury some credit for having some amount of common sense." People v. Marlow, 96 P.3d 126, 140 (Cal. 2004). The jury need not be told that "death means death", or that a condemned inmate is not eligible for parole, or that life without possibility of parole means just that. People v. Smith, 68 P.3d 302, 339 (Cal. 2003); State v. Bush, 942 S.W.2d 489, 522-523 (Tenn 1997); State v. Jones, 474 So.2d 919 (La. 1985); State v. Brown, 293 S.E.2d 569 (N.C. 1982).

K. Passion and Prejudice. Appellant fails to point out where in the record an instruction on passion and prejudice was requested and fails to even offer the substance of the instruction he now believes should have been given. In any event, such and instruction was not required and there is more than sufficient proof contained in this record to establish for this Court that a death sentence was not, "imposed under influence of passion, prejudice, or any other arbitrary factor." KRS 532.070(3)(a).

L. "Any Doubt." Appellant again fails to indicate where in the record where such and instruction was requested. Nonetheless, it is patently obvious that the jury was properly instructed as to when a sentence of death was appropriate. (TR 10; 1472-1492).

M. Alleged Failure to Explain Mitigation, Standard of Proof or that Mercy is a Proper Consideration. Contrary to appellant's assertion there is no reasonable probability that the jury misunderstood its role in the capital sentencing procedure or that it misunderstood how to properly consider mitigation evidence. The jury was question during voir dire with regard to their understanding and willingness to consider mitigation evidence. Further, the record reflects that the trial court properly instructed the jury on the use of mitigation evidence. (TR 10; 1474).

XXII.

APPELLANT WAS NOT DENIED THE OPPORTUNITY TO EXPLAIN WHY HE ENTERED HIS GUILTY PLEA.

The appellant testified extensively as to why he chose to enter the guilty plea he was later allowed to withdraw. (VR 15; 9/14/06, 2:32:40 *et seq*). Since appellant was given and took the opportunity to explain why he entered his guilty plea, there could be no prejudice resulting from the trial court's decision excluding hearsay evidence.

In order to bolster his self-serving statements the appellant attempted to introduce a fax from attorney David Kaplan that was sent to the prosecuting attorney. The alleged purpose of this blatant hearsay evidence was to provide tangible proof that visitation with his kids was part of the plea agreement. (See Appellant's Brief at 84). However, the trial court had previously ruled that visitation with his children was not part of the plea agreement. (TR 10, 1425). Further, during an evidentiary hearing held on July 31, 2006, appellant expressly conceded that the Commonwealth did not negotiate visitation with his

children as part of the plea. (VR 4; 7/31/06, 11:09:58). Since the trial court had already found, after considering appellant's own sworn testimony, that visitation with his children was not part of the plea agreement, the trial court properly prevented the appellant from using hearsay evidence to mislead the jury by providing unfounded support for purely fabricated facts.

XXIII.

APPELLANT'S RIGHT TO CONSULT WITH COUNSEL WAS INTERFERED WITH.

Appellant's right to counsel was not interfered with when the trial court refused to let him consult with counsel while on the witness stand. It is well-settled that, "When a defendant becomes a witness; he has no constitutional right to consult with his lawyer while he is testifying." Perry v. Leeke, 488 U.S. 272, 280 (1989); Beckham v. Commonwealth, 248 S.W.3d 547, 554 (Ky. 2008). In Beckham this Court expressly authorized a trial court to limit a defendant's to consult with his attorney during his testimony holding that,

> As the Court held in Perry, "*we do not believe the defendant has a constitutional right to discuss [his] testimony while it is in process.*" [FN24] All the trial judge did in the case at hand was attempt to minimize the risk that Beckham would get "coaching tips" before the resumption of his cross-examination. Since the trial judge's actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact during the waning minutes of the overnight recess, we hold that the trial court's admonition to counsel did not abridge Beckham's Sixth Amendment right to counsel. (emphasis in original).

Id. at 554. In this case appellant's request to consult with his attorney occurred during the middle of his ongoing testimony not during any break or recess. (VR 15; 9/14/06, 2:34:55-2:37:56). Given the timing of the request, it is fairly obvious appellant sought coaching with regard to his continued testimony once the proffered fax containing inadmissible hearsay was excluded. (Id.) As in Beckham the trial court refusal to allow appellant to consult with his attorney during the middle of his testimony was aimed at protecting the integrity of the proceeding and did not impermissibly limit appellant's right to consult with counsel.

Further, appellant's attempt to characterize his request to consult with counsel as his attempt to act as co-counsel at trial is completely refuted by the record. During a hearing on June 1, 2006, the appellant repeatedly asserted that he did not wish to act as co-counsel and that he was unwilling to make any type of limited waiver of counsel. (VH 3; 6/1/06, 2:54:30, 3:11:30). Additionally, appellant specifically asserted that he did not wish to participate as counsel during trial. (Id. at 3:04:18). Thus, appellant's attempt to mislead this court as to the purpose of his request to consult with counsel is conclusively refuted by the record.

XXIV.

THE TRIAL COURT PROPERLY LIMITED THE PARTIES ACCESS TO REGINA MEADE ONCE SHE TOOK THE STAND AS A WITNESS.

Appellant's ex-wife, Regina Meade, was not a party to this case. She was, however, called as a witness for the prosecution. Her testimony was split across two days

by an overnight recess. (VR 10, 8/31/06, 435:07; VR 11, 9/1/006, 9:13:00). Prior to the recess the trial court admonished the parties not to talk to Ms. Meade about her testimony because it was not proper. (VR 10; 8/31/4:35:07). Once she took the stand and was sworn, the trial court had broad powers to sequester a non-party witness. Absent an allegation or showing of abuse, the trial court's exercise of discretion in this instance should be affirmed.

In Geders v. U.S., 425 U.S. 80, 87 (1976), the United States Supreme Court held that, "[t]he judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony. Holder v. United States, 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); United States v. Robinson, 502 F.2d 894 (CA7 1974); United States v. Eastwood, 489 F.2d 818, 821 (CA5 1974)." Thus, it was not an abuse of discretion for the trial court to prevent both the appellant and the Commonwealth from talking to Ms. Meade about her ongoing testimony. The cases cited by the appellant are factually inapplicable to the situation presented here.

XV.

THERE IS NO COLORABLE CLAIM OF JUROR MISCONDUCT.

The basis for this assignment of error is a pro se motion appearing at TR Vol. 11, pp. 1624-1626. Meece's handwritten motion is vague. Meece claims he heard from somebody ("It has come to the attention of the defendant") that an unnamed juror

admitted to WLEX News that he or she disregarded unspecified admonitions and decided guilt "right from the start." Id. According to Meece's pro se motion, the unidentified juror might have "formed, and possibly expressed" an opinion prior to hearing all of the evidence. Id.

On the lower left-hand corner of the first page of Meece's pro se motion is a handwritten notation. The notation indicates that a copy of Meece's motion was sent to trial defense counsel. The ink and the handwriting style of the notation is obviously different than that used by Meece. Id. If there were any substance to Meece's allegation, DPA would have acted on it immediately because the failure of DPA to act on it immediately would constitute a procedural default not curable even through the conduit of a subsequent IAC claim. The occasion of the reply brief will enable DPA to come forth about its efforts to substantiate Meece's allegation. The oral argument will provide another opportunity to be forthcoming about such efforts.

XXVI.

THE TRIAL COURT PROPERLY EXCLUDED MS. HAYNES HEARSAY TESTIMONY.

During his case in chief the appellant sought to introduce testimony from Diane Haynes regarding a phone conversation she overheard between Joe Wellnitz and an unknown third party. (VR 14; 9/13/06,10:36:19). The trial court properly excluded this offered testimony on hearsay and relevance grounds. (Id. at 10:37:27).

Although appellant's counsel had indicated that they were not seeking to introduce the contents of the overheard phone conversation, Ms. Haynes avowal testimony indicates she overheard Joe Wellnitz speaking to someone who was upset about some animals. (Id. at10:45:48). Ms. Haynes surmised from the conversation that something was not right. (Id. at 10:45:48). To the extent Ms. Haynes testimony retold the content of the overheard conversation, that testimony was excluded as inadmissible hearsay. Otherwise, the testimony of Ms. Haynes was properly excluded as irrelevant. Pursuant to KRE 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." In this case there was absolutely no evidence to suggest an alternate perpetrator committed the crime. Appellant's assertion that Ms. Haynes' testimony provided such evidence was simply wild speculation, which the trial court properly excluded.

XXVII.

APPELLANT'S STATEMENT TO DELL JONES WAS PROPERLY ADMITTED.

On March 16, 2006, the appellant filed a *pro se* motion to suppress his statement to Detective Dell Jones during an polygraph examination in 1993. (TR 7 at 961). Pursuant to that motion an evidentiary hearing, in which Detective Jones testified, was conducted on August 11, 2006. During that hearing Detective Jones testified that appellant chose to terminate the examination during the pre-polygraph interview. (VR 1; 8/11/06, 5:35:25).

He further testified that appellant desire to terminate the interview were promptly complied with. (Id. at 5:36:23). Once appellant expressed his desire not to take the polygraph examination, Detective Jones had appellant sign out by executing what the appellant has characterized as a second waiver of rights form. (Id. at 5:37:30). Additionally, Detective Jones indicated that he tried to entice to take the poly-graph later or even the following day by offering to give appellant a copy of the questions to study and then promising not to deviate from that script. (Id. at 5:43:55). At no point did Detective Jones give any indication that appellant was held against his will for coerced in any way to make statements to police.

In Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000), the Kentucky Court of Appeals succinctly recognized long accepted standard for reviewing a circuit court's decision on a suppression motion as follows:

> Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law.

Additionally, RCr 9.78 indicates when reviewing a circuit court's decision on a suppression motion that, "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive."

The record in this case speaks for itself. There is absolutely no evidence that appellant's statements to Detective Jones were coerced in any way. Thus, the trial court,

by order entered on August 30, 2006, properly denied appellant's motion to suppress finding that appellant's statements were voluntarily made. (TR 10 at 1431-1432).

XXVIII.

THERE WAS AND STILL IS NO BASIS FOR SUPPRESSING APPELLANT'S STATEMENT TO DETECTIVE WHEAT IN 1993.

The appellant alleges that his 1993 statement to Detective Wheat was the product of coercion, and thus, should have been suppressed by the trial court. However, despite appellant's ability to file numerous suppression motions either *pro se* or through counsel, no motion to suppress this statement was ever made before the trial court. Thus, this issue is unpreserved for review on appeal. (Please see Prefatory Preservation Argument above). Because no suppression motion was made, no evidence was taken on this issue and there are really no facts on which this Court may review appellant's allegations. In fact the only citations to the record contained in appellant's argument refer only to appellant's age (VR 15; 9/14/06, 1:37:10) in February of 1993 and to the officers present during appellant's March 1993 interview (VR 11; 9/1/06,1:48:02). (See Appellant's Brief at 94-95). Thus, there is absolutely no evidence contained in the record on appeal to support appellant's contention that appellant's March 1993 statement to Detective Wheat was anything but voluntary.

Although the statement itself, or at least the majority of the statement, was played for the jury, it is unclear from the record whether appellant was first read his Miranda rights. (Id. at1:57:00). However, does appear that since the interview occurred at the

apartment of Randy Appleton that appellant was not in custody at the time the statement was given. Thus, officers were not required to inform appellant of his Miranda rights. Appellant's self-serving assertion that he was peer pressured into speaking with police is unconvincing and irrelevant. In Colorado v. Connelly, 479 U.S. 157 at 167 (1986), the United States Supreme Court held that, ". . . coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." There is no evidence in the record nor is there any credible allegation in appellant's brief that the officer's that interviewed appellant in March of 1993 engaged in any coercive activity when questioning the appellant. For these reasons this claim of error is completely without merit.

XXIX.

APPELLANT WAS NOT ENTITLED TO PLAY THE COMPLETE "FELICE TAPES" AND DID NOT EVEN REQUEST TO DO SO AT TRIAL.

On June 28, 2006, the appellant filed a *pro se* motion in limine seeking to prevent the Commonwealth from introducing "pieces and parts" of appellant's statements to undercover police officer, K.D. Felice, without playing all of the taped statements between the appellant and Felice. (TR 8, 1073). On August 7, 2006, the trial court entered a written order passing consideration of appellant's motion, "until such time the statements are offered for introduction." (TR 9, 1320). At trial the Commonwealth examined K.D. Felice but never played to sought to introduce the taped statements between Ms. Felice and the appellant. Further, appellant's brief is devoid of any citation

to the record indicating that he sought to introduce or play any portion of the taped statements between himself and Felice. (See Appellant's Brief at 95-97). Thus, it appears appellant waived this allegation of error.

In any event it is obvious that appellant was not entitled to play the "complete Felice Tapes." KRE 106 provides that, "**When 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 or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." (emphasis added). As pointed out above and admitted in appellant's brief, the Commonwealth did not admit any writing or recorded statement or any part thereof at trial. Instead, the Commonwealth call K.D. Felice to testify thereby subjecting her to cross-examination by the appellant. Had appellant believed Felice misquoted or quoted out of context anything he said to her, he was given the opportunity to cross-examine Felice and could have sought to impeach her with the recorded statements. Thus, KRE 106 is simply not applicable.

Further, even if KRE 106 were applicable appellant would not have necessarily been permitted to play all of the taped statements. In Schrimsher v. Commonwealth, 190 S.W.3d 318, 330, 331 (Ky. 2006), this Court held that,

> . . .a party purporting to invoke KRE 106 for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning. "The issue is whether 'the meaning of the included portion is altered by the excluded portion.' " Young, 50 S.W.3d at

> 169 (quoting Commonwealth v. Collins, 933 S.W.2d 811, 814 (Ky.1996))."
>
> . . .
>
> Contrary to Appellant's position, KRE 106 does not 'open the door' for introduction of the entire statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it.
>
> The completeness doctrine is based upon the notion of fairness-namely, whether the meaning of the included portion is altered by the excluded portion. The objective of that doctrine is to prevent a misleading impression as a result of an incomplete reproduction of a statement.

Id. at 331. Since the appellant has failed to raise at trial or on appeal how any statement quoted or paraphrased by Felice was some how taken out of context or otherwise plucked from the recorded statements so as to mislead the jury to its meaning, appellant has waived this issue and failed to meet his burden under KRE 106 for playing all of his taped statements to Felice. Thus, this issue is completely without merit.

XXX.

APPELLANT'S STATEMENTS TO K.D. FELICE WERE PROPERLY ADMITTED.

On September 4, 2004, appellant filed a motion to suppress any and all statements he made to undercover police officer K.D. Felice alleging only that he had made a prior request for an attorney in 1993. (TR 3 at 341-342). The Commonwealth written response filed on September 28, 2004, asserted that appellant never assert his right to an attorney during the March 1993 interview with police. In fact the Commonwealth pointed out that

during that 1993 interview the appellant affirmatively waived his Miranda rights. (TR 3; 420-421).

On October 8, 2004, the trial court held an evidentiary hearing to determine whether or not appellant's statements to K.D. Felice, an undercover police officer, were made after appellant had asserted his right to an attorney under Miranda. (VRH 2; 10/8/04, 10:29:00). Appellant alleged that he had asserted his right to counsel following the termination of polygraph examination in 1993. However, officers present at that examination refuted appellant's testimony, indicating that the appellant never asserted his right to counsel. Thus, the trial court properly exercised its discretion in believing the officers and overruling appellant's suppression motion.

In 1993, appellant agreed to submit to a polygraph examination at the Lexington Police Department. (VRH 2; 10/8/04, 10:30:05). However, during the pre-interview the appellant got angry that the questions had veered to the Wellnitz murder and terminated the examination. (Id. at 10:31:11). According to the appellant he exited the examination room into a hallway where he was met by three officers. Appellant testified at the hearing that the officers tried to continue interrogating him, but that he told them that he had nothing else to say to them without the presence of a lawyer. (Id. at 10:31:56). However, two of the officers present in the hallway with the appellant following the termination of the polygraph examination did not recall the appellant making any assertion of his Miranda rights. Specifically, Kentucky State Trooper Jeff Hancock testified that appellant never indicated any desire for an attorney. Instead, an angry appellant

demanded that the officer call ahead or otherwise give notice before came back around. Appellant indicated that should the officers fail to give notice he would consider their contact an act of hostility. (Id. at 10:43:59-10:44:42). Likewise, Kentucky State Police detective Roy Wheat testified that he met the appellant in the hallway after he terminated the polygraph examination. Detective Wheat recalled that the appellant indicated that he did not want to talk to police unless they called ahead and that anything less would be an act of hostility, but appellant never indicated any desire to contact an attorney or to have an attorney present at future meetings. (Id. at 10:55:41-10:57:15).

Based on the above testimony the trial court, in a written order entered on October 18, 2004, overruled appellant's motion to suppress. (TR 4; 529-530). Because the trial court's findings and decision were supported by "substantial evidence" its decision is conclusive and this Court must find this allegation of error to be without merit. RCr 9.78

XXXI.

KRS 615 WAS NOT VIOLATED.

Appellant alleges that the trial court abused its discretion when it allowed two former lead detectives on the Wellnitz case to remain at counsel table during trial. However, it is evident from the record that the unique circumstances of this case made the presence fo these two former investigators necessary. Thus, the trial court did not abuse its discretion.

In U.S. v. Phibbs, 999 F.2d 1053, 1073 (6th 1993), the United States Court of Appeals for the Sixth Circuit in a case arising from the Eastern District of Kentucky was

asked a question similar to the one now before this Court. In Phibbs the Sixth Circuit found that under FRE 615(3), a rule nearly identical to KRE 615, a Drug Enforcement Administration (DEA) special agent qualified as "essential" witness who could remain in courtroom, in addition to Federal Bureau of Investigation (FBI) special agent qualified as government representative, to assist with drug prosecution. Id. at 1073. In reaching that conclusion the Phibbs court held that,

> The "essential" witness exception set out in Rule 615(3) "contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." Advisory Committee Notes to Fed.R.Evid. 615. We are persuaded that Finken fell within this category due to the particular circumstances of the case at bar. This was a trial that was scheduled for approximately one month, involving several defendants and a great deal of evidence, not all of which was readily accessible. After Merryman was designated the government's representative in accordance with Rule 615(2), the court determined that Finken, who was intimately familiar with portions of the evidence, was also needed to advise the government in its handling of the prosecution. As Merryman and Finken were, for the most part, responsible for distinct aspects of a far-flung investigation, this was not an abuse of discretion.

Id. at 1073. Likewise, in the case presently before this Court Wheat and Benningfield were for the most part the lead investigators responsible for this case for different periods of time. Given the unique nature of this case, the vast time period of the investigation, and the length and complexity of the trial, the trial court did not abuse its discretion in allowing both Wheat and Benningfield to remain at counsel table to advise the prosecution in its handling of this case. Further, the trial court took distinct steps to

insure that Wheat and Benningfield did not parrot each other's testimony by directing that one would be excluded from the courtroom while the other testified. (VRH 2; 10/8/04, 11:15:00-11:25:55). This is precisely the same precaution taken and approved of by the Sixth Circuit in Phibbs, supra. For these reasons it is evident that the trial court did not commit error and appellant's convictions and sentence must be affirmed.

XXXII.

THE TRIAL COURT PROPERLY LIMITED THE SCOPE OF INDIVIDUAL VOIR DIRE.

Meece's brief complains of limitations on questioning about both punishment and mitigation.

A. Punishment: The questions defense counsel wanted to ask during individual voir dire were absolutely improper:

> How do you feel about the death penalty?
>
> What purpose does the death penalty serve?
>
> Is the death penalty a deterrent?

Such questions require jurors to guess what the laws are regarding the death-eligibility of capital defendants, and to guess what the legislative policies are behind those laws. The philosophical discussions by these laypeople often include incorrect statements of law, which are seized upon by the defense. Any later attempts to set these jurors straight about the law are then denounced as impermissible "rehabilitation."

The proper inquiry is whether the juror would be prevented from or substantially impaired in considering the entire range of punishments including the death penalty. See Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841, 851-852 (1985), citing Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Under those cases, a prospective juror whose personal beliefs would "prevent or substantially impair" him from imposing the death penalty must be excused for cause. Also see Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (life-qualification). This Court adopted the Wainwright v. Witt, "prevent or substantially impair" standard in Sanders v. Commonwealth, 801 S.W.2d 665, 672 (Ky. 1990). No further inquiry is required. McQueen v. Scroggy, 99 F.3d 1302, 1329-1330 (6th Cir. 1996).

The best statement of the law on this matter appears in the opinion of this Court in Morris v. Commonwealth, 766 S.W.2d 58, 60 (1989). There the Court stated:

> It is the opinion of this court that the lower court should have informed the jury there are four penalties for the capital offense of intentional murder – viz., death, life without parole or probation for 25 years, life, or a term of not less than 20 years. KRS 532.030. The jury should be asked the simple question [,] "If you determine under the instructions of the court beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider the entire range of penalties provided by statutes of this Commonwealth as outlined to you?

(The four penalties described in the 1989 Morris opinion have become five with the legislature's addition of life without parole in 1998. The minimum described in Morris has become 20 to 50 years.)

It is improper to ask the circumstances under which a prospective juror would impose a particular sentence, or whether capital punishment is a deterrent. McQueen v. Scroggy, supra, 99 F.3d at 1330 ("The questions the defense wished to ask concerning when the death penalty is warranted and whether it is a deterrent . . . were properly excluded."). A layperson's preconceived ideas about whether and under what circumstances the death penalty should be imposed, or about the death penalty's value to society in general, or whether the death penalty is imposed often enough, et cetera, have nothing to do with the legitimate issue at hand. Cf., Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994). The proper inquiry is whether the prospective juror is able and willing to comply with the oath of juror by considering the evidence and following the law as given by the court.

B. Mitigation: The only restriction specified in Meece's brief is that he was not allowed to ask about mercy. Other than that, Meece's argument is a legal discussion about the importance of mitigation questioning, without any allegations of fact.

"Mercy" is not a mitigating circumstance. KRS 532.025. Courts are not required to instruct capital sentencing juries on mercy. See California v. Brown, 479 U.S. 538, 543 (1987). Meece's brief cites no authority in support of his argument.

Questions about mitigation are governed by the same principles applicable to the subject of penalty range. The purpose is to empanel jurors who are able and willing to comply with their oath, not to "educate" them or obtain a commitment before the evidence is heard. A juror willing to consider mitigation is one who is capable of

complying with the oath of a juror. The Constitution requires no more than such consideration. E.g., Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (it was enough that the jurors were not prevented from considering mitigation); Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (same).

In United States v. Tipton, 90 F.3d 861, 878 (4th Cir. 1996), the trial judge refused all of the defendants' proposed questions about "deprived, poor background", "emotional, physical abuse", "young age", "limited intelligence", and "brain dysfunction." Affirming the defendants' death sentences, the Fourth Circuit found no abuse of discretion in the trial judge's generalized approach and rejected the "death is different" emotional appeal:

> Just how an inquiry adequate for this specific purpose should be conducted is committed to the discretion of the district courts. The Constitution no more "dictate[s] a catechism" for its conduct than it does for any other subject of required voir dire inquiry. [Morgan v. Illinois, 504 U.S.] at 729, 112 S.Ct. at 2229-30; Rosales-Lopez, 451 U.S. at 189, 101 S.Ct. at 1634-35; Aldridge v. United States, 283 U.S. 308, 310, 51 S.Ct. 470, 471, 75 L.Ed. 1054 (1931).

In United States v. McCullah, 76 F.3d 1087, 1114 (10th Cir. 1996), en banc reh. den., 87 F.3d 1136 (10th Cir. 1996), the Tenth Circuit observed that a juror who would not automatically vote for the death penalty is one who would consider mitigation. The question does not have to be asked both ways:

> The district court was not required, as Mr. McCullah suggests, to allow inquiry into each juror's views as to specific mitigating factors as long as the voir dire was

> adequate to detect those in the venire who would **automatically** vote for the death penalty. (emphasis original)

Once a clear answer has been given, there is no need to ask the same question again or in a different manner. In a recent Kentucky case where the murderer eventually served his death sentence, the Sixth Circuit explained:

> A person who answers that he will consider every possible penalty, specifically including life imprisonment and a term of years . . . is by virtue of that answer disclaiming the intent to impose the death penalty in every case. There are no magic words in these circumstances. Here the questions and answers disclose that the jurors were ready to consider each of the penalties that could be imposed, and that they were not predisposed to give only death or to act with leniency.

McQueen v. Scroggy, supra, 99 F.3d at 1330.

In Mu'min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), the U.S. Supreme Court approved of this generalized approach to voir dire. There, a death sentence was affirmed where the trial judge had asked about pre-trial publicity generally without delving into specifics. Mu'min relied on a line of cases dealing with questions about racial bias. What Mu'min said about pre-trial publicity and racial bias questioning is persuasive concerning any other topic such as mitigation. 500 U.S. at 424-425, 114 L.Ed.2d at 505. Mu'min left it to the discretion of the trial judge to determine whether any follow-up questioning is needed. Id. Specifically, the Court in Mu'min said:

> Voir dire serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in

> exercising peremptory challenges. In *Aldridge [v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931)] and *Ham [v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973)] we held that the subject of possible racial bias must be "covered" by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done. We did not, for instance, require questioning of individual jurors about facts or experiences that might have led to racial bias. Petitioner in this case insists, as a matter of constitutional right, not only that the subject of possible bias from pretrial publicity be covered – which it was – but that questions specifically dealing with the content of what each juror has read be asked. For the reasons previously stated, we hold that the Due Process Clause of the Fourteenth Amendment does not reach this far, and that the voir dire examination conducted by the trial court in this case was consistent with that provision.

Id., 500 U.S. at 431-432, 114 L.Ed.2d at 509-510.

In short, the weight of authority calls for a generalized approach to questioning prospective jurors about mitigation. Questions about specific mitigating circumstances are improper. Condemned prisoners have been known to collaterally attack the trial performances of defense lawyers who imply the existence of specific mitigating circumstances by asking about them but for whatever reason do not produce evidence about them at trial. It is enough to explain what mitigation is in general, and then to ask prospective jurors whether they are willing and able to consider it.

XXXIII.

THE TRIAL COURT DID NOT FAIL TO REMOVE UNQUALIFIED JURORS.

Appellant claims that the trial court erred when failed to remove four jurors, Charles Cohron, Melissa Johnson, Brad Harrell, and Jamie Miller, who he alleges were not qualified to be jurors in this case. However, appellant made no attempt to strike these allegedly unqualified jurors at trial. Thus, this issue is not properly preserved for appellant review. The record in this case reflects that counsel specifically moved to disqualify or strike many other prospective jurors but did not seek to have the four jurors mentioned above disqualified or stricken from service. (See Argument 17 above). Such action by trial counsel indicates that counsel specifically chose not to object to the these jurors being permitted to serve in this case. See West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989). Trial counsel's decisions on such matters are presumed reasonable under Strickland v. Washington, 466 U.S. 668, 687-696 (1984). For this reason alone this Court should reject this claim of error.

However, should this Court entertain this claim of error the real issue before the Court is whether the four veniremen mentioned above held views that "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." Wainwright v. Witt, 469 U.S. 412, 414 (1985). The determination of whether to exclude a venireman for cause lies within the sound discretion of the trial court and will not be reversed absent a showing that the exercise of this discretion was

clearly erroneous. Grooms v. Commonwealth, 756 S.W.2d 131, 134 (Ky. 1988); Simmons v. Commonwealth, 746 S.W.2d 393, 396 (1988). A juror should be dismissed for cause only if the juror cannot conform his or her views to the requirements of the law and cannot render a fair and impartial verdict. Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994). "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958).

Charles Cohron indicated that he could give serious and meaningful consideration to the entire range of penalties available in this case. (VR 3; 8/22/06, 10:10:34-10:17:47). Although he indicated that he may be inclined to pick one of the top two sentence, Mr. Cohron quickly qualified that response by questioning whether he was reading too much into the court's hypothetical and by stating that the sentence imposed would depend on the evidence. (Id.) After a bit of clarification, Mr. Cohron unequivocally agreed that he could consider the full penalty range. (Id. at 10:17:47). During thorough questioning by the Commonwealth and appellant's attorney, Mr. Cohron indicated his willingness to consider mitigating evidence, as well as aggravating evidence, and demonstrated that he was definitely not an "automatic death penalty guy." (Id. at 10:20:15, 10:25:42). Mr. Cohron expressly stated that he could foresee a set of facts or circumstances for which a lesser penalty of 20-50 years may be appropriate for an aggravated murder and made it crystal clear to everyone in the courtroom that he would consider all of the evidence before then considering the entire range of penalties. (Id. at 10:21:56, 10:24:59, 10:25:42). Thus, it is patently obvious from the record why appellant's counsel did not

seek to strike Mr. Cohron. It is equally obvious that Mr. Cohron did not hold views that "would prevent or substantially impair" the performance of his duties as a juror. See Wainwright v. Witt, 469 U.S. 412, 414 (1985). Thus, the trial court did not abuse its discretion in allowing Mr. Cohron to remain on the jury.

Contrary to appellant's assertion, Melissa Johnson had not been exposed to considerable publicity about this case. Rather, Ms. Johnson indicated that she only partially heard a story about the case on the Sunday night news. (Id. at 2:09:50). From that news story Ms. Johnson learned that three people had bee murder and that a woman, sister and daughter to the victims, was involved. She also believed that the woman implicated had plead guilty but recently "recanted her plea." (Id. at 2:09:50, 2:11:59). Ms. Johnson learned and knew nothing about appellant's alleged involvement in the murders. Further, she expressly indicated that she had not formed any opinion in this case and was willing and able to give appellant the presumption of innocense. (Id. at 2:10:55). In McQueen v. Scroggy, 99 F.3d 1302, 1319-1320 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 2422, the Sixth Circuit stated:

> There is no per se rule that mere exposure to media reports about a case merits exclusion of a juror. To the contrary, in order to merit disqualification of a juror, the media reports must engender a predisposition or bias that cannot be put aside, requiring the juror to decide a case one way or the other....There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case. The Constitution does not require ignorant or uninformed jurors; it requires impartial jurors. While it may be sound trial strategy for an attorney to exclude

anyone with knowledge of the facts or parties, such a result is not mandated by the Constitution.

Even the fact that a juror has read a news account of the case during the course of the trial is not automatically grounds to exclude that juror or declare a mistrial. Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992). It is without question that some knowledge about a case does not show objective bias supporting a challenge for cause. Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000). There is no requirement that prospective jurors be completely ignorant of the facts. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky.1997). The real test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of law and render a fair and impartial verdict. Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 671 (1994). Disqualification of a juror is merited only when the juror's knowledge precludes impartiality. Bowling, *supra*. Appellant did not object to this juror serving and has filed to show either error or prejudice thus, his conviction should be affirmed.

Brad Harrell was informed by defense counsel that some people refuse to consider mitigating factors such as a person's background or upbringing and was then asked whether he was that kind of person. Mr. Harrell indicated that he, "would say that it is a possibility of being considered," but he would have to see what the evidence was. Mr. Harrell then agreed with appellant's counsel that he accepted the concept that mitigating factors such as background are to be considered being choosing which sentence to impose. (Id. at 3:20:40). Mr. Harrell also indicated that he was not an "eye for an eye

kind of guy" and that he would need to see all of the evidence before setting a sentence. Given the totality of his responses it is patently obvious that Mr. Harrell was willing and able to consider mitigation evidence presented at trial before choosing a sentence. Thus, it is evident that this juror did not hold views that "would prevent or substantially impair" the performance of his duties as a juror and the trial court properly permitted him to serve as a juror in this case. See Wainwright v. Witt, 469 U.S. 412, 414 (1985).

In response to defense counsel's question inquiring whether she was the type of person who thought a defendant's background and upbringing was irrelevant when setting a penalty, Jamie Miller indicated that she believed background mitigation "probably should" be considered and that she personally thought that type of evidence to be important. (Id. at 10:21:30). Through his next question appellant's counsel confirmed that Ms. Miller was open to thoroughly considering mitigation evidence. (Id.) Appellant's brief characterization of Ms. Miller's responses on appeal it completely off the mark. It is readily evident from her response to defense counsel's questioning that Ms. Miller was willing and able to properly consider mitigation evidence and that she was well qualified to serve as a juror in this case.

For the reasons above appellant's allegations of error are completely without merit and therefore, this Court must affirm appellant's convictions and sentence.

XXXIV.

THE TRIAL COURT PROPERLY ADMITTED CRIME SCENE AND AUTOPSY PHOTOGRAPHS OF THE DECEASED VICTIM.

Appellant argues that the trial court erred by permitting the Commonwealth to introduce crime scene and autopsy photographs along with a video taken at the crime scene. More specifically, the appellant argues that the photographs were merely cumulative evidence that were not introduced to prove a point in controversy and thus, their admission was unduly prejudicial. It is evident from the record that this issue was not properly preserved at trial. Nonetheless, it will be demonstrated below that the appellant was not unfairly prejudiced by the admission this evidence and that the trial court properly admitted this evidence at trial.

Pursuant to KRE 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." All of the crime scene and autopsy photos admitted in this case were relevant to show the circumstance of the crime and the nature of the injuries inflicted by the appellant. Not only did these photos aid the medical examiner in explaining the nature and cause of the victims' injuries and ultimate deaths, but they also helped establish that the person who inflicted these wounds intended to cause the victim's death. In Parker v. Commonwealth, Ky., 952 S.W.2d 209, 212 (1997), this Court held that, "[p]roof of intent in a homicide case may be inferred from the character and extent of the victim's injuries. Intent may be inferred

from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense." [additional citations omitted]. Therefore, it is clear that the photos of the victim's injuries were relevant to prove that the appellant intentionally murdered each member of the Wellnitz family.

The longstanding rule in this Commonwealth is that otherwise admissible photographs are not excludable simply because they are gruesome and the crime is heinous. Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980); Holland v. Commonwealth, Ky., 703 S.W.2d 876 (1985); Epperson v. Commonwealth, Ky., 809 S.W.2d 835 (1991); Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1994). Further, the several cases cited in appellant's brief are easily distinguished from the facts of this case. Unlike the photos sought to be introduced in Clark v. Commonwealth, Ky., 833 S.W.2d 793 (1991) and Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1992), the photos in the present case did not depict mutilation, decomposition or decay not directly related to the crime. Instead the photo admitted by the trial court in this case directly aided testimony concerning the victim's injuries and helped prove that the injuries were inflicted with the intent to cause death. Thus, the trial court properly admitted the autopsy photos over appellant's objection.

XXXV.

STATUTORY AGGRAVATORS NEED NOT BE LISTED IN AN INDICTMENT AND APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE INDICTMENT.

Appellant argues that the indictment must allege specific statutory aggravator(s). Appellant argues the absence of listed statutory aggravators in the indictment violates his 5th Amendment right to grand jury indictment and due process. There is one gaping flaw in appellant's argument: the 5th Amendment right to grand jury indictment has never been incorporated to the States via the Due Process or Equal Protection Clauses. Since appellant does not have a 5th Amendment right to a state grand jury indictment, his 5th Amendment, and related due process, rights cannot be violated by any action taken by a state grand jury.

Appellant has waived his alleged error by failing to challenge, before the trial court, the alleged deficiency in the indictment. In Furnish v. Commonwealth, 95 S.W.3d 34, 41 (Ky. 2002), this Court found that the appellant could not complain on appeal of insufficient notice of the Commonwealth's intent to seek the death penalty or of the failure of the aggravator to be charged in the indictment where the appellant failed to first present these complaints to the trial court. Further, Furnish expressly disagreed with the contention that the aggravating circumstances were required to be included in the indictment. Id at p. 41. Since the error alleged by the appellant was not presented to the trial court, it is not reviewable by this Court.

Appellant was indicted for capital murder, first-degree robbery, and first-degree burglary. In that indictment, appellant was put on notice that the offense of murder was being charged as a capital offense, thus permitting penalties ranging from 20 year imprisonment to death. "Original Record of Adair Circuit Court," Vol. I p. 1-3. Thereafter, the Commonwealth filed its notice of aggravating circumstances, thereby putting appellant on notice that the Commonwealth would be seeking the death penalty against him. TR Vol I p. 36. Together, the indictment and the notice of aggravating circumstances supplied appellant with the statutory requirements, notice of what he had to defend against, and clearly satisfied due process. Ice v. Commonwealth, 667 S.W. 2d 671, 677-678 (Ky. 1984).

Appellant argues that failure to charge the aggravating circumstances within the indictment was error. The primary authority cited by appellant for this proposition is Jones v. United States, 526 U.S. 227 (1999). However, appellant's reliance on Jones is misplaced and not supported by the record. The holding in Jones is specific in that it relates only to elements of the crime, not sentencing considerations or penalty aggravators. Id.

The indictment herein contained the requisite information required by RCr 6.10. In Wylie v. Commonwealth, 556 S.W.2d 1 (1977), this Court held that an indictment is sufficient if it informs the accused of the specific offense with which he is being charged and does not mislead him. Later, in Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996), this Court, quoting from Runyon v. Commonwealth, 393 S.W.2d 877, 880 (Ky.

1965), noted that "[i]t is unnecessary under RCr 6.10 to 'restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the applicable statute, unmistakably accomplishes this end result'." The indictment herein informed appellant that he was charged with violating KRS 507.020, Murder (Capital Offense), and set forth in the narrative the date(s), place, and name of the victim (Sherry Lynn Bland) he was charged with killing. "Original Record of Adair Circuit Court", Vol I p. 1.

Appellant's citation to Jones v. United States, supra, which relates to federal prosecutions, is contrary to our RCr 6.10. Jones stands for the proposition that the indictment should furnish the accused with a description of the charge which will enable him to make his defense, and inform the court of the facts alleged, so the court may decide whether they are sufficient in law to support a conviction. United States v. Hess, 124 U.S. 483 (1888). Consistent with RCr 6.10, the Indictment herein provided appellant with a citation to the statute, an intentional crime, along with the basic facts alleged to support the charge. To the extent that Jones applies, due process has been satisfied. Further, other states have ruled that aggravating circumstances for the death penalty do **not** have to be charged in the indictment or approved by a grand jury under either federal law or state law. State v. Hunt, 582 S.E.2d 593 (N.C. 2003); Terrell v. State, 572 S.E.2d 595 (Ga. 2002). As the indictment and notice of aggravating circumstances herein were sufficient, no cognizable error has been established.

XXXVI.

APPELLANT'S DEATH SENTENCE IS NOT ARBITRARY OR DISPROPORTIONATE.

Appellant argues that the death penalty, as applied to him, is arbitrary and disproportionate. Appellant argues that his "motherless, lost" childhood and "minimal" criminal record somehow give him a free pass from the valid and just statutory punishment of death. Brief for Appellant p. 117. Appellant also argues there are "more 'deserving'" cases in which death was not imposed and therefore argues death is not proper for him. Brief for Appellant p. 117-118. Victim Sherry Lynn Bland's death was not proper for her. Death via execution is proper for appellant.

The sentences imposed upon other defendants are not relevant in determining the validity of a death sentence or other sentence. Marshall v. Commonwealth, 60 S.W.3d 513, 523 (Ky. 2000); Caudill v. Commonwealth, 120 S.W.3d 635, 672 (Ky. 2000). "What is important at the selection stage [of a capital sentencing proceeding] is an individualized determination on the basis of the character of the individual [defendant] and the circumstances of the crime. Tuilaepa v. California, 512 U.S. 967, 971-973 (1994). See also, Zant v. Stephens, 462 U.S. 682, 879 (1983); McCleskey v. Kemp, 481 U.S. 279, 303 (1987); Romano v. Oklahoma, 512 U.S. 1, 7-8 (1994).

XXXVII.

RECIPROCAL USE OF AGGRAVATING FACTORS.

Essentially, the appellant complains that because his crime was so heinous as to justify instructing the jury on multiple aggravators for each of three murders he was unfairly prejudiced by the creations of, ". . .a significant risk the jury may give undue weight to the mere number of aggravators found." (See Appellant's Brief at 120.). Simply put, this Court need not take extraordinary measures to protect this appellant from being prejudiced by the callousness and heinousness of his crimes. Further, this Court has previously held that, "The imposition of a death sentence for each murder committed under the intentional multiple death aggravating circumstances of KRS 532.025(2)(a)(6) is constitutional." Bowling v. Commonwealth, 942 S.W.2d 293, 305 (Ky. 1997); citing Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987); Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1993). Thus, this Court must reject this argument and affirm appellant's convictions and sentence.

XXXVIII.

DOUBLE JEOPARDY IS NOT VIOLATED WHEN A DEFENDANT'S RELATED ROBBERY AND BURGLARY CONVICTIONS ALSO SERVE AS STATUTORY AGGRAVATORS FOR IMPOSING THE DEATH PENALTY.

This issue is unpreserved. Appellant was convicted of capital murder, first-degree burglary, and first-degree robbery. The Commonwealth used the burglary and robbery

convictions to aggravate the murder conviction and impose the death penalty. Appellant argues this was improper.

Appellant correctly points out that this Court has previously rejected this argument. "Simply because the aggravating circumstance duplicates one of the underlying offenses does not mean that the defendant is being punished twice for the same offense." Bowling v. Commonwealth, 942 S.W.2d 293, 308 (Ky. 1997). It is interesting to note that the underlying convictions in Bowling were also burglary and robbery. Further, the United States Supreme Court has already considered and rejected the argument proffered by appellant. Witte v. United States, 515 U.S. 389 (1995), citing Williams v. Oklahoma, 358 U.S. 576 (1959); Schiro v. Farley, 510 U.S. 222 (1994).

Further, in Wilson v. Commonwealth, 836 S.W.2d 891 (Ky. 1992) (overruled on other grounds), this Court held that non-murder convictions obtained in the guilt phase of a capital murder trial may be used in the penalty phase to prove aggravating circumstances for murder. The Wilson Court held:

> K.R.S. 532.025 does not require that the defendant be punished for the same offense twice. The statute only requires that the aggravating circumstances be used only to determine whether the crime of murder should receive the death penalty. If the aggravating circumstance cannot be proved, then the penalty for death cannot be imposed. K.R.S. 532.030(2). **Simply because the aggravating circumstance duplicates one of the underlying offenses does not mean that the defendant is being punished twice for the same offense. The underlying offenses were only factors to be considered as to whether the punishment for murder should be death**. Wilson was

not subjected to double jeopardy or multiple punishments for the same offense.

Id at 891 (emphasis added); See also, Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky. 2002); Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990); Bowling v. Commonwealth, supra; Perdue v. Commonwealth, 916 S.W.2d 148 (1995).

XXXIX.

THE DEATH PENALTY IS CONSTITUTIONAL.

In an argument with 5 sub-arguments, appellant argues the death penalty, in general, is unconstitutional. The death penalty is constitutional.

A. The Statutory Scheme of KRS 532.025 is Constitutional. Appellant argues that KRS 532.025 is unconstitutional. In particular, appellant argues that KRS 532.025 makes all murder defendants death eligible because murder is a capital offense. Appellant relies upon a tortured interpretation of Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994) and Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990). Appellant's argument has already been considered, and rejected, by this Court. His argument that Jacobs v. Commonwealth (footnote omitted) amends KRS 532.025 and allows all murders to be eligible for the death sentence is meritless. In Jacobs, this Court recognized that the statute provides for the use of nonstatutory aggravators. Morever, Jacobs is not applicable here because only statutory aggravators were used. Only statutory aggravators were used herein. KRS 532.025(2)(a)(2).

Appellant's argument is without merit. As noted by this Court in Young v. Commonwealth, 50 S.W.3d 148 (Ky. 2001), a defendant may not be sentenced to death for the offense of murder unless the jury finds at least one statutory aggravating circumstance as set for in KRS 532.025(2) beyond a reasonable doubt, and which is supported by evidence at trial. In Harris, it was argued that the capital kidnapping death sentence was improper because the aggravating circumstance–the kidnapping victim was murdered-- was not one of the seven (at that time) aggravators listed in KRS 532.025(2)(a). This Court noted KRS 532.025(2) directs the jury to consider "aggravating circumstances otherwise authorized by law." KRS 509.040(2) allows for imposition of the death penalty when a kidnapping victim is not released alive. Thus, the Harris Court held that KRS 509.040(2) was an "aggravating circumstance otherwise authorized by law" per KRS 532.025(2). Harris, 793 S.W.2d at 805. Therefore, KRS 532.025(3), referencing the "statutory aggravating circumstances enumerated in subsection 2", meant all of subsection (2), not just the list in subsection (2)(a). Support was also found for this interpretation in subsection 1(b) of the statute - which directs the jury in all death penalty cases to determine the existence of any aggravating circumstances "as defined in subsection (2)" and hence does not limit the jury's consideration to those aggravating circumstances that are specifically enumerated in subsection (2)(a). Id. (*citing* Stanford v. Commonwealth, 734 S.W.2d 781, 790 (Ky. 1987).

Similarly, appellant also cites Jacobs v. Commonwealth, supra, (hereinafter referred to as "Jacob I"). He misstates that holding by contending that the language - "[t]herefore,

the jury's consideration of aggravating circumstances was not limited to one exactingly and specifically enumerated in this statute" - was a negation of KRS 532.025(3) by this Court and allowed for consideration of all nonstatutory aggravating circumstances in order to make a capital defendant death-eligible. On the contrary, in the context of the argument, it is clear that the aforementioned language was a reiteration of the Harris holding, that consideration of aggravating circumstances referenced the eight (8) listed in KRS 532.025(2) and those otherwise authorized by law. Jacobs I, 870 S.W.2d at 420.

Jacobs I was remanded on other grounds. However, the point made in that case (and argued here) was illustrated by this Court's holding in the appeal after remand - Jacobs v. Commonwealth, 58 S.W.3d 435 (Ky. 2001)(hereinafter referred to as "Jacobs II"). In Jacobs II, the defendant was convicted of murder with the aggravating circumstance of kidnapping. Jacobs II reversed the death sentence and remanded the case for resentencing, noting that kidnapping was not enumerated in KRS 532.025(2) and was not an aggravating circumstance otherwise authorized by law. In sum, appellant is incorrect in his contention that the holdings in Harris and Jacobs I make all murder defendants eligible for the death penalty.

Further, in Lowenfield v. Phelps, 484 U.S. 231, 241-246 (1988), the U.S. Supreme Court upheld a Louisiana death sentence for first degree murder (capital offense), and concluded that Louisiana's definition of first degree murder was sufficient to narrowly define the category of offenders eligible for the death penalty. The Lowenfield opinion stated in part, 484 U.S. at 244-245 and 246:

> The use of "aggravating circumstances" is not an end in itself, but a means of generally narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of trial or the guilt phase.*** The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury's finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

The Supreme Court reiterated this ruling in Tuilaepa v. California, 512 U.S. 967, 971-972 (1994). The Supreme Court has also narrowly defined when an aggravating circumstance is facially unconstitutional. "If the sentencer could fairly conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993). *Also see*, Tuilaepa v. California, *supra*; Lewis v. Jeffers, 497 U.S. 764, 774-778 (1990); Bell v. Cone, 125 S.Ct. 847 (2005).[2]

In the instant case, appellant was found guilty and sentenced to death for Murder committed while he was engaged in the commission of robbery in the first degree and burglary in the first degree. Therefore, since appellant was found guilty of murder in concert with a statutory aggravating circumstances as defined in KRS 532.025, appellant's

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[2]The U.S. Supreme Court has also held that even when a jury (hypothetically) relies upon an unconstitutionally vague aggravating circumstance for the death penalty, but finds other valid aggravating circumstances to support the death penalty, the death sentence is not rendered unconstitutional as a result. Zant v. Stephens, 462 U.S. 862 (1983).

argument must be rejected by this Court. Appellant's argument is inapplicable to his case and does not establish that the Eighth Amendment was violated with respect to his death sentence. KRS 532.025 is not facially unconstitutional, and the aggravating circumstances for which appellant was found guilty by the jury are sufficient to authorize his death sentence under the Constitution. *See* Tamme v. Commonwealth, 973 S.W.3d 13, 40 (Ky. 1998); Parrish v. Commonwealth, 121 S.W.3d 198, 205 (Ky. 2003); St. Clair v. Commonwealth, 140 S.W.3d 510, 569-570 (Ky. 2004); Epperson v. Commonwealth, 197 S.W.3d 46, 62-63 (Ky. 2006).

B. KRS 532.025 Provides Sufficient Guidance. This Court has specifically held that " KRS 532.025 provides sufficient statutory guidance for the imposition of the death penalty". Epperson v. Commonwealth, 197 S.W.3d 46, 62 (Ky. 2006). The Sixth Circuit also has rejected a similar argument against the Kentucky death penalty statute. McQueen v. Scroggy, 99 F.3d 1302, 1332 (6th Cir. 1996). In Tuilaepa v. California, 512 U.S. 967, 979-980 (1994), the Supreme Court recognized that States may grant the sentencing authority vast discretion to evaluate the circumstances relevant to the particular defendant and the crime he committed in deciding whether to impose a death sentence. The Supreme Court further pointed out:

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it is found that the defendant is a member of the class

> made eligible for that death penalty. [Internal quotation marks and citations omitted.]

As the Sixth Circuit recognized in McQueen, the Kentucky death penalty statute and capital sentencing procedure is substantially the same as that of Georgia, which was approved by the U.S. Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976). See also, Zant v. Stephens, 462 U.S. 862 (1983). This conclusion was recognized by this Court in Epperson, when it was noted that from that basis, KRS 532.025 was constitutionally sufficient to authorize a death sentence. Epperson, at 62.

C. The Death Penalty in Kentucky is Not Applied in a Discriminatory Manner. Appellant argues the death penalty in Kentucky is applied in a discriminatory manner. The Sixth Circuit rejected a similar argument in McQueen v. Scroggy, 99 F.3d 1302, 1333 (6th Cir. 1996). This Court has rejected the same or similar arguments presented in other cases. Epperson v. Commonwealth, 197 S.W.3d 46, 62-63 (Ky. 2006); Tamme v. Commonwealth, 973 S.W.2d 13, 40-41 (Ky. 1998); Mills v. Commonwealth, 996 S.W.2d 473, 495 (Ky. 1999); Stopher v. Commonwealth, 57 S.W.3d 787, 807 (Ky. 2001); Caudill v. Commonwealth, 120 S.W.3d 635, 678 (Ky. 2003); Thompson v. Commonwealth, 147 S.W.3d 22, 55 (Ky. 2004). Further, this Court has specifically held that the Kentucky capital sentencing procedure conforms with the constitutional standards set forth in McCleskey v. Kemp, 481 U.S. 279 (1987). Epperson, 197 S.W.3d at 63. As previously noted, the Kentucky capital sentencing procedure is substantially the same as the Georgia sentencing procedure upheld in McCleskey.

Further, if appellant wished to assert an argument of racial discrimination with respect to capital sentencing, he was required by the Kentucky Racial Justice Act, KRS 532.300, to file a pre-trial motion and to present his evidence to the court prior to the trial. Epperson, *supra*.

Appellant argues he was sentenced to death because he is African-American and because his victim, Sherry Lynn Bland, was Caucasian. He offers statistics in support of his contention. Both the United States Supreme Court and this Court have repeatedly rejected such statistical correlations. McCleskey v. Kemp, *supra*; Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 306 (1997); Foley v. Commonwealth, Ky., 942 S.W.2d 876 (1996); Perdue v. Commonwealth, Ky., 916 S.W.2d 148 (1995). Appellant was sentenced to death not because of his race, or his victim's race, but rather because he brutally beat and murdered Sherry Lynn Bland.

D. Prosecutorial Discretion Does Not Make Arbitrariness Inherent. Appellant contends that prosecutors have unlimited discretion in determining when the death penalty is sought, allegedly resulting in systemic arbitrary and capricious application of the death penalty. He has cited no persuasive or binding authority for this proposition, nor does he specifically allege a violation of statute or the infringement of any constitutional right. KRS 532.025(2)(a) provides a prosecutor with sufficient guidelines to determine whether or not to seek the death penalty. If a defendant believes the death penalty is disproportionate, he may always seek judicial pretrial relief. To the extent that plea bargains in other capital cases are at issue, "[n]o defendant has a constitutional right to plea

bargain. The prosecutor may engage in it or not at his sole discretion. If he wishes, he may go to trial." Commonwealth v. Reyes, 764 S.W.2d 62, 64 (Ky. 1989), *citing* Weatherford v. Bursey, 429 U.S. 545 (1977). "[W]hether to engage in plea bargaining is a matter reserved to the sound discretion of the prosecuting authority." Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992). In this case there is no evidence of abuse of discretion, nor is there merit to this claim. The fact that other jurisdictions choose to issue statewide guidelines or pre-trial review of capital prosecutions does not mean those procedures are required by the constitutions of Kentucky or the United States.

E. Claim of Likelihood of Execution the Innocent is Without Merit. This claim was addressed in United States v. Quinones, 313 F.3d 49 (2nd Cir. 2002). In a well reasoned and documented opinion the Second Circuit noted "that binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent." Id. at 63. There is no merit to appellant's argument.

XL.

DEATH QUALIFICATION OF JURORS IS CONSTITUTIONAL.

This issue is unpreserved. Both this Court and the United States Supreme Court have rejected the argument that death qualification of potential jurors to sit on a case in which the prosecution is seeking the death penalty is unconstitutional. Lockhart v. McCree, 476 U.S. 162 (1986); Buchanan v. Kentucky, 483 U.S. 402 (1987); Sanders v.

Commonwealth, 801 S.W.2d 665, 672 (Ky. 1991); Thompson v. Commonwealth, 147 S.W.3d 22, 53 (Ky. 2004); Caudill v. Commonwealth, 120 S.W.3d 635, 678 (Ky. 2003); St. Clair v. Commonwealth, 140 S.W.3d 510, 553 (Ky. 2004). Thus, this argument is completely without merit.

XLI.

NO JURORS WERE EXCUSED BECAUSE OF THEIR RELIGIOUS BELIEFS.

Appellant contends that as many as thirteen prospective jurors were improperly excused due to their religious beliefs.

In substance, Meece asserts the rights of third parties, the jurors. The United States Supreme Court has determined that there are three criteria that must be met before a defendant can assert the rights of third parties. These criteria only exist when the third parties belonged to a protected class of persons. The three criteria necessary to assert third parties' rights were outlined in Powers v. Ohio, 499 U.S. 400, 410-411, 111 S.Ct. 1364, 1370-1371 (U.S.Ohio,1991):

> In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. Department of Labor v. Triplett, 494 U.S. 715, 720, 110 S.Ct. 1428, 1431, 108 L.Ed.2d 701 (1990); Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). This fundamental restriction on our authority admits of certain, limited exceptions. We have recognized the right of litigants to bring actions on behalf of third parties, provided **three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in**

> **the outcome of the issue in dispute**, *id.*, at 112, 96 S.Ct., at 2873; **the litigant must have a close relation to the third party**, *id.*, at 113-114, 96 S.Ct., at 2873-2874; **and there must exist some hindrance to the third party's ability to protect his or her own interests**. *Id.*, at 115-116, 96 S.Ct., at 2874-2875. See also Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, *e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); see also McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, *e.g.*, Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

(emphasis added). Appellant has failed to demonstrate how he would meet any of these criteria. Ultimately, it is apparent from the record that the appellant did not suffer any prejudice because only jurors who demonstrated their ability to perform their duties as jurors in accordance with the court's instructions and their oaths. See Wainwright v. Witt, 469 U.S. 412, 414 (1985).

Meece contends that disqualifying a potential juror on the basis of their religious beliefs violates Section 5 of the Constitution of Kentucky, in that jurors were allegedly denied their civil right or privilege to participate on a jury. To the contrary, the trial court never inquired as to what religion any juror practiced. The trial court merely inquired whether or not each prospective juror could give serious, meaningful consideration to each available penalty, including the death penalty. In fact it was appellant's counsel who

inquired whether a prospective jurors inability to consider the imposition of the death penalty was religion based. Pursuant to Wainwright v. Witt, 469 U.S. 412, 414 (1985), the trial court must determine whether a prospective juror held views that, "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." Since this is a death penalty case, a prospective juror was not eligible to serve if their personal views would not allow them to follow the law and impose the death penalty. Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994); Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985). Thus, it is evident from the record that a prospective juror's inability to give serious, meaningful consideration to the full range of penalties is what excluded them only from this trial. All of the excluded jurors remained eligible for jury service.

In Pierce v. Commonwealth, 408 S.W.2d 187 (Ky. 1966) this Court considered if an oath violated Section 5. This Court held that it did not, and noted that only restrictions premised on religious beliefs would violate Section 5. No such qualification is present in this case, other than the ability to render a verdict according to the law. There is no indication that the trial court did other than protect the religious belief s of the prospective jurors, which is the intent and purpose of Section 5 of the Constitution of Kentucky.

Meece has cited no authority that religion-based challenges for cause violate the Equal Protection Clause. While it is clear that the Equal Protection Clause prohibits the use of peremptory challenges on the basis of race, see Batson, 476 U.S. at 92-95, 106

S.Ct. 1712, and gender, see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), no precedent exists that dictates an extension of the Batson principle to religion.

For these reasons it is patently obvious that juror were not prohibited from participating on any jury because of the religious beliefs. Rather, they were removed only from this trial because of their inability to consider the full range of penalties. Thus, no error occurred.

XLII.

THE COURT'S PROPORTIONALITY REVIEW CONDUCTED IN ACCORDANCE WITH KRS 532.075 IS CONSTITUTIONAL.

Appellant repeats the argument made before this Court in numerous cases that, because he disagrees with the manner in which this Court conducts proportionality review under KRS 532.075, it is unconstitutional. Both this Court and the Sixth Circuit have rejected such arguments. Thompson v. Commonwealth, 147 S.W.3d 22, 55 (Ky. 2004), citing, Sanders v. Commonwealth, 801 S.W.2d 665, 863 (Ky. 1990), Foley v. Commonwealth, 942 S.W.2d 876, 890 (Ky. 1996), Bowling v. Commonwealth, 873 S.W.2d 175, 181 (Ky. 1993), *habeas denied, sub. nom.* Bowling v. Parker, 138 F.Supp.2d 821, 919-921 (E.D. Ky. 2001), *affirmed*, 344 F.3d 487, 520-522 (6th Cir. 2003); McQueen v. Scroggy, 99 F.3d 1302, 1333-1334 (6th Cir. 1996); Skaggs v. Parker, 27 F.Supp.2d 952, 1004-1005 (W.D. Ky. 1998), *reversed on other grounds*, 235 F.3d 261 (6th Cir. 2000). Also see, Walton v. Arizona, 497 U.S. 639, 655-656 (1990); Peterson v. Murray, 904

F.2d 882, 887 (4th Cir. 1990); Smith v. Dixon, 14 F.3d 956, 966-967 (4th Cir. 1994)(en banc); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994)(en banc). The manner in which this Court conducts proportionality review is very similar to the methodology used by other States, which has been upheld. See Lester v. State, 692 So.2d 755, 801 (Miss. 1997); State v. Davis, 63 Ohio St.3d 44, 584 N.E.2d 1192, 1197 (1992); State v. Cobb, 234 Conn. 735, 663 A.2d 948, 954-962 (1995).

Appellant also complains about his inability to access the data used by this Court in conducting proportionality review. As this Court has previously noted, it does not use secret data but simply compares one death penalty case with that of all other cases in which a death sentence was imposed after January 1, 1970. Harper v. Commonwealth, 694 S.W.2d 665, 670, 671 (Ky. 1985); Sanders v. Commonwealth, 801 S.W.2d 665, 683 (Ky. 1991). Also see, Kordenbrock v. Scroggy, 680 F.Supp.2d 867, 898-900 (E.D. Ky. 1988), *reversed on other grounds*, 919 F.2d 1091 (6th Cir. 1990)(en banc); Skaggs v. Parker, *supra*, 27 F.Supp.2d at 894, citing *inter alia*, Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987); Bowling v. Parker, 138 F.Supp.2d 821, 920-921 (E.D. Ky. 2001), *affirmed*, 344 F.3d 487 (6th Cir. 2003).

Therefore, under the foregoing authorities, the proportionality review conducted by this Court is constitutional.

XLIII.

LETHAL INJECTION AND ELECTROCUTION ARE CONSTITUTIONAL MEANS OF EXECUTION.

This issue is unpreserved. Appellant argues that lethal injection and electrocution as means of execution per KRS 431.220 are unconstitutional under the "evolving standards of decency" of the Eighth Amendment. Electrocution is not cruel and unusual punishment and is a constitutional method of execution. Stanford v. Commonwealth, 492 U.S. 361 (1989); Baze v. Rees, 217 S.W.3d 207, 211-212 (Ky. 2006); Epperson v. Commonwealth, 197 S.W.3d 46, 64 (Ky. 2006), *cert. denied*, ___ U.S. ___ (2007).

This Court has previously held that lethal injection is not unconstitutional. Wheeler v. Commonwealth, 121 S.W.3d 173, 186 (Ky. 2000), citing, People v. Stewart, 121 Ill.2d 93, 520 N.E.2d 348 (1988). Further, the United States Supreme Court has recently held that lethal injection–and the lethal injection protocol used by Kentucky, particularly–is not cruel and unusual punishment. Baze v. Rees, ___ U.S. ____ (2008), 128 S.Ct. 1520, 1533 - 1538 (2008).

Also, as the Ninth Circuit has pointed out, execution by lethal injection is now used by 37 of the 38 states with the death penalty, which objectively indicates a national consensus that this is a constitutional means of execution. Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004), collecting state statutes, and citing, *inter alia*, State v. Webb, 252 Conn. 128, 750 A.2d 448 (2000), and, Sims v. State, 754 So.2d 657 (Fla. 2000). Also see, Moore v. State, 771 N.E.2d 46, 55 (Ind. 2002); Abdur'Rahman v. Bredesen,

2004 WL 2246227 (Tenn.Crim.App. October 6, 2004). More recently, the Ninth Circuit has rejected a more specific challenge to California's lethal injection execution protocol. Beardslee v. Woodford, 395 F.3d 1064 (9th Cir.), *cert. denied*, 125 S.Ct.982 (Jan. 18, 2005). Hence, the overwhelming weight of legal authority is contrary to appellant's argument.

XLIV.

RESIDUAL DOUBT DOES NOT BAR A DEATH SENTENCE.

Appellant presents the standard argument that residual doubt precludes a death sentence. The United States Supreme Court has held that the finding of guilt as to aggravating circumstances for the death penalty is reviewed under the reasonable doubt standard of Jackson v. Virginia, 443 U.S. 307 (1979). Lewis v. Jeffers, 479 U.S. 764, 780 (1990). See also, Victor v. Nebraska,, 511 U.S. 1 (1994).

The United States Supreme Court and the Kentucky Supreme Court have ruled that residual doubt is not a mitigating circumstance for the death penalty. Franklin v. Lynaugh, 487 U.S. 164, 172-174 (1988); Bussell v. Commonwealth, 882 S.W.2d 111, 115 (Ky. 1994). This Court has previously rejected the same argument in other death penalty cases. Garland v. Commonwealth, 127 S.W.3d 529, 546 (Ky. 2004), citing, Tamme v. Commonwealth, 973 S.W.2d 13, 40 (Ky. 1998), and Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997); Caudill v. Commonwealth, 120

S.W.3d 635, 679 (Ky. 2003). Also see, State v. McGuire, 88 Ohio St.3d 390, 686 N.E.2d 1112, 1122-1123 (1997).

The Counterstatement of the Case herein exhaustively details the evidence and proof of appellant's guilt. This evidence proved guilt beyond a reasonable doubt and the jury so found. There is no residual doubt herein, and that legal standard is sufficient to satisfy constitutional requirements.

XLV.

THERE IS NO CUMULATIVE ERROR IN THIS CASE, AND CUMULATIVE ERROR DOES NOT REQUIRE REVERSAL.

Appellant argues that if this Court does not find any single error which requires reversal, then the Court should reverse based upon the cumulative effect of non-prejudicial errors. There is no cumulative error in this case. And, even if there was, cumulative error does not require reversal. Sanders v. Commonwealth, 801 S.W.2d 665, 682 (Ky. 1990); Bowling v. Commonwealth, 942 S.W.2d 293, 308 (Ky. 1997); Tamme v. Commonwealth, 973 S.W.2d 13, 40 (Ky. 1998); Hodge v. Commonwealth, 17 S.W.3d 824, 855 (Ky. 2000); Stopher v. Commonwealth, 57 S.W.3d 787, 807 (Ky. 2001); Caudill v. Commonwealth, 120 S.W.3d 635, 679 (Ky. 2003); Parrish v. Commonwealth, 121 S.W.3d 198, 207 (Ky. 2003); Garland v. Commonwealth, 127 S.W.3d 529, 548 (Ky. 2004); Soto v. Commonwealth, 139 S.W.3d 827, 875 (Ky. 2004).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Warren Circuit Court's final Judgment and Sentence on Jury Verdict convicting the appellant of three counts of capital murder, first degree robbery and first degree burglary and sentencing appellant to three death sentences be affirmed.

Respectfully submitted,

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